Rectification: Law and Practice

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What is rectification?

- Where the terms of a document fail to reflect the true accord between the parties the court may rectify a document so as to make it correspond to their common agreement or understanding
- The court will rectify a unilateral document, such as a will, if it is shown that it does not accord with the intention of the party making it – the mistake may be either as to the words used (or omitted) or their legal effect.

Common Law Position

Before the introduction of s20 of the Administration of Justice Act 1982, it was generally considered that there was no jurisdiction to rectify a will by inserting words or modifying the language used in a will – However a probate court could omit words from a will if that had been included without the knowledge and approval of the testator.

s20 of the Administration of Justice Act 1982

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20.— Rectification

(1) 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.

(2) An application for an order under this section shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out.

Limit on the Power

Neither the power to omit words from probate nor the power to rectify provide any remedy for:

(i) the testator's failure to appreciate the legal effect of the words used in his will; or

(ii) uncertainty as to the meaning of his intended wording; or

(iii) a lacuna in the will, because he never had any intention relevant to the events which actually occurred. – (*Theobald on Wills* 14-004)

Re Segelman Decd [1996] Ch 171 – Chadwick J

The subsection requires the court to examine three questions. First, what were the testator's intentions with regard to the dispositions in respect of which rectification is sought. Secondly, whether the will is so expressed that it fails to carry out those intentions. Thirdly, whether the will is expressed as it is in consequence of either (a) a clerical error or (b) a failure on the part of someone to whom the testator has given instructions in connection with his will to understand those instructions.

In order to answer the first of those questions the court must admit extrinsic evidence of the testator's intentions with regard to the relevant dispositions.

Parkinson v Fawdon [2009] EWHC 1953 – Norris J

But before it can be decided (in accordance with section 20 of the Administration of Justice Act 1982) that the will does not, by reason of a clerical error or a failure to understand testator's instructions, carry out the testator's intentions it must first be decided what the document he executed actually means.

Slattery v Jagger [2015] EWHC 3976 (Ch)- Judge Hodge QC

There are a number of cases in which judges have indicated, admittedly not in the context of will rectification, that if a document is poorly drafted, then the requirement for cogent evidence of the relevant mistake may be correspondingly reduced. The authorities are considered and analysed at paragraphs 10-12 to 10–15 of the forthcoming (second) edition of Hodge on Rectification . They include statements by Mr Justice Leggatt in *Tartsinis v Navona Management Company [2015] EWHC 57 (Comm)* at paragraph 86 to the effect that the evidential weight of the document clearly varies according to the circumstances, and that where the meaning of a document is itself a matter of controversy and the subject of competing arguments and interpretation, it may be easier to displace the assumption that the meaning which the court identifies as the proper interpretation correctly records the parties' common intention than where the meaning of the document is clear and unambiguous.

What is a Clerical Error?

The best judicial summary of the effect of the cases so far decided on section 20(1)(a) was given by Blackburne J in Bell v Georgiou [2002] EWHC 1080 (Ch) (quoted in para 7-42of Hodge op cit):“The essence of the matter is that a clerical error occurs when someone, who may be the testator himself, or his solicitor, or a clerk or a typist, writes something which he did not intend to insert or omits something which he intended to insert.... The remedy is only available if it can be established not only that the will fails to carry out the testator’s instructions but also what those instructions were.”

Marley v Rawlings [2015] AC 129

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As explained in para 75 above, the term “clerical error” can, as a matter of ordinary language, quite properly encompass the error involved in this case. There was an error, and it can be fairly characterised as clerical, because it arose in connection with office work of a routine nature. Accordingly, given that the present type of case can, as a matter of ordinary language, be said to involve a clerical error, it seems to me to follow that it is susceptible to rectification.

In neither case did the mistake involve the solicitor misunderstanding or mischaracterising the testator's intention or instructions, or making any error of law or other expertise, so the error may fairly be characterised as "clerical" –and there is no question of trespassing into section 20(1)(b) territory.

I think that Chadwick J was referring to the fact that section 20(1)(b) refers to an error resulting from a failure to understand the testator's instructions, rather than a failure properly to implement those instructions. It seems to me that it is that distinction which underlies the third of the situations which that judge identified. It should also be noted that, in that passage, Chadwick J was referring to the introduction of words into a will rather than the omission of words from a will. It seems to me that there is a potential distinction to be drawn between a situation in which the error alleged occurs as a result of the inadvertent omission of a word or words, rather than the inadvertent inclusion of a word or words. It seems to me that, where a word or words has or have been mistakenly omitted, different considerations may arise, and there may well be a greater potential for characterising the error as one of a clerical nature rather than the section 20(1)(b) situation of a failure to understand the testator's instructions.

Practice

Time Limit – 6 months from grant unless court gives permission

These are helpfully summarised by Black LJ, as she then was, in *Berger v Berger [2013] EWCA Civ 1305* at paragraph 44, "(1) The court's discretion is unfettered but must be exercised judicially in accordance with what is right and proper.
(2) The onus is on the Applicant to show sufficient grounds for the granting of permission to apply out of time.
(3) The court must consider whether the Applicant has acted promptly and the circumstances in which she applied for an extension of time after the expiry of the time limit.
(4) Were negotiations begun within the time limit?
(5) Has the estate been distributed before the claim was notified to the Defendants?
(6) Would dismissal of the claim leave the Applicant without recourse to other remedies?
(7) Looking at the position as it is now, has the Applicant an arguable case under the Inheritance Act if I allowed the application to proceed?"

Kelly v Brennan [2020] EWHC 245 (Ch) – Master Shuman

I consider it right to be cautious. To simply align the guidelines from applications under section 4 of the 1975 Act to applications to extend time under section 20(2) of the 1982 Act is to disregard the fundamentally different nature of these claims. The former can effectively drive a coach and horses through testamentary intention whereas the latter seeks to find the true testamentary intention and give effect to it by rectifying the will. Whilst noting that section 20(3) of the 1982 Act is analogous to section 20 of of the 1975 Act I do consider that section 20 of the 1982 Act is and should be more flexible than the 1975 Act.

Practice (Cont)

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Part 7 or Part 8 – usually Part 7 unless no dispute of fact or in effect by consent or unopposed.

Venue – High Court (County Court has very limited jurisdiction in relation to rectification)

Probably worth pleading construction first and rectification in the alternative.

Practice (Cont)

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Evidence

1. Bare in mind what the court needs to determine. (T's wishes, does will carry those out and if not why not);
2. Usually require statement from person who drafted the will;
3. Conflict of interest – negligence!
4. Is it a case of omission or deletion;
5. How obvious is the mistake?

Practice (Cont)

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Costs!

Depends on all circumstances

Possible orders

1 usual order following hostile litigation - loser pays

2 all paid out of the estate

3 all paid by solicitors responsible for the mistake

4 any combination of the above