Executor v Eight Beneficiaries
Royal Court
3rd May 2017

JUDGMENT
24/2017

Application for the rectification of a will.

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between: **EXECUTOR** **Applicant**

-and-

EIGHT BENEFICIARIES **Respondents**

Hearing date: 18th August 2016

Judgment delivered: 25th August 2016

Reasons handed down: 3rd May 2017

Before: Richard James McMahon, Esq., Deputy Bailiff

Jurats: J Ferguson Esq., P S T Girard Esq., and J G Hooley Esq.

Advocate for the Applicant: Advocate A D Laws
The Respondents did not appear and were not represented

Cases & legislation referred to:

The Royal Court (Reform) (Guernsey) Law, 2008
Cooney v AFR Executors (Guernsey) Limited [2016] GLR 18
Dicey, Morris and Collins, *The Conflict of Laws* (14th ed., 2006)
Agulian v Cyganik [2006] EWCA Civ 129
Barlow Clowes International Limited (in liquidation) v Henwood [2008] EWCA Civ 577
Irvin v Irvin [2001] 1 FLR 178
Dicey, Morris and Collins on the Conflict of Laws (15th ed., 2012)
Freke v Carbery (1873) LR 16 Eq 461
In the Estate of Father Amy 2000 JLR 80
In re Middlebrook [2005-06] GLR Note 16
Re Vautier 2000 JLR 351
In re Carr (unreported, 22 December 2009)

Le Tissier v Tostevin (unreported, 16 March 2010)

Introduction

1. On 25 August 2016, the Court announced that it would grant the rectification of the Will of a gentleman to whom we will refer as "the Deceased" dated 16 March 2007 so that it excluded a leasehold interest in a London property. Having been informed that there was a degree of urgency to have the matter resolved for certain tax reasons, the Court had convened one week earlier during the vacation period to hear the Application of the executor appointed by the Deceased. The Court understood that the Application would not even have been required had the Eighth Respondent already reached the age of majority and so could have given informed consent.

2. At the time of announcing that decision, the Court expressly reserved the giving of full reasons relating to why it had decided to grant rectification and why the Will could not be construed in a manner that meant no rectification was required, which had been the Applicant's primary contention. This judgment now contains those reasons. The Court apologises for the length of time it has taken to prepare this judgment.

3. This judgment, which has been prepared in accordance with the provisions of section 16(5) of the Royal Court (Reform) (Guernsey) Law, 2008, contains the unanimous findings of the Jurats.

Background

4. The Application is dated 21 June 2016. Initially, it was presented *ex parte* and sought certain directions, which were given on 24 June 2016. At the time, the Court ordered that the hearing should proceed in private, primarily because of the age of the Eighth Respondent. A direction was also given that the interests of the Eighth Respondent should be represented by the Sixth Respondent, a sibling of the Eighth Respondent. Because of the alignment of the interests of the Deceased's grandchildren, which appeared different from the interests of the Deceased's children, it was preferable for an adult sibling to represent the minor rather than the minor's parent. Because none of the Respondents is resident in Guernsey, leave to effect service of the Application outside the jurisdiction was also granted. The remainder of the Application was adjourned for four weeks to enable service to be effected.

5. On 22 July 2016, the Court was informed by way of the Second Affidavit of the Applicant sworn on 20 July 2016 that all eight Respondents had been served. Each of them had returned a letter, dated variously 16, 17 or 18 July 2016, drafted in similar terms, indicating that they had discussed matters between themselves as a family, including the potential consequences if the Application were granted, and they each expressed their agreement with the Application. Although the Eighth Respondent had sent one of those letters anyway, the Sixth Respondent further confirmed that, having discussed the Application with the Eighth Respondent, the Sixth Respondent's agreement to the proposed outcome was shared by the Eighth Respondent. The First Respondent also indicated that legal advice from another Advocate had been sought. The Applicant further explained that there was a deadline of two years from the date of death of the Deceased, which had occurred on 11 September 2014, by which the heirs needed to have signed off on a deed of variation so that any changes to the Will were treated as neutral for UK inheritance tax purposes. The hearing was, therefore, listed for 18 August 2016.

6. Having indicated their agreement to either of the courses of action suggested by the Applicant, none of the Respondents appeared to make any further representations. The Court was, however,

shown e-mail responses from each of them sent shortly before the hearing in which they gave further information about their understanding of the Deceased's intentions expressed in his later years as to where he would spend the remaining years of his life.

7. The evidence before the Court in support of the Application was contained in an Affidavit of Advocate Nicholas Tostevin sworn on 20 June 2016, the First and Third Affidavits of the Applicant sworn on 22 June and 9 August 2016 respectively, and the First Affidavit of Julia Schaefer sworn on 10 August 2016, by which she exhibited legal advice received on the laws of Portugal and Denmark as they impact on the issues the Court has to resolve, and her Second Affidavit, sworn on 18 August 2016, by which she provided additional information responding to questions raised by the Court during the course of the hearing.

8. The Applicant has been represented throughout by Advocate Laws and the Court is grateful to him for the way in which he has conducted the Application.

Facts

9. The Deceased was born in Denmark in 1926. He was a successful businessman. He lived in Guernsey from 1980 to 1986. At that time, his marriage broke down and he was divorced. He was a Danish national throughout his life. The Deceased and his former wife had acquired a dwelling in Guernsey in 1980, possibly using a company as the purchaser. That property was sold in 1990. The Deceased had three children. Two of those children have their own children, the Deceased's five grandchildren, and one of them is childless.

10. The leasehold property in issue in this Application is a flat in London. On 25 June 1986, the Deceased purchased the remaining term of a lease of 125 years from 29 September 1976. On 3 March 2014, the First Respondent was registered as the proprietor of a lease of 999 years computing from 29 September 2012 in respect of this flat. The freehold of the land of which the flat forms part is owned by a company. The Applicant believes the First Respondent is a shareholder in this company.

11. In 1997 Advocate Tostevin prepared a will for the Deceased, which was executed on 10 February 1997. That will gave the Deceased's address as a hotel in Madeira. It declared his domicile as being Guernsey. It split his estate into two equal parts, one half to be shared between his children equally and one half to his then partner.

12. By a letter dated 9 July 2001, Advocate Tostevin was informed by the person who was named in the will of 1997 as joint executor with Advocate Tostevin, that the Deceased's partner had sadly died and that the Deceased was re-considering the terms of his will. That letter also raised the possibility that the Deceased's domicile of choice in Guernsey might have been lost leading to the revival of his domicile of origin in Denmark. That letter further refers to a proposal to have some of the Deceased's assets transferred to a Guernsey company, although some further work was needed to ensure that the tax consequences were not adverse. It mentions that Advocate Tostevin might contact the Deceased in the United Kingdom to obtain further instruction. Advocate Tostevin recalls writing to the Deceased at the hotel in Madeira on 17 July 2001. Matters then took time to progress.

13. On 27 February 2003, Advocate Tostevin took instructions from the Deceased by telephone and has produced his handwritten note of that conversation. Those notes include reference to there being instructions for an English will in respect of the London flat, which would pass only to the Deceased's children. On the same day, Advocate Tostevin wrote to the Deceased, enclosing a draft new will. The letter referred to the need for the Deceased to execute any will in conformity

in the territory where it is to be executed or in the territory of domicile, habitual residence or nationality either at the time of execution or of death. Advocate Tostevin suggested the Deceased seek further advice on Danish or Portuguese law. The draft will he had prepared declared the Deceased to have a Danish domicile of origin. It also referred to two settlements, because Advocate Tostevin was to be appointed successor protector of those settlements upon the Deceased's death. The operative part of the draft will was to give the whole of the estate in equal shares to the Deceased's children and to the managing director of the Deceased's business.

14. On 1 March 2003, the Deceased telephoned Advocate Tostevin. Having made the changes to the draft will requested, Advocate Tostevin sent a copy back to the Deceased on 5 March 2003. Advocate Tostevin's file note of 21 March 2003 records that the Deceased had telephoned on 19 March 2003 to say that the signed will ("the March 2003 Will") was being returned. The Deceased also raised the question of the will in respect of the London flat. Advocate Tostevin queried the address that should be used for that will. The Deceased indicated again that the beneficiaries in respect of the London flat would be his three children. The executed will dated 19 March 2003 was witnessed by two managers at the hotel in Madeira, which is the address given for the Deceased. It is expressed to cover all of the Deceased's personalty. The Applicant received a copy of this will on 25 March 2003.

15. Advocate Tostevin prepared a draft will to deal with the London property, although it is expressed more generally as a will dealing with the Deceased's real and personal estate in the United Kingdom. This was forwarded to the Deceased under cover of a fax dated 22 May 2003. It was also sent in draft to the Applicant, who had assumed the position previously occupied by one of his colleagues as the joint executor with Advocate Tostevin of the Deceased's Guernsey will of personalty. The Deceased executed this will on 27 August 2003 ("the August 2003 Will"). This will reads:

> "*THIS IS THE LAST WILL and TESTAMENT of me, [THE DECEASED], son of [Father], of [address of London flat] concerning my real and personal estate in the United Kingdom.*
>
> *1.* *I DECLARE that my domicile of origin is Denmark and that my Danish personal identification number is […].*
>
> *2.* *I REVOKE all Wills and Testaments concerning my real and personal estate in the United Kingdom by me heretofore made.*
>
> *3.* *[Appointment of Applicant and Advocate Tostevin as Executors]*
>
> *4.* *I GIVE, bequeath and devise my flat, [address] aforesaid, and its contents, in equal shares to my children, or should any of them have predeceased me to the survivors or survivor of them, Provided Always that should any of them have predeceased me leaving issue surviving, such issue shall take absolutely and in equal shares the share which such deceased would have taken had he or she survived me.*
>
> *[Signed at Madeira Hotel on 27 August 2003]*
>
> *SIGNED by the said [THE DECEASED] and by him declared to be his last Will and Testament concerning his real and personal estate in the United Kingdom in the presence of us both present at the same time who in his presence at his request and in the presence of each other have hereunto subscribed our names as witnesses.*"

16. Advocate Tostevin had further conversations with the Deceased by telephone on 2 and 7 June 2005, during which the terms of his will were raised. Advocate Tostevin's handwritten note of the second of these conversations and his subsequent letter to the Deceased dated 13 June 2005 indicate the types of matters then being considered, one of which was "*to provide a bequest for [the managing director] and to leave the rest to your children*". That letter concludes: "*Of course there would be no need to alter the Will which relates to the flat in England as that currently provides that it should go to your children in equal shares.*"

17. Nothing further was heard until 16 January 2007, when there was a further conversation between the Deceased and Advocate Tostevin. Following that conversation, Advocate Tostevin also spoke to the Applicant the same day, explaining the Deceased's wishes. Advocate Tostevin then prepared a draft revised will, which similarly referred to his Danish domicile of origin, and then dealt with his personalty in two parts, the first half going to his children in equal shares, as required by operation of Guernsey law, and the second part providing a bequest of £3 million to the managing director, with the residue split equally between the Deceased's grandchildren. The Deceased telephoned Advocate Tostevin's office on 26 February 2007, expressing his delight with the new draft but asking that the Applicant be requested to let the Deceased have any comments on it. Advocate Tostevin sent the Deceased a letter dated 2 March 2007 with a clean copy of the draft will and the Deceased duly executed this will in Madeira on 16 March 2007 ("the March 2007 Will"), with the witnesses similarly being from among the managers at the hotel. This will reads:

> "***THIS IS THE LAST WILL*** *and* ***TESTAMENT*** *of* ***PERSONALTY*** *of me,* ***[THE DECEASED]****, son of [Father], of […] Hotel in the Island of Madeira, Portugal.*
>
> *1.* ***I DECLARE*** *that my domicile of origin is Denmark and that my Danish personal identification number is […]*
>
> *2.* ***I REVOKE*** *all Wills and Testaments of Personalty by me heretofore made.*
>
> *3.* *[Appointment of Applicant and Advocate Tostevin as Executors]*
>
> *4.* *In the knowledge that my sons, [names] and my daughter, [name] are entitled by operation of Guernsey Law to an equal share of one-half of my estate, I give and bequeath the portion of my estate whereof I have the disposal according to law as follows:-*
>
> *(1)* *The sum of GBP Three million (£3,000,000) to [name], the Managing Director of [company name]; and*
>
> *(2)* *the residue in equal shares to my grandchildren, [names].*
>
> ***PROVIDED ALWAYS*** *that should Guernsey Law not apply to my estate, I give one-half of my estate in equal shares to my said sons and daughter and the residue as set out in Clauses 4 (1) and 4 (2) above.*
>
> *5.* *For the sake of clarity, my estate consists of not less than the whole of the issued shares of [holding company for Deceased's business], a company registered in Guernsey, and two bank accounts held with Lloyds TSB Bank PLC in Guernsey.*
>
> *[Signed at Madeira Hotel on 16 March 2007]*

> ***SIGNED*** *by the said* ***[THE DECEASED]*** *and by him declared to be his last Will and Testament of Personalty in the presence of us both present at the same time who in his presence at his request and in the presence of each other have hereunto subscribed our names as witnesses.*"

18. In February 2013, the Deceased informed the Applicant that he wished the London flat to be inherited solely by the First Respondent. However, nothing further was done about that wish and no amendment was made to the Deceased's will.

19. The Deceased died in Madeira.

20. By reference to the March 2007 Will, Advocate Tostevin renounced the office of executor and so the Applicant was then sworn sole executor of the Deceased's personal estate. The Deceased left a substantial Estate.

21. The District Probate Registry at Oxford of the High Court of Justice issued a grant of representation to the Applicant in 2016 in which it records that the Deceased was domiciled in Portugal at the date of his death.

22. The Applicant discussed with the Deceased's children the information that should be provided to HM Revenue & Customs about their late father. The information was then provided on Schedule IHT401, with the biography answering the query about education and employment history being:

> "*Born in Denmark of Danish parents so domicile of origin was Danish.*
>
> *Held a Danish passport and nationality until death.*
>
> *Worked for some years in London completing a degree then returned to Denmark.*
>
> *Returned to England and qualified as a Chartered Accountant and married an English wife.*
>
> *Moved to Guernsey in 1980 with his wife with the intention of remaining there permanently. It is possible that at that time he acquired a domicile of choice in Guernsey.*
>
> *Marriage broke down in the early 1980s, divorced in 1986 and left Guernsey temporarily but this became permanent. Danish domicile of origin probably revived at this time.*
>
> *From 1995 divided his time between principally Madeira, Sweden and the UK.*
>
> *From 2003 spends substantially all his time in Madeira with the intention of remaining there for the rest of his life hence acquiring a Portuguese domicile of choice.*
>
> *Last visit to the UK was for approximately 21 days in 2005 for the purpose of renewing his Danish passport at the Danish embassy in London.*"

That form also set out the following information in relation to visits to the UK:

> "*YE 05/04/1995* *110 days in UK*
>
> *YE 05/04/1996* *43 days in UK*
>
> *YE 05/04/1998* *57 days in UK*

YE 05/04/2000 *77 days in UK*

YE 05/04/2001 *110 days in UK*

YE 05/04/2002 *65 days in UK*

YE 05/04/2005 *approximately 21 days in UK*".

Finally, in response to an enquiry as to why there is a belief the Deceased did not intend to remain in or return to the UK, the Applicant stated:

> "*Apart from a short visit to London in May 2005 for the purpose of renewing his passport at the Danish Embassy the deceased remained permanently in Madeira from 2003 until his death in 2014. The Deceased advised his family he had no intention of leaving Madeira where ultimately he died*".

23. On 21 July 2016, pursuant to the Applicant's application dated 5 May 2016, a clearance certificate in respect of the Deceased's estate was issued on behalf of the Commissioners of HM Revenue & Customs. This certificate discharges the Applicant from any (further) claim for tax or duty.

24. E-mails sent by the Respondents dated variously 11 to 16 August 2016 make statements that most of them understood it was the Deceased's intention to remain in Madeira until his death, although the Third to Fifth Respondents appear to have little or no knowledge about the Deceased's intentions. The Second Respondent further comments that there was no intention for the Deceased to return to Denmark.

25. Advocate Tostevin states that it was clear to him that the March 2007 Will was intended to revoke the March 2003 Will but not the August 2003 Will. In his mind, the disposal of the London flat was intended to continue to be covered by the August 2003 Will, which should not have been affected by the March 2007 Will.

26. The Applicant also states that he understood the March 2007 Will was not intended to revoke the August 2003 Will. He refers to advice he has taken from English Counsel that indicates that the lease of the London flat would be regarded, at least as a matter of English law, as personalty and that the various Wills, if construed according to English law, would mean that the March 2007 Will governed the disposition of that leasehold property. He ventures the view that neither he nor Advocate Tostevin realised in 2007 the significance of the effect of the revocation clause in the March 2007 Will and that it was apparent that the Deceased always intended that the lease of the London flat and the flat's contents were to pass to his three children equally. The Applicant has consulted the Respondents, being children and grandchildren of the Deceased, and they had indicated their agreement with the proposals that the lease should be distributed to the children and not, as part of the residue of the Estate, to the grandchildren. The bequest of £3 million to the managing director would be unaffected in either scenario. As between the children, there was agreement that the Second Respondent would renounce any interest in that part of the Estate comprising the flat and contents and that the First Respondent would buy out the Third Respondent's interest and so become the proprietor of the London flat. But for the inability to obtain informed consent from the Eighth Respondent, the required deed of variation could have been completed without troubling the Court.

Expert evidence

27. Advocate Laws caused enquiries to be made about the position under Portuguese law. In an e-mail dated 27 February 2015, Miguel Ramos Ascensão, advogado at AMBA in Lisbon stated:

> "*According with the Portuguese legislation on successions and private international law, provided for in our Civil Code, the applicable law is the one of the deceased's nationality. The only conflict eventually to be raised would concern real estate, which, as far as I understood, is not at stake. However, if that is the case, the applicable law should be the Portuguese one, according to the Lex rei sitae principle.*
>
> *Regarding personal estate, the criteria is not residence but nationality, which means that the fact that the deceased lived in Portugal – even if the his [sic] heritage is here (except, as I mentioned, real estate) – is irrelevant.*"

28. This advogado was subsequently asked two additional specific questions, the first as to how a long lease of 100 or more years is classified in Portuguese law and the second as to whether the revocation of all previous wills of personalty, as in the March 2007 Will, would be construed in Portugal as revoking the August 2003 Will. In respect of the first issue, the advogado noted that the maximum length of lease permitted by the Portuguese Civil Code is 30 years. Accordingly, he gave his opinion that a 100-year lease, if allowed, "*would be considered as "realty" as it substantially shrinks the right over property*". In respect of the second issue, his opinion was that the wording would be construed as having revoked all earlier wills of personalty, including the August 2003 Will. He added, in a supplementary oral response, that Portuguese law does not differentiate between realty and personalty and so all assets are treated the same.

29. Advocate Laws also caused enquiries to be made about the position under Danish law. In a letter dated 18 August 2015, subsequently clarified by him, Jørn Qviste, now of Moltke-Leth, considered how Danish domestic law (and so disregarding any different outcome resulting from renvoi) would treat the wills of the Deceased:

> "*1. Both the 2003 will and the 2007 will are formally valid according to Danish law as signed before two witnesses, ct. the Danish Inheritance Act (arveloven), art. 64.*
>
> *2. According to Danish Material Inheritance Law, a testator can by will dispose over 75% of his net assets, when he leaves descendants. The descendants share these 25% equally per stirpes, i.e. they receive 1/12 each as their minimum compulsory inheritance part according to Danish Inheritance Law (arveloven), art. 5.*
>
> *3. Interpretation of the wills should take place according to Danish law. The interpretation is to find out the deceased's intentions.*
>
> *4. Both the 2003 will and the 2007 will operates with a distinction between will of personalty and will of reality [sic]. This distinction is unknown in Denmark.*
>
> *5. The testator had at the time of signature the understanding that he was owner of a flat in London, which should be characterized as realty.*
>
> *6. After [the Deceased's] death 11 September 2014, it became clear that the flat was not a freehold, but a leasehold. A leasehold is not characterized as realty according to the testator's understanding. The testator did not think that the 2007 will revoked the 2003 will.*

7. *It must be assumed that the testator has signed the 2007 will with this understanding, and therefore did not intend to revoke the 2003 will in which he had decided to distribute the value of the London flat equally between his three children. It must therefore be the right interpretation of the two wills. This is not changed, because it became clear after the testator's death that the London flat was not a freehold, but a lease, and therefore not falling under the Guernsey concept of "realty".*

8. *The deceased might or might not have had an intention to change his testamentary disposition. However, without a valid will such a possible intention cannot be taken into consideration when distributing the inheritance of the deceased.*"

30. In a telephone conversation noted by Ms Schaefer in an e-mail dated 5 August 2016, with which he expressed his agreement on 8 August 2016, Jørn Qviste added that the Danish courts would simply take a pragmatic view of the situation. Accordingly, where there was evidence that the testator had not intended to revoke the August 2003 Will, the court would simply proceed to distribute the assets dealt with by that will in accordance with its terms. In practice, there would be no question of the later will having revoked the August 2003 Will. The remaining assets of the Deceased's estate would be distributed in accordance with the March 2007 Will.

31. Although these opinions about the foreign laws are not in the form strictly required to be adduced as expert evidence, the Deputy Bailiff took a relaxed view in the circumstances of this case and directed the Jurats on the basis that both opinions were accurate descriptions of the positons in Portugal and Denmark respectively.

General directions

32. The Deputy Bailiff reminded the Jurats about their respective roles: the Deputy Bailiff is the sole judge of questions of law and procedure and the Jurats are the sole judges of questions of fact. The Jurats were directed that they must accept his directions on the law and follow them. The Deputy Bailiff explained that to establish something on the balance of probabilities means to prove that something is more likely so than not so. Although there was no opposition to any of the facts advanced, the burden of proof still fell on the Applicant.

33. The Jurats were to have regard to the whole of the evidence presented to the Court, and to form their own judgments about the material provided. There was no oral evidence, but they could consider what evidence they treated as reliable, and any which they considered was not to be treated as reliable. They might take account of the arguments developed by Advocate Laws in his submissions, but were not bound to accept them. If at any time the Deputy Bailiff appeared to express any views concerning the facts, or emphasise a particular aspect of the evidence, the Jurats were not to adopt those views unless they agreed with them. The Deputy Bailiff summarised that position by clarifying that, when it comes to the facts on the questions for the Jurats' determination, particularly as regarding the Deceased's domicile, it is the Jurats' judgment alone that counts.

Law on domicile

34. In a case such as this, the question of the Deceased's domicile at the date of his death arises. The relevance of that factual finding by the Jurats potentially influences the construction issue, which is largely a question of law for the Deputy Bailiff. It also potentially informs the approach to be taken to rectification.

35. The Deputy Bailiff directed the Jurats on the factors to consider by reference to the detailed exposition given in *Cooney v AFR Executors (Guernsey) Limited* [2016] GLR 18. These principles included reference to the Rules in Dicey, Morris and Collins, *The Conflict of Laws* (14th ed., 2006) ("Dicey 14"), including Rule 5 ("*No person can be without a domicile*") and Rules 6 ("*No person can at the same time for the same purpose have more than one domicile*"). Given the shared nationality of the Deceased and of the writer to whom reference is made, it was particularly apposite to bear in mind the guidance offered by Mummery LJ in *Agulian v Cyganik* [2006] EWCA Civ 129 (at para. 46(1)) that:

> "*... the court must look back at the whole of the deceased's life, at what he had done with his life, at what life had done to him and at what were his inferred intentions in order to decide whether he had acquired a domicile of choice ... by the date of his death. Soren Kierkegaard's aphorism that "Life must be lived forwards, but can only be understood backwards" resonates in the biographical data of domicile disputes.*"

The summary of principles set out in para. 8 of *Barlow Clowes International Limited (in liquidation) v Henwood* [2008] EWCA Civ 577 was also highlighted as containing a brief summary of the key considerations.

36. Deputy Bailiff highlighted the importance in this case of Rule 10: "*Every independent person can acquire a domicile of choice by the combination of residence and an intention of permanent or indefinite residence, but not otherwise*". As further explained in Dicey 14:

> "*It is not, as a matter of law, necessary that the residence should be long in point of time: residence for a few days or even for part of a day is enough. Indeed, an immigrant can acquire a domicile immediately upon his arrival in the country in which he intends to settle. The length of the residence is not important in itself: it is only important as evidence of animus manendi. A person may be resident in a country although he lives in hotels there or in the house of a friend, and although he is staying there for some particular purpose such as conducting business or taking part in legal proceedings. On the other hand, a person spending short periods in a house he owns may be held not to be resident there; he may be there as a visitor and not as an inhabitant.*" (para. 6-036)

> "*The intention which is required for the acquisition of a domicile is the intention to reside permanently or for an unlimited time in a country. "It must be a residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation." This intention must be directed exclusively towards one country. Thus a person who leaves the country of his domicile with the intention of settling in one of several other countries does not acquire a domicile in any of those countries.*" (para. 6-039)

> "*A person who determines to spend the rest of his life in a country clearly has the necessary intention even though he does not consider his determination to be irrevocable. It is, however, rare for the animus manendi to exist in this positive form: more frequently a person simply resides in a country without any intention of leaving it, and such a state of mind may suffice for the acquisition of a domicile of choice. The fact that a person contemplates that he might move is not decisive: thus a person who intends to reside in a country indefinitely may be domiciled there although he envisages the possibility of returning one day to his native country. If he has in mind the possibility of such a return should a particular contingency occur, the possibility will be ignored if the contingency is vague and indefinite, for example, making a fortune or suffering some ill-defined*

> *deterioration in health; but if it is a clearly foreseen and reasonably anticipated contingency, for example the termination of employment, or the offer of an attractive post in the country of origin, succession to entailed property, a change in the relative levels of taxation as between two countries, or the death of one's spouse, it may prevent the acquisition of a domicile of choice.*" (para. 6-040)

37. In relation to any consideration of what happens when moving on from one location to the next, Rule 7 states that "*An existing domicile is presumed to continue until it is proved that a new domicile has been acquired*" and Rule 13(1) states that "*A person abandons a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently, or indefinitely, and not otherwise*". Referring to *Irvin v Irvin* [2001] 1 FLR 178, there is a further principle that "*Cogent and clear evidence is needed to show that the balance of probabilities has been tipped, and this is true whether the issue is the acquisition or loss of a domicile of choice*" (Dicey, para. 6-019).

38. The Deputy Bailiff invited the Jurats to consider the evidence given by the Applicant and others that the Deceased had indicated he wished to spend the remainder of his days in Madeira. If they found that there was coincidence of residence and intention, then a domicile of choice in Portugal having been acquired prior to the Deceased's death could be found. However, if there were no domicile of choice in Portugal, consideration would be needed of the earlier stages of the Deceased's life. For example, the Jurats would need to resolve whether the Deceased had acquired a domicile of choice in Guernsey and, if so, whether it continued thereafter or was lost, in the sense of being abandoned. If it were abandoned, but without acquiring another domicile of choice in its place, the outcome would be that the Deceased's domicile of origin, to which he had referred on the face of both Wills, would resurrect.

Discussion on domicile

39. Applying the balance of probabilities, the Jurats find that, at his death, the Deceased was domiciled in Portugal.

40. In relation to residence, the Deceased had lived in Madeira for more than a decade and had only left comparatively briefly in 2005 for the purpose of travelling to London to renew his Danish passport. The Deceased's association with Madeira pre-dated 2003 but the Jurats found that since 2003 he had consistently lived in Portugal, whereas before then he was more itinerant. Although the Deceased lived in an hotel, the Jurats do not regard that as being anything other than the place where he chose to reside. In particular, the fact that he had not purchased or rented a house or flat was not regarded as affecting his factual residence for that long period of time up to his death in 2014.

41. There was little evidence about the Deceased's motives in settling in Portugal and then choosing to stay there. However, in terms of motivation, the Jurats noted that the Deceased had chosen not to travel to Denmark in 2005 to renew his passport but instead had travelled to London. They recognise that the Deceased owned a flat in London throughout this period. Although the London flat appears to have been available to him as a residence, the Deceased did not occupy this flat at any time over this period, other than possibly during his 2005 visit. Insofar as it was a residence, it was a dwelling of which he was the proprietor and not his home.

42. In respect of the intention with which the Deceased resided in Madeira, the Jurats are satisfied that this was clear well before the time of the Deceased's death in 2014. The evidence of his children and grandchildren does not lead to any suggestion that the Deceased intended to remove himself from Madeira and live elsewhere. On balance, it supports the conclusion that the

Deceased had become settled in Madeira with the intention of remaining there indefinitely by 2003 at the latest. Before that time, he was spending a portion of each year in the United Kingdom and reference was also made to him spending time, after he had left Guernsey, in other locations as well. Accordingly, even to the extent that the Deceased was principally resident in Madeira before 2003, the Jurats have taken the view that there was no coincidence of intention until the time when he became fully settled there, which they regard as being 2003, at which time the purpose of the Deceased's residence had become general and indefinite.

43. The Jurats do not regard the absence of any reference on the faces of the August 2003 Will and the March 2007 Will to the Deceased being domiciled in Portugal as leading to the conclusion that he had not at either of those times formed the intention of staying permanently in Madeira. It is apparent from the ongoing use of Advocate Tostevin to prepare his wills for him that the Deceased wished to emphasise the relevance of his assets largely being in Guernsey and the importance to him of having that Guernsey connection override his having settled in Madeira. The Jurats noted that a declaration of domicile is a factor to take into account rather than being conclusive. The switch from declaring his domicile as being Guernsey to referring to his domicile of origin in Denmark reflects the Deceased acknowledging that any previous domicile of choice in Guernsey could properly be regarded as having been lost. It leaves open the question of whether the domicile of origin revived at all and, if it did, whether it was then replaced through acquiring a new domicile of choice. All of these factors have been taken into account by the Jurats before concluding that there was coincidence of residence and intention to remain in Madeira, hence the acquisition of a Portuguese domicile of choice.

44. The finding of a domicile of choice in Portugal is consistent with the conclusion shown on the grant of representation to the Applicant issued by the High Court of Justice.

45. In these circumstances, the Jurats did not strictly need to look further back in the Deceased's life to consider what his domicile was previously. However, in case it is of any relevance, on the information presented, whilst leaving open the question as to whether the Deceased in fact acquired a domicile of choice in Guernsey, they are satisfied that any such domicile of choice were abandoned by the Deceased, by no later than the time he severed his connections with Guernsey on selling the Guernsey dwelling in 1990. The Deceased had ceased to reside in Guernsey before then and the Jurats consider that the sale of the dwelling demonstrates that he had also ceased to have any intention to reside in Guernsey permanently. The facts surrounding where the Deceased went thereafter and with what intention are too sketchy for the Jurats to form any view about the acquisition of any domicile of choice before the Portuguese domicile they have found from no later than 2003. In the absence of any alternative domicile of choice, the effect of the abandonment of any Guernsey domicile (assuming for this purpose that such a domicile had been acquired) was that the Deceased's domicile of origin in Denmark must have revived. As just mentioned, this may explain the references in the Will he executed on 19 March 2003, the August 2003 Will, and carried through into the March 2007 Will to his domicile of origin being in Denmark. However, whether that domicile of origin did indeed revive has no bearing on the decision reached that the Deceased then established a domicile of choice in Portugal for a good number of years prior to his death.

Construction of Wills

46. Guernsey law will adopt a similar approach to English law when it comes to considering the law applicable to succession. In *Dicey, Morris and Collins on the Conflict of Laws* (15th ed., 2012) ("Dicey 15"), Rule 156 states:

> "*A will is to be interpreted in accordance with the law intended by the testator. In the absence of indications to the contrary, this is presumed to be the law of his domicile at the time when the will is made.*"

47. The March 2007 Will refers to the Deceased's knowledge that Guernsey law (at that time) made provision for his children to have their *légitime*. Paragraph 5 states, for the sake of clarity, that the Deceased's estate consisted of shares in a Guernsey-registered company and two bank accounts held in Guernsey. The Deceased chose to appoint two persons who were (and still are) based in Guernsey to be his executors. Given the potential uncertainty about where he was domiciled, albeit that the Jurats have found he was domiciled in Portugal at the time, the inclusion of these references to Guernsey leads the Court to conclude that the law that the Deceased intended to be used to interpret his will was the law of Guernsey. The references made in this Will to Guernsey are sufficient to displace what would otherwise be the default position described in Rule 156 that interpretation is governed by a law of which the Deceased made no mention, save for referring to his address in Portugal and him having executed that Will there.

48. The commentary following Rule 156 also supports that conclusion. It is suggested that there is a rebuttable presumption that a will is to be construed according to the law of the testator's domicile. That presumption is displaced where the evidence points towards a different law. The continued use of a Guernsey Advocate to assist in drafting the provisions of the Deceased's will and the repeated reference to Guernsey in such a short document are matters that the Court considers have rebutted any presumption in favour of a different law (whether Portuguese or Danish).

49. Guernsey law distinguishes between realty and personalty. English law operates similarly. Succession to realty, though, is governed, in general, by the *lex situs*. Succession to personalty is governed by the domicile of the deceased person. Despite referring to realty and personalty, the proper distinction to draw when considering any impact of the conflict of laws on the question is between immovables and movables. This is explained in para. 22-004 of Dicey 15:

> "*In English domestic law the leading distinction between proprietary interests in things is the historical and technical distinction between realty and personalty. In the English conflict of laws, however, the leading distinction between things is the more universal and natural distinction between movables and immovables. This distinction is capable of application to the different systems of law between which a choice must be made, which the distinction between realty and personalty is not. "In order to arrive at a common basis on which to determine questions between the inhabitants of two countries living under different systems of jurisprudence, our courts recognise and act on a division otherwise unknown to our law into movable and immovable."*"

50. Because the flat in question is in London, it is appropriate to look to the law of England and Wales to determine how to regard this leasehold interest. Rule 128 of Dicey 15 states:

> "*The law of a country where a thing is situate (<u>lex situs</u>) determines whether*
>
> *(1) the thing itself is to be considered an immovable or a movable; or*
>
> *(2) any right, obligation or document connected with the thing is to be considered an interest in an immovable or in a movable.*"

One of the examples given in para. 22-012 of Dicey 15, citing ***<u>Freke v Carbery</u>*** (1873) LR 16 Eq 461, is that:

> "*Leasehold interests in land in England are interests in immovables, and it is quite immaterial that English domestic law regards them as personal estate.*"

51. In Jersey, the Royal Court has approached questions of construction in the following way (*In the Estate of Father Amy* 2000 JLR 80, 99, *per* Birt, DB):

> "*In my judgment, the court's primary duty is to construe the will so as to give effect to the testator's intention. The primary duty is emphasized strongly in the Norman and French texts to which Mr. Falle referred, and in English law. That intention is, however, to be ascertained for the wording of the will together with any evidence of surrounding circumstances and other evidence properly admissible. In construing the will, the court is not to use an unduly narrow grammatical approach. It should adopt a generous and benevolent approach (see Pothier (op. cit., at para. 150). But where the will so construed is plain and unambiguous, the court must give effect to it. It is not entitled to re-write the will merely because it strongly suspects that the testator did not mean what he plainly said. Where there is ambiguity, the court should adopt that interpretation which best gives effect to the testator's intention as ascertained from the terms of the will and the surrounding circumstances (including any extrinsic evidence properly admissible).*"

52. In Advocate Laws' submission, these principles can lead to the conclusion that the wording of clause 3 the March 2007 Will was not effective to revoke the August 2003 Will. All that is revoked by the March 2007 Will are all wills of personalty made by the Deceased before executing that Will. The August 2003 Will should not be regarded as a will of personalty, because it disposes of an interest that in English law would be treated as an interest in an immovable. Accordingly, clause 3 of the March 2007 is ineffective to revoke the August 2003 Will.

53. The simplicity of that submission was found by the Deputy Bailiff to involve one too many applications of conflicts rules to be capable of resolving the issues in the present case. In any event, because the Court was prepared to rectify the March 2007 Will so as to lead to an outcome supported by the Respondents and the Applicant, there is strictly no need for this construction issue to be resolved. Had it been necessary to do so, the Deputy Bailiff would have ruled (on para. (2) of the Application) that the August 2003 Will is not valid so as to bequeath and devise the London flat in accordance with clause 4 of it and that (on para. (3) of the Application) the March 2007 Will had the effect of revoking the August 2003 Will.

54. That outcome follows from the way to construe clause 3 of the March 2007 Will in accordance with Guernsey law. On its face, clause 3 is straightforward because it expressly revokes all prior wills of personalty. There is no ambiguity and so no justification for giving the plain words any generous or benevolent meaning aligned to the testator's apparent intentions. Any re-writing is a matter to be dealt with by way of rectification rather than interpretation. As a matter of Guernsey law, the Deceased's lease would be treated as something within his personal estate and not as realty. The domestic law in England draws the same distinction. Accordingly, as a matter of construction, the only proper interpretation to be given to clause 3 of the March 2007 Will is that is has the effect of revoking the August 2003 Will. The validity of the August 2003 Will cannot be saved by invoking the principles of conflicts of law and treating the lease as an immovable. This is because the distinction between movables and immovables is not engaged where the distinction between realty and personalty, to which Guernsey law has regard, can continue to apply. In the Deputy Bailiff's opinion, that distinction can still be used when it applies to the meaning to be given to clause 3 of the March 2007 Will and so there is no requirement to have regard to a classification rule to assist in that interpretation. Accordingly, upon executing the March 2007 Will, that Will had the effect of revoking *inter alia* the August 2003 Will.

55. If the conclusion that Guernsey law should be used to interpret the March 2007 Will is wrong, then the March 2007 Will would fall to be interpreted according to Portuguese law (as the law of the Deceased's domicile at that time) and the opinion of Miguel Ascensão is that the wording of this Will would be treated under Portuguese law as having revoked the earlier August 2003 Will. As a result, the outcome would be no different.

Rectification

56. The directions given by the Deputy Bailiff to the Jurats relating to the principles to apply when considering whether to exercise the Court's discretion to rectify the March 2007 Will in the manner proposed by Advocate Laws were taken from previous examples of cases involving rectification that had come before the Court.

57. The earliest of them was *In re Middlebrook* [2005-06] GLR Note 16, in which the reasoning of the Royal Court of Jersey in *Re Vautier* 2000 JLR 351 was adopted:

> "*The rectification of a will of realty is a remedy to be used sparingly and with extreme caution, since the testator is no longer present to explain his intentions and the parties may have their own reasons to seek rectification. However, if the court is satisfied by clear and compelling evidence (such as ambiguity on the face of the will, e.g. by reason of the failure of the testatrix's advocate to include in her will, as instructed, a devise of her realty to her surviving husband, thereby creating an intestacy as to that property) that a mistake has been made and that the words used in the will do not reflect the testator's intentions, it may exercise its discretion to grant rectification so that those intentions may be carried out. An applicant should therefore make full and frank disclosure of all the material facts. In rectification, there is no reason or justification for drawing a distinction between a deletion and any other change.*
>
> *In the absence of Guernsey authority and detail in the Norman customary law relating to the rectification of wills of realty, regard has to be paid to other French authorities (In re Vibert, 1987-88 JLR 96, dicta of Dorey, Commr. Applied), which lay down the principle that it is of paramount importance to ascertain the intention of the testator, and that extrinsic evidence may be introduced in order to do this (Pothier, Coutumes d'Orléans, vol. 2, para. 150, at 497, para. 154, at 499-500 (1821 ed.).*"

Although that case dealt with a will of realty, those principles were then applied without modification in a case involving a will of personalty (*In re Carr* (unreported, 22 December 2009)), and that approach was similarly followed in *Le Tissier v Tostevin* (unreported, 16 March 2010).

58. It is initially a question of law as to whether the Court should entertain an application for rectification. In this way, the presiding judge is the gatekeeper as to whether or not the Jurats should be invited to consider, on the basis of whatever evidence can be adduced, including extrinsic evidence, whether the will under consideration properly reflects the testator's intentions. That question will frequently turn, as here, on whether or not there is prima facie evidence that an error has been made and whether the proposed rectification is within the permissible range of responses open to the Court. If those questions are resolved affirmatively, the Jurats proceed to consider whether they can ascertain the testator's intentions and, if they find that those intentions are different from the wording on the face of the will, whether to exercise the Court's discretion to grant rectification. In doing so, the Jurats need to be satisfied "*by clear and compelling evidence that a mistake has been made and that the words do not reflect the testator's intentions*". The Deputy Bailiff reminded the Jurats that the remedy of rectification of a will is exceptional

and to be afforded only sparingly and that they should proceed with extreme caution because of the inability to ask the Deceased himself what he had intended.

59. The Deputy Bailiff concluded that the matter could properly be left to the Jurats. This Court has jurisdiction to entertain an application for rectification where the Ecclesiastical Court has already sworn the Applicant in as the executor. There appeared to have been a mistake made when the March 2007 Will was prepared. Advocate Tostevin may not have analysed fully the status of the lease of the London flat and whether it would be caught by the terms of the March 2007 Will. Having recognised in 2003 that the will of personalty in Guernsey needed to be supplemented by an English will, it is possible that he then overlooked giving full consideration to whether or not using standard wording in the replacement Guernsey will of the Deceased would impact on that earlier English will. In those circumstances, there was prima facie evidence that a mistake had been made and also evidence that the wording did not reflect the outcome that the Deceased wished.

60. The solution proposed by Advocate Laws was to add further wording to clauses 2 and 5 of the March 2007 Will. The key change was to exclude from the revocation made by clause 2 the provision that the Deceased had made in respect of the London flat. The wording proposed by Advocate Laws was:

> "***I REVOKE*** *all Wills and Testaments of Personalty (other than in respect of my leasehold interest in [the London flat] and the contents thereof) by me heretofore made.*"

Advocate Laws also proposed adding at the end of clause 5 "*and, for the avoidance of doubt, excludes my leasehold interest in [the London flat] and the contents thereof*". The Deputy Bailiff was satisfied that rectification by adding these words in clauses 2 and 5 was a permissible form of rectification for the Court to order if the Jurats were minded to do so.

61. The Jurats took into account that the testator's testamentary wishes changed as his circumstances changed. In 1997 he recognised that his children would share in the portion of his personal estate to which they would be entitled as their *légitime* and he chose to leave the other portion of his estate to his partner. When his partner died, the Deceased re-considered the provision he wished to make. From his communications with Advocate Tostevin, which were consistent with the understanding of the Applicant at the time, the Deceased wanted to make provision for his children and the managing director in equal shares. He was advised that the London flat needed to be dealt with separately under an English law will. It was only his three children who were to benefit from the London flat. The August 2003 Will gave effect to those wishes. When the Deceased again re-considered his testamentary wishes, he also wished to make provision for his grandchildren. On 13 June 2005, Advocate Tostevin wrote to the Deceased pointing out that "*there would be no need to alter the Will which relates to the flat in England as that currently provides that it should go to your children in equal shares*". The Jurats accept that this statement reflects the wishes of the Deceased in 2005 that there be no change to the way the London flat would be dealt with and that the Deceased's intentions in that regard did not change up to the execution of the March 2007 Will. Accordingly, by the time of the March 2007 Will, the Deceased intended to leave in place the August 2003 Will and he only wanted to deal with the remainder of his personal estate under the terms of the March 2007 Will.

62. In those circumstances, the Jurats are satisfied that the Deceased was mistaken when he executed a Will that had the effect of revoking the August 2003 Will. They are satisfied that, if those involved in advising him and preparing his Will had advised him of the legal effect of clause 2 in the March 2007 Will the Deceased would have pointed out that it was his intention that his leasehold interest in the London flat was meant to be disposed of in accordance with his wishes

already set out in the August 2003 Will. No one has suggested that the March 2007 Will should be treated as the will governing the distribution of the London flat. This is a case where the Jurats are satisfied that each of the Respondents has properly and fully considered the implications of the proposed rectification and that they have freely given their approval of what the Applicant proposes. The absence of any opposition makes it easier for the Court to consider whether to accede to the Application.

63. Because the Jurats were satisfied that the Deceased's intentions throughout 2005 to 2007 in relation to the London flat were clear and consistent, and were also satisfied that the inadvertent revocation of the August 2003 Will was not what the Deceased intended, rectification could properly be granted. Accordingly, this was a case where the Court was prepared to insert the words into the March 2007 as proposed by Advocate Laws. In this way, the clear wishes of the Deceased were capable of being respected and made effective.

Conclusion

64. For the reasons given, the Court was unable to construe the March 2007 Will in a manner that did not result in the August 2003 Will being revoked. Having decided that the March 2007 Will as executed by the Deceased had revoked the August 2003 Will, so that the distribution of the Deceased's leasehold interest in the London flat could not be effected by the Applicant pursuant to that Will, the Court was satisfied that this consequence only arose as a result of a mistake made in the drafting of the revocation clause in the March 2007 Will. In those circumstances, although it is a remedy only to be used sparingly, the Jurats were satisfied that the provisions of the March 2007 Will should be rectified so as to give effect to the Deceased's clear intention that his leasehold interest in the London flat and the contents of that flat should continue to be covered by the terms of his August 2003 Will, which had made distinct provision in respect of those assets. The relief sought by para. (4) of the Application was therefore granted.

65. Advocate Laws indicated at the end of the hearing on 25 August 2016 that the costs involved in the making of the Application had been agreed amongst those involved. Accordingly, so far as it was necessary to do so, the Deputy Bailiff made an order that the costs of the parties could be drawn from the Estate on the usual indemnity basis.