SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

[2019] SC ABE 18

ABE-A297-18

JUDGMENT OF SHERIFF PHILIP MANN

in the cause

THE PARACHUTE REGIMENT CHARITY

Pursuer

against

DEBORAH LOUISE HAY

Defender

Act: Parratt, QC
Alt: Simpson, QC

Aberdeen 22 February 2019

The sheriff, having resumed consideration of the cause, Sustains the pursuer's preliminary plea number one to the extent, meantime, of finding the defender's averments in answer to be irrelevant; Repels all other preliminary pleas; Continues the cause to the procedure roll of 21 March 2019 at 10:00am within the Sheriff Court House, Civil Centre, Queen Street, Aberdeen to enable parties to address the court on the precise terms of the interlocutor required to dispose of the cause in light of this interlocutor and the note appended hereto; reserves the question of expenses meantime.

Note

Introduction

[1] This is an action of count reckoning and payment by one of the two residuary beneficiaries on the estate of the late Gregory William Hughes (hereafter referred to as "Gregory").

[2] The issue between the parties is whether, properly interpreted, clause Three of Gregory's Will contains a valid bequest and, if so, whether the legacy of that bequest has adeemed.

[3] The pursuer has two preliminary pleas as follows:

> "1. The Defender's averments in answer being irrelevant, et separatim lacking in specification, decree should be granted as craved."
> 2. The Defender's averments in answer, being irrelevant, et separatim lacking in specification, should not be admitted to probation."

[4] The defender has one preliminary plea as follows:

> "1. The proper interpretation of the Legacy being that Ms Hay is to receive whatever the deceased received by way of rights in, to, or deriving from The Old Schoolhouse, the action should be dismissed, under deduction of the expenses involved in his acquisition of those rights."

[5] I heard debate on these preliminary pleas on 31 January 2019. The pursuer was represented by Mr Parratt, QC. The defender was represented by Mr Simpson QC.

The Admitted or Agreed Facts

[6] The following facts were admitted or agreed either in the pleadings or by concession for the purposes of the debate by counsel during the debate:

[7] Gregory died on 14 December 2014. He left a Will, prepared by a solicitor, which is dated 13 March 2014. The defender is the sole executrix on his estate.

[8] Clause Three of Gregory's Will is in the following terms:

"I bequeath the following specific legacy free of expenses and of Government taxes payable on my death, namely:- to KATHERINE HAY, my interest in the property known as The Old Schoolhouse, Ruthven, Huntly, Aberdeenshire"

[9] Katherine Hay (hereafter referred to as "Katherine") is the defender's daughter.

[10] Gregory was the son of James Hughes (hereafter referred to as "James"), who died on 11 December 2009. James had one other child, Mrs Clare Glass.

[11] James's estate included property known as The Old Schoolhouse, Ruthven, Huntly, Aberdeenshire (hereafter referred to as "the property").

[12] James had left a Will by which he bequeathed his whole means and estate to his wife and thereafter provided:

> "And in the event of my said wife not surviving me I bequeath my said means and estate equally between my children, subject to payment of my debts and funeral expenses and the expenses of administering the Executry hereby created, and I nominate and appoint my daughter Mrs Clare Isabella Hughes or Glass to be my executor."

[13] James's wife predeceased him. Mrs Glass was confirmed as his executor nominate.

[14] At the time when Gregory executed his Will the property was still within James's estate and was on the market for sale. Gregory knew this. The property was sold sometime prior to mid-June 2014. Gregory received his share of James's estate, which included the net free proceeds of sale of the property, in mid-June 2014.

[15] Gregory did not change his Will before he died, although he was capable of communicating by text and email though not verbally.

Submissions for the Defender

[16] Mr Simpson commenced by looking at some authorities to establish how one should go about the task of interpreting a Will. In *Carleton* v *Thomson* (1867) 5M (H.L.) 151 Lord Colonsay said, at page 153:

> "Other questions are involved in the appeal, but I shall first deal with the question of vesting. When the question arises under a *mortis causa* settlement, whether the benefit given is or has become a vested right, the intentions of the testator, in so far as they can be discovered or reasonably inferred from the deed, taken as a whole, and from the circumstances legitimately collected under which the deed was made, should have effect given to them."

[17] Then in *Marley* v *Rawlings* [2015] A.C. 129 Lord Neuberger, at para 19, said:

> "When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does it 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."

Then at paragraph 20 he said:

> "When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context."

[18] Finally, on this point, Mr Simpson referred to the case of *Fulton* v *Muir* [2017] CSOH 25 in which Lord Pentland followed Lord Neuberger's approach.

[19] Mr Simpson suggested that the pursuer's approach was to focus simply on the word "interest" and to seek to give it the only meaning that, it said, it could bear. According to the pursuer the only meaning that the word could bear was a recognised legal right or title. The pursuer was ignoring the fact that "interest" could have other meanings in other legal contexts. It could mean a financial interest of some sort.

[20] Mr Simpson then examined the terms of Gregory's Will following the approach identified by Lord Neuberger. He pointed to clause FIVE 2 of Gregory's Will which conferred power on the executor to "settle any pecuniary or specific legacy bequeathed by me either in cash or in kind or partly in cash and partly in kind." This indicated that it was of no great importance to Gregory whether Katherine obtained a recognised legal right in the property. He maintained that when one had regard to the facts it could be seen that Gregory used the word "interest" in a broader sense than simply to mean a recognised legal right. This was because Gregory knew that he had some sort of interest in the property, although since he was merely a residuary legatee of James he might never, as a matter of law, obtain any actual legal right to the property.

[21] In response to a question from the bench Mr Simpson maintained that Gregory's interest in the property survived the sale of the property because at the time that Gregory's Will was executed the sale of the property was already afoot and because it would be slightly pointless to restrict the word "interest" to mean his right as a residuary legatee to a share in the property.

[22] In short, Mr Simpson maintained that Gregory had used the word "interest" to mean his interest in the property as at the date of his Will. "Interest" had to include the value of that interest were the house to be sold. This meant, he said, that the subject of the legacy was the value of Gregory's interest in - in other words the monetary value of his share of - the property. If I understood Mr Simpson correctly, he was saying that the subject of the legacy came to be the actual sum of money that Gregory received, after the date of the Will, as representing his interest in the property at the date of the Will.

[23] He maintained that that legacy could not adeem unless it could be shown that that actual sum of money had been dissipated by Gregory during his lifetime. He accepted that

that would involve a detailed examination of Gregory's bank accounts and financial records to determine whether and to what extent he had spent that actual sum of money.

Submissions for the Pursuer

[24] Mr Parratt's submissions relative to what was meant by the phrase "my interest in the property known as The Old Schoolhouse, Ruthven, Huntly, Aberdeenshire" were predicated on Gregory being a residuary beneficiary in James's estate. His position was that, as a residuary beneficiary, Gregory had no right or title to any specific asset within that estate, such as the property. What had vested in Gregory was a one half share of James's estate not a one half share in the property. Gregory never had vested in him any proprietorial right in the property. If Gregory had no right or title to the property then he had no interest in it which could form the subject of a bequest. The legacy was therefore inept.

[25] Under reference to Gloag and Henderson, *The Law of Scotland*, fourteenth edition, paragraph 39.16 Mr Parratt submitted that the ordinary rule of construction of testamentary writings was that "the intention of the testator is to be collected from the language of the deed read in the light of those circumstances (such as the state of the testator's family and property) known to the testator and with reference to which the will was written". The function of the court was to interpret the words and not to speculate as to what the testator meant. A passage from the speech of Lord Moncrieff in the case of *Blair* v *Blair* (1849) 12D 97 gave helpful guidance. At Page 107 Lord Moncrieff said:

> "I hold the law to be clear, that we must find the intention of the testatrix within the four corners of the deed which she has legally executed. We are, undoubtedly, to look at the whole deed; and I do not doubt, that if there be any doubt in the terms, we are to take into consideration the circumstances under which the deed was

> executed – that is, with reference to the state of the family, and any relative deeds duly executed, to which the testatrix was a party."

Mr Parratt acknowledged that there had been some movement in that position, such as in the case of *Marley* v *Rawlings*, but he pointed out that *Marley* was not concerned with the issues of specific legatees and ademption. *Marley* was an English case and although the bench included the Scottish judge Lord Hodge, he did not specifically concur in Lord Neuberger's judgment but merely offered some comments as to how Scots Law might have dealt with the situation.

[26] Mr Parratt's position came to be that it had always been the case, and it remained the case, in Scots Law that in construing a testamentary writing the court should not look beyond the words used unless there was ambiguity. He said that the word "interest" should be construed in the legal and doctrinal context of Gregory being a residuary legatee on James's estate. All Gregory had was an interest in the residue of the estate which happened to include the property. As a matter of law Gregory could not bequeath an interest in the property because he himself did not have an interest in it. He had no right to direct James's executor as to how that estate should be settled or administered. This was vouched by the case of *Cochrane's Executors* v *Inland Revenue* 1974 S.C. 158 in which, at page 165, the Lord President (Emslie) said:

> "It is no part of the Law of Scotland that a residuary legatee in the position of Peter Cochrane in this case acquires *a morte testatoris* any right to any particular asset forming part of the entire estate which has passed to the executors for disposal in accordance with the testator's directions and intention."

At best Gregory had a right to an accounting but he could not force the executor to give him a proprietorial interest in the property.

[27] In the course of Mr Parratt's submissions I directed him to the specific terms of James's Will and suggested that Gregory was not a residuary legatee but was, rather, a

universal legatee. Mr Parratt accepted that James's Will could bear that interpretation and also acknowledged that the rights of a universal legatee might be significantly different from the rights of a residuary legatee as regards interest in the assets forming part of the estate. He made the point that it was clear that Gregory had never called on James's executor to vest in him a proprietary right in the property. As at the date of Gregory's Will he did not have such a right. Thus it was still the case that he had no interest in the property that he could bequeath.

[28] Mr Parratt then turned to the question of ademption on the assumption that I held that Gregory did have an interest in the property that could form the subject of a bequest. He submitted that whether or not a legacy had adeemed was purely a question of fact to be tested as at the date of death of the testator. The question was whether the subject of the bequest remained in the testator's estate as at the date of his death. The intentions of the testator were irrelevant to that question. These propositions were vouched by several authorities – Gloag and Henderson, The *Laws of Scotland*, fourth edition paragraph 39:30; Hiram *The Scots Law of Succession* second edition, paragraph 8.15; *Cobban's Executors* v *Cobban* 1915 S.C. 82 (a case in which the legacy comprised a debt due to the deceased which was repaid to the deceased during his lifetime with the result that the legacy had been adeemed).

[29] The subject of the bequest had to still be in the testator's estate as at the date of his death in substantially the same form. So, for example, in the case of *Ogilvie-Forbes's Trustees* v *Ogilvie-Forbes* 1955 S.C. 405, where the testator had converted his interest in a house into shares in a company to which the house had been conveyed, a legacy of that house adeemed because it no longer existed in the estate, albeit that it might be said that the house was represented by the shares in the company.

[30] Under reference to the case of *Young's Trustees* v *Young* 1927 S.C. (H.L.) 6, Mr Parratt maintained that the court was bound by the facts as agreed and admitted even if, in the words of Viscount Dunedin at page 9 in that case, "the Court is bound to give an interpretation which in its heart it is perfectly certain is not what the testator would have wished". As a matter of law on the facts of this case the property no longer existed so far as Gregory's estate as at the date of his death was concerned. Therefore, the legacy of an interest in the property had adeemed.

[31] Mr Parratt then made reference to the case of *McArthur's Executors* v *Guild* 1908 S.C. 743 as an example of a case in which ademption did not occur where the testator had agreed to sell the subject of the legacy, a hotel, but yet the hotel had remained in his estate because a suspensive condition had not been purified as at the date of his death.

[32] Mr Parratt submitted that there was a sufficiency of agreed or admitted facts upon which I could hold that the legacy to Katherine had adeemed. If I so held then the defender's averments had to be held irrelevant and the pursuer was entitled to the decree which it sought.

The Defender's Reply

[33] In a short reply, Mr Simpson took issue with Mr Parratt's submission that it was necessary to find ambiguity before one could look beyond the words used by the testator. But, if ambiguity were needed that was easily found because the word "interest" could have several different meanings.

[34] Mr Simpson pointed out that the form in which Gregory's interest in the property was realised into his estate depended on decisions taken by James's executor not on decisions taken by him. This, he said, supported the interpretation that he sought to place

on the phrase "my interest in the property known as The Old Schoolhouse, Ruthven, Huntly, Aberdeenshire", namely that it was a financial interest. Furthermore, it was a financial interest that survived the sale of the property.

[35] Mr Simpson did not take issue with Mr Parratt's submissions on the law relating to ademption. He said that the question of ademption depended on further factual considerations of what Gregory did with the money after he received it. That was a matter for proof.

[36] Mr Simpson made no submissions relating to the effect on the issues between the parties if Gregory were a universal legatee as opposed to a residuary legatee.

Discussion and Decision

[37] Mr Parratt maintained that the correct approach to interpretation of a Will does not permit the court to go beyond the words used by the testator unless there is ambiguity. He maintained that there was no ambiguity in the use of the word "interest". He maintained that to have an interest in something one must have a right or title. On the other hand Mr Simpson, relying on the case of *Marley*, maintained that enquiry into the surrounding circumstances was permissible whether or not there was any ambiguity. In any event, there was ambiguity in that the word "interest" was capable of having different meanings which could go beyond right or title.

[38] As Mr Simpson pointed out, Lord Neuberger in *Marley* did not qualify his comments on interpretation by saying that ambiguity was required. In paragraph 20 of his judgment Lord Neuberger went on to say:

> "As Lord Hoffmann said in *Kirin-Amgen Inc* v *Hoechst Marion Roussel Ltd* [2005] 1 All ER 667, para 64, 'No one has ever made an acontextual statement. There is always some context to any utterance, however meagre.' To the same effect, Sir Thomas

> Bingham MR said in *Arbuthnott* v *Fagan* [1995] CLC 1396, *1400* that "courts will never construe words in a vacuum."

It seems to me that it is impossible to ignore the surrounding circumstances and the context in which a testator makes his Will when interpreting its provisions but, then again, interpretation in the sense of deciding as to which of two competing meanings should be ascribed to a particular word or phrase will generally not be required unless there is ambiguity. Thus the difference in approach adopted by the parties in this case is more apparent than real. Mr Parratt, in fact, examined the surrounding circumstances and, in any event, I think that both Mr Simpson and Mr Parratt came to agree that the facts set out under the heading "The Admitted or Agreed Facts" *supra* could be taken account of by me in determining the issues in the case. They were, though, also agreed that the fact that Gregory did not change his Will after the sale of the property was neutral – perhaps this was an acknowledgment that this was a fact or circumstance that did not exist at the time of making the Will and as such was excluded from consideration.

[39] Giving the word "interest" its ordinary meaning it is, to my mind, indisputable that Gregory had an interest in the property. There is no ambiguity there. The worst case scenario in relation to the nature of the interest would be that Gregory was a residuary beneficiary. In that scenario, If Gregory had been asked at the time of executing his Will: "As regards the state of your property, what is your interest in the Old Schoolhouse?" he would surely have answered "My interest in the Old Schoolhouse is that it forms part of my father's estate in which I have a right to share. I have a right to a share of the proceeds of sale of the property, when it is sold, calculated by reference to the share of my father's estate to which I am entitled." At the very least Gregory had an interest in, though he may not have had a right or title to, the property. His interest may have been indirect but it was an

interest nonetheless. If the property had remained unsold within James's estate at the time of Gregory's death the bequest could have been given effect to by assigning to Katherine the right to receive from James's executor Gregory's share of the proceeds of sale of the property.

[40] But, the property had been sold and no longer formed part of James's estate as at the date of Gregory's death. Mr Simpson maintained that the question whether the legacy had adeemed in these circumstances depended on what the bequest actually was. There was ambiguity as to what Gregory meant by the phrase "my interest in the property known as The Old Schoolhouse, Ruthven, Huntly, Aberdeenshire". It could have meant an interest in the property whilst it remained part of James's estate; or it could have meant Gregory's share of the proceeds of sale. If it meant the latter then those proceeds of sale were still capable of identification within Gregory's estate as at the date of his death.

[41] Mr Simpson maintained that the agreed facts, particularly the fact that, to Gregory's knowledge, the property was on the market for sale at the time when Gregory signed the Will supported his interpretation of what Gregory meant by the phrase "my interest in the property known as The Old Schoolhouse, Ruthven, Huntly, Aberdeenshire". Gregory would have known that there was a possibility that the property would be sold before he died and it would have been a rather pointless bequest if he did not intend it to mean the money received or to be received by him as his share of the proceeds of sale.

[42] I do not accept Mr Simpson's interpretation for the following reasons. Firstly, that interpretation would involve reading into the bequest words that are not there, such as, perhaps, "that sum of money that is equivalent ….. ". The Will was prepared by a solicitor instructed by Gregory. It would have been an easy matter for the solicitor to express the bequest so that it clearly had the meaning contended for by Mr Simpson if that was what he

intended. Secondly, there would be no certainty as to the value of the legacy. Thirdly, the ascertainment of the value of the legacy on Gregory's death would require a forensic examination of Gregory's bank accounts and financial records, a task that would become ever more difficult the longer that Gregory survived. Fourthly, there is nothing on record or in the agreed facts, such as a close relationship, to suggest that Gregory wanted Katherine to benefit from the bequest come what may.

[43] If I were Gregory sitting in my armchair contemplating how to express my Will I would see nothing inherently illogical or nonsensical in deciding that if the property be not sold by the time I die and I shall not have had the benefit of it, anyway, then Katherine can, and may as well, have my interest in it; however, should the property have been sold and I shall have received the benefit of it by way of cash into my estate, which I may or may not have spent as I please by the time I die, then she shall have nothing. I would know that there would be certainty in that approach. I would know that if I wanted Katherine to receive a benefit from my estate come what may I could provide for a bequest of a sum of money to her either by reference to a specific amount or by reference to some formula or other which might or might not be tied to my interest in the property.

[44] In all of the circumstances I am satisfied that the subject of the bequest to Katherine was simply Gregory's interest in the property. On the agreed facts, whatever else the defender might be able to prove on the basis of her pleadings, it cannot be said that Gregory had any interest in the property as at the date of his death. It matters not whether Gregory was a universal legatee or a residuary legatee on James's estate. If he were a universal legatee his interest in the property may have amounted to a legal right to the actual property, but that interest disappeared on the sale of the property. If he were a residuary legatee his interest in the property amounted to a right to receive a share of its sale proceeds

as part of his share of the residue of the estate but (similarly to the situation in *Cobban's Executors* v *Cobban*) that right disappeared when the proceeds were received by him before his death. Either way the legacy in favour of Katherine has adeemed.

[45] It follows that the defender is bound to fail in her defence and that the pursuer's first plea in law falls to be sustained. The other preliminary pleas fall to be repelled. The pursuer is entitled to decree. However, parties were agreed that I should not grant decree at this stage but should continue the cause to the procedure roll to enable parties to address me on the precise terms of the final interlocutor required to give effect to this judgment. This is because the executry accounts in Gregory's estate will need to be brought up to date in order to ascertain the share of residue due to the pursuer. The question of expenses will have a bearing on that issue. As requested by parties I have also reserved all questions of expenses meantime.

Other Matters for Consideration

[46] There is another reason why I think it inappropriate to grant decree at this stage without giving parties the opportunity to consider matters. I am troubled by the fact that neither Katherine nor the other residuary beneficiary has entered the process. So far as I can determine from the process folder neither of them has even had intimation of this action. I am not so concerned about the other residuary beneficiary because it will not be prejudiced by my judgment, although it would have been if my judgment had been in favour of the defender. However, Katherine is prejudiced by my judgment and I think that parties ought to consider what ought to be done in order to avoid any difficulty in the future were Katherine to take issue with it. This judgment would not be *res iudicata* against her.