OUTER HOUSE, COURT OF SESSION

[2024] CSOH 14

A50/22

OPINION OF LORD BRAID

In the cause

MBM TRUSTEE COMPANY LIMITED

Pursuer

against

WILLIAM MOULTRIE

Defender

Pursuer: Heaney; Balfour + Manson LLP
Defender: Byrne KC; Campbell Smith LLP

14 February 2024

Introduction

[1] For several years prior to her death, the defender acted as the attorney of his mother, Mrs Beryl Moultrie, under a continuing power of attorney (POA) granted by her. In this action of count, reckoning and payment Mrs Moultrie's executor is suing for an accounting of the defender's intromissions with Mrs Moultrie's property during his tenure as attorney.

[2] The action called before me for a debate on the procedure roll. The principal issue for decision is whether the defender remains under an obligation to account for his intromissions with Mrs Moultrie's property, or whether that obligation (which admittedly he had) has prescribed. The POA came to an end on Mrs Moultrie's death on 14 December

2016, and the present action was not served until 17 March 2022. Whether the obligation to provide an account has prescribed turns on whether the defender's obligation to account was one which was subject to the short negative prescription provided for by section 6 of the Prescription and Limitation (Scotland) Act 1973 (in which event it prescribed in December 2021, five years after Mrs Moultrie's death, before the action was served); or whether section 6 is disapplied in the defender's case by virtue of paragraph 2(h) of schedule 1 and schedule 3 to the 1973 Act, which provides that a trustee's obligation to produce accounts of his intromissions with any property of the trust is imprescriptible. The crisp question is: was the defender, whilst acting as an attorney under the POA, a trustee within the meaning of the 1973 Act?

[3] There is a subsidiary issue, namely, whether an expert accountancy report lodged in process by the defender is a sufficient account of his intromissions, or whether something more is required in the event that he does remain under an obligation to account.

The Prescription and Limitation (Scotland) Act 1973

[4] Section 6 of the 1973 Act provides, so far as material:

> "**6.- Extinction of obligations by prescriptive periods of five years.**
> (1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years –
> (a) without any relevant claim having been made in relation to the obligation, and
> (b) without the subsistence of the obligation having been relevantly acknowledged,
> then as from the expiration of that period the obligation shall be extinguished."

[5] Section 15, the interpretation section, provides, so far as material:

> "'trustee' includes any person holding property in a fiduciary capacity for another and, without prejudice to that generality, includes a trustee within the meaning of the Trusts (Scotland) Act 1921; and 'trust' shall be construed accordingly."

[6] By virtue of schedule 1 paragraph 1(f), section 6 applies to "any obligation of accounting, other than accounting for trust funds": in other words, an obligation to account will normally prescribe after five years. However, paragraph 2(h) of that schedule further provides that section 6 does not apply to any obligation specified in schedule 3 as an imprescriptible obligation; and the obligations there specified include:

> "...
>
> (e) any obligation of a trustee-
>
> (i) to produce accounts of the trustee's intromissions with any property of the trust;
>
> (ii) to make reparation or restitution in respect of any fraudulent breach of trust to which the trustee was a party or was privy;
>
> (iii) to make furthcoming to any person entitled thereto any trust property, or the proceeds of any such property, in the possession of the trustee, or to make good the value of any such property previously received by the trustee and appropriated to his own use;
>
> (f) any obligation of a third party to make furthcoming to any person entitled thereto any trust property received by the third party otherwise than in good faith and in his possession;
>
> ..."

Adults with Incapacity (Scotland) Act 2000

[7] Since an attorney acting under a continuing power of attorney is subject to the provisions of the 2000 Act, it is also germane to take notice of certain provisions of that Act which were touched upon in submissions.

[8] The concept of a continuing power of attorney was introduced by section 15 of the 2000 Act, which provides, among other things, that if an individual grants a power of attorney relating to his property or financial affairs in accordance with that section (which requires certain formalities to be observed), that power of attorney shall continue to have effect in the event of the granter's becoming incapable in relation to decisions about his property or financial affairs. So it was that the defender came to act as attorney for Mrs Moultrie.

[9] Part 3 of the Act, headed "Accounts and Funds" contains a suite of provisions whereby a person may seek and obtain authority to intromit with the funds of an incapable adult for certain purposes which are set out in section 24A(2). Ordinarily such an application would be made by someone who is not already an attorney (or financial guardian). Section 24D, insofar as material, provides:

> "**24D Authority to open account in adult's name**
> (1) This section applies where—
> (a) a person believes that—
> (i) an adult holds funds;
> (ii) an adult is entitled to income or other payments or is likely to become so entitled; or
> (iii) a fundholder holds funds on behalf of an adult; but
> (b) the adult does not have a suitable account in the adult's sole name in which the funds, income or other payments can be placed for the purposes of intromitting with the adult's funds under this Part.
> (2) Where this section applies, the person may apply to the Public Guardian for a certificate authorising the opening of an account in the adult's name for the purpose of intromitting with the adult's funds.
> ...
> (5) A fundholder presented with a certificate issued under subsection (3) may open an account in the adult's name.
> ..."

Where an account has been opened under section 24D(5), section 25 allows certain persons, including an individual, or individuals acting jointly, to apply to the Public Guardian for a certificate, known as a withdrawal certificate, authorising that person to intromit with an adult's funds. Such person is referred to in the Act as a "withdrawer". The Act contains detailed provisions regulating how and for what purposes a withdrawer may intromit with the adult's funds. By virtue of section 33(2) "fundholder" means a bank, building society or other similar body which holds funds on behalf of another person.

[10] Section 81 provides:

> "**81 Repayment of funds**
> (1) Where–
> (a) a continuing attorney;
> (b) a welfare attorney
> (c) a withdrawer;
> (d) a guardian;
> (e) a person authorised under an intervention order; or
> (f) the managers of an authorised establishment within the meaning of Part 4,
> uses or use any funds of an adult in breach of their fiduciary duty or outwith their authority or power to intervene in the affairs of the adult or after having received intimation of the termination or suspension of their authority or power to intervene, they shall be liable to repay the funds so used, with interest thereon at the rate fixed by Act of Sederunt as applicable to a decree of the sheriff, to the account of the adult.
> (2) Subsection (1) shall be without prejudice to section 69 and 82."

The trustee at common law

[11] As the Stair Memorial Encyclopaedia Volume 24, Trusts, states at paragraph 9, it is difficult to discover a wholly satisfactory definition of "trust" in Scots law. However, certain essential ingredients of a trust, and consequently of a trustee, emerge from the authorities. These are that trust property vests in a trustee, who then holds that property on behalf of a beneficiary. Gloag and Henderson, *The Law of Scotland* (15th Edition, 2022), explains at paragraph 41.03, citing Stair, that the trustee,

> "is the owner of the property subject to the trust:
>
> > 'The property of the thing intrusted, be it in land or in moveables, is in the person of the intrusted, else it is not proper trust.'
>
> However, the property is owned by the trustee under the fiduciary obligation to use it for the benefit of the beneficiary. Such property can be regarded as being in a patrimony separate from the trustee's private patrimony."

[12] Wilson and Duncan, *Trusts, Trustees and Executors,* (2nd Edition) is to similar effect, stating at paragraph 1-43 that the preponderance of authority is to the effect that trust property is vested in the trustee, against whom the beneficiary merely retains a right of

action. Transfer of legal ownership to the exclusion of competing claims is, therefore, necessary to constitute a trust, and the trustee, in whom the property vests, holds that property for a specific purpose:

> "…a trust is either constituted when the owner of the property, who becomes the truster, transfers the legal ownership of the property to trustees to hold it for defined purposes on behalf of the beneficiaries or when it is constituted by operation of law. The trustee has full legal title to the property, the beneficiary a *jus crediti*" (Stair Memorial Encyclopaedia, Trusts, paragraph 12).

In *Inland Revenue* v *Clark's Trustees* 1939 SC 11, Lord Moncrief emphasised the importance of vesting: "the right of property in the estate of the trust is vested in the trustees to the exclusion of any competing right of property".

The power of attorney

[13] The POA granted by Mrs Moultrie appointed the defender to "attend to all matters" on her behalf and, without prejudice to that generality, conferred the following powers, which were to be:

> "operated or not operated as my Attorney in [his] unfettered discretion shall decide:
> 1. to operate, open or close bank and building society accounts, and borrow, in my name,
> 2. to apply for and uplift my benefits and pensions,
> 3. to submit tax returns on my behalf,
> 4. to settle accounts due by me,
> 5. to access, uplift, adjust and sue for sums, documents, information or others due to me,
> 6. to sell or lease or grant security over or manage all or any heritable and moveable property of mine and all or any other property wherever situated of mine,
> 7. to renounce any tenancy, liferent or other right of occupancy,
> 8. to receive, compromise, re-direct, disclaim or renounce as my Attorney shall in my Attorney's unfettered discretion deem appropriate any inheritance falling to me,
> 9. to take decisions relating to Investments,
> 10. to buy or take on lease any heritable or moveable or real or personal property,
> 11. to execute on my behalf and deliver all deeds, stock transfers and other documents,

12. to engage at the usual professional remuneration my Attorney (if appropriately qualified) or any other person as solicitor or other professional adviser."

Submissions

[14] The parties agreed that the issue turns on a proper interpretation of the 1973 Act, and, in particular, what is meant by a "person holding property in a fiduciary capacity" in section 15. Thereafter, they parted company, the defender arguing for a narrow construction, the pursuer for a much wider and more purposive one.

Defender

[15] Senior counsel for the defender submitted that the starting point was to have regard to the essential ingredients of a trustee at common law, set out above. "Trust" and "trustee" had an existing well-established meaning at common law, and Parliament must have intended that those terms would have the same meaning in the 1973 Act; thus, for a person to be a trustee, it was essential that property was transferred to, and vested in, him. In support of this submission, counsel referred to *R (PACCAR Inc)* v *Competition Appeal Tribunal* [2023] 1 WLR 2594, in which the Supreme Court had to determine the meaning of the phrase "claims management services". At paragraph 48, Lord Sales said that the potency of the term defined may provide some guidance as to the meaning of that term as set out in the statutory definition, whether it actually does so depending on the terms of the legislation and the nature of the concept referred to by the word or phrase being defined; and at paragraph 49 he added the corollary, which is that the weaker the established meaning of the term defined, the weaker its ability to throw light on Parliament's meaning (in that case, the phrase "claims management services" was found to have no established meaning). Counsel submitted that one could think of few terms as potent as "trust", the

meaning of which at common law was well understood. Even if there was ambiguity in the word "holding", that should be resolved by determining that it meant holding as a trustee. Prior to the 1973 Act, it was only a trustee's obligation to account which was imprescriptible, not that of a mere fiduciary, and it would be surprising if Parliament had intended such a significant change to the law of prescription; *cf Barratt Scotland Ltd* v *Keith* 1993 SC 142, in which the Lord Justice Clerk (Ross) observed of the 1973 Act that it would be surprising if it had changed the pre-existing law that obligations in missives were covered by the long negative prescription without evincing a clear intention to do so.

[16] If, contrary to that principal argument, "trustee" had a *sui generis* meaning in the 1973 Act, nonetheless there remained a requirement to "hold" property in something close to the same sense as trusteeship. To be held, a property must be owned, or at least possessed: see *Words and Phrases Legally Defined*, 5th Edn, Volume 1, p 1380, referring to *Re Bennet (decd)* [1957] VR 113 at 116. In *Henry Briggs & Co* v *IRC* [1961] (HoL) 1 WLR 68, Lord Reid explained the meaning of "holding of investments or other property" in a different statutory context, stating that it did not mean simply the owning of investments or other property, but that it involved the idea of retention permanently or for an indefinite time. There was a wealth of authority on how the courts had approached the meaning of "held" or "holding" in various contexts, but the case most in point was *Jamieson* v *Clark* (1872) 10 M 399, in which (under the law as it then stood) an executor was held not to be a trustee in the sense of being a depositary; unlike a trustee, an executor had to administer funds rather than to hold them. The consequence in that case (as it ought to be here) was that the obligation to account had prescribed by virtue of the short negative prescription.

[17] Whether "trustee" was given its common law meaning, or a wider meaning, section 15 required not simply that a fiduciary relationship existed, but that property was held in the sense explained. On either approach, it could not be said that an attorney held property simply by dint of being an attorney; it did not vest in the attorney, who merely had a power to intromit with it and so was akin to the position of the executor in *Jamieson* v *Clark*. In support of this submission, counsel prayed in aid the provisions of the 2000 Act, in particular those in Part 3 referred to above. Even if in certain circumstances an attorney might "hold" property, that was not so in all cases, and it was necessary to aver facts and circumstances establishing that, which the pursuer had not done. If the pursuer's argument were correct, that would deprive paragraph 1(f) of schedule 1, which provided that a liability to account was normally subject to the five year negative prescription, of any meaningful effect.

Pursuer

[18] Counsel for the pursuer adopted a more purposive approach to the construction of the 1973 Act. He pointed out that any adult for whom an attorney was acting by virtue of a continuing power of attorney would, by definition, lack capacity and therefore be vulnerable. Section 15 provided a wider definition of trustee than would be the case at common law; see Johnston, *Prescription and Limitation*, (2nd Edn) 3.24. All of the persons listed in section 81 of the 2000 Act, above, were trustees. A continuing attorney was someone who held or handled the adult's money in a broad sense, and as such, although not a trustee at common law, fell within the wider words of the statutory definition. "Holding" could be read as having control or power over the disposal of the adult's property: see the Chamber's Dictionary definition, which listed as one of the meanings of the transitive verb

hold, "to have in one's possession, keeping or power". Such an approach would be in line with the grain of the statutory intention which was to deny the benefit of the short negative prescription to those in fiduciary relationships. Why, counsel asked rhetorically, should the incidence of whether the short negative prescription apply turn on the happenstance of whether the fiduciary had the property vested in him or merely had the power of disposing of it? The adult who had granted the deed was equally at risk of exploitation in both circumstances. The Supreme Court had recently set out the approach to statutory interpretation in *R (O)* v *Home Secretary* [2023] AC 255: what was required was an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words under consideration: see in particular, Lord Hodge at paras [26] to [31] and Lady Arden at [58] to [63]. That case concerned the extent to which external aids might assist in construing a statute: no such aids were relied upon here; however, it had been observed in *PACCAR* that the court will not interpret a statute to produce an absurd result. The pursuer's approach had the opposite result - treating like cases alike. *Ross* v *Davy* 1966 SCLR 369 was a paradigm example of a trustee being a person who had control over property but was not an owner.

Decision

[19] The first question is whether the definition of "trustee" in section 15 of the 1973 Act has the restricted common law meaning contended for by the defender. The defender's potency argument loses much of its force where, as here, the definition is an inclusive one. As Bennion on Statutory Interpretation (8th Edn) explains at 18.3, an inclusive definition is used to enlarge the meaning of the defined term to cover things that are or might not otherwise be caught; the term as used in the Act has its natural meaning (which is left

undefined) and in addition has the special meaning given to it by the inclusive definition. It follows that, here, "trustee" must not only be given its normal common law meaning (which is where the potency argument is relevant), but must also be read as including the persons that the interpretation clause declares are to be included, who are (a) any person holding property in a fiduciary capacity for another and (b) without prejudice to that generality, a trustee within the meaning of the 1921 Act. To read the section 15 definition of "trustee" in the restricted manner contended for by the defender would deprive it of any real effect, and render the inclusive part of the definition nugatory.

[20] That leads to the next question, which is in what circumstances might a person be said to hold property for another in a fiduciary capacity? There is no doubt that a person can do so without necessarily being a trustee in a common law sense, for example, an agent. Were it otherwise, the definition in section 15 would have been unnecessary. Professor Johnston, for one, is clear that the broad definition in the 1973 Act has the consequence that

> "the question of an obligation being imprescriptible can arise well outside the context of trusts proper and may extend to some or all cases in which there is no trust but the debtor in the obligation owes a fiduciary duty to the creditor": Johnston, *Prescription and Limitation* (2nd Edn) 3.24.

However, as Professor Johnston also acknowledges in that paragraph, the precise scope of the category of cases where that does arise is uncertain. He lists solicitors as one example of persons falling within it; so, too, company directors, under reference to *Ross* v *Davy* 1966 SCLR 369 at 374, where it was accepted that, at least in the circumstances of that case, a company director fell within schedule 3, although not a trustee in all cases.

[21] Professor Johnston goes on to say at 3.29 that the broad definition of "trustee" has the result that in any case where property is held by one person who owes a fiduciary duty to another the obligation to produce accounts is imprescriptible, which he observes is

different from the pre-1973 position, and he asks whether this consequence of the Act's broad definition of trustee was intended. It is not only the obligation of a trustee to produce accounts which is imprescriptible of course, but also the obligation to make reparation or restitution in respect of any fraudulent breach of trust to which the trustee was party or was privy; and a person must either be a trustee in relation to both such obligations, or to neither. It follows that since Parliament, by the words used, clearly did intend to remove the cloak of the five year prescriptive period from persons who were not strictly trustees but who had fraudulently intromitted with funds which they held in a fiduciary capacity, it must be taken also to have intended to render imprescriptible the obligation on all persons holding funds in such a capacity to produce an account of their intromissions. If it was necessary for Parliament to evince a clear intention to change the pre-existing law, as Lord Ross observed in *Barratt Scotland Ltd* v *Keith*, above, then it has done so.

[22] Turning next to consider the POA in this case, whatever else it did, it did not transfer Mrs Moultrie's property to the defender nor vest it in him, and so he was not a trustee in the common law sense; but does he nonetheless fall within the broad section 15 definition? The submission of counsel for the defender that the defender merely had the power to intromit with Mrs Moultrie's estate was founded largely on the provisions of part 3 of the 2000 Act. However, as counsel for the pursuer pointed out, that part of the Act (the provisions of which are described at paras [9] and [10]) deals with intromission with an adult's funds by a withdrawer, who almost by definition is not an attorney; in effect, it provides for a less restrictive means by which an incapable adult's estate may be dealt with, short of financial guardianship, where there is no continuing power of attorney. Even if a withdrawer, who merely has a power to intromit with funds for certain purposes and nothing more, cannot be said to hold those funds, it does not follow that an attorney is likewise necessarily a mere

intromitter. Accordingly, reference to section 24D and the related provisions of the 2000 Act does not really advance the argument one way or the other.

[23] This leads to the nub of the case, which is whether any property was "held" by the defender within the meaning of that word in the section 15 definition. Since it follows from the expanded definition of trustee that funds or other property can be held by someone who is not a trustee, there can be no requirement that property need necessarily be owned by, or be vested in, the holder, the most obvious example perhaps being solicitors, who very commonly hold funds for a client. I do not find the authorities cited by counsel on the meaning of "hold" to be of great assistance, other than that they demonstrate that the precise meaning will vary according to context; *Henry Briggs & Co*, above, was very fact-specific and to the extent that it suggests that "holding" requires an element of permanence, clearly does not apply to all circumstances. Rather than focus on any need to protect vulnerable adults, as counsel for the pursuer urged me to do in part of his submissions, the correct approach in the first instance (as he submitted at a later point) is to ascertain the objective meaning which the legislature was seeking to convey by use of the word "hold" (that is, at the time the 1973 Act was enacted, rather than the 2000 Act): *R (O)* v *Home Secretary*, above. The preponderance of the dictionary definitions suggests (and the authorities support) that to hold something does require some element of possession, even temporary, which suggests that a person who merely has the power to intromit with property, such as a withdrawer authorised under section 24D, does not hold property, and therefore benefits from the short negative prescription, at least in relation to the obligation to account. This is by no means an anomalous or absurd result, as *Jamieson* v *Clark*, above, illustrates.

[24] For completeness, the provisions of the 2000 Act which describe a bank or other financial institution as holding funds for an adult are not particularly helpful in casting light

on the meaning of "hold", since funds in an account are, in a sense, also held by the person whose account it is. Nor is section 81 of particular assistance; while it equiparates continuing attorneys with withdrawers and guardians (and others), making all such persons liable to repay funds used in breach of fiduciary duty, no real conclusion can properly be drawn from that as to whether some or all of such persons might be trustees within the meaning of section 15, the section simply being neutral in that regard.

[25] It follows from all of the foregoing that whether property can be said to be held by an attorney or not is ultimately a question of fact in any given case; for example, *Ross* v *Davy* shows that a company director might be said to hold funds in some, but not all, circumstances. The powers of an attorney are wholly defined by the terms of the power of attorney in his favour, which could vary greatly, as might the extent to which they are in fact utilised. The powers may do no more than give the attorney the power to intromit with the adult's funds; or (as here) they may confer the power to invest the adult's estate, or to purchase property for the adult. The wider the powers, the easier it might be in any given case to establish that the attorney "held" the estate but that must depend both on the nature of the powers, and whether, and if so how, the attorney in fact exercised those powers.

[26] The problem the pursuer faces in this case is that it has chosen to predicate its case on averments that the defender held Mrs Moultrie's estate simply because he was an attorney, without averring any facts and circumstances from which it could be concluded that her property was held by him (in which event, he will remain under an obligation to produce an accounting), and that he was not a mere intromitter (in which event, he will not). For the reasons given, that is insufficient to plead a relevant case that the defender was a trustee within the meaning of the 1973 Act, and the action falls to be dismissed as irrelevant.

The form of the account

[27] I will deal briefly with the subsidiary point as to the form an accounting must take. Counsel for the defender submitted that the expert report lodged by the defender, which had been properly and professionally instructed and vouched the defender's transactions whilst an attorney, fulfilled all the requirements of an account. There was no need for a year by year account, as the pursuer suggested. If an account were ordered, the defender would simply produce it again. The action was, therefore, academic in any event and the court did not entertain academic litigation: *Macnaughton* v *Macnaughton's Trs* 1953 SC 387. For this reason too, the action should be dismissed.

[28] Counsel for the pursuer submitted that justice could be done only if an account in proper form were produced, showing the starting and end property for each year, and the course of movements. The defender ought to be able to do that, since he had been under a statutory duty to keep records: 2000 Act, section 21. One might want to see if the adult held money, in which case the fiduciary might have been under a duty to invest it. To hold the report which had been lodged as the account would be to allow the case to progress in a way which would not conduce to procedural certainty and convenience for all parties.

[29] What form an account should take is considered in Walker, *The Law of Civil Remedies in Scotland* at page 306, where it is stated that "ideally" accounting should take the form of a proper itemised account, periodically audited by a competent person and docqueted as correct and adequately vouched, or supported by bank books and other relevant vouchers, but it goes on to make the point that it is almost a basic hypothesis of this form of action that such an account has not been or cannot be prepared, or that it is inadequate, defective or

includes items disputed or not vouched, concluding that a strictly formal and correct accounting is not indispensable.

[30] As with the more fundamental question of whether an attorney is a person holding property, it seems to me that the form of an account is also, to some extent at least, a fact-specific issue. Walker, above, makes clear that the ideal may not be achievable, or necessary, in every case. What is necessary in a case where funds were "held", may not be necessary where they were merely intromitted with. However, having given the matter careful consideration, had I held that the defender did hold funds, or property, I would then have found that the expert report lodged was not a proper accounting. The clue is in the nomenclature: an expert report is different in nature from an accounting. It deals with specific issues, admittedly in some detail, but it does not provide an accounting of the defender's dealings with the entirety of Mrs Moultrie's estate insofar as he (on this hypothesis) held it. Thus, I would not have found the action to be academic, nor that the obligation to account had been satisfied by production of the expert report.

Disposal

[31] Having found that the action is irrelevant, I will repel the pursuer's third plea-in-law, sustain the defender's second and third pleas-in-law, and dismiss the action. As requested by both parties, I shall reserve all questions of expenses.