

Case Note

WHERE THERE'S A WILL, THERE'S A WAY

Marley v Rawlings
[2014] 2 WLR 213

The UK Administration of Justice Act 1982 gives the courts a power to rectify wills. In *Marley v Rawlings* [2014] 2 WLR 213, the UK Supreme Court gave an extremely expansive interpretation to this power and said that the power existed not only by virtue of the English statute but also at common law. This case note considers the implications of this decision for Singapore. It is argued that this case has created considerable uncertainty in the law and that the position should be remedied by an appropriate statutory amendment.

Barry C CROWN*

LLB (Jer), LLM (Lond), M Litt (Oxon);

Solicitor (England and Wales);

Associate Professor, Faculty of Law, National University of Singapore.

I. Facts

1 *Marley v Rawlings*¹ involved a most unfortunate fact situation. Mr and Mrs Rawlings instructed their solicitor to draft for them mirror wills in which each left his or her entire estate to the surviving spouse, but in the event that the other failed to survive, the entire estate would pass to Terry Marley, who was not related to them but who had been treated by them as their son. The wills made no provision for the Rawlings' two natural sons. The wills were drafted correctly, but when it came to execute them, the wills were mixed up by the solicitor with the result that Mr Rawlings signed the will prepared for his wife and Mrs Rawlings signed the will prepared for her husband. Both wills were witnessed by the solicitor and his secretary. The mistake was not noticed on Mrs Rawlings' death in 2003, but came to light only on Mr Rawlings' death in 2006. At the time of his death, Mr Rawlings was a joint tenant with Mr Marley of the house in which they both lived, so that the tenancy passed through the doctrine of survivorship. In addition there was some £70,000 in Mr Rawlings' estate.

* Thanks are due to Kevin Ho Hin Tat, student in the Faculty of Law of the National University of Singapore, for his able assistance in the research for this article.

1 [2014] 2 WLR 213.

2 Terry and Michael Rawlings, the two natural sons, challenged the validity of the will, as they stood to inherit the £70,000 if Mr Rawlings had died intestate. Mr Marley sought rectification of the will so that it should record what Mr Rawlings had actually intended and that probate should be granted of the will so rectified. The brothers were successful both at first instance and in the Court of Appeal. However, the Supreme Court ordered rectification of the will to make it accord with Mr Rawlings' intentions.

II. Relevance to Singapore

3 The Court of Probate has long exercised a limited jurisdiction to correct errors in wills by *omitting* words from the will which were inserted without the knowledge and approval of the testator.² It was thought, however, that the court did not have the power to rectify the will by *inserting* words to make the will reflect the true intention of the testator. To remedy this defect, the UK Parliament legislated on the topic in s 20 of the Administration of Justice Act 1982.³ Section 20 is headed "Rectification", and sub-s (1) provides as follows:

If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence—

- (a) of a clerical error; or
- (b) of a failure to understand his instructions,

it may order that the will shall be rectified so as to carry out his intentions.

4 Section 20(2) provides that, save with the court's permission, no application for rectification under sub-s (1) can be made more than six months after the grant of probate. Section 20(3) protects executors who distribute in accordance with the terms of a will before it is rectified after the six-month period referred to in sub-s (2).

5 Although *Marley v Rawlings* was decided on the basis of the application of the English statute, it is of relevance even in jurisdictions, such as Singapore, which do not have a statutory provision for rectification of wills. This is because Lord Neuberger, giving the judgment in which all the other members of the court agreed,⁴ stated that in his view there was a power at common law for a judge to rectify a will in the same way as any other document.⁵ Assuming the Singapore courts accept this view, then it would be possible for a court in

2 *In re Horrocks (deceased)* [1939] P 198.

3 c 53 (UK).

4 Lord Hodge gave a concurring judgment setting out the position in Scots law.

5 *Marley v Rawlings* [2014] 2 WLR 213 at [28].

Singapore to reach the same result as the UK Supreme Court on similar facts as *Marley v Rawlings*. Indeed, it would appear that the Singapore courts would have wider powers to rectify a will as they would not be bound by the restrictions contained in s 20(2).⁶

6 The judgment of Lord Neuberger is important also in Singapore because of his remarks on how a will should be interpreted. In his Lordship's opinion, the approach to interpreting wills should be the same as that applied to the interpretation of contracts. There was no reason for adopting a different approach towards the interpretation of wills. It was true that a will is made by a single party, whereas a contract is agreed between a number of parties. However, that distinction was not a convincing reason for adopting a different approach in principle to interpretation of wills. It was merely one of the contextual circumstances which had to be borne in mind when interpreting the document concerned.⁷ It should be noted, however, that these remarks are strictly *obiter dicta*, as the case was decided on the issue of rectification.

III. Arguments against rectification rejected by court

7 It was argued by counsel for the brothers that the correction sought here was too extreme to amount to rectification. This argument was rejected by Lord Neuberger. It was true that the claimed correction would involve transposing the whole text of the wife's will into the husband's will, but that did not prevent it from being "rectification" of each will. There was no reason in principle why a wholesale correction should be ruled out as a permissible exercise of the court's power to rectify. On the contrary, to impose such a restriction would be unprincipled and would lead to uncertainty.

8 A further argument against rectification was that the document signed by Mr Rawlings was not in fact his will at all. A will must be made with the knowledge and approval of the testator. It is precisely for this reason that a court of probate will omit words from a will which have been inserted by mistake without the testator's knowledge and

6 Administration of Justice Act 1982 (c 53) (UK). Lord Neuberger (in *Marley v Rawlings* [2014] 2 WLR 213 at [30]) stated that, "Given that Parliament decided to confer a limited power of rectification at a time when there was clear authority that the court had no inherent power to rectify, it would be wrong for any court to hold, at least in the absence of a compelling reason, that it actually had an inherent power which was wider than that which the legislature conferred." Such reasoning would obviously not apply in Singapore.

7 *Marley v Rawlings* [2014] 2 WLR 213 at [19]–[23]. For a detailed discussion of Lord Neuberger's approach to interpretation and its relevance for Singapore, see Goh Yihan & Yip Man, "*Marley v Rawlings*: Reflections from Singapore" [2014] Sing JLS 218.

approval. In the present case, Mr Rawlings executed the document which was intended to be his wife's will. He did not, therefore, know and approve of any part of the document. If so, how could it be said to be his will and, if it was not his will, how could it be rectified? This argument found favour with the Court of Appeal,⁸ but was rejected by Lord Neuberger who held that a document did not have to satisfy the formality requirements of the Wills Act⁹ or even to have the knowledge and approval of the testator before it could be treated as a "will" capable of rectification.¹⁰

9 The final argument against rectification was that the mistake in question was not a "clerical error" within the meaning of s 20(1)(a).¹¹ The phrase "clerical error" is normally limited to mistakes involved in copying or writing out a document, which would not include a mistake of the type that occurred in this case. However, Lord Neuberger gave it a wider meaning to include any mistake that arises in connection with office work of a routine nature. There is no limitation to clerical errors in the common law, as opposed to the English statutory power of rectification and, therefore, the point is of limited relevance to Singapore law. Suffice it to say that Lord Neuberger's expansive definition of the term "clerical error" seems wide enough to include most errors made in a solicitor's office other than a failure to understand the testator's instructions, which is covered by s 20(1)(b).¹² Potentially, it expands considerably the court's power to rectify wills, which may well lead to increased litigation.

IV. Rectification and formalities

10 It is submitted with respect that the judgment of the Supreme Court blurs the distinction between rectification and formalities. Lord Neuberger said that it was possible to rectify a document which was not a valid will¹³ and thereby convert it into a valid will.¹⁴ In the present case, the terms of the two wills were very similar. Rectification only involved substituting a gift to Mrs Rawlings for the meaningless gift to Mr Rawlings himself in the will he actually executed. Both wills provided that if the spouse predeceased the testator, Mr Marley should take the whole estate. It is possible, however, to imagine more extreme

8 See *Marley v Rawlings* [2013] Ch 271 at [56] (*per* Black LJ) and at [99] (*per* Sir John Thomas P).

9 Wills Act 1837 (c 26) (UK).

10 *Marley v Rawlings* [2014] 2 WLR 213 at [60].

11 Administration of Justice Act 1982 (c 53) (UK).

12 Administration of Justice Act 1982 (c 53) (UK).

13 But which is on its face *bona fide* intended to be a will (*Marley v Rawlings* [2014] 2 WLR 213 at [65]).

14 *Marley v Rawlings* [2014] 2 WLR 213 at [62].

cases. Suppose the solicitor had handed to Mr Rawlings for signature a completely different will drafted for another client. It would seem to follow from *Marley v Rawlings* that this will too could be rectified to make it comply with the one originally drafted for Mr Rawlings.

11 It might be more logical to admit that what is really happening in a case like this is that the court is admitting to probate a will which has not been executed in accordance with the formal requirements of the Wills Act.¹⁵ The fact that another document has been executed as a will provides the pretext for admitting the unexecuted will to probate. The formal requirements serve an important function in reducing the risk of fraud, but cases do occur where the requirements have not been satisfied, yet it is clear that no fraud has occurred. In several jurisdictions the courts have a dispensing power to set aside the formal requirements in such cases. For example, s 18 of the Queensland Succession Act 1981 provides that where a document which purports to state the testamentary intentions of the deceased has not been executed, the court may nevertheless admit the document to probate if satisfied that the person intended the document to form his will.

12 In jurisdictions which have similar statutory provisions to s 18, situations like *Marley v Rawlings* have been dealt with by invoking the statutory power to dispense with formalities.¹⁶ In a case involving a fact pattern identical to *Marley v Rawlings* decided by the Supreme Court of South Australia, the court exercised the dispensing power to admit to probate the will intended for the deceased, but signed by his wife. It chose this course of action rather than rectifying the will actually executed by the deceased. As Gray J put it, “In my view, to delete the portions of the will of the deceased’s wife which the deceased actually signed so that the document complies with the known intentions of the deceased, is of greater artificiality than to admit to probate the actual will of the deceased, despite its lack of appropriate execution.”¹⁷

13 Oddly enough, there is an echo of this reasoning in *Marley v Rawlings* itself. Counsel for Mr Marley suggested that the will actually executed by Mr Rawlings could be amended by deleting those portions which were inserted without his knowledge and approval. Such a power of deletion, as has been noted,¹⁸ was available even before s 20 of the Administration of Justice Act 1982¹⁹ was enacted. This would therefore

15 Wills Act 1837 (c 26) (UK).

16 See, eg, *In the Estate of Blakely* (1983) 32 SASR 473.

17 *In the Estate of Hennekam* [2009] SASC 188 at [37]. See also *Estate of Daly* [2012] NSWSC 555. By contrast, in *Re Estate of Johnson, Deceased* [2014] NSWSC 512 on identical facts to *Marley v Rawlings*, it was held that the dispensing power and the power of rectification were both available as alternatives.

18 See accompanying text at n 2 above.

19 c 53 (UK).

involve deleting the name of the wife as testator, and deleting Mr Rawlings' name as the principal beneficiary. That would leave one with only the gift to Mr Marley. Such an approach in a similar fact situation had been attempted before in England and rejected.²⁰ It had, however, been accepted by the New Zealand Court of Appeal in *Guardian Trust & Executors Co of New Zealand Ltd v Inwood*,²¹ which has been followed in Canada.²² Following the earlier English cases, Lord Neuberger rejected this exercise in selecting phrases for deletion to enable the will intended to be signed by someone else to comply by happenstance with the testator's intentions. Lord Neuberger saw this as an artificial exercise but, with respect, one may query whether it is indeed any more artificial than using s 20 to delete the whole of the will actually executed by Mr Rawlings and replacing it with the text of the will actually intended for him.

V. Hard cases make bad law?

14 On an initial reading, one is tempted to view *Marley v Rawlings* as an illustration of the truth of the old saying that hard cases make bad law. The Supreme Court may perhaps, as has been argued here, have stretched the concept of rectification, but justice was achieved. Mr Rawlings wanted Mr Marley, and not his natural sons, to inherit his estate and that is exactly what happened as a result of this case. Justice was undoubtedly done, although at inordinate expense, considering that the value of the estate was only £70,000, yet the case had to be fought in three courts. But was it really a hard case?

15 A much simpler way of achieving justice in this fact situation would have been for Mr Marley to have sued Mr and Mrs Rawlings' solicitor in negligence. It was held in *White v Jones*²³ that a disappointed beneficiary has an action against a solicitor whose negligence causes him to fail to receive a promised bequest in a will.²⁴ However, in *Walker v Geo H Medlicott & Son*²⁵ it was held that the disappointed beneficiary had to seek to mitigate his loss by making an application for rectification of the

20 *In the Goods of Hunt* (1875) LR 3 P & D 250; *In the Estate of Meyer* [1908] P 353.

21 [1946] NZLR 614.

22 See *Re Brander* [1952] 4 DLR 688. The Canadian court purported to follow *Guardian Trust & Executors Co of New Zealand Ltd v Inwood* [1946] NZLR 614, but actually went further by not just omitting words from the will but by inserting words to replace them. However, the judgment in *Re Brander* does not state any legal justification for this power. See Gilbert D Kennedy, "Case and Comment" (1953) 31(2) *The Canadian Bar Review* 185.

23 [1995] 2 AC 207.

24 For recent Singapore illustrations of this principle see *Anwar Patrick Adrian v Ng Chong & Hue LLC* [2014] 3 SLR 761 and *AEL v Cheo Yeoh & Associates LLC* [2014] 3 SLR 1231.

25 [1999] 1 WLR 727.

will where appropriate. This is subject to the rider that it was not necessary for the disappointed beneficiary to undertake “complex litigation” even under an indemnity as to costs.²⁶ By greatly expanding the availability of the remedy of rectification for wills, *Marley v Rawlings* has made life more difficult for disappointed beneficiaries. It is uncertain to what extent rectification is available, yet if they fail to bring a claim for rectification, disappointed beneficiaries run the risk of losing also the possibility of bringing a successful negligence claim against the solicitor responsible for the mistake. In this context, it is worthy of note that Mr Marley’s legal costs up to the Supreme Court were paid by the professional indemnity insurers of the Rawlings’ solicitors.²⁷ Indeed, it is solicitors’ insurers who will most welcome the judgment of the Supreme Court in this case. It will greatly strengthen their hands in negotiations with disappointed beneficiaries claiming professional negligence. People in Mr Marley’s position in future may well find it preferable to accept whatever they can obtain by way of settlement from the insurers rather than the uncertainties and expense of litigation.

VI. Conclusion

16 The consequences of this decision for Singapore are even more severe. Several jurisdictions have introduced a power of rectification into their legislation on wills. Singapore has not. Before this case, disappointed beneficiaries in Singapore had no remedy of rectification where a will failed to embody the intentions of the testator. However, this problem normally occurs as a result of the negligence of the solicitor drafting the will and an action against the solicitor was possible. Now it would appear that disappointed beneficiaries have a common law action for rectification, but the scope of this action is completely unclear, as is the question of when it is necessary to bring such an action to mitigate the loss resulting from the solicitor’s negligence. A potentially more serious problem is that, unlike the statutory remedy of rectification in England, there are no time limits to bringing such an action under the general law, except for general defences such as *laches*. This places executors too in a most invidious position. Section 20(3)²⁸ in England provides for a defence for executors who distribute after the expiry of the six-month statutory time limit for claiming rectification. In the absence of such a statutory defence and without any clear time limits for bringing an action to claim rectification, executors in Singapore are bound to wonder when it is safe to distribute the estate of the deceased if there is any risk of an action for

26 See *Pilkington v Wood* [1953] 1 Ch 770; *Horsfall v Haywards* [1999] PNLR 583; [2000] WTLR 29.

27 Alexander Learmonth, “*Marley v Rawlings* in the Supreme Court” (2014) 20(7) *Trusts & Trustees* 725. See also *Marley v Rawlings (costs)* [2014] UKSC 51 at [9].

28 Administration of Justice Act 1982 (c 53) (UK).

rectification being brought.²⁹ The simplest way of dealing with these problems, would be to put the remedy of rectification of wills on a statutory footing as has been done in England and other common law jurisdictions.³⁰ It is to be hoped that it will not be too long before an appropriate amendment is made to Singapore's Wills Act.³¹

29 Cf the defence for executors in s 4(3) of the Inheritance (Family Provision) Act (Cap 138, 1985 Rev Ed). The executors do have the benefit of the general power of the court to relieve them from personal liability for any breach of duties incident to the office of a personal representative. See s 60 of the Trustees Act (Cap 337, 2005 Rev Ed) and the definition of "trust" and "trustee" in s 3.

30 Legislation along the lines of s 20 of the Administration of Justice Act 1982 (c 53) (UK) would not, of course, provide a clear solution to the problem which occurred in *Marley v Rawlings* itself, as the Singapore courts may possibly choose not to follow this decision. However, even such legislation would be better than leaving the rectification of wills to the uncertainties of the common law. It is beyond the scope of this case note to discuss possible legislation, but there is much to be said for adopting also a provision similar to s 18 of the Queensland Succession Act 1981 (discussed in the accompanying text at n 16 above).

31 Cap 352, 1996 Rev Ed.