Neutral Citation Number: [2022] EWHC 11 (Ch)

Case No: CH-2021-000153

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 5 January 2022

Before :

Mr Ashley Greenbank (sitting as a judge of the High Court)

- -

Between :

(1) Equiom (Isle of Man) Limited
(2) John Jeremy Callin
(3) Peter Charles Crossley

Claimants

- and -

(1) Peter Christian Velarde
(2) Rebecca Velarde
(3) Matthew Julian Velarde

Defendants

- -
- -

Penelope Reed QC (instructed by **Mills & Reeve LLP**) for the **First Defendant**
Rodney Stewart Smith, counsel (instructed by **Brabners LLP**) for the **Third Defendant**

Hearing date: 24 November 2021

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APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Ashley Greenbank

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 5 January 2022 at 10.30am.

Mr Ashley Greenbank (sitting as a judge of the High Court):

Introduction

1. This appeal is against a decision of Deputy Master Dray dated 15 June 2021 (the "Decision"). It is reported with neutral citation number [2021] EWHC 1528 (Ch).

2. In that decision, Deputy Master Dray decided that a provision of the will of Mrs Patricia Moores dated 12 November 2007 (the "2007 Will") had effect to revoke a previous exercise of a power of appointment by Mrs Moores in relation to property under a settlement created by her father, Cecil Moores, dated 11 July 1949 (the "Settlement"). As a consequence of his decision, Deputy Master Dray ordered that the effect of the 2007 Will was that the trustees of the Settlement hold the property for the First, Second and Third Defendants in equal shares.

3. The Claimants in these proceedings are the trustees of the Settlement. The First, Second and Third Defendants are Mrs Moores's children, Christian Velarde, Rebecca Velarde and Matthew Velarde. I refer to them, without any disrespect, by their given/known names.

4. The appellant in this appeal is Christian, the First Defendant. The respondent is Matthew, the Third Defendant.

5. At the hearing, Christian was represented by Ms Penelope Reed QC. Matthew was represented by Mr Rodney Stewart Smith, of counsel. I am grateful to both of them for their very clear and focussed submissions. Ms Reed QC and Mr Stewart Smith also appeared at the hearing before Deputy Master Dray.

6. Neither the Claimants nor Rebecca were represented before me. The Claimants have quite properly maintained a neutral stance in these proceedings. Rebecca, the Second Defendant, has played no part in the proceedings. In his judgment, Deputy Master Dray suggests that she is supportive of the position taken by Matthew.

7. The appeal is brought with the permission of Deputy Master Dray.

8. The 2007 Will is governed by the law of the Isle of Man. It is common ground between the parties that Isle of Man law is the same as English law in all material respects.

Background

9. I have set out a summary of the background facts below. It is drawn in part from the Decision, but also from the documents that were before the Deputy Master.

10. The Settlement made by Mrs Moores's father created three funds for his three children. The fund created for the benefit of Mrs Moores is referred to in the Settlement as the "Patricia Trust Fund". Under the terms of the Settlement, the trustees held the Patricia Trust Fund to accumulate the income until she was 21 or married under that age and thereafter on protective trusts for life. By clause 2(c) of the Settlement, Mrs Moores enjoyed a special power of appointment in respect of property in the Patricia Trust Fund. This power could be exercised by deeds revocable or irrevocable, or by will or codicil. Clause 2(c) provides:

> From and after the death of Patricia either before or after attaining the age of twenty-one years the Trustees shall stand possessed of the capital and future income of the Patricia Trust Fund upon trust for all or such one or more exclusively of the others or other of the children or remoter issue of Patricia by any marriage at such age or time or respective ages or times (but so that such children shall take vested interests not later than twenty-one years from the death of Patricia) if more than one in such shares and with such trusts for their respective benefit and such provisions for their respective advancement and maintenance and education at the discretion of the Trustees or any other person or persons as Patricia shall by any deeds revocable or irrevocable or by will or codicil appoint and in default of and subject to any such appointment in trust for all or any the children or child of Patricia who attain the age of twenty-one years and if more than one in equal shares.

11. Mrs Moores exercised the power by a Deed of Appointment dated 27 December 1981 (the "1981 DOA"). In the 1981 DOA, which is expressed to be supplemental to the Settlement, Mrs Moores divided the Patricia Trust Fund into three separate funds and, with effect from her death, appointed those funds upon certain trusts for the benefit of each of Christian, Rebecca and Matthew.

By clause 6 of the 1981 DOA, the appointment was expressed to be revocable by deed, will or codicil.

12. On 1 June 1993, Mrs Moores made a will (the "1993 Will"). In the 1993 Will, having made various specific legacies and bequests, Mrs Moores left her residuary estate to her three children, Christian, Rebecca and Matthew in equal shares. The residuary gift in the 1993 Will is in the same terms as that in Mrs Moores's later will, to which I refer below, and which is the subject of these proceedings. The 1993 Will does not refer expressly to the 1981 DOA. One of the executors of 1993 Will was Mr George Moore, an Isle of Man advocate. The Deputy Master records in his judgment that Mr Moore advised Mrs Moores over a number of years.

13. By a Deed of Revocation and Appointment dated 20 August 1997 (the "1997 DOA"), expressed to be supplemental to the Settlement and the 1981 DOA, Mrs Moores revoked the appointment made in the 1981 DOA and instead appointed the Patricia Trust Fund, from and after her death, on trust for Christian and Rebecca in equal shares, omitting Matthew. By clause E of the 1997 DOA, the appointment was expressed to be revocable by deed, will or codicil.

14. On the same date, Mrs Moores made a codicil to the 1993 Will under which she gave Matthew a sum of £700,000 and her loan account and shareholding in a private company.

15. At the time of the 1997 DOA, Matthew was going through a divorce. In the Decision, the Deputy Master recorded that, in his evidence, Christian had suggested that a wish to avoid Matthew's ex-wife making a claim on Matthew's interest under the Settlement was the reason that the appointment in the 1997 DOA excluded Matthew from any benefit from the Patricia Trust Fund.

16. Mrs Moores executed two further codicils to the 1993 Will: the first, dated 14 September 1998, made gifts to Matthew and Rebecca of funds in two separate bank accounts; the second, dated 20 October 2002, revoked the bequest to Rebecca that she had made in the codicil of 14 September 1998 and revoked the bequest of £700,000 to Matthew which she had made in the codicil of 20 August 1997.

17. In 2007, Mrs Moores made the 2007 Will, which is the subject of the present proceedings. The 2007 Will revoked all previous wills and testamentary dispositions (including the 1993 Will). The 2007 Will was drafted by Dickinson Cruickshank, Advocates & Notaries in the Isle of Man, the firm that had drafted the 1981 DOA and the 1997 DOA. Mr George Moore was involved in the preparation of the 2007 Will. He was also one of the executors named in the 2007 Will.

18. Mrs Moores died in 2017.

19. The dispute between the parties concerns the meaning and effect of clause 7 of the 2007 Will. It is in the following form:

> "I LEAVE DEVISE BEQUEATH AND APPOINT the whole of my real estate and the rest residue and remainder of my personal estate wheresoever situate and of whatsoever kind of or to which I shall be seised possessed or entitled at the date of my death or over which I shall have any power of testamentary disposition whatsoever … unto my children PETER CHRISTIAN VELARDE, MATTHEW JULIAN VELARDE AND REBECCA VELARDE"

20. The issue in these proceedings is whether clause 7 of the 2007 Will operated to revoke the 1997 DOA and make a new appointment, giving Matthew an equal share of the Patricia Trust Fund along with Christian and Rebecca, and so diluting their respective shares from one-half to one-third.

The decision of Deputy Master Dray

21. Deputy Master Dray decided that, as a matter of construction of the terms of the 2007 Will, Mrs Moores's testamentary intention was to revoke the appointment made under the 1997 DOA and make a new appointment of the Patricia Trust Fund on the terms of clause 7 of the 2007 Will. His conclusion is at paragraph [70] of the Decision, where he said:

> 70. For the above reasons, I conclude that on the true construction of the Will, read in the light of the relevant factual matrix, clause 7 operates, both impliedly to revoke the 1997 DOA and also to exercise afresh the power of appointment conferred on Mrs Moores by the Settlement in favour of her three children equally.

22. He decided, however, that the terms of the 2007 Will were ambiguous, and that he was therefore entitled under s19 of the Isle of Man Wills Act 1985 (which is in the same form as s21 of the Administration of Justice Act 1982) to have regard to extrinsic evidence. Having done so, he found that to the extent that it was of any assistance, the extrinsic evidence supported his interpretation of the effect of clause 7 (Decision [78]).

23. I will address some of the detail of the Deputy Master's reasoning when I address the grounds of appeal. However, I will at this point, summarize briefly the process by which the Deputy Master reached his conclusion.

24. Having summarized the basic principles governing the construction of wills (Decision [16]-[18]), the Deputy Master referred to the circumstances in which extrinsic evidence might be admitted as an aid to construction and referred to the provisions of s19 of the Isle of Man Wills Act 1985, which mirrors that of s21 of the Administration of Justice Act 1982.

25. The Deputy Master then noted the cases that support the proposition that an intention to exercise a special power of appointment can be deduced from more general words in the instrument in question: *In re Ackerley* [1913] 1 Ch 510, *In re Lawrence's Will Trusts* [1972] Ch 418, *In Re Latta's Marriage Settlement Trusts* [1949] Ch 490. He concluded that if the 1981 DOA and the 1997 DOA had not been made in this case, clause 7 would have been effective to make an appointment to the children in equal shares (Decision [23]).

26. The Deputy Master then turned to the case law concerning the circumstances in which a subsequent disposition might be regarded as effecting a revocation of a prior exercise of a power of appointment. He referred to four cases: *Pomfret v Perring* 43 ER 1071, *In re Brace* [1891] 2 Ch 671, *In re Thursby's Settlement* [1910] 2 Ch 181 and *In re Barker's Settlement* [1920] 1 Ch 527. The principles that the Deputy Master drew from that review are set out at Decision [55]. I will consider them later in this judgment. For present purposes, it is sufficient to note that, in addition to the principle that a power of revocation could be exercised otherwise than by the use of express terms, the Deputy Master regarded the cases as supporting the principle that "if a testamentary gift framed

in general terms will fail altogether unless it is construed as entailing the exercise of a power of revocation (so as to bring within the ambit of the will the property which is the subject of such power), the instrument will be taken as an exercise of the power" (Decision [55(5)]). This theme - that the provisions of a will should be construed so far as possible to ensure that no provision is "idle" – runs throughout the Deputy Master's judgment (see, for example, Decision [51], [55], [64], [62], [67]).

27. The Deputy Master then turned to the context in which the 2007 Will was executed. He took into account that, when Mrs Moores made the 2007 Will, she was clearly aware of the existence of the Settlement and her powers of revocation and appointment under it, and that Mrs Moores had no other powers of appointment vested in her under other trusts (Decision [61]). He regarded these points to be significant because: in his view, the relevant wording of clause 7 of the 2007 Will – the reference to appointment and to any property over which Mrs Moores had any power of testamentary disposition whatsoever – evidenced an intention on the part of Mrs Moores to exercise a power of appointment; in the circumstances, that intention could not be given effect without the associated revocation of the 1997 DOA; and the relevant wording in clause 7 would be redundant, if the interpretation advanced by Christian – that the wording of clause 7 was not sufficient to revoke the 1997 DOA – was adopted (Decision [62]).

28. Having dismissed (at Decision [63]-[65]) a submission by Ms Reed QC that clause 7 was "boilerplate" wording designed to sweep up assets which had not otherwise been dealt with under the will, the Deputy Master summarized his conclusions and his reasons for those conclusions at paragraphs [66] and [67] of the Decision in the following terms:

> 66. I regard the revocation of the 1997 DOA, coupled with the making of fresh appointment in favour of all three children equally, as having been Mrs Moores' testamentary intention, as objectively deduced from the language of her Will interpreted in its particular context. As noted, Mrs Moores had but one power of appointment, that derived from the Settlement. She never held any other like power. There was therefore no other candidate to come within the scope of that which is clearly described by, and

the subject of, the relevant text in clause 7. If Mrs Moores is not to be taken as having revoked the 1997 DOA, central parts of clause 7 of her Will were of no consequence at all.

67. In summary my reasoning is that:

(1) Since Mrs Moores only ever had a single power of appointment, that conferred by clause 2(c) of the Settlement, the reference in clause 7 of her Will to property "over which [she had] any power of testamentary disposition", although framed in general terms, is on the facts of the case close to an express reference to the power derived from the Settlement.

(2) Allied to that, if no prior appointment had been made by the [1997] DOA, the general words of appointment in clause 7 of the Will would undoubtedly operate as the exercise of the special power of appointment conferred by clause 2(c) of the Settlement, despite the absence of any specific reference to such power.

(3) Although clause 7 of the Will does not in terms allude to the Settlement or the [1997] DOA and does not expressly speak of revocation of the 1997 DOA, nonetheless in context the words of appointment (which, as above, can only apply to the power in that regard derived from the Settlement) are on their true construction properly to be regarded as effecting implied revocation of the 1997 DOA, for otherwise the words of appointment in clause 7 are otiose; unless clause 7 is construed as displacing what has gone before, both the verb "appoint" and also the phrase "over which I shall have any power of testamentary disposition whatsoever" come to naught, even though there was only one candidate to which the same can possibly refer (namely, the power conferred by the Settlement).

(4) In context, where there was no other power of appointment available to Mrs Moores, the notion that clause 7 did not refer, or operate in relation, to the power of appointment stemming from the Settlement on the footing that, absent express revocation, there was no such subsisting power is, to my mind, commercially unrealistic. Whilst the concept that a previously used power of appointment lacks subject-matter unless and until the previous exercise is revoked is intelligible and indeed is articulated in *In Re Brace*, the concept is technical and more theoretical than real, and something of a play on words; to all practical intents and purposes Mrs Moores did retain the power to make an appointment under the Settlement by her Will notwithstanding that in order to exercise it anew she would have to revoke its prior exercise. It is not an abuse of language to say that a power to appoint remained vested in her, given that she could reverse that which had gone before at a stroke, including by implied revocation as part of a "double process" in what is here a "one power" case. Further, I do not believe that the said

> concept requires the court to construe clause 7 of the Will as impotent so far as the clearly intended exercise of the only power of appointment vested in Mrs Moores is concerned. It is permissible to regard the language as signifying an implied intention to revoke the 1997 DOA in order to render effective the intended fresh appointment in clause 7, else that object cannot be achieved and is frustrated.
>
> (5) In the particular circumstances, an intention to exercise the power of revocation is reasonably and objectively to be deduced from the terms of clause 7 of the Will, construed in their context. I conclude that the requisite intention is shown, not least because otherwise a significant element of the clause would be a waste of ink.

29. As I have mentioned above, the Deputy Master then concluded (at Decision [70]) that the wording of clause 7 operated to revoke the appointment made in the 1997 DOA and to make a new appointment to Mrs Moores's children in equal shares.

30. As I have mentioned above, notwithstanding his conclusion (at Decision [70]), the Deputy Master found that the wording of the 2007 Will could be said to be ambiguous and so it was permissible to have regard to extrinsic evidence. In this context, the Deputy Master considered the following matters:

    i) the trust accounts for the Settlement for various years following the execution of the 2007 Will, which had been signed by Mrs Moores and which refer to the effect of the 1997 DOA (but not to the effect of the 2007 Will);

    ii) the written evidence of Christian referring to Matthew's divorce and that there had been a cooling in the relationship between Matthew and Mrs Moores (which was disputed by Matthew);

    iii) the evidence of Christian that Mr Moore had advised Mrs Moores over many years that Matthew should not be reinstated as beneficiary of the Settlement;

    iv) two letters of instruction sent by Mrs Moores to Mr Moore in relation to the drafting of the 2007 Will, which referred to Mr Moores's wish that

"all my worldwide assets to be taken into account and divided equally between my three children".

31. The Deputy Master regarded the trust accounts as not being "a point of substance" and the evidence of Christian as being of "no weight" or "of no consequence". He treated the letters sent by Mrs Moores to Mr Moore as being, at the very least, consistent with his conclusion that Mrs Moores intended that each of her children (including Matthew) should receive one third of everything within her gift, including a share in the Patricia Trust Fund.

Grounds of appeal

32. Christian appeals against the Decision. The grounds on which he has permission to appeal are set out below.

    i) **Ground 1**: The Court was wrong to find the very general words used in clause 7 could bear the weight of an exercise of a power of revocation where no such power was referred to, nor was any property over which the power existed mentioned nor was there any reference to the settlement in which it was comprised: thus going further than any of the decided cases.

    ii) **Ground 2**: The Court was wrong to reject the argument that the words used in clause 7 were intended to sweep everything up on the basis that the 2007 Will was intended to take effect on death at a date in the future when [Mrs Moores] could not be sure what powers of appointment might be vested in her.

    iii) **Ground 3**: The Court placed too much emphasis on the so-called principle that every part of the 2007 Will had to be given effect when construing general words in a residuary gift designed to sweep up whatever the property [Mrs Moores] had at death.

    iv) **Ground 4**: The Court was wrong to accept the submission that the examples of words strong enough to imply a revocation in *In re Brace* and *In re Thursby's Settlement* provided no guidance as to the strength

of the words needed to demonstrate an intention to revoke when those cases are authority for the proposition that general words which might support an appointment being made would not do.

v) **Ground 5**: The Court did not refer to or deal with the submission that *In re Barker's Settlement* (which was the only case cited where the Court found that there had been a power of revocation exercised without the power being expressly referred to) was a case where the testatrix was not revoking any previous exercise by her of a power of appointment but a power of revocation of the original trusts and mischaracterized the case as involving the revocation of a previously exercised power.

vi) **Ground 6**: The Court wrongly rejected the submission that there was really no explanation in this case as to why the draftsman of the 2007 Will who had been responsible for the previous deed of revocation and appointment (the 1997 DOA) did not refer to it expressly if there was an intention to exercise the power of revocation set out in it.

vii) **Ground 7**: The Court further did not explain why [Mrs Moores] had not previously revoked the 1997 DOA during her lifetime as she had done with a previous appointment in 1981 (the 1981 DOA).

viii) **Ground 8**: The Court wrongly relied on the fact that clause 7 would have been effective to exercise a power of appointment which had no relevance to whether a quite different power of revocation was being exercised.

ix) **Ground 9**: The Court wrongly considered the extrinsic evidence such as there was supported its conclusion when there was no mention in any relevant document of the Settlement or the 1997 DOA.

The relevant case law

33. As I have mentioned above, in the Decision, the Deputy Master reviewed various cases which have considered the circumstances in which general words in a subsequent disposition might be regarded as an exercise of a power of

revocation. That discussion focussed on four cases: *Pomfret v Perring*, *In re Brace*, *In re Thursby's Settlement*, and *In re Barker's Settlement*. I have heard competing submissions from Ms Reed QC and Mr Stewart Smith as to the principles which are to be drawn from those cases. Before I turn to the individual grounds of appeal, I will therefore set out in a little more detail the keys aspects of those cases, the principles which the Deputy Master drew from them, the parties' submissions and my views on them.

34. As can be seen from the Grounds of Appeal, some of those Grounds involve criticism of the Deputy Master's approach to the case law. So it is inevitable that, in doing so, I will trespass on matters which are relevant to the specific Grounds of Appeal.

The Deputy Master's review of the case law

Pomfret v Perring

35. The first case is *Pomfret v Perring*. In this case, the testatrix, Mrs Perring, during her lifetime, made a revocable appointment of one fifth of a settled fund. Her will included the following provision:

> "I give, devise and bequeath, and by virtue of every power or authority whatsoever by an indenture bearing date on or about the 30th day of April 1799… and by an indenture dated the 8th day of this present month, or either of such indentures, given or limited to me, or otherwise howsoever enabling me, do by this my will direct, limit and appoint all and singular the stock, sums of money, messuages, hereditaments and real and personal estate whatsoever, which I may at my decease be possessed of or entitled to, or, under or by virtue of the powers contained in the said indenture of settlement or otherwise, have power to appoint, save and except the sum of £20… in manner following (that is to say), two equal fourth parts of the same respectively to Charles Perring, one-fourth to my daughter Ellen Goodchild, and the remaining one-fourth to my daughter Blanche Butler, for her separate use.."

36. The reference to the indenture of 30 April 1799 was an express reference to the settlement, which contained the power of appointment. There was, however, no reference to the prior appointment of part of the settled fund.

37. The question before the Court was whether or not the appointment made in the will revoked the previous appointment of one fifth of the settled fund so that the appointment made in the will also extended to that part of the settled fund. The Court of Appeal, reversing the first instance decision, found that it did not because full effect could be given to the appointment made in the will by confining it to the four-fifths of the settled fund which had not been the subject of the prior appointment. The judgments of Knight Bruce LJ and Turner LJ are short and I have set them out in full below.

38. Knight Bruce LJ said this (at page 1073):

> I apprehend that it is not according to the true import or correct interpretation of the words used by the testatrix to say, that they exhibit of themselves an intention to exercise a power of revocation. But if the will shews an intention to have existed, which, without so construing them, cannot be effectuated, they may certainly be so construed. I conceive, however, that the will here does not shew such an intention. *Every word of the instrument may, in my opinion, be satisfied, without ascribing to the testatrix any idea of dealing with the power of revocation or the property subjected to it*.

(My emphasis added.)

39. Turner LJ said this (also at page 1073):

> The cases cited on behalf of the Respondents are very distinguishable from the present. Here an actual appointment has been made with a power of revocation, and that appointment was to be undone, before the power of new appointment would arise. To shew that a power of this description has been exercised, it is not, I think, enough to shew an intention to appoint; an intention to revoke the former appointment ought, I think, also to be shewn. The principles acted on in other cases, with respect to the exercise of powers, seem to me to apply to this. If a person has an interest in one subject, and a power over another, and uses general words of disposition only, those words will not operate as an exercise of the power. It is otherwise when he has no interest, but only a power. The same principle must, I think, apply to a case where a person has a power of appointment, and also a power of revocation and new appointment. The general words of appointment ought not to be held to be an exercise of the power of revocation. *If there was no power except one of revocation and new appointment, it would be different, and the general words would be then held to be an exercise of that*

> *power.* I think it clear that an intention must be shewn to revoke and undo what has been already done. I cannot find that intention here.
>
> I concur with my learned brother in thinking that the appeal on this point must be allowed.

(My emphasis added.)

40. The Deputy Master derived four points from the decision of the Court of Appeal in *Pomfret v Perring*:

    i) that the issue was one of the true construction of the will on its wording and in its context;

    ii) that an intention to revoke must be shown, it was insufficient merely to show an intention to appoint;

    iii) that no such intention could be shown in the case in question because Mrs Perring's will could operate fully without any power to revoke being exercised; and

    iv) that if the provisions of a will would be idle unless the will is taken to effect the exercise of a power of revocation, general words will be held to have that effect. (Decision [32])

41. In support of the last of these points, the Deputy Master relied upon the sentence in the judgment of Knight Bruce LJ which begins "Every word of the instrument…" and the sentence in the judgment of Turner LJ which begins "If there was no power except…" which I have marked with italics in the passages that I have quoted at [38] and [39] above.

In re Brace

42. The next case is *In re Brace*. In that case, the testatrix had exercised a revocable power of appointment of certain real estate. In her will, she made a general devise of all the real estate to which she was entitled on her death. She was not entitled to any real estate at her death other than the real estate which she had previously appointed.

43. Under the s27 of the Wills Act 1837, a general devise of real estate contained in a will was to be construed as including any real estate over which the testator had a power of appointment. The issue before the court was whether the deemed exercise of a power of appointment under s27 of the Will Act 1837 could operate as a revocation of a previous exercise of a power of appointment and the making of a new appointment. North J held that it could not. Having done so, he continued (at page 675):

> Wherever there has been a complete appointment under a power, an appointment which entirely disposes of the property, you must get rid of that appointment in some way or another before any further appointment can be made. In other words, you must displace that which has operated as a complete appointment before there can be room for any further exercise of the original power, or, to put it in legal language, you must revoke the existing uses or trusts, and create new ones to take their places. It is not of course necessary that this should be done by technical words. Though there are two things to be done—a revocation of the existing uses and a subsequent substitution of other uses—the two may be done uno flatu just as well as by two separate processes. *The revocation of the old uses and the declaration of new ones may be contained in different instruments, or they may be in one and the same instrument, and, moreover, it is clear law as well as common sense that the thing may be done, without any express revocation of the old uses, by the use of words which can take effect only if a revocation of the old uses is implied.* If a power has been exercised in favour of A., and by his will the donee of the power were to say, "Although I have given the property to A., I now give it to B.," that, of course, would imply the revocation of the gift to A., and the substitution for it of the gift to B. But, although the two processes may be combined in that way, you must be able to find that the first appointment, so far as it is effectual, is displaced by something which is afterwards done.

(My emphasis added.)

44. The Deputy Master derived the following principles from *In re Brace*:

i) the case involved the interpretation of the particular will;

ii) it is necessary to discern an intention to revoke a previous appointment if the purported later exercise of a power of appointment is to be held to extend to the property previously appointed;

iii) where (as in *In re Brace*) a power of appointment has been completely exercised, unless and until that appointment is revoked, there is no subsisting power of appointment;

iv) (based on the words in North J's judgment that I have marked in italics in the passage quoted at [43] above) although a revocation must be found for any later appointment to have substance, revocation need not be effected by express words, it can and will be implied if the provisions of the instrument would otherwise be nugatory;

v) North J's conclusion that the testatrix's will did not revoke the earlier appointment was based on the fact that the general devise of real property by the will did not itself indicate an intention to revoke the earlier appointment in respect of the real estate (Decision [35]).

45. The Deputy Master agreed with a submission of Ms Reed QC that the example (involving A and B) which North J gave in the extract from North J's judgment that I have quoted at [43] above, was "far removed" from the present case. However, he regarded the example as a "mere illustration" that an express revocation was unnecessary and was "not to be taken as suggesting that any other lesser form of words must, regardless of context, be insufficient to effect implied revocation" (Decision [37]).

In re Thursby's Settlement

46. The third case is *In re Thursby's Settlement*. This case involved a marriage settlement under which a husband and wife held a joint power to appoint the "trust moneys, stocks, funds and securities" comprised in the settlement amongst their children or remoter issue. The husband and wife exercised the power to appoint certain real estate (the Priors Hardwick Estate) which had been acquired with funds from the settlement in favour of their eldest son from the death of the survivor. They subsequently exercised the power to appoint the fund on trust for their five children equally, without any reference to the previous appointment of the real estate.

47. The Court of Appeal decided that the second appointment did not operate as a revocation of the first. Farwell LJ said this (at page 186):

> The law as to powers of revocation and new appointment has been settled for more than fifty years by *Pomfret v. Perring*. A power of revocation is not a power of appointment, but is a power the exercise of which is a condition precedent to the exercise of the power of appointment in question. An appointment, therefore, in exercise of a power of appointment and of every or any other power or similar words does not prima facie refer to powers of revocation, but to powers of appointment: if and so far therefore as the intention to appoint in such a case depends on the reference to the power, it cannot be found: such words might shew an intention to execute not only the power in the particular instrument stated, but also any other power of appointment which the appointor might possess, but it does not shew any intention to execute a power of revocation.
>
> It is, however, of course open to the claimants to shew that there are other indicia besides the reference to the power, shewing an intention to execute; *for example a reference to property which can only pass by means of an execution of both power of revocation and of appointment*: thus, if in the present case the appointment had been of "the Priors Hardwick Estate," the powers both of revocation and of appointment in the deed of 1895 would have been exercised because in no other way could the clear intention to pass the Priors Hardwick Estate be effected.
>
> The question therefore next arises, can words so inappropriate as "trust moneys stocks funds and securities" be held to include this real estate? The general rule is that if there is property to which the words of appointment apply in their primary sense, so that effect can be given to the deed in its ordinary signification, the appointment is confined to its primary meaning, and this is especially the case when the Court is asked to divest an estate already vested. Take the analogous case of election: if a testator devises Blackacre which belongs to A. to B., and gives A. a legacy, A. is put to his election; but it is otherwise if the testator has any interest in Blackacre, for example a charge thereon, as in *Maddison v. Chapman*. The presumption in each case is that the appointor or the testator means to deal with that which he can properly dispose of without displacing other persons' rights.

(My emphasis added.)

48. The Deputy Master regarded the decision in this case as an application of the principle in *Pomfret v Perring*. As in *Pomfret v Perring* effect could be given to the second appointment without implying the revocation of the first

appointment. He also noted, however, based on the words that I have marked in italics in the extract from the judgment of Farwell LJ at [47] above, that "the Court of Appeal endorsed the notion that, in an appropriate context, an intention to execute a power of revocation may be implied if a provision in the instrument would otherwise be idle" (Decision [43]).

49. The Deputy Master regarded the example (involving the Priors Hardwick Estate) given by Farwell LJ in the second paragraph of the extract from his judgment that I have quoted at [47] above as a "mere example" of the words "that would, on the facts of the case have connoted an intention to execute the power of revocation" (Decision [45]).

In re Barker's Settlement

50. The final case is *In Re Barker's Settlement*. In this case, the testatrix had a power to revoke a settlement with the consent of the trustees of the settlement or by will or codicil expressly referring to the power. She exercised the power during her lifetime in her own favour irrevocably on two occasions with the consent of the trustees. By her will, the testatrix devised, bequeathed and appointed all her real and personal estate to trustees on certain trusts. The relevant provision of the will was as follows:

> "I give devise bequeath and appoint to my said trustees all my estate both real and personal whatsoever and wheresoever not hereby otherwise disposed of upon trust…"

The testatrix had no other power of appointment other than that reserved by the settlement and, at her death, had little property other than that comprised in the settlement.

51. On the facts, Sargant J found that the words in the will were sufficient to exercise a power of revocation and make a new appointment. He said this (at page 533):

> I have next to decide whether the words of gift in the will are sufficient to execute a power of revocation and new appointment. This is what is sometimes known as a one power case - that is a case where the testatrix had only one power of appointment. And it is clear, and indeed is conceded, that the

> words of the will would be sufficient in such a case to exercise a general power of appointment even apart from s. 27 of the Wills Act, or to exercise a special power of appointment: *In re Mayhew*. But it has been strongly contended that they are not sufficient to exercise a power the exercise whereof requires in strictness a double process - namely, first revocation and next new appointment. In my opinion, however, this is not so. The words here are made singularly emphatic by the repetition of the word "and" instead of its mere transposition; the previous words of gift "I give devise and bequeath" are repeated in full, and then the words "and appoint" are added; the phraseology is almost as marked as if the added words had been "and I appoint." The language indicates clearly an intention to add to a gift of property belonging in full to the testatrix a gift of property over which she had a power of appointment. And there being no property of this kind except property over which she had a power of revocation and new appointment (a distinction fine in itself and hardly appreciable by a layman), she must have been referring to this property and this power. And this being established the words are sufficient to effectuate her double process of revocation and new appointment. My conclusion in this particular case has the great advantage of being in accordance with the general view expressed by Turner L.J. in *Pomfret v. Perring*.

52. Sargant J also decided that, if they were sufficient to revoke the settlement and make a new appointment, the words of the will to which I have referred at [50] above must also be sufficient to meet the requirement in the settlement that the words of the will "expressly refer" to the power of appointment. Sargant J said this (at page 534):

> The word "expressly" seems to me in such a phrase to be contrasted as usual with "impliedly," and to mean that the reference has to be an expressed reference, that is, a reference appearing from the expressions used in the subsequent instrument. Here the additional words "and appoint" are part of the expressions or express words used in the will; and if I am correct in my previous view that they are sufficient to point to and exercise this power of revocation and new appointment apart from the special requirement of an express reference thereto, it seems to me to follow almost necessarily that they do also satisfy this special requirement.

53. Deputy Master Dray took the following points of principle from the decision in *In re Barker's Settlement*:

i) the decision establishes no new principle, being decided on its own facts;

ii) if an appointment is to operate in respect of property which has been the subject of a previous appointment, there is recognition of the need both to revoke the previous appointment and make a new one;

iii) the fact that the words of the will would have achieved nothing if they had not applied to the settlement and operated, in a double process, to both revoke the earlier appointment and make fresh appointment, was regarded as a matter of significance. (Decision [49])

The Deputy Master's conclusions

54. The Deputy Master concluded his review of the case law by referring to a passage from the leading text, *Lewin on Trusts* (20th edition, paragraph 33-100), which is in the following form:

> In common with other powers, a power of revocation is not exercised unless an intention to exercise it is apparent. A power of revocation is not a power of appointment but is a power the exercise of which is a condition precedent to the exercise anew of a power of appointment. Hence an appointment in general terms in exercise of a particular power and of every other available power will not, without more, revoke an earlier exercise; and if a will is executed exercising a power of appointment and later a deed is executed revocably exercising it in a different way, the deed is not revoked when the will takes effect. But it is not necessary that there should be any express reference to the power of revocation and a grant of the specific property subject to the power will be enough. A gift in a will of property of a general description will be an exercise of the power only if the testator has no property of his own of that description, so that the gift has to be treated as an exercise of the power to take effect at all. A release of the power of appointment will operate as a revocation, at any rate if the release is expressed to free the property subject to the power from the power altogether.

55. As I have mentioned above, the Deputy Master then summarized his own conclusions from his review of the case law at paragraph [55] of his decision, in the following terms:

> 55. Unsurprisingly, the thrust of Lewin is line with what I have deduced from the authorities, namely:
>
> (1) An intention to exercise a power of revocation must be apparent from the instrument.

> (2) A power of revocation is distinct from a power of appointment.
>
> (3) Thus the mere exercise of a power of appointment will not "without more" operate as a revocation.
>
> (4) However, a power of revocation may be exercised otherwise than in express terms.
>
> (5) Moreover, if a testamentary gift framed in general terms will fail altogether unless it is construed as entailing the exercise of a power of revocation (so as to bring within the ambit of the will the property which is the subject of such power), the instrument will be taken as an exercise of the power…

56. He concluded that his summary was consistent with the passage from *Lewin*. In particular, the Deputy Master took the view that paragraph 33-100 addressed the ratio of the decision of Sargant J in *In re Barker's Settlement* – which the Deputy Master appeared to accept as being that an appointment which would be wholly ineffective in the absence of an implied revocation must be deemed to effect the implied revocation – provided that the phrase "a gift in a will" in the penultimate sentence of paragraph 33-100 could be regarding as including the exercise of a power of appointment (Decision [57]).

The parties' submissions on the case law

The appellant's submissions

57. Ms Reed QC, for Christian, relies on *Pomfret v Perring* and *In re Brace* in support of her central submission that if general words of appointment are to be treated as a revocation of a previous appointment and the making of a new appointment, it is not sufficient to show an intention to make an appointment. The words must also demonstrate an intention to revoke the prior appointment.

58. Ms Reed QC accepts that a prior appointment can be revoked by implication, but she says that a revocation can only be implied where it is necessary to give effect to the testatrix's intention as evidenced by clear words in the will. She points to the examples given by North J in *In re Brace* (at page 675) and by Farwell LJ in *In re Thursby's Settlement* (at page 186) as indicative of the strength of the wording that will be required for a revocation of a prior exercise of a power to be implied.

59. Ms Reed QC takes issue with the principles which the Deputy Master draws from *Pomfret v Perring*, *In re Brace* and *In re Thursby's Settlement* at [32(4)], [35(4)], and [(49(3)] of the Decision that if a provision of the will would be "idle" unless the will is taken to give effect to a revocation, general words in the will should be taken to have that effect. She says that the Deputy Master takes the principle that every provision of a will should be given effect too far. If a revocation of a prior appointment is to be implied, the words of the will must demonstrate a clear intention to make a disposition of the property, which can only take place if the prior appointment is revoked. In particular, a residuary gift which does not refer to specific property or to the exercise of a specific power and is drafted as a "sweep-up" clause to ensure that all the assets in a testatrix's estate are dealt with under the will does not carry that implication.

60. Ms Reed QC submits that *In Re Barker's Settlement* is a very different case. It is not a case about the revocation of a previously exercised power. The power vested in the testatrix, in that case, was to revoke the original trusts under the settlement and appoint the property on new trusts. The words of the will did not need to be sufficient to exercise a power of revocation and make a new appointment (as *In re Brace*).

61. Furthermore, the facts of *In Re Barker's Settlement* were such that the only property to which the testatrix could have been referring in her will was the property comprised in the settlement. That is not the case in relation to Mrs Moores's will. Her estate outside the Patricia Trust Fund was substantial.

The respondent's submissions

62. Mr Stewart Smith, for Matthew, does not seriously challenge the proposition that if the revocation of a previous appointment is to be implied, it is not enough to show an intention to make an appointment, the words must also show an intention to exercise the power to revoke. However, he does say that the case law demonstrates that a distinction is to be made between cases where a person has a power of appointment and also a power to revoke and make a new appointment (so-called "two power cases") and those in which a person has only a power to revoke and make a new appointment (a "one power case"). He says

that in one power cases, the judgment of Turner LJ in *Pomfret v Perring*, in particular, provides support for the proposition that a power to revoke must be treated as impliedly exercised by general words of appointment because effect can only be given to the words of appointment by implying the revocation of the previous appointment. The statement by Turner LJ is strictly obiter, but Mr Stewart Smith says that it is given authority, in particular, by the judgment of Sargant J in *In re Barker's Settlement*.

63. Mr Stewart Smith regards *In re Brace* as an unusual case, which turns on the construction of the Wills Act 1827. But he relies on the words of the judgment of North J in that case to the effect that a revocation can be implied. He supports the Deputy Master's conclusion that the examples given by North J in *In re Brace* and Farwell LJ in *In re Thursby's Settlement* are simply examples and do not set any threshold for the strength of the wording that is required for a revocation to be implied.

64. Mr Stewart Smith submits that there is no relevant distinction between *In Re Barker's Settlement* and the cases involving the implied revocation of a power of appointment. He notes that Sargant J expressly relies on the judgment of Turner LJ in *Pomfret v Perring* without reference to any distinction between the cases. He also relies on the Sargant J's decision that the words of the will were sufficient to meet the requirement for an express reference to the power as an acknowledgment that, in appropriate cases, general wording in the will can be treated as if it were an express reference to the power in question.

Discussion

65. At this point, I will seek to address some of the submissions made by Counsel on the conclusions drawn by the Deputy Master on the points of principle that should be drawn from the case law.

66. The Deputy Master set out a summary of the conclusions that he drew from his review of the case law at Decision [55] (see [55] above). I did not detect any material disagreement between Counsel on the first four of the principles in that summary. Any dispute centred on the fifth of those principles (in Decision [55(5)]), which for ease of reference was as follows:

> (5) Moreover, if a testamentary gift framed in general terms will fail altogether unless it is construed as entailing the exercise of a power of revocation (so as to bring within the ambit of the will the property which is the subject of such power), the instrument will be taken as an exercise of the power …

67. One issue which informed the Deputy Master's view is what he described as "a general trend, readily discernible from the authorities, against a conclusion which would leave aspects of a will redundant and shorn of consequence, having regard to both the language of the instrument and its context" (Decision [51]). So, from his review of the decision in *In re Barker's Settlement*, for example, the Deputy Master notes that the fact that the words of the will "would achieve nothing unless they applied to the subject of the settlement and operated, in a double process, to effect both revocation (of the earlier appointment) and fresh appointment was regarded of significance" in the court reaching its conclusion that a revocation should be implied in that case (Decision [49(3)]).

68. He states the principle in, if anything, broader terms in his review of the decisions in *Pomfret v Perring*, *In re Brace*, and *In re Thursby's Settlement*, although he accepts that the statements on which he relies are, in those cases, obiter.

    i) For example, in relation to the decision of the Court of Appeal in *Pomfret v Perring*, the Deputy Master concludes that, if the provisions of a will would be idle unless the will is taken to effect the exercise of a power of revocation, general words will be held to have that effect (Decision [32(4)]). The Deputy Master relies upon the sentence in the judgment of Knight Bruce LJ which begins "Every word of the instrument…" and the sentence in the judgment of Turner LJ which begins "If there was no power except…" (which I have shown in italics in the extracts at [38] and [39] above) in support of this conclusion.

    ii) In a similar way, in his conclusions on the judgment of North J in *In re Brace*, the Deputy Master relies on the statement of North J to the effect that a revocation may be implied "by the use of words which can take effect only if a revocation of the old uses is implied" in support of a

conclusion that a revocation can and will be implied if the provisions of the instrument would otherwise be nugatory (Decision [35(4)]).

iii) The Deputy Master draws a similar conclusion from the decision of the Court of Appeal in *In re Thursby's Settlement* where he says that the Court of Appeal "endorsed the notion that, in an appropriate context, an intention to execute a power of revocation may be implied if a provision in the instrument would otherwise be idle" (Decision [49(3)]). His conclusion in this case is based on the statement in the judgment of Farwell LJ that an intention to revoke the previous appointment might be demonstrated by "for example, a reference to property which can only pass by means of both power of revocation and appointment". In this instance, his conclusion is not stated in absolute terms and is qualified by reference to the context.

69. Ms Reed QC takes issue with conclusions that the Deputy Master draws from these statements. I agree with her that they do not justify a rule of construction in the absolute terms which the Deputy Master appears to derive from them at some points in his judgment.

70. In my view, the statements to which the Deputy Master refers from Turner LJ's judgment in *Pomfret v Perring*, North J's judgment in *In re Brace* and Farwell LJ's judgment in *In re Thursby's Settlement* support a more limited proposition, namely that a revocation will be implied if the words used in the will, viewed in context, demonstrate an intention on the part of the testator or testatrix to make a gift or to exercise of a power of appointment which can only take place if a prior appointment is revoked.

71. The examples given by North J in *In re Brace* and Farwell LJ's judgment in *In re Thursby's Settlement* illustrate this principle. However, they are relatively straightforward examples because, in each case, they refer to subsequent gifts or appointments of specific property that can only be achieved by exercising the power to revoke the prior appointment.

72. It is clear from the case law that a revocation may be implied in circumstances where the wording is less explicit than that in the rather simplified examples

given in *In re Brace* and *In re Thursby's Settlement*. In *In re Barker's Settlement*, for example, Sargant J takes the view that the words in used in the will – in particular, the reference to an appointment – viewed in their context, demonstrated a clear intention on the part of the testatrix to exercise her power to revoke the trusts under settlement and make a new appointment. The relevant context in that case included the facts that there was no other relevant property to which the words could apply and no other power of appointment to which the words could refer.

73. I therefore agree with the Deputy Master - and with Mr Stewart Smith – that the examples in these cases are examples and do not set a threshold which must be met before a revocation will be implied. That having been said, I agree with Ms Reed QC that the theme of the decisions in *Pomfret v Perring*, *In re Brace* and *In re Thursby's Settlement* is that a revocation should only be implied if it is necessary to give effect to the clear intention of the testator or testatrix. This will depend on the wording and the context. I did not understand the Deputy Master's words at Decision [37] as diverging materially from that approach. And it is consistent with the decision in *In re Barker's Settlement* itself, where Sargant J treated the general words in the will, read in their relevant context, as if they contained an express reference to the exercise of the specific power of appointment. In cases where that intention cannot be discerned, the presumption is that the prior appointment should be respected (Farwell LJ, *In re Thursby's Settlement*, page 186).

74. The principle is also illustrated by the distinction that is drawn in some of the cases between "one power" and "two power" cases. In the two power cases, *Pomfret v Perring* and *In re Thursby's Settlement*, a revocation cannot be implied from the general words of appointment in the subsequent instrument because they do not give rise to the necessary implication that a prior appointment must be revoked in circumstances where there remains property to which the words can apply.

75. The one power cases are more difficult. Turner LJ's words in *Pomfret v Perring* suggest that, in a one power case, general words of appointment will be sufficient to imply a revocation of the prior appointment and the exercise of a

power to make a new appointment. These words are, of course, strictly obiter and made in the context of a case concerning a will which makes express reference to the relevant power of appointment. However. Turner LJ's words are not themselves restricted by reference to cases concerning a specified power. Sargant J relies upon Turner LJ's judgment in his decision in *In re Barker's Settlement*. That is a one power case. However, as I have discussed, Sargant J treats the exercise of a power of appointment expressed in what might be regarded as general terms as if it were an express exercise of the power over specific property given the context in which the words were used.

76. In my view, the weight of authority does not support the conclusion that, in a one power case, the use of general words of appointment should always be regarded as involving the necessary implication of the exercise of a power of revocation and the exercise of a new appointment. The better view is that the question turns on the words used and the context in which they are used, as demonstrated by Sargant J's judgment in *In re Barker's Settlement*.

77. It follows that, in my view, the Deputy Master's principle – that a revocation will be implied if otherwise a disposition made by general words in a will would be nugatory or idle – goes too far to the extent that it is stated in absolute terms. It remains necessary to determine whether the general words reflect a testamentary intention to make the gift in question. That can only be determined by viewing the words in the context of the circumstances of the case. It is not an absolute rule. I accept that in many cases where there is only one power which could be exercised, it may often be the case that the testator or testatrix intended to exercise the power of revocation and power of appointment to make the gift in question. But it will not always be so. For example, I agree in principle with Ms Reed QC's submission that, in some cases, a residuary gift is simply that – a residuary gift which is designed to "sweep up" assets which have not otherwise been dealt with by a will or prior appointment. In such cases, it should not be automatically assumed that the purpose of the residuary gift is to reflect the testator or testatrix's intention to revoke prior appointments and make new ones.

Application to the Grounds of Appeal

78. I should now turn to the specific Grounds of Appeal in this case.

79. The appellant, Christian, has raised nine separate Grounds of Appeal. All of the Grounds are relevant to the central question in this appeal as to whether clause 7 of the 2007 Will, read in its context, operates as a revocation of the 1997 DOA and a fresh appointment. Some of the grounds relate to question of the principles of construction as applied to the 2007 Will, others to the context and the inferences drawn by the Deputy Master in relation that context, and others to the extrinsic evidence.

80. Against that background, it is perhaps more straightforward for me to state my conclusion at the outset. In doing so, I remind myself that this is an appeal. It is not a rehearing of the case. If I am to allow the appeal, I must be persuaded that the decision of Deputy Master Dray was either wrong or unjust because of some serious procedural or other irregularity. No procedural or other irregularity has been raised in this case. Although I have some reservations about some of the aspects of the Decision or the way in which some of the principles are expressed, having considered all the Grounds of Appeal, I am not convinced that, on the facts of the case, the decision of Deputy Master Dray was wrong in the sense of being unsustainable. I therefore propose to dismiss this appeal.

Ground 1

81. The first Ground of Appeal is, in summary, that the words of clause 7 of the 2007 Will are not strong enough to imply both a revocation of the appointment made under 1997 DOA and the making of a fresh appointment.

82. I have set out my analysis of the principles which the Deputy Master draws from the case law to which he was referred. As I have mentioned above, I agree with Ms Reed QC that the Deputy Master overstates the principle that the court should seek to find a construction that does not render some words of the will otiose, particularly in the context of a residuary gift. I also agree that the weight of authority does not support the principle for which Mr Stewart Smith contends

– and with which the Deputy Master at some points appears to have agreed – that in a "one power case" general words of appointment in a will are always sufficient to imply a revocation of a prior appointment and the making of new appointment. In my view, whether or not general words of appointment in a will can be sufficient to imply a revocation of a prior appointment and the making of new appointment turns on the words used and the context.

83. That having been said, I do not agree that the Deputy Master's decision was one that he was not entitled to reach based on the words in the will in the context as he found it. As can be seen from the Deputy Master's summary of the reasons for his conclusions (at Decision [67]), the Deputy Master focussed on the use in clause 7 of the verb "appoint" and the phrase "over which I shall have any power of testamentary disposition whatsoever" (Decision [67(3)]). He regarded that wording as "close to" an express reference to the power derived from the Settlement (Decision [67(2)]) in circumstances where Mrs Moores only ever had one power of appointment to which that wording could apply, and she was clearly aware of the terms of the Settlement.

84. Ms Reed QC says that the Deputy Master's conclusion cannot be justified on the basis of the existing case law. However, I do not regard his conclusion as going beyond the bounds of the existing case law. The facts may differ in some respects from those of *In re Barker's Settlement* – as Ms Reed QC points out, Mrs Moores had a significant estate in addition to the assets comprised in the Patricia Trust Fund – but the basic principle is the same. On the facts, the Deputy Master found that Mrs Moores must in those words be referring to the one power of appointment that she had and, by using those words, she must have intended to exercise that power. This is a "one power" case: the exercise of that power required the prior revocation of the appointment made under the 1997 DOA and so Mrs Moores could be regarded as having intended to exercise the power of revocation (Turner LJ, *Pomfret v Perring*; Sargant J, *In re Barker's Settlement*).

85. The other issue which impinges upon the construction of clause 7 is the appellant's submission that the words of clause 7 are simply "boilerplate" wording. This is the subject of Ground 2 and I have addressed it below.

Ground 2

86. The second Ground of Appeal is, in summary, that the court was wrong to reject the argument that the words used in clause 7 of the 2007 Will were simply boilerplate designed to ensure that the will dealt with all the assets in Mrs Moores's estate at her death.

87. I agree with Ms Reed QC that the court may have dismissed this argument rather peremptorily (Decision [63]). There are circumstances in which a residuary gift is simply that, "boilerplate" wording, which is designed to ensure that the will deals with all the assets in the estate whether seen or unforeseen. Even in such circumstances, I would not describe the wording of the residuary gift as "idle". It is clearly performing a valuable function even if, in the event, there are no assets to which it applies because all the testatrix's assets are already dealt with by other provisions in the will.

88. That having been said, although the Deputy Master dismisses this point rather brusquely, as Mr Stewart Smith points out, clause 7 does not provide for a simple gift of the residue of Mrs Moores's estate. The Deputy Master's decision is founded on the specific words of clause 7 and, in particular, the use of the word "appoint" and the phrase "over which I shall have any power of testamentary disposition whatsoever". If Mrs Moores had intended to deal solely with the residue of her own estate, she could have made a simple gift of the residue. She did not. She referred to the exercise of a power of appointment. She only ever had one power of appointment.

89. Ms Reed QC says that the use in clause 7 of the word "appoint" may be intended as catch-all to ensure that the will includes any other powers of appointment to which she may have become entitled by the date of death. That may be one permissible construction. However, in a context where Mrs Moores only ever had one power of appointment, I cannot find that the Deputy Master's conclusion that the wording of clause 7 was intended to exercise the power that she did have was unsustainable.

90. I may have reached a different conclusion if I had been persuaded that the form of the residuary gift in clause 7 – and, in particular, the wording on which the

respondent relies – was simply standard wording which was included in wills by practitioners as a matter of routine. There is a brief reference to the possibility that such wording may not be uncommon in wills governed by the law of Isle of Man in the witness statement of Mr John Callin, the Second Claimant, one of the trustees of the Settlement, and an Isle of Man advocate. The statement was referred to at the hearing of the appeal, but it is not referred to in the judgment of the Deputy Master. I have not given it any weight. There was no further evidence before me or the Deputy Master of law and practice from an Isle of Man practitioner. Indeed, as I have mentioned, the proceedings have been conducted on the basis that there was no difference between English law and Isle of Man law in all material respects. In the absence of such evidence, I accept the submission of Mr Stewart Smith that the use of the word "appoint" and the phrase "over which I shall have any power of testamentary disposition whatsoever" would not be included in a residuary gift as a matter of routine drafting. (I note in passing that the 1993 Will contained a residuary gift in the same terms. However, that takes the matter no further. Mrs Moores would have been in the same position at that time in considering whether to revoke the appointment made under 1981 DOA and exercise the power of appointment under the Settlement.)

Ground 3

91. The third Ground of Appeal is that the court placed too much emphasis on the so-called principle that every part of the 2007 Will must be given effect.

92. As I have mentioned above, I agree with Ms Reed QC that the Deputy Master overstates the principle that the court should seek to find a construction that does not render some words of the will otiose, particularly in the context of a residuary gift. However, for the reasons that I have given above, it seems to me that the construction adopted by the Deputy Master was a permissible one given the context.

Ground 4

93. The fourth Ground of Appeal is that the court was wrong to accept the submission that the examples of words strong enough to imply a revocation in

the judgment of North J in *In re Brace* and Farwell LJ in *In re Thursby's Settlement* provided no guidance as to the strength of the words needed to demonstrate an intention to revoke.

94. I agree with the Deputy Master that the examples given in those cases are simply examples and do not set a threshold for the strength of wording that is required for a revocation to be implied. However, the words that are used must be such that it is clear that the testatrix intended to make the relevant gift or exercise the power of appointment in a way which would necessarily require the revocation of the prior appointment. The strength of the words required will depend upon the context.

95. The Deputy Master appears to accept that approach at Decision [37]. On the facts of this case, he was satisfied that in their context the words of clause 7 were "close to" a specific reference to the relevant power of appointment. In my view, there is no good reason to disturb that conclusion.

Ground 5

96. The fifth Ground of Appeal is that the court did not address the submission that *In re Barker's Settlement* was not a case involving the revocation of a prior exercise of a power of appointment; it was a revocation of the original trusts under the settlement.

97. I do not agree with Ms Reed QC that I should distinguish *In re Barker's Settlement* on the basis that it concerns a power to revoke the terms of the original trusts under a settlement rather than a power to revoke a prior exercise of a power of appointment. The issue is essentially the same, namely whether the words in the will justify the implication of the exercise of power to revoke the terms of a prior disposition. Sargant J did not feel any need to make any distinction – see his reference to Turner LJ's judgment in *Pomfret v Perring*. Neither do I.

Ground 6

98. The sixth Ground of Appeal is that the court wrongly rejected the submission that there was no explanation why the draftsman of the 2007 Will (Mr Moore) who had been responsible for drafting the 1981 DOA and the 1997 DOA did not refer to the 1997 DOA in the 2007 Will if there was an intention to revoke the appointment made in the 1997 DOA.

99. The Deputy Master accepted that Mr Moore could easily have included a reference to the revocation of the appointment made in the 1997 DOA in the 2007 Will (Decision [65]). He regarded this point as equivocal in that it could be equally said that the 2007 Will contained no reference to the effect that clause 7 was not intended to revoke the previous appointment.

100. Ms Reed QC says that Deputy Master Dray was not entitled to dismiss this point on the basis that there would be no construction issues if the document was more clearly drafted. The court's task was to identify the intention of the testatrix to exercise a power of revocation and the fact that she had not made it clear in her will was a relevant factor.

101. I do not accept this criticism of the Decision. The Deputy Master considered the point and took the view that the absence of a reference to 1997 DOA did not assist one way or the other in determining the intention of the testatrix. It seems to me that was an inference which the Deputy Master was entitled to draw in his assessment of the testamentary intention of Mrs Moores.

Ground 7

102. The seventh Ground of Appeal is that the court did not explain why, if she intended to reinstate Matthew as a beneficiary, Mrs Moores had not revoked the 1997 DOA during her lifetime as she had done with the previous appointment that was made in the 1981 DOA.

103. As can be seen from the history of Mrs Moores's testamentary dispositions that I set out at the beginning of this judgment, Mrs Moores made various changes to her will and appointments under the Settlement during her lifetime. The

Deputy Master did not refer to that history in any detail in giving his reasons for his conclusion, and, with the exception of this issue, the parties have not raised issues arising from it in the hearing before me. It is not clear to me that this particular aspect of that history can be viewed in isolation as this Ground of Appeal invites me to do.

104. In any event, this issue does not advance the appellant's case any further. The Deputy Master came to the view that, by clause 7 of the 2007 Will, Mrs Moores intended to revoke the previous appointment. It was not necessary to go any further and to speculate on why Mrs Moores did not enter into a separate deed of revocation and appointment during her lifetime.

Ground 8

105. The eighth Ground of Appeal is that the court wrongly relied upon the fact that clause 7 would have been effective to exercise a power of appointment if no previous appointment had been made. Ms Reed QC says that the court appears to have been incorrectly influenced by this point (Decision [22]-[23], [67(2)]), when the question before the court was whether or not the wording of clause 7 was sufficient to imply the exercise of a completely different power, the power to revoke a prior appointment.

106. I do not accept this challenge to the Decision. The Deputy Master regarded this point as a starting point: if the wording had been insufficient to exercise the power of appointment, it would have been insufficient both to revoke the prior exercise of the power of appointment and make a fresh appointment. The Deputy Master is clear that, having established that wording is sufficient to exercise the power to make an appointment, it is necessary for the words to do more if they are to carry the implication of the exercise of a power of revocation (see, for example, Decision [24], [67]).

Ground 9

107. The final Ground of Appeal is that the court wrongly considered that the extrinsic evidence such as there was supported its conclusion when there was no mention in any relevant document of the Settlement or the 1997 DOA.

108. I reject this Ground of Appeal. The only extrinsic evidence on which the Deputy Master placed any weight were the two letters of instruction written by Mrs Moores to Mr Moore. Those letters record her intention for her estate to be divided between her children in equal shares. I accept that those letters are not conclusive; they could be read as referring to Mrs Moores's estate including or excluding the assets in the Patricia Trust Fund. But the Deputy Master did not treat them as determinative (Decision [77]) and I am satisfied that the conclusion which the Deputy Master drew from that evidence – that it was, at least, consistent with the notion that Mrs Moores intended Matthew to receive one third of everything that was within her gift (including the Patricia Trust Fund) – was a conclusion that he was entitled to draw.

Decision

109. Having considered all the issues raised in the Grounds of Appeal, I am not persuaded that, on the facts of the case, the decision of Deputy Master Dray was wrong.

110. I dismiss this appeal.