

**In the Estate of ASHLEY EDWARD SERVOZ-GAVIN deceased**

**BETWEEN:**

**ANNE AYLING**

**Claimant**

**and**

**(1) EMMA PELAGIA ELIZABETH SUMMERS  
(the personal representative of the above-named deceased)**

**(2) SYDNEY MARTIN AYLING**

**(3) ROBERT NOEL AYLING**

**(4) CHRISTINE ANNE DINOULIS**

**(5) KEITH AYLING**

**(6) STEVEN AYLING**

**(7) MRS LESLEY PARSONS**

**(8) DAVID ANTHONY AYLING**

**(9) ANDREA AYLING-NACKE**

**(10) HOWARD MARTIN AYLING**

**(11) ALAN DEREK AYLING**

**(12) ANTHONY STUART AYLING**

**Defendants**

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**JUDGMENT**

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**Introduction**

[1] Ashley Servoz-Gavin died on 14 April 2005. The first defendant, who is his first cousin once removed, obtained letters of administration at attorney for the claimant, who is an aunt of the deceased, on the footing that he had died intestate. Subsequently it became apparent that in 1985, and again in 1990, the deceased, who had been a ship's radio officer, had made, or might have made, nuncupative wills which would be valid under the privilege accorded to a "mariner or seaman being at sea" within section 11 of the Wills Act 1837. The sole beneficiary under any such will would be the claimant. In this action the claimant asks the court to revoke the grant of administration and to pronounce in favour of one or other of the allegedly privileged wills. The claimant herself, and the twelve defendants (with the exception of the first defendant), are the persons who will be entitled to the estate on an intestacy.<sup>1</sup>

[2] The claimant has been represented by Ms Penelope Reed QC. The first and fourth defendants were present at the hearing and gave evidence: they support the

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<sup>1</sup> See, however, note 2 below.

claimant. The second defendant did not take part in the trial. The remaining defendants, who oppose the claim, were represented by Mr Gilead Cooper QC.

[3] The case has involved a forensic journey on a path along which most lawyers, counsel and myself included, never travel after our student days. I am grateful to Ms Reed and Mr Cooper for their elegant, economical and helpful written and oral submissions. As will appear from what follows, the areas in which I have to reach decisions are these. (1) There are questions of fact as to the making of the alleged wills. What is central to these questions is the reliability or unreliability of the evidence given by the fourth defendant. (2) If the fourth defendant's evidence is accepted, I will have to decide whether the words used by the deceased were such as to show that he had the intention required for the making of a privileged will. (3) There is a pure question of law as to the extent of the privilege granted to "any mariner or seaman" by section 11 of the Wills Act 1837. When the alleged wills were made, the deceased was about to join ships registered in the Netherlands (in 1985) and in Panama (1990), and Mr Cooper has contended that privileged wills can be made only by those employed on British-registered or British-owned vessels. (4) There is a mixed question of law and fact arising from the words "at sea" in the statutory phrase "any mariner or seaman being at sea." I will have to decide whether the deceased, in 1985 and again in 1990, is properly to be regarded as having been "at sea" in the sense in which those words have been interpreted in the authorities.

## **Narrative**

### *The Ayling family*

[4] The family structure is quite complicated. There are within the family five persons of particular importance in the story, and I hope that no offence will be taken by anyone if I refer to them informally in the way in which they have been most frequently referred to in the course of the trial.

[5] Wyndham and Florence Ayling, who are both long since dead, had ten children, one of whom died in infancy. It will be sufficient for the purposes of this judgment to say something about four of those children.

[6] The eldest child was Walter Ayling. The fourth defendant Christine Dinoulis ('Christine') is a daughter of Walter Ayling. The first defendant Emma Summers ('Emma') is Christine's daughter.

[5] The fifth child was the claimant Anne Ayling ('Aunt Anne'). Aunt Anne is the only one of the children of Wyndham and Florence Ayling who is still living. She has never married. She is now 98 years old. She gave evidence at the hearing and appears to be, for a person of her age, in exceptionally good health.

[6] Aunt Anne was the elder of twin sisters, the younger being Agnes Ayling ('Agnes').

[7] The youngest of the ten children was Ron Ayling.

[8] Agnes was married either before the outbreak of war in 1939 or during the War. Her husband, whose surname was Chapman, was away on military service for almost the whole of the War. The deceased ('Ashley') was her son. Ashley was born on 22 February 1946. The family lore, which is not disputed by anyone, is as follows. Ashley was conceived on VE Day. His father was Irish: no one knows anything more about him, not even his name.<sup>2</sup> When Agnes's husband came home from the War, he found that Agnes was pregnant and he wanted her to have an abortion. She refused, the husband subsequently left her, and they were divorced. Agnes did not remarry, nor did she have any more children.

[9] Aunt Anne lived, and still lives, in a house in Raynel Drive, Leeds. For many years until he died in 1990, she shared her home with her youngest sibling Ron. Her eldest brother Walter and his wife also lived in Raynel Drive, just a few doors from Aunt Anne. Their daughter Christine was born in 1939, and so was six years older than Ashley. Ashley was brought up by his mother Agnes in Lincolnshire, first in Cleethorpes and later on in Grimsby.

[10] It is perhaps easy to forget how, even in the recent past, birth out of wedlock was a stigma. Ashley was not merely bullied at school on account of his illegitimacy, but he appears to have been cold-shouldered by many members of the Ayling family. Not all the members of the family adopted this attitude. Aunt Anne was the shining exception. Walter Ayling and his wife must also have been exceptions, because Christine can recall going on holiday with her parents to stay with Agnes. Agnes and Ashley would also come to Leeds to stay with Aunt Anne, and so the first cousins, Ashley and Christine, got to know each other well and became quite close.

[11] Ashley decided to join the Army when he was 14 and went as a boy soldier into the Junior Leaders Regiment. He served in the Far East, and was badly burnt when a hand-grenade was thrown into a jeep in which he was travelling. He had to grow a beard because of his burnt facial skin and this meant that, although he remained in the Army, he was unable to carry out the usual duties. Perhaps unsurprisingly, he left the Army and went to a college in Hull where he trained as a radio officer for the Merchant Navy. Upon leaving the Army Ashley changed his surname from Chapman to Servoz-Gavin. Various certificates and other documents which I have seen show that he qualified as a radio officer in 1978 and gained an additional qualification in maintenance of radar equipment in early 1979.

[12] In the meantime, in 1964, Christine had left home and moved to Hertfordshire, where she still lives. In 1975 Agnes died, and thereafter, Aunt Anne's house became "home" to Ashley and she became "second mother" to him. The evidence on this is quite detailed, and has not been challenged, so I need say very little about it. I should, however, emphasise that the evidence about the relationship between Aunt Anne and Ashley is not confined to the recollections of Aunt Anne and Christine, but also comes from quite extensive correspondence

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<sup>2</sup> If the father was still alive on the date of Ashley's death, or (if he had predeceased Ashley) descendants of his were then living, then one-half of Ashley's estate would pass on an intestacy to his father's side of the family. No attempt has been made to trace the father because, without as much as a name to go on, there is simply no starting-point from which a search could begin.

which passed between Aunt Anne and Ashley and which, fortunately, was not destroyed.

[13] After qualifying as a radio officer, Ashley spent the rest of his working life at sea. He was not employed by any particular shipping company, but was a free-lance officer, signing up for (usually) lengthy voyages when work was available. When Ashley was not at sea, he spent much of his leave at Aunt Anne's, although some time was also spent in Hull, where he had bought investment properties, and on holiday with friends in Germany. Contact between him and Christine was by this stage of their lives no more than occasional. After her move to Hertfordshire, where she was a teacher, it cannot have been often that her visits to her parents during school holidays will have coincided with Ashley's being in residence at Aunt Anne's.

*May 1985*

[14] The first privileged will is said to have been made in May 1985, in the course of a conversation between Ashley and Christine outside the home of Christine's parents in Leeds. Christine's evidence about this has been challenged. What I propose to do in this section of the judgment is to confine myself to the evidence relating to Ashley's movements in May 1985, in so far as they have been reconstructed from documents which are not challenged.

[15] A seaman's book is a passport-like document which records the dates on which a seafarer joins and leaves ships. A seafarer may, as I understand matters, have several books issued by the authorities of different countries. Ashley's Dutch seaman's book is in evidence. This shows that Ashley was examined by a port doctor in Rotterdam on 14 May 1985; that he arrived on board the Dutch vessel *Mijdrecht* on 22 May 1985; and that he left the ship at Rotterdam on 22 September 1985. There is also a letter from Ashley to Aunt Anne and her brother Ron, dated 23 May 1985 and post-marked in Kent on 25 May 1985. It is not, I think, speculating to say that the letter appears to have been started in Rotterdam before 22 May and subsequently finished on board and handed to someone for posting in England.<sup>3</sup> In the letter Ashley said:

After kicking around here in Rotterdam for a week I have at last got a date. Leave tomorrow to join a ship called the '*Mijdrecht*.' I join in England of all places – Tilbury. Then it's off to the Pacific via the Panama canal....

*February 1990*

[16] The second privileged will is said to have been made in February 1990, in the course of a conversation between Ashley and Christine, when Ashley was staying at Christine's house in St Albans. Once again, I shall do no more at this stage than reconstruct Ashley's movements from documents which are not challenged.

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<sup>3</sup> Ashley appears to have begun by giving the address of the shipowners, but crossed that out and wrote '*Mijdrecht*'; and the date on the letter is one day later than the seaman's book shows him as having joined the vessel.

[17] The pattern disclosed by the documents appears to be that of going to London in order to obtain a visa for India, missing a flight to Bombay, and eventually getting another flight and joining a pipe-laying vessel called the *CPLB Crawler*. The evidence comes from Ashley's record of his expenses claim and a letter to Aunt Anne. There is nothing in any seaman's book relating to this journey, although there has survived a photocopy of one page of what is presumably a Panamanian seaman's book (it is in Spanish) which records that Ashley had been employed on the *CPLB Crawler* for seven periods during the years 1981 to 1983.

[18] The expenses claim shows, in summary: (1) on 12 February 1990, telephone calls to Ortona and Rotterdam "for instructions" and to "cousin in St Albans [to] arrange overnight accommodation"; (2) on 13 February, return saver ticket from Hull to St Albans; (3) on 14 February, expenses in London involving visits to "Microperi office [to] collect telex for India House requesting issue of Visa", the passport office in Petty France, and India House, with a single ticket to St Albans; (4) on 21 February a taxi "Hull to airport", "computer ticket booking error", telephoning Rotterdam "for instructions", then "ticket arrives 1 hour after plane has departed, instructed by Rotterdam/Ortona to return home", and finally a taxi back to Hull; and (5) on 22 February a taxi from Hull to the airport, followed by "9 hour delay Bombay flight."

[19] The letter to Aunt Anne is dated 8 March 1990 and was written from the *CPLB Crawler*. The letter has a Bombay post-mark for 19 March.

I went to London for my visa and stayed with Christine in St Albans. They both seemed ok.

I was going to ring you but (here comes the excuse) I was fairly shattered after 2½ days of running around then up half the night packing. Anyway I kept nodding off in front of the TV...

The trip out here was long. I first left on 21<sup>st</sup> 0530 to the airport. Ticket arrived 1 hour after the plane had left, so I went back to Hull. Slept all day. I'd been up all night packing.

Left again 22<sup>nd</sup> Feb 0530. [Words missing] to Bombay was 9 hours late. By the time I arrived in Bombay, the transport out to the ship had left, so I had to hang around in Bombay for 2 days waiting (sleeping). Got on board eventually on the 25<sup>th</sup> Feb.

### *Subsequent events*

[20] In 1999, while Ashley was in Hull, he suffered a stroke. He survived until his death from a heart attack on 14 April 2005.

[21] At first it was believed by Christine and Emma that Ashley had died intestate. Christine told Emma about the conversations in which, as is now alleged, Ashley made privileged wills, but Emma brushed aside what her mother said on the basis that a will could only be validly made in writing and with witnesses. On 2 August 2005 Emma obtained a grant of letters of administration for the use and benefit of Aunt Anne. Then Emma's husband came (on the internet) across the concept of privileged wills, something of which none of those involved had previously been aware. After counsel and solicitors had been consulted, this action was commenced on 12 November 2008.

[22] There was some criticism of Emma during cross-examination along the lines that she had been less than forthcoming with other members of the wider family with regard to the administration of Ashley's estate. I should record that I accept Emma's explanations. I wish to mention two points in particular. First, Emma said, very fairly in my judgment, that she spent the first few months after Ashley's death in hunting for a written will and in getting Ashley's affairs into some sort of order. He had, for example, tenanted properties in Hull which were in urgent need of external repairs; and off-shore bank accounts had to be traced and brought into the estate. Second, there is in the correspondence one letter which was written to the intestacy beneficiaries in terms which were much too firm in asserting the validity of a privileged will and could well have been taken by a beneficiary as leaving little or no room for doubt on the question. That letter was, however, written by a solicitor on whose advice Emma was relying, and it would be unfair to lay the blame at her door.

[23] Estate accounts have been prepared up to 30 June 2009. These show that, after payment of inheritance tax, other debts, and the costs of administration, the amount remaining for distribution as at 30 June was over £582,000.<sup>4</sup>

### **Issue (1): the making of the wills**

#### *Introduction*

[24] I bear in mind that the burden of establishing that Ashley expressed himself in the way which is alleged rests on Aunt Anne. I also bear in mind that the only person who has given direct evidence about the relevant conversations is Christine and that, as Aunt Anne said in evidence, Emma is the sole beneficiary under her (Aunt Anne's) will as it now stands. It has not been suggested by Mr Cooper that Christine is anything other than an honest witness, but he says, rightly in my judgment, that one cannot exclude the possibility of an innocent reconstruction of past events in a manner which will be favourable to her part of the family. That is a fair point, and is not one which I ignore.

#### *Christine's oral evidence*

[25] In the unusual circumstances of the case, counsel agreed that it would be appropriate that, with regard to the events of May 1985 and February 1990, there should be an old-style examination-in-chief of Christine.

[26] As regards May 1985, Christine said that she was staying with her parents in Leeds, and was outside their house dealing with her car in readiness for a return to St Albans on the following day. Ashley came to the gate and they had a conversation on the path. He asked her whether she was going back on the following day and, if so, whether she could give him a lift to Heathrow. She said that she could not take him to Heathrow direct, as the drive would be too much for her, but that he could come with her to St Albans and that she would take him to

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<sup>4</sup> The only question-mark hanging over this figure is the value of the properties in Hull, which are put at £230,000 (£240,000 at death with a subsequent fall of £10,000).

Heathrow on the next morning. That did not, however, fit in with Ashley's plans, as he had to catch a flight to join his ship.

[27] Christine said that she and Ashley went on to discuss Aunt Anne and her own parents, and her worries about what might happen if she were to die – she was afraid that her parents might be regarded as too old to look after Emma, who was only just 9 years old. Ashley then told Christine that he had been trying to talk to Aunt Anne, but that she would not listen to him. He said

You listen to me. If anything happens to me, I want everything to go to Auntie Anne.

[28] As to February 1990, Christine said that Ashley came to stay with her for two nights while he was getting a visa. They discussed a new raincoat which he had bought and was not a good fit; in some detail, his experiences in the Army; his properties in Hull (he had spent a great deal of money on work which was required to comply with fire regulations, but did not think it right to increase the rents in consequence); the sea, pirates and piracy; and the ship which he was going to join. The last topic extended to a description of the *CPLB Crawler*, which had a crane and helicopter, and to an account of the long shifts which he had worked when he was previously employed on that ship.

[29] Christine went on to say that, before Ashley left, he said

What I told you before still applies. If anything happens to me, if I snuff it, I want everything to go to Auntie Anne.

*Critique of Christine's evidence: general*

[30] Mr Cooper referred me to a publication of The British Psychological Society, *Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory, A Report from the Research Board, June 2008*. On the basis of passages in this report, Mr Cooper emphasised the fallibility of memory, particularly where many years have passed between the relevant event and the recounting of the event. He also adverted to the trap into which a fact-finder may easily fall, that of relying too heavily on the confidence with which an undoubtedly honest witness tells his or her story: a seeming firmness of recollection is no guarantee of accuracy. These are all salutary warnings, and it is as well to be reminded of them: but their content is, one trusts, part and parcel of the approach of any careful judge who is himself finding facts or is giving directions to a jury. I can assure the parties that I keep them in mind.

*Critique of Christine's evidence: specific points*

[31] The principal points made against the reliability of Christine's evidence are, in a roughly ascending order of gravity, the following.

[32] It is said that it is odd that, if Ashley did speak in the manner alleged, Christine did not tell him that he should have a will drawn up by a solicitor. In my judgment, Christine answered that criticism satisfactorily when she said that she did not regard it as her place to tell Ashley what he should do.

[33] It was also said to be strange that Ashley did not mention the subject of the disposition of his property after his death in any discussion with Christine after 1990. Christine's answer, which I found cogent, was that she could not recall seeing Ashley after 1991 or 1992, because of her own family circumstances. Her mother came to live with her in St Albans at the end of 1992, and Christine could not leave her alone there until she died in 1995. (Her father had died in a mental institution in 1993). After 1995 Christine was once again able to visit Leeds but, as she own family home was no longer available, she had to stay with Aunt Anne and there was no room for her in that house when Ashley was in residence.

[34] Next, there is no doubt that, as Christine's story has developed from an initial manuscript statement, to her formal and much longer witness statement, to her oral evidence, her apparent recollection has become more elaborate and further detail has been added, particularly with regard to the 1990 conversation. There are, in my judgment, two satisfactory answers. One came from Christine herself and was that, as one thinks back over the past, further details come to one's mind. The other is that, so far as the central feature of each conversation is concerned, there has been no alteration in Christine's account of the words used by Ashley.

[35] Again, it is said to be unusual that, as Christine firmly maintains, she purports at considerable distances in time (24 and 19 years) to be able to recall *verbatim* the words used by Ashley. Again, it seems to me, Christine provided a convincing answer: the words stuck in her mind because she could not recall any other occasions on which Ashley had spoken so seriously.

[36] I have left until last the specific feature of Christine's evidence on which Mr Cooper understandably laid most stress. It has to do with the date of the alleged conversation in May 1985. In that year, the early May bank holiday fell on Monday 6 May and the late May bank holiday was three weeks later, on Monday 27 May. In her written evidence, Christine said this:

The first occasion was the day before I intended driving back from my parents' house in Leeds. I think that it was at the end of the Whitsuntide half-term 1985 but I cannot recall the exact date. It was late spring, early summer. I remember that the weather was very spring-like.

It is now apparent that no conversation can have taken place between Ashley and Christine during the Whitsuntide half-term of 1985, because by the end of May Ashley was on board the *Mijdrecht*. This error, if it be an error, on Christine's part is advanced as seriously undermining the reliability of her evidence as to the substance of the conversations with Ashley, in 1990 as well as in 1985.

[37] I have to say very plainly that I am not impressed by this criticism. In the first place, Christine did not in the witness statement, or in the manuscript document which is the predecessor of the statement, go further than saying that she *thought* that the conversation was in the half-term holiday. She has never been firm on the point, whereas she has been firm on two other points, namely, that the conversation took place in the spring and that the year was 1985. She pinpointed the spring by reference to the weather, and the year by reference to her health in 1985: she had undergone a hysterectomy in 1984 and would have her

gall-bladder removed in 1986, and in the intervening year she was feeling very unwell and was worried about the future and what would happen to Emma if she were to die. Further, Christine said in her oral evidence that she would now place the conversation around the early May bank holiday. This would fit with Emma's birthday, which had been on 1 May, around which time it would be natural to pay a visit to the grandparents in Leeds; and, as Christine was then teaching on a part-time basis (she had a two days per week contract), she could well have stayed on for a couple of days after the bank holiday. The explanation seems to me to be entirely cogent.

### *Conclusions on the evidence*

[38] Even after giving full consideration to all the points made by Mr Cooper, I have no hesitation in accepting as accurate Christine's account of the conversations with Ashley in 1985 and 1990. I find that the 1985 conversation took place around 6 May of that year, perhaps a day or two after 6 May, but in any event within a narrow time-frame. There has been no attack on Christine's veracity. As to her reliability, I found her to be a straightforward and careful witness. Given the relationship between Ashley and Aunt Anne, there is nothing unnatural or surprising in what Christine says about the two conversations. With regard to what was said in 1985, Christine had a particular reason to recall it, because she felt guilty about being unable to give Ashley a lift all the way to Heathrow. As regards the 1990 conversation, Ms Reed rightly points out that matters incidental to the main topic have been corroborated from other sources: for example, the return of the ill-fitting raincoat is referred to in a letter from Ashley to Aunt Anne, and his previous acquaintance with the *CPLB Crawler* appears from the Panamanian seaman's book. In short, at the beginning of this case, I did not expect the evidence to be overwhelming in favour of either side: but, at the end, I find it to be so.

### **Issue (2): intention**

[39] It is not necessary for the validity of a privileged will that the testator knew that he was making a will: what is required is that he "intended deliberately to give expression to his wishes as to what should be done with his property in the event of his death."<sup>5</sup> Wrangham J put the matter in this way:<sup>6</sup>

As Salter J said in *Beech's* case<sup>7</sup>: 'I think that, in order to constitute a will, the words used by the testator must be intended by him, at or after the time when he uses them, to be preserved or remembered so as to form the guide to those who survive in carrying out his wishes.' In other words, in order to be a testamentary act there must be a statement of the deceased's wishes for the disposition of his property after his death which is not merely imparted to his audience as a matter of information or interest, but is intended by him to convey to that audience a request, explicit or implicit, to see that his wishes are acted on.

[40] Mr Cooper has submitted that the words said to have been used by Ashley fall on the wrong side of the line, that is, he did not go beyond conveying a matter of information or interest. I do not agree. The actual words used, the seriousness

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<sup>5</sup> *Re Stable, deceased. Dalrymple v Campbell* [1918] P 7 at 9 (Horridge J).

<sup>6</sup> *In the Estate of Knibbs, deceased. Flay v Trueman* [1962] 1 WLR 852 at 855, 856.

<sup>7</sup> *In the Estate of Beech, deceased* [1923] P 46 at 57.

with which Ashley spoke, the injunction in 1985 that Christine should “now listen to me”, and the fact that she was a person who could be relied upon to carry out his wishes, combine, in my judgment, to show that the test of intention has been easily satisfied in this case. We are a very long way removed from the facts which Wrangham J was considering. There a barman on a liner said to the head barman “If anything ever happens to me, Iris will get anything I have got”, Iris being the barman’s sister who had been on board as a passenger. That was no more than the exchange of family information: what Ashley did was implicitly to convey to Christine a definite request.

### **Issue (3): ‘any mariner or seaman’**

[41] I begin by setting out the relevant statutory provisions.

[42] By section 11 of the Wills Act 1837

[A]ny soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.

This ensured that the privileged will could be made, even orally, without the ordinary formalities as to execution and attestation required by section 9 of the Wills Act.<sup>8</sup>

[43] Then, by section 2 of the Wills (Soldiers and Sailors) Act 1918 it was provided that section 11 of the 1837 Act

shall extend to any member of His Majesty’s naval or marine forces not only when he is at sea but also when he is so circumstanced that if he were a soldier he would be in actual military service within the meaning of that section.

[44] Mr Cooper’s submission, which (as he accepts) is not supported directly by any authority, is that the privilege accorded to mariners and seamen by section 11 is restricted to those who are serving, or have been engaged to serve, on British-registered ships.<sup>9</sup> Put another way, the privilege is enjoyed only by members of the Merchant Navy, and not by people like Ashley who are serving on foreign-registered vessels. Mr Cooper said that such persons could be equated, in military terms, with mercenaries.

[45] There are occasional references in decided cases which indicate that a particular judge may have been thinking in terms only of British ships,<sup>10</sup> but the question which confronts me was not being litigated. The remarks are, in the true sense of the term, *obiter dicta* and Mr Cooper rightly does not make too much of them. He relies primarily on what he says must be the underlying rationale

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<sup>8</sup> For a short account of the history of privileged wills, see *Re Wingham, deceased. Andrews v Wingham* [1948] P 187 at 194, 195 (Denning LJ).

<sup>9</sup> So far as I can discover in a limited amount of research undertaken for the purpose of writing this judgment, the registration of British vessels was, as regards ships with a deck and of more than 15 tons burden, first made compulsory by the Merchant Shipping and Navigation Act 1786.

<sup>10</sup> See, for example, *In the Goods of Milligan* (1849) 2 Rob 108 at 110, “seamen whether in the Queen’s or merchant’s service” (Sir Herbert Jenner Fust); *Re Rapley, deceased* [1983] 1 WLR 1069 at 1073, “[t]he evidence, in short, has to show that the testator was serving either in the Royal Navy or the Merchant Navy” (Judge Finlay QC).

of section 11, and, as a subsidiary point, on what he says is a signpost which is provided by section 2 of the 1918 Act.

[46] The argument from the rationale of section 11 is that persons who are covered by the privilege are (1) engaged in unusually hazardous activities; (2) likely, while undertaking those activities, to find themselves in places in which there is no ready access to the means of making a will in the conventional way; and (3), this being crucial, undertaking their activities in the national interest. It is this last point which, in Mr Cooper's submissions, differentiates someone in Ashley's position from a seafarer who is a member of the crew of a British ship. In a *reductio ad absurdum*, Mr Cooper asks whether the privilege would be extended to pirates (or, in the case of war, to traitors).

[47] Mr Cooper's argument on section 2 of the 1918 Act runs thus. He accepts that the section does not deal in any way with persons serving on civilian vessels. The words "His Majesty's naval or marine forces" show that the draftsman had in mind only members of the Royal Navy and the Royal Marines. This is said to show that there are "some words missing from section 11", which I take to be words which would exclude members of foreign (armed) naval services, "and there may be other words which have to be implied."<sup>11</sup> Those "other words" would be words which limited the privilege, as regards civilian seafarers, to persons employed on British vessels.

[48] I am unable to accept this restrictive construction of section 11.

[49] I begin from the fact that I am faced with four very ordinary words, "a mariner or seaman", which are easily understood and which, on their plain meaning, apply to *all* mariners and seamen.<sup>12</sup> If the meaning is to be in some manner restricted, then the ground on which the restriction is to be attached must appear from the context in which the words are used or from the underlying purpose of the legislation. The concept of "national service" is, with respect to Mr Cooper's submissions, nowhere to be found in section 11, and it does not have to be introduced in order to make the section workable or rational. Arguments from absurdity are rarely appealing, and I am not deterred from my conclusion by the example of the pirate. If I am disposing of a carefully constructed argument in a brusque manner, I apologise: but, if a question of language appears to be as clear as this does, nothing will be gained by dealing with it at greater length.

[50] There are, however, three points with which I should deal briefly.

[51] First, as regards section 2 of the 1918 Act, the most that can be said is that it suggests that the draftsman may have believed, rightly or wrongly, that section 11 of the 1837 Act did not apply to members of foreign (armed) naval services.

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<sup>11</sup> The words in quotation marks come from my note of Mr Cooper's reply to Ms Reed, in which he was clarifying the submission which he was inviting her to address.

<sup>12</sup> They would, of course, have to have domiciles in a country within the United Kingdom, because under private international law the formal validity of a will is governed by the domicile of the testator.

[52] Second, there is an instructive case from 1840, *In the Goods of Donaldson*.<sup>13</sup> The facts, and the conclusion, are set out succinctly in the judgment of Sir Herbert Jenner:

The deceased must be considered to have been a surgeon in the East India Company's service; his being in charge of recruits for royal regiments, which was no part of his regimental duty, would not constitute him a Queen's officer. But, with respect to mariners, the exception is extended to merchant seamen, and by parity of reasoning, persons in the military service of the East India Company would seem to be included in the term 'soldiers'; there is nothing in the section of the Act which restricts the exemption to the Queen's soldiers.<sup>14</sup>

This judgment appears to me to provide strong support for the approach which is advanced by Ms Reed, that section 11 should be read in what may be called a non-restrictive manner.

[53] Finally, there are three Irish cases in which the section 11 privilege has been extended to persons serving in the armed forces of other states. But, as Ms Reed accepts, the reasoning in these cases is not impressive, and they are in any event of no more than persuasive authority.<sup>15</sup>

#### **Issue (4): 'being at sea'**

[54] A privileged will can be made by "any mariner or seaman, being at sea." The phrase "being at sea" has been construed as extending, not just to persons who have actually boarded the vessel on which they are sailing or to sail, but to those who are, in the nautical phrase, "under orders" to join their ship. It may be helpful if I set out a few cases from each side of the line.

[55] The case most frequently cited, and which has been followed by the courts of this country, is an Irish decision, *In the Goods of Sarah Hale*.<sup>16</sup> The deceased was a typist employed by the Cunard Steamship Company. Her permanent assignment was as a typist on board the *Lusitania* but, when not working on the ship, she worked in the company's offices in Liverpool. She made her will while working at those offices at a time when, in the view of the judge, she was definitely engaged to going on the next voyage of the vessel. That turned out to be the fatal voyage on which the *Lusitania* was sunk by a torpedo fired from a German submarine. The deceased was held by Madden J to have been "at sea."

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<sup>13</sup> (1840) 2 Curt 386 at 387.

<sup>14</sup> A much older East India case, *Shearman v Pyke*, decided by Dr Bettesworth in Hilary Term 1724, was elaborately discussed Sir Herbert Jenner Fust (as Sir Herbert Jenner afterwards became) in *Drummond v Parish* (1843) 3 Curt 522 at 539-542: Dr Bettesworth had said, although it is not clear whether this was one of the grounds of his decision, that "[t]hose who are enlisted in the service of the Company have the same privilege as those in the service of the Crown."

<sup>15</sup> The cases are: *Doherty v Mangan* [1943] IR 80 in which an Irish citizen serving in the Royal Air Force was treated by Hanna J as a soldier, but apparently without argument on the point; *In the Goods of Ryan, deceased* [1945] IR 174, a similar case (the deceased was a sergeant in the Irish Guards) in which Maguire P simply followed the decision of Hanna J; and *In the Goods of Schroeder, deceased* [1949] IR 89, a decision of Haugh J which is difficult to explain, as the judge extended section 11 to the will of a French citizen, who was in the French Army, the testator being domiciled in France and making his will in Brittany!

<sup>16</sup> [1915] 2 IR 362.

[56] Then, there are two decisions of Havers J. *In the Goods of Newland, deceased*<sup>17</sup> was a case in which the judge upheld the will of an apprentice in the merchant navy while on shore leave (which was, at longest, from 4 July to 1 August 1944) from the troopship on which he was employed. *In the Goods of Wilson, Wilson v Coleclough*<sup>18</sup> concerned a chief officer employed by an oil company. He came ashore in England from one vessel on 10 January 1946, and was on leave until 16 April. On 25 April he received instructions to join another ship on 30 April, and on 27 April he made a nuncupative will. Havers J upheld the will, having found that it had been made “in contemplation of sailing on that ship on that particular voyage, and... he was preparing for that voyage.”

[57] A case which went the other way was *Re Rapley, deceased*.<sup>19</sup> There the deceased was an apprentice with Ellerman City Lines. He was discharged from one ship on 7 October 1960 and joined another of his employer’s ships on 29 November. He attempted to make a privileged will on 22 October when, as was common ground at the trial, he had not yet been notified by the shipping company when and where he was to join his next ship. Judge Finlay QC distinguished the three cases which I have mentioned so far, and held that the deceased was not “at sea” on 22 October.

[58] Mr Cooper drew my attention to two decisions of Horridge J,<sup>20</sup> in which that judge cast doubt on the correctness of *In the Goods of Sarah Hale*.<sup>21</sup> Horridge J’s view was that “at sea” meant being engaged on a voyage or on work connected with the actual navigation of the sea. All that I think that I need say is that this proposition is out of line with the trend of more recent authority, in which I include the judgment in *Re Rapley, deceased*,<sup>22</sup> and that, on the facts of one of the cases before Horridge J, a finding adverse to the alleged will was inevitable, even if the judge had applied the more generous (and, as I think, the correct) test.<sup>23</sup>

[59] If I apply that test to the circumstances in which the 1990 will was made, I am in no doubt that Ashley must be regarded as having been “at sea” when he made it. The evidence shows that he telephoned the owners of the *CPLB Crawler* or their agents for instructions on 12 February. Those instructions can only have been to proceed to join the ship in Bombay, because all his recorded activity in England after 12 February was directed towards preparation for the journey to India, in particular the obtaining of the visa. That Ashley was from 12 February engaged to join the ship is also demonstrated by the record which he kept of expenses because, absent any such definite engagement, those expenses would not have been claimable. The nights on which he stayed with Christine can be identified from his record as those of 13 and 14 February, when, adapting the words of Havers J, he was contemplating the voyage and preparing for it.

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<sup>17</sup> [1952] P 71: the judgment contains a comprehensive and valuable review of the authorities.

<sup>18</sup> [1952] P 92 at 93.

<sup>19</sup> [1983] 1 WLR 1069.

<sup>20</sup> *In the Estate of Thomas. In the Estate of Bowly* (1918) 34 TLR 626 at 628.

<sup>21</sup> [1915] 2 IR 362.

<sup>22</sup> [1983] 1 WLR 1069 at 1073.

<sup>23</sup> In *Thomas*, the deceased was in hospital after having been discharged from his ship; *Bowlby*, however, is out of line with the other decisions, the deceased being on a mere five days leave from the Royal Naval vessel of which he was in command.

[60] If the 1990 will is upheld, it will have operated to revoke any previous will, which would include any will made in 1985. What happened in 1985 is less well documented and the evidence is equivocal. If the 1985 will were alone in contention, I would not have upheld it. The best evidence is that, very soon after 6 May, Ashley wanted to catch a flight at Heathrow for the purpose (so he said) of joining his ship. There is, by contrast with the events of 1990, no evidence of previous contact with ship owners or agents; no mention to anyone of a specific vessel; no record of expenses to demonstrate that Ashley was, while in England, going about his employer's business; and no accounting for the interval between (say) 7 May and the date, 14 May, on which Ashley was medically examined in Rotterdam. It seems that, after 14 May, Ashley was "kicking around" (to use his own words) in Rotterdam for a week: but it does not follow that he was in Rotterdam for a whole week before that date. It is, in my judgment, as probable that Ashley left Heathrow in the hope of obtaining a post as it is that he was, when he spoke to Christine in Leeds, definitely engaged by a particular employer. All this is, however, academic: indeed, the relative weakness of the case for the 1985 will serves, in my judgment, to underline the strength of that for the 1990 will.

### **Disposal**

[61] It follows that I will revoke the grant of letters of administration, pronounce in solemn form in favour of the 1990 will, and direct that a grant of probate be made to Aunt Anne or her attorney. It may assist the parties if I express a provisional view as to costs. The circumstances of the case were, in my judgment, such as to make a challenge to the two wills inevitable. That challenge was made with moderation, and did not extend beyond putting Aunt Anne and her witnesses to proof and to canvassing some short legal points. This was done without rancour, much less any attack on the honesty of the witnesses, and with commendable brevity. It is unusual nowadays for the court to allow the costs of all parties to a contested probate action out of the estate, but this is an unusual case, and the argument for making an order along these lines appears to me to be a strong one.

Peter Langan  
Mercantile Judge, North Eastern Circuit

14 September 2009