SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT PERTH

[2024] SC PER 13

PER-A7-23

JUDGMENT OF SHERIFF DAVID W HALL

in the cause

(FIRST) VALERIE SCOTT-MAY; (SECOND) MAUREEN CURRIER;

(THIRD) GILLEAN McNAB

Pursuers

against

SHONA SCOTT-MAY

Defender

Pursuers: Macleod, adv
Defender: Garrioch, sol adv

PERTH, 2 NOVEMBER 2023

The Sheriff having resumed consideration of the cause sustains the defender's first and second pleas-in-law to the extent of dismissing crave 1; repels the pursuers' first, second and third pleas in-law; assigns a procedural hearing to enable parties to address me in respect of further procedure and expenses.

NOTE

[1] This debate called before me on 5 June 2023 in respect of the pursuers' preliminary pleas and the first and second preliminary pleas of the defender. The pursuers were represented by Mr McLeod, advocate and the defender by Mr Garrioch, solicitor advocate.

[2] The case concerns the parties rights in the property at ("the subjects").

[3] The parties are all sisters and this case is concerned with the interpretation of their mother's Will in particular the provision therein which entitles the defender to reside in the subject which formed part of their mother's estate.

[4] The Will is dated 21 April 2004 and the parties' mother died during 2008.

[5] In terms of clause 4 of her Will, the parties' mother directed her trustees to make over the residue of her estate to the parties equally between them or among them. No specific reference is made to the subjects in dispute at this part of the deceased's Will but it was a matter of agreement between the parties that the subjects, namely ……, formed part of their mother's estate at the time of her death and fall to be treated as part of the residue of their mother's estate. Specific reference is made to the subjects in clause 5 of the Will which is in the following terms:

> "I direct that my daughter, the said Shona Scott-May shall be permitted to reside at ……. aforesaid after my death so long as she may wish to do so and that on a rent free basis, declaring however that my daughter shall be responsible for the payment of all normal running costs such as Council Tax, utility bills and the like for so long as she chooses to reside there".

[6] Notwithstanding reference to "……" there is no earlier mention of the subjects in the deceased's Will, other than as the home address of the deceased herself.

[7] There is no subsequent reference to the subjects in the deceased's Will but in a codicil to said Will dated 11 May 2004 the deceased bequeathed to the defender among other things:

> "the whole stock (whether living or dead), crop (whether growing or harvested including timber, standing or fallen), unexhausted manures, seeds, fertilisers and other farm stores, farm vehicles, machinery and implements and all other moveables used in the business of the partnership between the deceased and the defender"

[8] When the parties' mother died the subjects extended to 47 acres or thereby. In or about 2013 a portion of land, amounting to 12,356 square metres was disponed. The subjects

currently comprise a house in which the defender lives and a lodge erected by the first named pursuer in or around 2010.

[9] The defender has resided in the subjects continuously for her entire life. Prior to the death of the parties' mother the defender operated the subjects as a croft in partnership with her mother. The defender still operates the subjects as a croft.

[10] Both parties lodged written submissions which they adopted and relied upon. In addition, both parties made further oral submissions at debate.

Pursuers

[11] The pursuers' position is that there was no binding condition in terms of which the pursuers acquired their interest in the subjects. The said effect of clause 4 of the Will means that the purported right of occupancy conform to clause 5 of the Will is ineffective. The defender has no real or personal right of occupancy enforceable against the pursuers — the construction of the Will contended for by the defender is repugnant to the pursuers' interests as heritable proprietors of the subjects. The key issue is the testamentary interpretation of the Will and the effect of the Will.

[12] The Supreme Court case of *Marley* v *Rawlings* 2015 AC 129 authoritatively sets out the approach to interpreting a testamentary writing.

[13] The relevant passages are from the speech of Lord Neuberger:

> "19. When interpreting a contract the Court is concerned to find the intention of the party or parties and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed and (v) common sense but (b) ignoring subjective evidence of any party's intentions ...
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> 20. When it comes to interpreting Wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contact or a Will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context.
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> 23. In my view at least subject to any statutory provision to the contrary, the approach to the interpretation of contracts as set out in the cases discussed in para 19 above is therefore just as appropriate for Wills as it is for other unilateral documents. Indeed the well known suggestion of James LJ in *Boyes* v *Cook* (1880) 14 ChD 53, 56 that when interpreting a Will the Court should 'place itself in the testator's armchair' is consistent with the approach of interpretation by reference to the factual context".

[14] A testamentary writing falls to be interpreted by considering its terms without recourse to extrinsic evidence *Blair* v *Blair* (1849) 12 D 97 and it is only in exceptional circumstances that recourse to extrinsic evidence will be permitted *Hannay's Trustees* v *Keith* 1913 SC 482.

[15] In relation to the issue of repugnancy where in a Will there is an outright gift of property any subsequent attempt to limit the beneficiary's rights is repugnant and will not be given effect to.

Lord Sands opined at page 119:

> "It is well settled that, if an initial gift is made in absolute terms, the Court will not in general construe that gift as qualified so as to be short of a gift of fee by the terms of any succeeding provision. .... The Law does not say 'Clause 1, if read by itself, is *prima facie* a gift of fee but Clause 2 shows that this was not the intention'. On the contrary the Law says "Clause 1, if read by itself, imports a fee. Clause 2 is inconsistent with a fee. Therefore Clause 2 must be treated '*pro non scripto*'".

[16] In this case there is no liferent or trust. The pursuers acquired an absolute interest in heritable property. There is no conveyance of the trust estate to trustees. Clause 5 is not an expressed condition it is at best a wish.

[17] While a testamentary bequest can be made conditional as Lord President Dunedin observed in *Garden's Executor* v *More* 1913 SC 285 (at page 288):

> "It is quite possible to constitute a precatory trust which is binding upon an Executor; but if the Estate is left to a person not as an Executor but as a beneficiary, then it must be left with a clearly expressed condition in order to bind him".

[18] The right of *pro indiviso* proprietor to sue for a division and sale is an absolute right.

[19] In terms of clause 4 there was an outright gift in favour of the parties each to a *pro indiviso* share of the subjects. That legacy was not conditional. There would require to have been a clearly expressed condition - that the bequest of the subjects was subject to a right of occupancy in favour of the defender to bind the pursuers. There is no such condition clearly expressed or otherwise. The defender does not have any personal or real rights enforceable against the pursuers. Any attempts by the defender to restrict the pursuers interest in the subject is repugnant.

Defender

[20] There was no dispute between parties in the principles to be applied in the interpretation of a Will. The correct approach is set out by Lord Neuberger in his judgement in the Supreme Court decision in *Marley* v *Rawlings* (2015) A.C 2019.

[21] This approach was adopted by Lord Pentland in the outer house decision in *Fulton and Others* v *Muir* (2017) CSOH 25.

[22] The defender referred to the need to have regard to all provisions within a contract or Will as an important principle of interpretation.

[23] Lord Hodge JSP in *Wood* v *Capita Insurance Services* (2017) AC 1173 at paragraph 10 stated:

> "The Court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this a literalist exercise focused solely on a parsing of the wording of the particular clause but that the Court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning".

[24] The question in this case is viewed objectively what was the testators intention?

[25] On a literal interpretation the answer is clear.

[26] Clause 4 is entirely clear in its terms each daughter was to become a *pro indiviso* owner of …….

[27] Clause 5 is also entirely clear in its terms namely that the defender was to be permitted to continue to reside in ……... for so long as she wished to do so. The defender had a right to occupy the subjects to be owned by all four daughters.

[28] The guidance of Lord Hodge in *Wood* v *Capita Insurance Services* is equally applicable to Wills. The wording in the Will is clear. Context is less important. Exercise of interpretation is a unitary one and so it is relevant to identify the applicable context. This exercise supports the literal interpretation identified. The relevant context is as follows:

[29] All four daughters were adults at the date of the Will and so not dependents.

[30] The pursuers had all left …… but the defender had remained in occupation in …….. with her mother and had, in fact, resided there all her life.

[31] The defender had operated the croft in partnership with her mother.

[32] In terms of the codicil (production 5/2) the bequest would be pointless unless the deceased intended the defender to continue to reside at …….. and operate the croft.

[33] The factual matrix in play at the time of the Will entirely supports an interpretation that the deceased wanted the defender to continue to reside at ……. for as long as she wished to do so.

The issue of repugnancy

[34] The pursuers argument is that the principle of repugnancy is engaged in this case. They say

[35] Clause 5 is repugnant to clause 4 and that clause 5 requires to be treated as "*pro non scripto*".

[36] The pursuers argument fails for two reasons. They state the correct approach is stated in the Inner House decision in *Ironside*. They are wrong to do so. *Ironside* is not good Law. The correct approach is set out in *Cochrane's Executrix* v *Cochrane* 1947 SC 134. Secondly when proper regard is had to the terms of the Will it can be seen repugnancy is not engaged.

[37] The approach in *Ironside* was criticised by the seven judge bench in *Cochrane's Executrix* v *Cochrane*. It determined that the formulation of the principal in *Ironside* was too simplistic to have application.

[38] In *Cochrane* the issue centred on a Will in which a testator whose estate consisted entirely of moveables bequeathed all he possessed to his sister. He further provided

> "Anything she may desire to dispose of or realise after my decease such as library and stamp collection may be done. On her decease everything of mine to be sold and the proceeds divided".

[39] Conflicting provisions arose on the one hand a gift of property, but this was contradicted by the subsequent provision, which, given its terms, impacted on rights associated with ownership.

[40] In delivering the court's decision LJC (Cooper) and Lord Jamieson said that the statement of Law in *Ironside*

> "formulating the so called rule of the initial gift of fee is stated too broadly and without necessary qualifications, and that it is impossible thus to combine in a single 'elementary principle' several different rules of more limited ambit".

[41] Later they stated:

> "The above examples are not presented as exhaustive of the type of case in which an initial gift of fee may override later repugnant (or seemingly repugnant) provisions, but they embrace the vast majority of the instances recorded in Scottish Decisions. They certainly carry the risk of the initial gift of fee a long distance, but they do not carry it the whole length of Lord Clyde's formulation. The bare fact that the separate rules have been stated and re-stated with such provision and subject to so many qualifications is itself factual to the over simplification of the single abbreviated formula in Ironside's Executor and of the use to which that formula was sought to be put.
>
> For these reasons and in view of the numerous cases to which we were referred in which the Court has not hesitated to construe a Will without regard to the alleged 'elementary principle' of Ironside's Executor we are unable to accept as sound the statement of the rule contained in that case".

[42] Thus, the pursuers are not entitled to rely on the dicta in *Ironside's Executor* as determining the approach to be adopted in this case.

[43] Repugnancy is not engaged in this case. Clause 5 does not impose conditions that impact on the right of ownership. It modifies or abridges the gift by specifying that it comes with a condition, that condition being the defender's right of occupation.

[44] As was stated in *Cochrane's Executrix* a provision which modifies or abridges the gift is not repugnant clause 5 is not therefore repugnant to clause 4. The gift, ownership came

with a condition or burden that formed an integral part of the gift itself. The two elements cannot be distinguished as they form part of the gift. There is no provision seeking to subsequently impose a condition that impacts that gift/ownership.

[45] I was referred to the Inner House decision in *Gore-Browne-Henderson's Trustees* v *Grenfell* 1968 SC 73 for guidance. In that case a testator who owned an estate which included two farms directed his Trustees to convey the estate to a cousin "as her own absolute property subject to the following conditions "

[46] The conditions included directions that the trustees were to locate a tenant for the farms gifted. The cousin contended that the condition was repugnant to the gift of the fee of the estate. The court determined that there was no repugnancy, there being no direct gift of an absolute unqualified fee of the estate to the testator's cousin but only a direction to the trustees to convey it to her subject to the conditions which became conditions of the gift.

[47] LP Clyde opined:

"The first question in the case is whether these conditions regarding the tenancy of the farm are repugnant to the bequest in favour of Mrs Grenfell and therefore fail. In my opinion there is no such repugnancy. In the first place the scheme of this Will does not involve a direct gift from the testator to Mrs Grenfell, but a disposition of the testator's whole estate to Trustees to carry out certain Trust purposes.

These Trust purposes involve payment of debts and legacies, and thereafter, so far as the heritable properties are concerned, the Trustees are directed to make them over to Mrs Grenfell subject to the Trustees having offered a lease of the farms to a selected tenant. The only right which Mrs Grenfell gets to the heritage under this Will is a right subject to a Lease negotiated by the Trustees. It is well settled that where, as here, a bequest is contained in a direction to Trustees to pay a named beneficiary 'whatever conditions are adjected to that direction become condition of the gift itself' (per LJC Inglis in *Donaldson Trustees* v *MacDougall* 12 at page 154 an observation which was approved on appeal 13 - see *Henderson on vesting* (2nd Edition) page 24. Under this Will Mrs Grenfell could not demand from the Trustees an unqualified conveyance of heritable estate. That is not what the testator has given her. She can only get a conveyance subject to the possible lease, which is a qualification and condition of the gift to her.

Apart from this consideration in my opinion in the second place the doctrine of repugnancy has no application to the circumstances of this bequest. The doctrine only applies (see the Opinion of the Judges of the First Division in *Yuill's Trustees* v *Thomson*, 14 at page 819) 'when a vested unqualified and indefensible right of fee is given to a beneficiary of full age'. The Court has held that in such a case directions to the Trustees such as to retain capital and pay over the interest are repugnant to the initial gift. But this is not the situation in the present case. Mrs Grenfell's rights under this Will is not an unqualified right of fee at all, but merely a right to a conveyance of the heritage, subject to a Lease to be negotiated by the Trustees. It was argued on behalf of Mrs Grenfell that the effect of the provision regarding the heritage was to confer an unqualified right of property on Mrs Grenfell and then to seek to reduce the value of that right by purely administrative provisions as to the manner in which the property was to be dealt with namely by its occupancy by a tenant. This argument, however, confuses values with rights and moreover fails to recognise the qualified nature of the right conferred on Mrs Grenfell. In the whole circumstances, therefore, in my opinion there is no repugnancy in the provision in question, and the Trustees under the Will are bound to offer the farms to a tenant before conveying a property to Mrs Grenfell".

[48] In this case the clear scheme of the Will was that the beneficiaries would obtain ownership of ……. subject to the defender's entitlement to reside there. The entitlement was a qualification or condition of the gift. It has an impact on the value of the gift as opposed to rights. The price at which the property can be sold will likely be reduced as a consequence of the defender's entitlement. Any such reduction in value is not a relevant consideration to take it into account, it would confuse values with rights.

Decision

[49] The pursuers seek declarator in terms of crave 1 that under clause 4 of the Will the pursuers and the defender each acquired unconditionally an equal *pro indiviso* share of the subjects and that clause 5 of the Will is ineffective in conferring a real or personal right of occupancy in favour of the defender in respect of the subjects which restricts the pursuers' right to sell the subject with vacant possession.

[50] Secondly, in terms of crave 2 the pursuers seek declarator that they are entitled to insist in an action of division and sale of all the subjects and for division of the subjects between the pursuers and the defender, or if a division is found to be impracticable or inexpedient for declarator the subjects should be sold as after mentioned ...

[51] The Court has to determine firstly in relation to the Will the principles to be applied in the interpretation of the Will and in particular clauses 4 and 5.

[52] Parties were agreed that the Supreme Court case of *Marley* authoritatively sets out the approach to interpreting a testamentary writing, the relevant passages from Lord Neuberger at paragraphs 19 and 20. The approach to interpreting Wills is the same as the approach to interpreting contracts. The aim is to identify the intention of the party by interpreting the words used in their documentary, factual and commercial context.

[53] I was referred to the approach set out by Lord Pentland in the Outer House decision in *Fulton* where he adopted the approach set out by Lord Neuberger in *Marley*.

[54] Lord Pentland approved the well known approach that when interpreting a Will, the court "should place itself in the testator's armchair" and that the court is concerned to identify the intention of the party by reference to

> "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean".

[55] I accept that I require to have regard to all provisions within the Will. This approach was identified in *Wood* by Lord Hodge JSP at paragraph 10 where he said:

> "The Court's task is to ascertain the objective meaning of the language which the parties have choose to express their agreement. It has long been accepted that this is not a literalise exercise focus solely on a passing of the wording of the particular Clause but that the Court must consider the contract as a whole and depending on the nature, formality and quality of drafting the contact give more or less weight to elements of the wider context in reading its views as to that objective meaning".

[56] I considered the question viewed objectively as what was the testator's intention when she subscribed the Will dated 21 April 2004.

[57] I find that the wording in the Will is clear - clause 4 is entirely clear in its terms that the deceased's estate was made over to her four daughters equally between them - the estate included the subjects thus each daughter became a "*pro indiviso*" owner of the subjects.

[58] I also found clause 5 to be entirely clear in its terms namely that the defender was to be permitted to continue to reside in the subjects for as long as she wished to do so.

[59] I find that the defender has a right to occupy the subjects owned by all four daughters.

[60] To me the testator's intention was further enforced in the codicil (production 5/2) leaving to the defender

> "The whole stock (whether living or dead), crop (whether growing or harvested including timber, standing or fallen), unexhausted manures, seeds, fertilisers and other farm stores, farm vehicles, machinery and implements and all other moveables used in the business of the partnership between the deceased and the defender".

[61] The defender had lived in the subjects her whole life and worked the farm alongside the deceased.

[62] Since 20 August 2008 the parties in agreement disponed in 2013 12,356 square metres.

[63] In or around 2010 the first pursuer erected a lodge with the agreement of all the parties.

[64] A stage has been reached where the pursuers now wish to sell the subjects and divide the net proceeds between the parties equally. The parties have been unable to agree the process whereby this can be achieved and the defender wishes to continue to reside in the subjects.

[65] It is clear to me that if I placed myself in the armchair of the testator the wording of the Will and the facts in place at the time of the Will cause me to conclude that the deceased wanted the defender to continue to reside at the subjects for as long as she so wished.

[66] The court secondly has to decide whether the principle of repugnancy is engaged in this case.

[67] The pursuers argue that clause 5 is repugnant to clause 4 and therefore clause 5 requires to be treated as "*pro non scripto*".

[68] They contend that the defender's averments that she has acquired a continuing right of occupancy are wrong as a matter of law. The reason being the deceased conferred an

outright gift of property to the parties including the pursuers and therefore any attempt to restrict the pursuers' interests in the subjects is repugnant.

[69] The defender argues the correct approach is set out in the Inner House decision in *Cochrane's Executrix* and not in *Ironside's Executor*. In *Cochrane* a seven judge bench found the principle in *Ironside* was too simplistic to have application.

[70] The arguments on repugnancy in those cases were that the offending terms sought to dictate what may happen at some point in the future to the property gifted. The terms being contradictory to the right of ownership, impacting on entitlement to dispose or bequeath.

[71] I accept the submission of the defender that this case is different.

[72] Clause 5 does not impose conditions that impact on the right of ownership - it modifies the gift by specifying it comes with a condition, the defender's right of occupation. *Cochrane* states that a provision which modifies or abridges the gift is not repugnant.

[73] I conclude in this case the clear scheme of the Will was that the beneficiaries would obtain ownership of the subjects subject to the defender's entitlement to reside there, that entitlement being a qualification of the gift.

[74] I am satisfied considering the submissions of the parties and the authorities referred to that the terms of clauses 4 and 5 are clear and that further clause 5 is not repugnant to clause 4.

[75] Therefore, my conclusion is that the pursuers are not entitled to decree as first craved. I will repel the first, second and third pleas-in-law of the pursuers and sustain the first and second pleas-in-law for the defender to the extent of dismissing the pursuers' first crave.

[76] Parties did not address me in relation to the pursuers' second crave and how, if at all, it could be proceeded with and accordingly I will assign a procedural hearing to enable

parties to address me in respect of further procedure and also in respect of the issue of expenses