Neutral Citation Number: [2021] EWHC 1057 (Ch)

Case No: PT-2020-000359

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

IN THE ESTATE OF MICHAEL JOHN KIRTLEY NODES (deceased)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30/04/2021

Before :

DEPUTY MASTER LINWOOD

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Between :

Mr. DONALD KEITH EADE — **Claimant**

- and –

(1) Mr. ROWLAND ANTHONY RYMER HOGG
(2) Mr. IAN CHRISTOPHER DONALDSON
(3) Mr. ERNEST JAMES ODDS
(as personal representatives of Michael John Kirtley Nodes deceased)
(4) Mr. NICHOLAS TREVOR KIRTLEY NODES
(5) CANCER RESEARCH UK
(6) Mrs. PATRICIA ANN NODES — **Defendants**

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Mr Alexander Learmonth QC (instructed by **Hart Brown LLP**) for the **Claimant**
Ms Nina Ferris solicitor of **Hill Dickinson LLP** attended for the **1st-3rd Defendants**
The 4th Defendant neither appeared nor was represented
Mr Edward Hewitt (instructed by **Michelmores LLP**) for the **5th Defendant**
Mr James McKean (instructed by **Druces LLP**) for the **6th Defendant**

Hearing dates: 18th and 19th March 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 on 30th April 2021.

DEPUTY MASTER LINWOOD:

1. This is, at its simplest, a claim to rectify or construe a will by replacing the word "both" with "each". My determination of that will have financial consequences for most of the parties. Mr Michael Nodes ("the Deceased" or "Mr Nodes") made a will dated 22nd October 2015 ("the Will"). Mr Nodes died on 8th March 2019. The Third Defendant, Mr Donaldson, when a partner with Matthews Arnold & Baldwin, solicitors, ("MAB"), drafted it. The First – Third Defendants are the executors and trustees ("the Executors") appointed by the Will.

2. The beneficiaries under the Will include the Claimant, the Fourth Defendant, Mr Nicholas Nodes, brother of the Deceased, who indicated his intention not to defend this claim, so has played no part in it, Mr Nodes' widow, the Sixth Defendant, and the Fifth Defendant, Cancer Research UK ("Cancer Research"). Mr Eade is supported in his claim by Mrs Nodes. It is opposed by Cancer Research, who are the primarily affected beneficiary if this claim succeeds. The Executors appear to assist the court but the position is not as straightforward as it appeared at the commencement of these proceedings.

3. Probate was granted on 11th November 2019, the estate being worth about £6.4M gross. The Executors say they are neutral as to the claims of Mr Eade, but Mr Donaldson has filed two witness statements setting out why the clause as drafted with the word "both" in it should not be rectified or construed as he claims it means what it says, those being Mr Nodes' intentions at the time. Due to his evidence Cancer Research, on the advice of counsel, consider they have no alternative but to defend the claim.

4. Below I summarise the case, set out the issues, certain factual matters, my views as to the witnesses of fact and opinion, the principles of the law concerned, and then turn to my findings of fact and determination of the issues. References as [ ] are to paragraph numbers in this judgment unless the context appears otherwise. If a witness has made more than one statement I refer to it as initials/number. I am grateful to leading and junior counsel for their extensive and helpful skeleton arguments, closing submissions and their agreement of key trial documents including the Case Summary and List of Issues, which I reproduce below, slightly amended.

The claim in summary

5. Clause 2(b) of the Will deals with Mr Nodes's shares in John Nodes & Sons Limited ("the Company").

6. At the time of the Will and at the time of his death:

   a. Mr Nodes owned 15,909 shares in the Company, i.e. approximately 90.91%;
   b. Mr Eade owned 1,091 shares, i.e. approximately 6.23%; and
   c. Mrs Nodes owned 500 shares, i.e. approximately 2.86%.

Mr Eade was a friend and colleague of Mr and Mrs Nodes, and has been a director of the Company since 1998.

7. Clause 2(b) of the Will as drafted provides that Mr Nodes's shares in the Company are held on trust for Mrs Nodes for life, subject as follows:

   '*(b) during the life of my said wife PATRICIA ANN NODES my Trustees shall have the power to appoint to either or both of my said wife PATRICIA ANN NODES and/or my co-director DONALD KEITH EADE up to such number of my personal holding of shares as shall when added to the existing shareholding of both of them amount to 26% of the issued share capital of the company as at the date of my death*'.

8. Thereafter the shares are held on trust to pay the income to Mr Nicholas Nodes, and subject thereto to Cancer Research absolutely.

9. Mr Eade claims:

   a. A declaration as to the proper construction of clause 2(b), in the light of extrinsic evidence that he says is admissible under s.21 of the Administration of Justice Act 1982, as to whether this permits the trustees to appoint to Mr Eade and Mrs Nodes so many shares as will bring <u>each</u> of their shareholdings up to 26% of the shares in the Company, or only so many as will bring their combined shareholdings to 26% <u>together</u>;

   b. Further or alternatively, an order rectifying clause 2(b) under s.20 of the Administration of Justice Act 1982, so that the trustees may appoint so many shares to each of Mr Eade and Mrs Nodes as will bring their respective shareholdings to 26% each, rather than 26% in total;

   c. Further, an order rectifying clause 2(b) so that the trustees *shall within a reasonable period* appoint to Mr Eade and Mrs Nodes the shares in the Company, rather than merely have a discretionary power to do so.

10. In support of his claim under ss.20 and 21 of the Administration of Justice Act 1982, Mr Eade relies on:

    a. The evidence of Mrs Nodes, who says she was present when instructions for the Will were given and when it was executed, and says her husband did not intend to

change the effect of his previous will from 2007, which by clauses 2 (a) and (b) gave each of her and Mr Eade enough shares to bring their shareholdings up to 26% each;

b. The absence of any documentary evidence (besides the Will itself) indicating an intention on the part of Mr Nodes to change the gift of shares from being of 26% *each* to 26% *in total*;

c. Statements which are said to have been made by Mr and Mrs Nodes, contemporaneously with the Will, to their own solicitors and to Mr Eade that he would receive enough shares to bring his shareholding to 26%;

d. Mr Donaldson's file in respect of the Will, and in particular his own manuscript note which Mr Eade says reads "each", but which has been transcribed by Mr Donaldson's secretary as "both"; in this regard, Mr Eade relies on the expert report of forensic document examiner Ellen Radley;

e. The statements and actions of Mr Donaldson, the drafter of the will, shortly after Mr Nodes's death, which Mr Eade says are consistent with his own understanding at that time that he was to be given an extra 20% of the Company's shares.

11. The 1st Defendant, Mr Hogg, is a relative of the Deceased. Both Mr Donaldson and Mr Odds are solicitors, formerly of MAB, now at Hill Dickinson. However:

a. Mr Donaldson has given evidence in his capacity as drafter of the Will stating that the Deceased gave instructions for the Will to be drafted in the form it was executed;

b. The 1st to 3rd Defendants originally chose to be represented by counsel at the trial (in their capacity as executors only) in view of other parties' criticisms of their conduct in that capacity, but following criticism as to the costs, withdrew counsel but Ms Ferris attended on their behalf.

12. By amendment consented to by the other parties, Mr Eade also claims the removal of the executors, and proprietary estoppel in relation to an alleged promise by the Deceased, in the alternative to the relief sought above. Those claims have been stayed (by consent) pending determination of the construction/rectification claims, and do not fall for determination at this trial.

THE ISSUES

13. These are:

1. Construction:

a. Does clause 2(b) of the Will on its true interpretation:

i. give the Executors (as trustees) power to appoint up to as many shares in the Company to Mr Eade and Mrs Nodes as will, when added to the shares they

already have, amount to 26% of the issued share capital of the Company between them; or

ii. give the Executors power to appoint to each of Mr Eade and Mrs Nodes up to as many shares in the Company as will, when added to the shares they each already have, amount to 26% of the issued share capital of the Company each (*i.e.* 52% in total)?

b. Is the meaning of clause 2(b) of the Will ambiguous (either on its face or in the light of the surrounding circumstances) so as to permit extrinsic evidence of the Deceased's intention to be admitted under s.21 of the Administration of Justice Act 1982? If so, does any such extrinsic evidence assist in the interpretation of clause 2(b)?

2. Rectification

a. If the true interpretation of clause 2(b) of the Will is as stated in option (i) of issue 1) a) above, then:

i. Did the Deceased intend the Will to have the effect stated in option (ii) of issue 1) a) above?

ii. If so, was the failure of the Will to have that effect the result of either (a) a clerical error by Mr Donaldson or some other person, or (b) a failure by Mr Donaldson to understand the Deceased's instructions?

b. Did the Deceased intend to invest the trustees under the Will with a discretion as to whether to appoint the shares to Mr Eade and Mrs Nodes?

i. If not, then did the Will so provide as a result of either (a) a clerical error by Mr Donaldson or some other person, or (b) a failure by Mr Donaldson to understand the Deceased's instructions?

3. Consequential issues (for decision following trial on the issues above):

a. What order should be made on the costs of the claim? In particular, should an order for costs be made out of the estate, or against Mr Donaldson (or his former firm, or their insurers) as draftsman of the Will, and should the Executors be entitled to their costs of attending the trial, despite being neutral?

b. What order should be made as to the reserved costs of Mr Eade's application to rely on expert evidence?

c. What if any directions should be given in relation to the removal and estoppel claims consequent upon the judgment?

THE FACTUAL BACKGROUND

14. There are certain discrete but interlinking factual matters relevant to the Issues which I set out as neutrally as I can, indicating where there is a conflict of evidence.

John Nodes & Sons Limited

15. The Company was founded by Mr Nodes' great grandfather in 1828 as a funeral service and incorporated in 1937. Mr Nodes became a director in 1968, the last of his family to practice as a funeral director. Mrs Nodes was the legal cashier for some 20 years at Messrs Kirkwoods, solicitors, until she retired in 1996, when she became a director. Mr Eade, a chartered accountant, was originally brought in by Mr Nodes to computerise the Company. He assumed an increasing amount of management duties and in 1998 joined Mr and Mrs Nodes as a director.

16. The funeral business was sold in 2013 leaving the Company with about 8 freehold properties, comprising of shops, offices and flats, which provided a substantial rental income. One, the former head office at 15-17 Hewer St, London, W10, was for sale in 2015, originally at around £8M. The shares were as of then and continuing held approximately by Mr Nodes as to 91%, Mrs Nodes 2% and Mr Eade 6%. Mr Eade received a salary as a director, plus invoiced fees for management services and also bonuses. In 2013, on the sale of the funeral business, he received a total of £172,000. His remuneration caused Mrs Nodes some concern as I turn to below.

The 2007 Will of Mr Nodes

17. By his 2007 will Mr Nodes appointed Mr Eade and Mr Scott, then senior partner of Messrs. Kirkwoods, as his executors/trustees. By clause 2(a) he gave to Mrs Nodes:

> "such number of my personal holding of shares in [the Company] as shall when added to the existing shareholding of my said wife in the Company amount to 26% of the issued share capital of the company as at the date of my death."

18. By clause 2(b) he gave to Mr Eade:

> "such number of my personal holding of shares in [the Company] as shall when added to the existing shareholding of my said co-director in the Company amount to 26% of the issued share capital of the Company as at the date of my death."

19. Clause 3 provided that the remaining balance of Mr Nodes's shares were to be held for Mrs Nodes for life, then to his brother for life and thereafter to Cancer Research. The intention was clear – they were to have whatever number added to their existing shareholding gave them 26% each of the Company. That also ensured control of the Company was in their hands, in circumstances where Cancer Research would hold the balance.

20. Mr Eade recalls attending a meeting at Kirkwoods with Mr Nodes prior to the making of the 2007 will. He says that the intention of Mr Nodes, as expressed to him at the time the 2007 will was made, was that he and Mrs Nodes would receive shares to take their total holdings to 26% each, thereby making it easier for them to run the Company with a joint majority of 52%. That accords with Mrs Nodes's recollection. This was, unsurprisingly in view of the clarity of the drafting, unchallenged.

21. The major differences with the Will are that by clause 2(b) of the Will all the shares are held on trust for Mrs Nodes for life, then for Mr Nicholas Nodes for life and thereafter for Cancer Research, subject to a power to the Executors to appoint shares to Mr Eade and Mrs Nodes:

> "…as shall when added to the existing shareholding of both of them amount to 26% of the issued share capital." (my emphasis).

Mr and Mrs Nodes's marriage, relationship and his health

22. They met in 1951 when Mrs Nodes was 17 and were married for almost 50 years, from 1969 - 2019. In her first witness statement Mrs Nodes said she had a strong relationship with her husband until his death, adding that he did not have "…a particular eye for detail. He would often sign documents without reading them through properly or for that matter even at all." Less formally, in her oral evidence, she said he enjoyed signing documents but was not very good at reading them.

23. Mrs Nodes also said she "…was responsible for ensuring everything was in order relating to our property and financial affairs. I was in charge of keeping our documents filed away safely", and that in his last 5 – 6 years she "…would be the one to take a proactive approach to safeguard our future." She also kept a detailed and candid typewritten diary.

24. She additionally said her husband's health was poor when MAB were instructed in August 2015; he had difficulties in understanding matters, especially if they were complicated. Mrs Nodes said despite her minority shareholding in the Company she was heavily involved in its operations and dealt with a significant amount of its paperwork, her husband taking a back seat due to his health.

The dispute with Mr Eade and the Instruction of MAB

25. In September 2007 Mr Nodes had an exchange of letters prompted by and with Mr Eade, by which in addition to his monthly time based remuneration, Mr Eade asked for and was given by Mr Nodes one third of any distribution or payment out of the Company, Mr Nodes keeping the remainder. Mrs Nodes said she only found out about this substantial increase in Mr Eade's package in 2014. This annoyed her; not least because she was a director and shareholder and had not been consulted. She felt it was out of all proportion for Mr Eade to receive a third of returns on properties which had been held by the Nodes family for generations, especially as Mr Eade was then driving the disposal of the Hewer St property worth around £8M.

26. Mrs Nodes therefore wrote to the senior partner at MAB on, she said, the recommendation of her former employer, Mr Scott, on 17th August 2015, seeking advice as to the September 2007 agreement and new articles of association of the Company which she felt she and her husband were being pressurised into accepting by Mr Eade. She explained how she was 81, her husband 86 and Mr Eade 72. Whilst that letter does not specifically seek anything other than dispute advice, she prepared detailed schedules of her and her husband's assets showing their wealth as of August 2015.

27. Her enquiry was referred to Mr Tim Constable, a partner in the litigation department, who was assisted by Ms Samantha Chaney. They arranged to call on the Nodes at their home on 27th August to discuss the matters in her letter. No doubt arising from that meeting on 28th August Mr Constable asked Mr Donaldson to contact the Nodes to give advice as to IHT and review their wills. He arranged a home visit for 8th September 2015.

28. Thereafter the two matters MAB were instructed upon proceeded quite independently of the other. The Will was executed on 22nd October 2015 and the dispute was resolved amicably by an agreement entered into a few months later dated 11th February 2016.

The Making of the Will as appears from MAB's file

29. Below I will mention the relevant documents that appear on MAB's file. Mr Donaldson was provided with a copy of the letter from Mrs Nodes of 17th August 2015 I mention in [26] above plus copies of the 2007 will and the letter prepared by Mr Eade that Mr Nodes signed dated 4th September 2007 regarding the increase in his remuneration. There are then several pages of detailed asset schedules prepared by Mrs Nodes. With her characteristic efficiency I note she has listed at the end in the now old fashioned way her 6 different files that she had filed this note on and the 4 individuals who received this document. She concluded the note with her initials and that this was "Latest Update 13.08.15".

30. Next is a paper prepared by Mrs Nodes dated 25th August 2015. It is headed "Notes for Consultation with Solicitors re WILLS and IHT" (sic). It sets out key points of each of their wills and that Mr Nodes has left Mrs Nodes:

> "…additional shares…to increase my holding from the present 2% to 26% to match the personal holding then of our Co-Director DK Eade".

31. The note concludes:

> "Mrs Nodes wonders if advice should be given upon the above broad provisions in relation to present IHT parameters?"

32. This is followed by the email dated 28th August 2015 I mention in [27] above which led to Mr Donaldson's secretary Ms Monzione setting up a diary out of office engagement for 7.5 hours on 8th September 2015. Next is a will questionnaire form, partially completed in manuscript by Mr Donaldson, also dated 8th September.

33. In fact very little of that questionnaire is completed. The Executors changed – Mr Donaldson volunteered himself and his partner Mr Odds. There is reference to the Company and that it was no longer trading and that there was "…no BPR – don't want to pay IHT on this – significant tax liability already in company".

34. The most pertinent part of that form appears under the heading "Specific Legacies", and subheading "Spouse/Partner". In manuscript Mr Donaldson has noted

> "- Income to Mrs Nodes – no IHT [illegible]…Power to on first death so as to make up to 26% shareholding for Mrs Nodes and Mr Eade. Mrs Nodes can consider PET after her death if she wishes" (sic)."

A few lines below, in the middle of a space on the form, Mr Donaldson wrote in manuscript "The above are to be the only changes".

35. An email dated 10th September from Ms Monzione to Mr Donaldson records Mrs Nodes called with a new address for a beneficiary. On 14th September 2015 Mrs Nodes wrote to Mr Donaldson. She referred to the meeting on 8th September. As to her will, she confirmed that new address; as to her husband's will, she confirmed he agreed with Mr Donaldson's suggestion of him and another MAB partner as executors

with a family member, Mr Hogg, as the third. She concluded by stating that it might be desirable to get her husband's new will executed shortly.

36. Undated, but apparently next chronologically, is what Mr Learmonth referred to as the "Blue Note" which is a manuscript note on MAB headed notepaper apparently taken by a secretary of instructions from Mr Donaldson as to the amendments necessary in both wills. It states the draft wills are to be sent as tracked changes. It stops short of stating "each" or "both" but does state all of clause 2 is to be deleted and replaced with:

> "During the life of my said wife my [trustees] should have the power to appoint to either or both my said wife PAN and/or DKE [Mr Eade] such number as shall be ….a good discharge for my Trustees."

37. Then in the file appears a 15 page red line amended will for Mr Nodes. As the Nodes asked, the original 2007 will can be seen in black with the new version in red. The above amendment has been inserted in full, excluding the dots so the sentence does not make sense. That latter part was then deleted by Mr Donaldson in blue pen. He noted in the right-hand margin what he required to be inserted in its place:

> "of my personal holding of shares as shall when added to their existing shareholdings of XXXX of them amount to 26% of the issued share capital of the company as at the date of my death."

38. XXXX is my indication for the, to me, illegible word "each" or "both". This and other manuscript amendments were carried into the next version of the draft on the file, but crucially the XXXX has been replaced with "both".

39. That version was then sent to the Nodes with Mr Donaldson's letter of 16th September 2015, in which Mr Donaldson refers to the draft amended wills, asks that they be checked and if there are any alterations he requests that they be noted on the wills and returned to him. He also enclosed a leaflet as to Lasting Powers of Attorney and MAB's formal Terms of Engagement. The latter refers to his fee of £700 plus VAT, and states that their:

> "…file of papers will be destroyed safely and confidentially following our file closing procedures unless you advise us to the contrary and wish us to send it to you. A digital copy of your file will be retained by us indefinitely."

40. Mrs Nodes sent two replies both dated 21st September 2015; the first enclosed proof of identity documents. The second states her husband wished to think further as to which charities should benefit, that she wanted a personal charitable trust for certain Devon properties to be established and then concluded by referring to the desirability of LPAs and other issues that Mr Constable was dealing with.

41. This Mr Donaldson replied to on 24th September 2015 (albeit that he referred to the letter from Mrs Nodes being dated 23rd September, which is wrong), enclosing an amended copy of Mr Nodes's will. He requests Mr Nodes to check the will and if happy call his secretary to make an appointment for him to visit for execution. It

appears he visited them on 7th October as he has made a note of instructions on a paper copy electronic diary appointment sheet for that home attendance which indicates time out of office of 5 hours. It concludes "Send engrossments".

42. That he did by letter dated 12th October 2015, together with signing instructions. By letter dated 16th October 2015 he sent Letters of Wishes ("LoW") for each of Mr and Mrs Nodes, the former referring to his only animals then being a cat named Lucy and several garden goldfish. The Nodes signed their wills 4 days later but later that day they did so Mrs Nodes called Mr Donaldson's secretary to say they were both concerned that her husband's will did not leave £30,000 to the Trustees. Mr Donaldson, as seems to be his practice, noted his conversation with no doubt Mr or Mrs Nodes in manuscript (and it appears the time spent at 18 minutes) on a hard copy of the email from Ms Monzione.

43. He sent out a further version of Mr Nodes's will and LoW on 20th October 2015, which was duly executed by Mr Nodes two days later. Mrs Nodes sent two letters to Mr Donaldson on 23rd October, the first regarding access to their properties and their safe on their deaths and the second returning the executed Will and two LoWs. She queried the poor formatting of her husband's will (there is a superfluous "(a)" in the opening clause so the layout looks odd) but records Mr Donaldson's "…assistant Kathleen says it could not be reformatted and remains properly legal."

44. She also records corrections made in manuscript to both wills due to errors of MAB. In reply on 3rd November 2015 Mr Donaldson encloses his invoice, which Mrs Nodes pays – all of which was pointless as she had put MAB in funds, to the irritation of Mrs Nodes who then in her letter of 16th November 2015 raises a query as to retention of the file.

45. A manuscript note on that letter confirms that Mrs Nodes was told on 17th November the file will be "…scanned and saved to the database" and only then is the hard copy destroyed, and that original documents are kept indefinitely. Mr Donaldson then in his reply of 19th November 2015 apologised once more for the billing confusion and confirmed the document retention policy. That concluded the Will file.

46. In summary, the correspondence clearly shows more attention to detail in the letters to MAB from Mrs Nodes than in their letters to her. That also applies to a certain extent to the amendments carried through. She picked up both typographical errors and some of substance which she accurately recorded and put to MAB.

WITNESSES OF FACT

47. I heard oral evidence remotely from Mr Eade, Mrs Nodes and then Mr Donaldson. Below I set out my impression of their evidence and the reliance I can place upon it. Before I turn to that, the evidence of three witnesses was unchallenged in that they were not called. Mrs Eade's statement concerned her recollection of a call from Mr Donaldson in his capacity as Executor to her husband whilst he was driving in May 2019 ("the Car Call"), shortly after Mr Nodes died. She heard both sides as his 'phone was on hands free.

48. Mr Francis was a partner with Haines Watts LLP, accountants, and the Company was a client of his. His evidence concerned the restructuring of the Company – involving

the new articles I mentioned above – and how he was asked by Mr Donaldson in May 2019 to produce a share valuation for Mr Nodes's shareholding, and also a valuation for a 20% shareholding, which it seemed to him was in connection with the Will, albeit he had not seen the Will as of then.

49. Thirdly, Ms Beverly Webb, a legacy specialist employed by Cancer Research, set out in her statement why it was defending the claim, as there would be a reduction in the shares they would receive eventually from 74% to 48%. She explained she has no direct personal knowledge of the matters in issue.

Mr Eade

50. Mr Eade has made two statements, in May and December 2020. He set out how he joined the Company as company secretary in 1996 and became a director two years later, taking over more and more of the day to day running of the Company including the finances from Mr Nodes, who was about 15 years older than him; Mr Eade is currently 78. Mr Eade said Mr Nodes was very comfortable with this as it enabled him to continue his almost daily involvement in the business which Mr Eade said he loved. He said that Mr Nodes trusted his wife implicitly.

51. I found Mr Eade to be careful, clear and direct in his evidence. He was thoughtful, accepting when he was wrong. In particular, his recall was excellent. I have no reason to doubt any of his evidence.

Mrs Nodes

52. As I have indicated above Mrs Nodes is central to the history of this claim. Mrs Nodes is 86. She maintained at all times, from him making the 2007 will until his death that it was her husband's intention that each of her and Mr Eade were to receive up to a maximum of 26% of the shares in the Company so as to give them 52% and a controlling interest; she says if that had ever changed, she as the person in their marriage responsible for keeping their financial affairs in order would have known about it. From my reading of the documentation I have no doubt that she was at all times at the centre of all financial matters.

53. She also pointed out the figure of up to 26% each meant the trustees would have a deciding vote if she was in disagreement with Mr Eade as to the running of the Company, but confirmed the amicable settlement of what she called the "dispute" with Mr Eade.

54. Mrs Nodes was cross examined by Mr Hewitt as to her attention to detail. For example he referred her to the first red line version of the Will at clause 20.2 where there appears the typographical error "roritable" which should read "charitable". Mrs Nodes alerted Mr Donaldson's assistant and it was corrected. After another couple of examples Mr Hewitt referred Mrs Nodes to the formatting I set out at [43] above and asked her if that was the formatting she queried in her second letter of 23rd October 2015. She replied "I'm afraid I'm not at all sure what I meant. I'm afraid I can't remember."

55. It was then put to her that the correspondence shows she and her husband read the draft wills on a number of separate occasions. Her response was that she would

"…qualify the words "carefully read". What we were both concerned with here was charitable gifts and Devon [meaning properties in Devon]. I certainly slipped up regarding the increase in Eade's and my own holdings. I certainly slipped up. I didn't notice as I was so concerned with the charitable trust in Devon."

56. Mrs Nodes was adamant as to the shareholdings not changing from the 2007 will: "…there was no discussion or change to my husband's and my intention to retain control of the company after his death full stop." Similarly, as to her husband intending the trustees to have a discretion to appoint shares she replied that he "certainly didn't" and "I certainly don't believe that".

57. Later, when it was suggested to her that she could not recall one meeting she had with Mr Donaldson and that he was right in that her husband had instructed him she and Mr Eade should only receive 26% between them so she and Mr Eade could not gain control of the Company she replied that "…my husband wanted us to have control of the company", and as to clause 2(b) being intended to operate as 26% in total "…it most certainly did not."

58. There were a couple of instances where Mrs Nodes was confused by lengthy questions where she had to consider several documents at once. This twice was in my view a question of context which she corrected at least once when it was pointed out. I would add that I make no criticism of Mr Hewitt's cross examination as the circumstances necessitated detailed questions on multiple documents.

59. Mrs Nodes also, in her solicitors' letter of 15th July 2020, answering questions put by Michelmores on behalf of Cancer Research, stated that she did "…not recall ever meeting Iain Donaldson in person to discuss alterations to her or the Deceased's Will." Mr Hewitt submits that this completely undermines the reliability of her evidence as to what instructions Mr Nodes did or did give over 5 years ago, as she met Mr Donaldson with her husband on two lengthy occasions at her home.

60. Therefore, her current memory (Mr Hewitt referring me to the well-known passages in *Gestmin SGPS S.A. v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [15-21]), was based on after the event material and advice as opposed to contemporaneous recollection, likewise indicated by her change of position in relation to the trustee discretion issue. As to that, Druces wrote on 25th February 2021 to say Mrs Nodes no longer wished to advance a positive factual case that the trustees should retain a discretion as to whether to appoint shares under the Will. However I accept the submission of Mr McKean that that was for tax reasons; her factual case remains unchanged.

61. Mr Hewitt submits her evidence is the only first-hand evidence of her husband's intentions which contradicts that of Mr Donaldson, and insofar as her evidence is inconsistent with his, his should be preferred. I disagree; I have set out the above examples in some detail in view of her central role in this matter, to illustrate why I find her evidence accurate, truthful, direct and forceful. She said when she did not know or could not recall and avoided speculation. I found her oral evidence compelling and I have no hesitation in accepting the key points of her evidence. The error in her solicitors' letter does not alter my conclusion.

62. My view of her oral evidence is supported by the impression I have of her by the documents she has created over the history of this matter. Her contemporaneous written records and notes, which are detailed and display considerable attention to detail, reinforce my above conclusion.

Mr Iain Donaldson

63. Mr Donaldson qualified as a solicitor in 1988. He describes himself in his Letter of Engagement as "…a Partner and Team Leader of the Wealth Management Department". He states he is a full member of the Society of Trusts and Estates Practitioners and that he "…subscribes to their standards and Code of Practice." There are two overarching points I make as to his evidence.

64. The first was the way his evidence emerged. Some uncertainty by the Executors as to whether the shares were to be 26% in total for Mr Eade and Mrs Nodes or each of them appeared as far back as an email from Mr Hogg to Mr Eade dated 4th August 2019. It also appeared Mr Donaldson had, according to Mr Eade and Mrs Eade, said Mr Eade would receive 26% in total, personally in the Car Call which took place on 24th May 2019 – see [47] above.

65. Mrs Nodes wrote to Mr Donaldson on 28th August 2019 as to progression of the probate, and expressing her firm view that she and Mr Eade were each to be brought up to a 26% shareholding. Her solicitors, Druces wrote to Hill Dickinson stating the same on 15th April 2020. In those circumstances, and understandably in the absence of any definitive response by Mr Donaldson, notwithstanding considerable correspondence between the parties' solicitors, it appeared to Mr Eade and Mrs Nodes that the claim would proceed unopposed.

66. But then on 24th August 2020 Hill Dickinson served Mr Donaldson's first statement dated 14th August 2020 in which he said at [17]:

> "Mr Nodes' clear intention as expressed to me was to make appointments up to 26% between them, not each so that Mr Eade could not block any votes."

67. Then at [21]:

> "Mr Nodes did not want Mr Eade and Mrs Nodes to have 26% each so that they, or their successors, might be able to block the trustees or the charity in remainder…Those were my instructions. I was not asked to include provisions for 26% of the shares to pass to each of Mr Eade and Mrs Nodes or to allow that to happen. I have not written the word "each" in any of my notes because that was not Mr Node's intention for the reasons set out above. I was also not instructed, in the alternative, to include a legacy of shares to Mrs Nodes to increase her holding to 26%..."

68. His evidence is direct, clear and specific that a) Mr Nodes instructed him to reduce what the shareholdings for his wife and Mr Eade would otherwise have been and b) he had accordingly not used the word "each". But I have to say this emerged

especially late after a year of correspondence in circumstances where this had not been put in any form whatsoever to either Mr Eade nor Mrs Nodes nor for that matter anyone else – including, it appears, his co-executors and the remainder beneficiary. There was no explanation for this lack of transparency or frankness notwithstanding his regularly repeated and stated intent to assist the Court and his duties as an executor/trustee to the beneficiaries.

69. The second point was that I cannot place the reliance upon it that I would expect from a solicitor of his experience and standing. I set out below some examples why I have come to this conclusion.

70. First, there is the considerable delay of some 12 months in providing his account of what he says the instructions of Mr Nodes were and that he had specifically not used the word "each" as I have set out above at [66-7].

71. Secondly, his evidence was in certain respects very detailed – such as his comprehensive recollection of the precise instructions of Mr Nodes notwithstanding the fact that he has not produced any, let alone detailed contemporaneous attendance notes or letters to confirm the same as would be expected with a busy solicitor seeing many clients over the 5 years from 2015 – 2020. However, whilst he said he could recall the Car Call he did not recall saying each of Mr Eade and Mrs Nodes would receive sufficient to take each shareholding to 26% (ID2 at [11]).

72. Likewise, in ID1 he says at [4] as to his files that he had retrieved the Will file but:

> "The firm also had an electronic document management system. I have been unable to retrieve the contents of that system which I believe would have included other documents and typed attendance notes."

73. In ID2 at [5] Mr Donaldson was slightly more specific saying that:

> "I believe that attendance notes were prepared and filed on that system at the time."

74. I would have thought given the importance solicitors attach to attendance notes and to methods of working that Mr Donaldson would have been more specific and detailed as to his day to day working practices up to very recently, namely 2020, and have been able to set them out with certainty, but, understandably, may have been less precise as to verbal instructions from one of no doubt many clients five years before.

75. Thirdly Mr Donaldson did contradict himself – for example in his statement in [73] above he said he believed typed attendance notes were made, then in oral evidence said they were electronic (which may be a distinction without a difference) but then said he could not recall whether he made an attendance note of his instructions or not.

76. Fourthly, Mr Donaldson did vacillate and then attempt to explain away matters in his oral evidence. One example concerned the crucial issue; was XXXX "each" or "both"? Mr Learmonth put this to Mr Donaldson after a period of sustained, but fair, cross examination. This had not, I can only conclude deliberately, been addressed by Mr Donaldson in his statements.

77. Mr Donaldson answered "each". The hush indicating surprise or shock that would usually follow in a face to face hearing was absent from this remote hearing but it was a significant statement. Mr Learmonth pushed the point and eventually Mr Donaldson requested a short break so as to collect himself.

78. On his return Mr Donaldson excused himself by saying first his head was spinning as Mr Learmonth had said his secretary had "made a hash of it", secondly that Mr Learmonth's pixelated face had distracted him and thirdly and finally, and even less convincing than the other two excuses, that he was taken by surprise by the question, which I cannot accept as a) it is crucial in this claim and b) Mr Donaldson knew that he would face these questions as they were set out in Mr Learmonth's skeleton argument which Mr Donaldson agreed he had read.

79. Mr Donaldson then did, after some thought, and referring back to his statements, say that what he wrote and meant was "both".

80. In summary, I have to say his evidence was unsatisfactory in that I cannot place the reliance upon it that I would otherwise expect to in a matter such as this. Where his evidence is not supported by contemporaneous documents and conflicts with that of others I generally prefer the evidence of others. Mr Donaldson did not give impartial evidence to assist the court; he advocated his position.

Expert Evidence: Ms Ellen Radley

81. Ms Radley is a forensic document examiner. She made a report dated 7th December 2020. At [1] she says her instructions were:

> "To examine page 2 to 15 of the Draft Will and to consider whether after the words "existing shareholding of", the next word is either "*each*" or "B*oth*""

82. That is the word I have described as XXXX. After setting out her methodology and examination at [34] she says:

> "…I am of the opinion that there is strong evidence to support the proposition that [XXXX] was written as "each", not as "Both" (or "both")."

83. In her glossary of opinion terminology for handwriting Ms Radley explains that "strong evidence" is:

> "…a very narrow band of opinion of very high confidence which just falls short of the conclusive level. An alternative explanation is considered highly unlikely."

84. Ms Radley's opinion is unchallenged, and there is no reason why I should not accept it. Accordingly, the word XXXX is "each" but it seems to have been read as and typed as "both" by Mr Donaldson's secretary. Mr Donaldson does not address this opinion evidence in his second witness statement made just over 6 weeks later on 22nd January 2021. Hill Dickinson in their letter of 18th January 2021 state "It is

inappropriate to seek to persuade Mr Donaldson to change his evidence in correspondence…His recollection is what it is…".

85. Michelmores on behalf of Cancer Research in their letter of 23rd December 2020 said the Expert Report was not determinative of Mr Nodes's intentions or necessary to determine them, and that likewise even if XXXX read "each" the matter still fell to be determined by the Court on the basis of the factual evidence.

86. In summary, the word is "each" and there is no further factual evidence as to any change of instructions between when Mr Donaldson wrote "each" and when the first draft of the Will appeared with "both" in it.

THE LAW

The Construction Claim

87. It is common ground that the principles I must apply are authoritatively set out by Lord Neuberger in *Marley v Rawlings* [2015] AC 129:

> "19. When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions. […]"
>
> "20. When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context. As Lord Hoffmann said in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667, para 64, "No one has ever made an acontextual statement. There is always some context to any utterance, however meagre." To the same effect, Sir Thomas Bingham MR said in *Arbuthnott v Fagan* [1995] CLC 1396, that "[c]ourts will never construe words in a vacuum"."

88. Then at [23] Lord Neuberger stated that the approach as to contractual interpretation in [19] was "…just as appropriate for wills as it is for other unilateral documents." I was also referred to the well known dictum of James LJ in *Boyes v Cook* (1880) 14 Ch D 53, affirmed in *Marley*, namely:

> "You may place yourself, so to speak, in [the testator's] arm-chair, and consider the circumstances by which he was surrounded when he made his will to assist you in arriving at his intention."

89. The armchair principle with its surrounding circumstances includes the terms of earlier wills: Master Teverson in *Wales v Dixon* [2020] EWHC 1979 (Ch) at [23]. However the interpretation of one will is unlikely to assist the court with similar wording in later cases: *Sammut v Manzi* [2008] UKPC 58.

90. But subjective evidence is excluded, save as provided in s.21(1) of the Administration of Justice Act 1982 ("AJA"):

> "(1) This section applies to a will—
>
> (a) in so far as any part of it is meaningless;
>
> (b) in so far as the language used in any part of it is ambiguous on the face of it;
>
> (c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.
>
> (2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation."

91. What the parties differ on is whether s.21 of the AJA is engaged, and, if it is, whether there is any extrinsic evidence of Mr Nodes's intentions which assist in construing clause 2(b) of the Will. Mr Hewitt submits that clause 2(b) is perfectly clear in that it gives the Executors a power, exercisable during the life of Mrs Nodes, to appoint to either or both of her and Mr Eade shares up to a maximum of 26% between them. Accordingly, it is not open to the Court to construe the clause as Messrs Learmonth and McKean submit "…without doing impermissible violence to the wording."

92. Mr Hewitt submits that *Brooke v Purton* [2014] EWHC 547 (Ch) and *Reading v Reading* [2015] EWHC 946 (Ch) show that the approach in *Marley* results in a 3 stage process namely:

i) first, adoption of the approach at [19] of *Marley*, and dependent thereon

ii) consideration whether s.21 is engaged and if it is,

iii) on consideration of any extrinsic evidence which is admitted by s.21, does that assist in construing the clause and does that construction differ from that at (i)?

93. As to s.21(1)(c) and whether clause 2(b) is ambiguous in the light of the surrounding circumstances, Mr David Donaldson QC sitting as a Deputy High Court Judge in *Brooke* said "…it is in my view both desirable and appropriate that the concept of ambiguity in s.21… should be broadly interpreted."

94. In *Reading* the phrase "issue" was found by Asplin J to have been ambiguous in the light of the surrounding circumstances and therefore extrinsic evidence would have been admissible. With evidence of the letter of wishes and the family dynamic,

"issue" was found to include stepchildren and the children of both the testator's children and stepchildren. That, Mr McKean submits, means I should consider the Company dynamic when considering ambiguity here.

95. Mr McKean submitted that was an example of how a clause which may appear clear in isolation was found to be ambiguous for the purpose of s.21(1)(c). He cited *The Royal Society v Robinson* [2015] EWHC 3442 (Ch) as another example where Nugee J (as he then was) found "…property of mine which is situated at my death in the United Kingdom" was ambiguous for the purpose of s.21(1)(c) in that the deceased intended it to include property outside the UK namely in the Channel Islands and the Isle of Man.

96. Mr Learmonth emphasised that a key point in such interpretation is the rejection of literalism so regard must be had to what the reasonable reader with the same background knowledge would have understood the testator to have meant – so the matrix of fact "…includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" – *Investors Compensation Board v West Bromwich BS* [1998] 1 WLR 896 at 913A.

97. Accordingly, he submits, a particularly generous approach as to construction of wills is to be adopted, where the testator's true intentions are clear, as first by the time interpretation is required the testator has died so cannot correct any drafting error and secondly, unlike contracts, no-one is prejudiced as the will only takes effect on death. That Mr Learmonth submits results in the decisions in *The Royal Society* I refer to above and also *Guthrie v Morel* [2015] EWHC 3172 (Ch) where the will described a property as "87 Loma del Rey" but the testator owned no. 81, not 87. The court interpreted that as referring to what he owned, being what he obviously meant. Mr Hewitt's response to those authorities is that they were extreme examples in circumstances where a partial intestacy would have arisen, in itself a compelling reason not to construe literally.

98. Also Mr Hewitt emphasised that when a gift is clear the Court cannot find it is ambiguous due to the absence of a rational explanation for it; Mr Nodes could have picked a bizarre number of shares to bequeath for reasons only known to him but that would not result in a clear gift being deemed to be ambiguous. Further, it is important to keep s.21 within its guidelines as to do otherwise could open the floodgates.

99. Mr Hewitt concluded by stating that first clause 2(b) is perfectly clear; it means what it says. Secondly, even if s.21 of the AJA is engaged, and extrinsic evidence is admissible, the best evidence is that of Mr Donaldson.

Rectification

100. Again there is common ground as to the law in that first the power of the Court to rectify derives from s.20(1) of the AJA:

> "(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."

101. Secondly, the three stage approach of Chadwick J (as he then was) in *Re Segelman* [1996] Ch 171 at 180D should be followed:

> "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 […]'

102. Mr Hewitt referred me to the emphasis Chadwick J placed upon the standard of proof in that whilst it is on the balance of probabilities at p184A:

> "…the probability that a will which a testator has executed in circumstances of some formality reflects his intentions is usually of such weight that convincing evidence to the contrary is necessary."

103. Evans-Lombe J in *Goodman v Goodman* [2006] EWHC 1757 (Ch) at [18] likewise referred to the balance of probabilities being the standard but:

> "bearing in mind a strong bias in favour of the conclusion that a duly executed will evidences the intention of the testator."

104. This, Mr Hewitt submits, is also supported by Norris J in *Sprackling v Sprackling* [2006] EWHC 1757 at [18] where confidence that the will does not record the instructions means "…being satisfied on the balance of probabilities by evidence of a quality commensurate with the inherent probabilities of the case itself."

105. Finally in this respect Mr Hewitt referred me to *Fielden v Christie-Miller* [2015] EWHC 2940 (Ch) at [39] where Sir William Blackburne said:

> " […] I am reminded that where what is sought is rectification of a will, namely a document which on its face was executed in compliance with certain formal requirements, the claimant has to overcome a presumption, and it is one of some weight, that the will as executed reflects the testator's intentions. Why else go to all the trouble of getting a solicitor to advise, draft and engross the will and then go through the process of execution, complete with witnesses and, in the instant case, sign each page of the document if the position were otherwise? In Re Segelman (Decd) [1996] Ch 171 Chadwick J drew attention to

> these matters when stating (at page 184) that although the standard of proof in such cases is the balance of probability such is the weight of the presumption so described that convincing evidence to the contrary is needed if the presumption is to be overcome."

DISCUSSION AND THE FACTS

106. As I have set out above Mr Donaldson arranged to attend the Nodes at their home on 8th September 2015. Mrs Nodes in her diary recorded that day that:

> "Iain Donaldson of MAB (Birmingham accent?) came 2.45-4.15pm, discussing our respective Wills and IHT plus existing Powers of Attorney. It stirred M [Mr Nodes] out of his self-absorption, he seemed to grasp some of the advice we were given. I gave Donaldson a copy of my Driving licence for him to authenticate in lieu the one I'd send Samantha (sic) of an out-of-date one."

107. Mr Donaldson said there was some urgency in providing advice and amending their wills, that Mr Nodes emphasised he wished to mitigate IHT so far as possible and to that end wished no tax to be payable on the first death of himself or Mrs Nodes. Mr Donaldson says he gave advice in that respect, explaining how the 2007 will did not leave the estate in a tax efficient way so a discussion to remedy that resulted in it being decided that the shares in the Company would be placed in a life interest trust with income to Mrs Nodes for life, then to Mr Nicholas Nodes and thereafter to Cancer Research, so no IHT would be payable on the first death of either of them. The Executors, Mr Donaldson says, had a discretion to appoint shares up to 26%, which he said was an important point.

108. Mr Nodes instructed Mr Donaldson that as only certain parts of his 2007 will were to be changed to minimise IHT he wanted that will to be updated as opposed to being drafted from scratch, being Mr Donaldson's usual practice. But as Mr Nodes wanted, he said, a redline amended version he did not fill in the will questionnaire completely. He was also to draft a new will for Mrs Nodes.

109. Mr Donaldson specifically stated that his clear instructions from Mr Nodes were:

i) that Mr Eade was not to have more than 25% of the shares in the Company as he could then block any shareholder resolutions;

ii) therefore trustees were to have a power to appoint to Mr Eade and Mrs Nodes up to 26% between them, "…not each so that Mr Eade could not block any votes.";

iii) there was a right to income for Mr Nicholas Nodes;

iv) this was against a background of Mr Eade being, in terms, over-remunerated;

v) neither Mr Eade nor Mrs Nodes were to have 26% of the shares each as that could mean they could block the trustees or the charity in remainder, in

circumstances where Mr Eade was seeking to change the articles of association of the Company for his own benefit;

vi) the word "each" was not written in his notes as that was not the instruction of Mr Nodes, and for Mrs Nodes's there was to be no provision to increase her shares to 26%.

110. Mr Donaldson said in his statements that his firm did have "…an electronic document management system" but that he had been unable to retrieve the contents which he believed (in ICD1) would have included other documents and typed attendance notes and (in ICD2) that attendance notes were prepared and filed on it. There is a distinction here in my view between i) electronic files maintained for this and other client matters, ii) documents retained electronically – as are any documents prepared on a laptop, PC, smartphone etc. and iii) a scanned electronic copy of the Will file which MAB said they would retain on completion of the matter.

111. In oral evidence Mr Donaldson was asked if he had prepared a letter explaining the effect of the new will and the reason for the changes. He answered "None I can locate". Then he was asked if he would usually write such a letter; he said usually but he could not locate it, nor could he locate an attendance note. He was asked if he recalled writing such a letter and he said:

> "My recollection was something was sent but I cannot locate it."

112. When questioned further as to whether there was any reason why any outgoing letter had gone missing Mr Donaldson said:

> "There are items from this – including advice items – not in this file but I cannot explain that….Do I think there was a letter? I think there was but there is no copy here…so I think there's one but not one here."

113. Then Mr Donaldson confirmed he was familiar with the STEP Code ("the Code"), which he had also confirmed in his letter of engagement. It was put to him the Code provided that adequate notes of instructions were to be taken and preserved. He replied that he would file part paper and part electronically but he had not succeeded in getting access to the electronic file; so he did not answer that question. As to whether he dictated attendance notes he said sometimes he typed them himself, depending on the time of day and work capacity.

114. Then, with further reference to the Code it was put to Mr Donaldson that he should have sent an attendance note or fact find to his client and he had not. His answer was a non-admission; he said evidently not from what Mrs Nodes said. When pressed, he added he thought a confirmation was sent but he could not find it. As to the need for him to confirm IHT advice in writing to his client he accepted if it had not been done, then he ought to have done it.

115. It was put to Mr Donaldson that Mr Nodes was elderly and physically unwell. He replied that Mr Nodes was "…frail. He was generally jolly. In good spirits. Very direct." He was asked about the Golden Rule and why he did not follow it. Mr

Donaldson said Mr Nodes had capacity. Then Mrs Nodes's diary entry was put to Mr Donaldson who replied that he was "… not aware of this diary. At no time was it suggested by Mrs Nodes he was not understanding."

116. Also of note was it was put to him that objectively it was wrong to say Mr Eade would benefit from the new articles of association. Mr Donaldson replied that that was the position put to him – the amount of remuneration – that he was taking without reference to others. But he then said it was background and he did not discuss the dispute with the Nodes, but they had said it once.

117. Mr Donaldson confirmed that in view of the substantial difference between 26% each and 26% between them, he asked Mr Nodes what provision he should use. When it was put to him that Mrs Nodes was specific in her evidence there was no change nor reason to reduce her percentage, he said "Mr Nodes wanted to ensure at least 74% would go to charity. It was always possible Mrs Nodes would give it to someone else." This was not stated in his witness statements.

118. Mr Donaldson also confirmed Mrs Nodes was present at all times save if she say stepped out of the room. When asked again about the specific change from 26% each to 26% for both and that it was nowhere spelt out in his notes he sidestepped the question by saying "In my notes I set out what he wanted".

119. I was concerned over the apparent loss of files so at the conclusion of Mr Donaldson's evidence I asked how the electronic files had become irretrievable. He said:

> "There was a data transfer. I enquired of the former IT manager of MAB as to what happened. I understand the data was transferred electronically to Hill Dickinson…but it was not available on Hill Dickinson's system at all. I asked IT at MAB do you still have it and the answer was no…as such I cannot retrieve it."

120. Also in response to questions from me Mr Donaldson said the files lost were those which had been closed, for the period from when the system was first used until the date of transfer (to Hill Dickinson) which, he said, possibly could mean numerous client files had been lost.

121. I find that Mr Donaldson's process of taking instructions for the Will, his drafting of the Will and management of the Will file itself was flawed for these reasons:

    i) On his own case he took instructions from Mr Nodes as one client to the detriment of his other client, Mrs Nodes, which in the context of what he knew from the 2007 will amounted to a clear conflict of interest in the reduction of her future share holding.

    ii) He did not take instructions from Mr Nodes alone nor attempt to do so.

    iii) Further, he took instructions from Mrs Nodes without having the same confirmed by Mr Nodes. In that respect, I do not accept that Mr Nodes gave him clear and direct instructions.

iv) He did not make an attendance note of the 90 minute meeting when instructions were given on 8th September 2015, notwithstanding that that and its preservation is required by [1(xviii)] of the very Code he expressly stated he complied with. This is also a requirement of the Law Society's File Practice Note ("the Note") at [3.3]. Mrs Nodes's diary is the only note, save the part completed will questionnaire.

v) The Note at [2.2] also requires "…a detailed contemporaneous record…" to be prepared.

vi) He did not send notes of either meeting to the Nodes, in contravention of [1(xix)] of the Code.

vii) His failure to make a written record of his instructions on 8th September was also contrary to the Law Society's Wills and Inheritance Protocol ("the Protocol") at [11.1.1].

viii) He did not send a copy of his instructions for the Will as agreed at the meeting or a letter with the draft will to explain its effect, being another failure to comply with the Protocol at [13.1].

ix) There appears to have been no discussion nor record of the reasons for the way the 2007 will worked and why and how it was to be changed.

x) A failure to carefully and properly proof-read the drafts of the Will to ensure they followed his instructions.

xi) The failure, by Mr Donaldson, on his case as to the discretion of the Executors as to allocation of the shares, to ensure a Letter of Wishes was prepared for Mr Nodes so their discretion could be properly exercised.

xii) A failure to follow the Golden Rule, notwithstanding Mr Nodes's age and frailty – as specifically referred to by Mrs Nodes and evidenced by the need for a home visit.

122. Many aspects of the above failings are especially of concern a) in light of their ages (86 and 81 at that time), b) that IHT advice was requested c) that there was – on Mr Donaldson's case – a most substantial change in Mr Nodes's testamentary intentions, to the detriment of his wife and long term co-director and d) that as Mrs Nodes recorded (and I find) Mr Nodes only grasped some of the advice, contrary to what Mr Donaldson says his impression of Mr Nodes's understanding was.

123. I find on the balance of probabilities that Mr Nodes did not instruct Mr Donaldson to vary his 2007 will by changing the percentage up to which both Mr Eade and Mrs Nodes would receive shares in the Company from 26% each to, as Mr Donaldson said in his evidence, 26% in total for both of them.

124. I also find that allocation of shares to Mrs Nodes was not intended to be at the sole discretion of Messrs Donaldson, Hogg and Odds. Mr Nodes did not intend nor instruct Mr Donaldson to make those reductions nor give a discretionary power as

now appears. There never was any change of mind by Mr Nodes to disadvantage his wife or Mr Eade as Mr Donaldson alleged.

125. What I find happened was that Mr Donaldson, after meeting with the Nodes on 8th September 2015 dictated instructions to Ms Monzione as to the preparation of red-lined versions of the new wills, as he was asked to. Those instructions appear in the Blue Note. The first draft of the will on the file was after the dictation of the instructions in the Blue Note as the part I referred in [37] above to not making sense appears in that redlined printed draft.

126. Mr Donaldson corrected that mistake and then, as there was no reference to share holdings in that part of the draft inserted what he wanted in manuscript namely:

> "of my personal holding of shares as shall when added to their existing shareholdings of XXXX of them amount to 26% of the issued share capital of the company as at the date of my death."

127. Mr Donaldson did not prepare any attendance note in any form contrary to what he endeavoured to persuade me of his instructions nor an immediate letter nor for that matter any letter detailing what his instructions were and guiding the Nodes through their new wills. Given, as I find below, that I accept Mr Donaldson's evidence that some data was lost, I think he genuinely believed he may have made an attendance note or prepared the appropriate letter.

128. He was therefore working from memory, about 5-7 days after the meeting; the exact situation that the three professional obligations or statements of best practice that he was subject to namely the Code, the Protocol and the Note are intended to avoid. It is not possible to be precise as to when XXXX was transcribed as no meta-data for the various drafts has been provided, no doubt because it was lost with the other data.

129. The overwritten word XXXX is "each" as found by Ms Radley in her unchallenged evidence. I add that it appears Mr Donaldson did at the time vacillate as to what the word should read as at [17] Ms Radley found that the first letter was overwritten "…with an apparent "e" construction." However, I find it was mis-transcribed by a secretary to read "both" which was then typed into the second draft that follows in the Will file, and that mistake was missed from then onwards.

130. That draft was sent under copy of a letter dated 16th September 2015 to the Nodes with other attachments I mention above. Mrs Nodes replied raising various queries but she did not spot "both". I have no doubt at all in view of the other errors that she did spot that if she had realised she would have raised it immediately and pursued the point. After some general correspondence both wills were executed.

Reasons

131. My reasons for finding as above are:

i) Mrs Nodes's account is inherently probable; that of Mr Donaldson inherently improbable. There was no good reason for Mr Nodes to change his testamentary intentions as to the share-holdings as set out in the 2007 will as Mr Donaldson maintains he did.

ii) For the reasons I have set out above I prefer the evidence of Mrs Nodes where it conflicts with that of Mr Donaldson. She was direct, forceful and certain. Her minor errors were wholly understandable; Mr Donaldson was evasive, equivocal and frankly unsatisfactory in the litany of excuses that he put forward.

iii) If Mr Donaldson had sent the Nodes an attendance note or a letter setting out the two crucial changes I have no doubt that Mrs Nodes would have reverted immediately and in detail challenging him. No such note or letter was ever sent. I especially note that apart from pro-forma parts of his letters – such as the Terms of Engagement – the letters from Mrs Nodes were always longer and more detailed than those of MAB.

iv) There is also no evidence that such a note or letter of advice was ever prepared; I would have expected to see a timed entry for the time Mr Donaldson would have spent as that all would have been proper work done for the clients – or some other reference to the existence of such material. But there is nothing. Further, there are no time records.

v) In addition, if Mr Donaldson had sent an attendance note and/or a confirmatory letter to the Nodes, and one or the other had not been responded to, the reasonable solicitor would have enquired of them why, due to the importance of the changes. Mr Donaldson did not as nothing of that nature was sent by him.

vi) There is no logical reason for Mrs Nodes and Mr Eade to receive 26% in total between them; it just does not make sense. However, a joint holding of 52% meant they together could defeat the Executors or with 26% each they each with the Executors could defeat the other.

vii) On 12th October 2015, 6 days before Mr Nodes executed the Will, Mrs Nodes wrote to Ms Chaney enclosing a draft letter for her to advise on in the reduction of Mr Eade's remuneration. Mrs Nodes's detailed and comprehensive draft, rightly described by Mr Constable as excellent, said in the penultimate paragraph:

> "Upon my decease, as with my previous Will, provision is made for your's and Ann's shares in NJS to increase to 26% each".

Mrs Nodes clearly was of the view that there was no change.

viii) Then on 23rd October 2015, the day after the Will was executed, the Nodes met Mr Constable and Ms Chaney for 90 minutes to discuss the position regarding Mr Eade and the aforesaid draft letter. Ms Chaney's comprehensive, closely typed 6 page attendance note records:

> "…on Mr Nodes' death Mrs Nodes and Mr Eade's shares in the Company would increase to 26% each."

ix) Ms Chaney also confirmed this to be her understanding of the position in her letter dated 24th February 2016 to the Nodes.

x) It also appears in Ms Chaney's letter to Mr Eade, dated 6th November 2015, written Without Prejudice as it was an offer to resolve the dispute:

"…that according to Mr Nodes' recently attested Will, on his death both you (sic) and Mrs Nodes' shares in the Company will increase to 26% each."

xi) The uncontested evidence of Mr and Mrs Eade of the Car Call on 24th May 2019 that Mr Donaldson said each of him and Mrs Nodes would receive up to 26% each of the shares of the Company.

xii) The valuation by Mr Francis FCA on 13th June 2019 of a 20% shareholding at the request of Mr Donaldson as of the date of death, to reflect the difference between what Mr Eade had – 6% - and was to receive – 20%. I can see no other reason as to why this figure was used, and Mr Donaldson supports this by saying in ICD2 he "…thought this would help inform a decision of the Trustees and was around the amount I was considering suggesting to the Trustees might be appointed to Mr Eade." That would take Mr Eade's shares to 26%.

132. Ms Chaney did not give evidence, but she took her instructions from Mr and Mrs Nodes. Again there does not seem to me to be any reason why she would or could mistakenly state the effect of the Will or misunderstand what she had been told. In addition, her correspondence was sent to the Nodes and there was no objection, as it was as Mr Nodes intended, both as to the amount each and in that rightly no discretion was mentioned. Her attendance note and letters were detailed, and specific; I can see no possibility of her being mistaken.

133. I now turn to the reasons advanced by Mr Donaldson as to why the entitlements of Mr Eade and Mrs Nodes were to be reduced. These are the dispute with Mr Eade, which Mr Donaldson said resulted in Mr Nodes instructing him that Mr Eade was not to have more than 25% due to the power it would give Mr Eade to block resolutions, and to give the Executors discretion as to the number of shares they could grant him. I do not accept that for these reasons:

i) All the documentation treated the IHT/wills instruction as distinct from the dispute.

ii) Resultingly there was no coordination between Mr Donaldson and Mr Constable/Ms Chaney. Mr Donaldson in oral evidence accepted he did not liaise as to it nor was he involved in it. They were separate instructions, not inter-dependent.

iii) Indeed, the initial letter of instruction makes it clear that a new will had been considered by Mr Nodes for some time previously and the dispute instructions were not predicated on (nor suggested to be) linkage between the two.

iv) The dispute was resolved amicably by agreement in a deed dated 11th February 2016, just under 4 months after the Will. If one depended upon the other, they would have been executed at the same time.

v) It appears the first documented reference to the ability of a 25% shareholder to block a special resolution was recorded in the dispute file, but that advice was given in January 2016, several months after the execution of the Will. It therefore can have no bearing on advice or drafting at the time.

134. I conclude that Mr Donaldson, when the each/both issue became apparent, after a considerable period of contemplation, decided that he must have intended to have written the word "both" as that was why it appeared in the Will. He then convinced himself that was what happened, notwithstanding the evidence with which he was confronted.

135. I do not accept any of the reasons he put forward as to why the shareholdings were to be a total of up to 26% as opposed to up to 26% each. Finally, in that respect, Mr Donaldson did say the proposed change to the articles of association propelled Mr Nodes to alter the provision so as to guard against Mr Eade having too much power. That was not the case; the amendment was for the benefit of all of Mr and Mrs Nodes and Mr Eade.

136. I also find that there was no electronic client file that was lost on the transfer of data from MAB to Hill Dickinson, as this misconception arose from Mr Donaldson rightly in my view referring to a electronic document management system. As I have set out above such a system is in use on almost any electronic device on which documents can be typed, whether smartphone, PC or whatever.

137. That system then was referred to as a file, which I do not think it was – as I consider I can take judicial notice of what indicates a solicitors' electronic filing system – which commonly appears as a long reference number. This is first seen on an email from Mr Donaldson when at Hill Dickinson of 30th July 2019. That type of number does not appear on any MAB correspondence so it appears to me they did not use such a filing system.

138. Mr McKean and Mr Learmonth emphasised, rightly, that the loss of client files is a very serious matter. I think that requires not just, as they submit, a report to the Information Commissioner's Office but also to MAB's insurers, due to the risk that ensues, possibly the Solicitors Regulation Authority, any legal quality assurance scheme such as Lexcel and the clients themselves. But it appears to me that it was the pure data that Mr Donaldson could not access. Having said that, the position remains in that I found no attendance notes or detailed letter of instruction was created or sent by Mr Donaldson.

Analysis and Decisions

Construction

139. The objective is to ascertain the intention of Mr Nodes, as set out in the Will, and in the light of the admissible evidence. I first must consider if the Will is, in clause 2(b), ambiguous, either on its face or in the light of the surrounding circumstances. The

word "both" can frequently be ambiguous. Here, in the light of the surrounding circumstances, from the testator's armchair, I have no doubt it is. First, the word used, if Mr Hewitt is correct and it just means what it says, even in the light of the surrounding circumstances, would appear as poor drafting as it would be better replaced by "in total" or "between them". Further, the surrounding circumstances include the 2007 will and the lack of a Letter of Wishes as to the new discretion vested in the Executors.

140. The change from the former is a major one alone; the latter is most curious in that did Mr Nodes actually wish to give his trustees the discretion to decide a) whether and how many shares should be allocated and b) in what proportions between them and on what basis? That is especially so as one trustee, Mr Odds, was wholly unknown to Mr Nodes. That would give three people considerable power over shares for Mrs Node, to whom he had been married to for 45 years at the time of drafting.

141. A literal approach is wrong; a generous approach to construction is to be taken where the testator's true intentions are clear, as it is not possible to correct any error of drafting – hence the approach in *Royal Society* and *Guthrie*. The matrix of fact is wide. Here, applying *Marley*, "both" is ambiguous. Mr Learmonth's illustrations here show this well – if a father says to his two squabbling daughters that "you both can have a chocolate bar" that implies two bars, notwithstanding "bar" is singular, and the word works as a synonym of "each".

142. But if that father says to his adult son and daughter-in-law "I will give you both a car" it implies one car for them together. Context is important in interpretation. So here, whatever unspecified number took the shareholdings to 26% between them does not make sense as first it would mean in effect they were to share the distribution and secondly it ignores their starting positions of Mr Eade having approximately 6% and Mrs Nodes 2%. So the 2007 will, viewed from that armchair, strongly indicates that the position was not to differ in that it would be 26% each. It is also important that the Executors themselves disagreed as to what clause 2(b) meant.

143. I therefore find the Will is ambiguous both on its face and in the light of the surrounding circumstances. Accordingly s.21(1)(c) of the AJA is engaged and I can consider all the direct extrinsic evidence of Mr Nodes's intentions, namely the evidence of Mrs Nodes as to what she believes her husband intended, said and did, the will file, the evidence of Mr Donaldson, Mr and Mrs Eade, and the surrounding documentation such as the note and letters of Ms Chaney – all the matters I have found at [123-130] for the reasons at [131-132] and my rejection of Mr Donaldson's account at [133].

144. The result leaves no doubt as to the intentions of Mr Nodes; each of Mrs Nodes and Mr Eade were to have such shares as would bring their total shareholding in the Company up to 26% each. Further, there was no intention that the Executors as trustees were to have a discretion as to the amount to be awarded.

145. I therefore find, as to the first Issue, that clause 2(b) is ambiguous and the admission of extrinsic evidence means on its true interpretation the Executors have the power to appoint to each of Mr Eade and Mrs Nodes up to as many shares as will, when added to their current holdings, amount to 26% each and thereby 52% in total.

Rectification

146. Alternatively, if I am wrong as to the above, I must consider the application of s.20(1) of the AJA and the three stage process in *Re Segelman.* As I have set out above I reject the evidence of Mr Donaldson and find that "each" understandably – as it had been overwritten – was mis-transcribed by his secretary as "both" in the circumstances as I found them. That is a perfect example of a "clerical error" for the purpose of s.20(1)(a).

147. In other words, Mr Donaldson's secretary wrote what both Mr Donaldson and Mr Nodes had not intended – *Marley* at [71]. No-one realised the clerical error and so the Will was executed.

148. As to the question of rectification of the excessive discretion vested in the Executors, I find this to be a failure to understand instructions under s.20(1)(b), as although Mr Nodes was anxious to avoid IHT, there is no evidence that he wanted tax saving to override the total shareholding of 52% for his wife and Mr Eade. I find that the creation by Mr Donaldson of a discretion for the Executors was a misunderstanding on his part; the absence of any reference to the exercise of the discretion in the Letter of Wishes, which does refer to provision for a few family pets, stares off the page.

149. I have set out Mr Hewitt's submissions as to the standard of proof I must apply, so as to overturn the presumption in favour of a professionally drafted will, in detail above. I have no doubt that my findings are based on convincing evidence and satisfy that standard, especially as here there is no doubt that the Will was supposed to say "each" and not "both".

150. As to Issue 2a, rectification, I find Mr Nodes did intend his Will to result in 26% each/52% in total. The failure of the Will to have that effect was due to a clerical error by Mr Donaldson's secretary. As to Issue 2b, Mr Nodes did not intend for the trustees under his Will to have a discretion as to whether to appoint shares to his wife and Mr Eade. That error arose as a result of a failure by Mr Donaldson to understand the instructions of Mr Nodes.

151. This judgment will be handed down without attendance. No doubt arrangements will be made for an attended hearing in respect of the Consequential Issues unless a Minute of Order is agreed.

Deputy Master Linwood 30th April 2021

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