



OUTER HOUSE, COURT OF SESSION

[2024] CSOH 69

A26/21

OPINION OF LORD SANDISON

In the cause

MEGAN COCKBURN

Pursuer

against

CAROLE HOPE, as Judicial Factor on the estate of the late Scott Edward Cockburn

Defender

**Pursuer: Party (Lay Representative: Jacqueline Moriarty)
Defender: McKinlay; DAC Beachcroft Scotland LLP**

18 July 2024

Introduction

[1] In this action the pursuer seeks payment from the defender of the sum of £350,000, or alternatively £50,000, in respect of alleged breaches of duty in the course of her activities as judicial factor on the estate of the pursuer's father. The larger sum is said to represent the diminution in the value of the estate as a whole as a result of the alleged failings, and the lesser the amount by which the pursuer's own interest in the estate was devalued. The matter came before the court on the procedure roll for a debate on the defender's preliminary pleas.

Background

[2] Mr Scott Cockburn, the pursuer's father, died on 6 June 2015. He left a will dated 15 July 2013, by which he appointed his sister, Tracy Cockburn, as his executrix and bequeathed the residue of his estate in equal shares to three of his children, namely the pursuer and her two half-brothers, Conner and James Cockburn (then minors). His widow and three other children were entitled to claim legal rights in his estate. The pursuer maintains that the estate included a half share in the matrimonial home and certain contents there, a separate house and some of its contents, the whole issued capital in three roofing and scaffolding companies, various valuable moveable items, and cash *in specie*.

[3] Despite the appointment of Tracy Cockburn as Mr Cockburn's executrix, his brother Steven Cockburn, a former employee of the companies, in practical terms assumed that role and in due course was appointed to be a co-executor. He appears to have appointed himself a director of the companies, paid himself a monthly salary, removed money from the companies' accounts, and took or disposed of moveables forming part of the estate. In consequence of this and other difficulties encountered in the administration of the estate, the defender was appointed as *interim* judicial factor on it by the Sheriff at Edinburgh on 26 November 2015 and that appointment was made permanent by interlocutor dated 23 March 2016. The pursuer claims that the defender has failed in various regards in her administration of the estate, causing loss to it. In summary, it is said that the defender did not act quickly or effectively enough to deal with Steven Cockburn's various activities, failed to remove or address the activities of another allegedly errant director of the companies, dealt with heritable property in a way which diminished its value, caused the companies to incur a liability

for unfair dismissal, and otherwise failed to take reasonable steps to preserve the value of the estate under her control. The defender provides detailed responses to each of these criticisms. The pursuer claims that the initial value of the estate was in excess of £1.3 million, but had diminished as a result of the defender's failings to £277,000 or so by 2020, with only a small sum left after fees and expenses for distribution to the beneficiaries.

Defender's submissions

[4] Counsel for the defender invited me to sustain her fourth, eighth and ninth pleas-in-law and assoilzie her from the conclusions of the action, or else to dismiss it.

His submissions centred on three separate grounds of criticism, as follows:

[5] Firstly, in relation to the defender's ninth plea, it was submitted that the pursuer's claim was based on allegations of professional negligence, that it was not permissible (as amounting to an abuse of process) to maintain allegations of professional negligence without a supportive independent expert report, and that the pursuer had produced no such report.

[6] Counsel drew my attention to the pursuer's first and second pleas-in-law, which referred to the losses claimed having been sustained in consequence of the defender's fault and negligence, and to Article 28 of Condescence, which claimed that it was the duty of the defender to exercise the degree of skill and care to be expected of an ordinarily competent judicial factor, acting with reasonable care, and that no ordinarily competent judicial factor acting with reasonable care would have failed in the discharge of that duty as she allegedly did.

[7] In support of the proposition that it was not permissible, as an abuse of process, to maintain allegations of professional negligence without a supportive independent expert report, counsel referred to the opinion of Lord Woolman in *Tods Murray WS v Arakin*

Ltd [2010] CSOH 90, 2011 SCLR 37 at [90] - [93], [124] - [125]:

“[90] The pursuers emphasised the vital importance of a party being in possession of an appropriate expert [report] before making allegations of professional negligence. They contended that in the absence of such a report, it is an abuse of process to institute and persist in such proceedings.

[91] In response, Mr McNamara argued that in respect of some of the allegations, no expert was required. This was most clearly put in the defenders’ note of argument, which stated ‘sometimes matters of misconduct are just so blatant they require no ‘expert’s’ view to demonstrate that this is the case’.

[92] I reject that approach. In my view, allegations of professional negligence require to have a proper foundation. Without such underpinning, the court is not in a position to make a finding in favour of the defenders (*Walkers, Evidence* (3rd edn), para 16.3). As a solicitor must always exercise a measure of judgment in fulfilling his duties, it is not enough to say that he has failed to implement his instructions. The allegation must always be buttressed by a report from an appropriate witness, which states that the course taken was one that no solicitor exercising ordinary skill and care would have taken.

[93] In the absence of such a rule, it would be open to a party to make whatever assertions he or she chose, however spurious or mistaken. In my view, that is just what has happened here.

...

[124] Lord Justice Clerk Gill indicated that an abuse of process may occur if a case ‘wastefully occupied the time and resources of the court in a claim that was obviously without merit’: *Clarke v Fennoscandia Ltd (No 3)* [2005 SLT 511] at paragraph [17]. In my view having regard to the factors discussed above, the defenders’ counterclaim clearly fits that description.

[125] It follows that I am satisfied that the counterclaim is an abuse of process and should be dismissed on that basis. To allow it to proceed would in my view not be in the interests of justice. It compromises the court’s procedures. In effect, Mr McNamara is seeking to use the counterclaim action to air his own unfounded complaints. ...”

Counsel next referred to *JD v Lothian Health Board* [2017] CSIH 27, 2018 SCLR 1 per

Lord Brodie at [39]:

“[39] I have sympathy with [counsel’s] complaints of lack of fair notice. However, where a pursuer is not professionally represented I consider that the court should be slow to dismiss his case on that ground alone where there is an alternative means of providing his opponent with the notice to which he is entitled. In the present case difficulty has arisen because the pursuer has not instructed a medico-legal report from Dr Quinton, as he should have done if it is his intention to lead Dr Quinton in evidence with a view to supporting a case of negligence. Accordingly, had the court only been concerned with the defender’s point (i) I would have proposed that the reclaiming motion be allowed and the cause remitted to the Outer House but proof not be allowed, that being a matter to be determined by the Lord Ordinary after a further hearing on the By Order (Adjustment) Roll as provided for by Rule of Court 42A.4. Precisely how that hearing would be conducted and what issues would be addressed at it would be for the Lord Ordinary to decide, but I would anticipate that, having regard to all his powers including his powers under r.42A.6, he might consider ordering the pursuer to instruct and lodge a report from any medical expert he intends to lead in evidence, with a view to demonstrating how the pursuer proposes to establish negligence. Among the consequences of failure to lodge such a report might be the cause being again appointed to debate in which event the court might well be justified in taking a strict approach to the pleadings.”

per Lady Clark of Calton at [54] and [58]:

“[54] ... Requiring a party litigant to have a proper foundation for pleadings in a medical negligence case is essential in my opinion. Advocates and solicitors who have rights of audience before our courts have professional obligations and duties to the court not to advance pleadings without proper investigation and support from an appropriate expert or experts who have carried out an expert assessment. That may include, for example, an opinion as to whether or not the expert considers that there has been some act or omission by a treating doctor which falls below an accepted standard of care and identifying what that is. The issues of causation and loss in a case such as this also require to be considered by an appropriate expert.

...

[58] ... This is an action of damages for loss injury and damage caused by professional negligence and such an action must have a proper foundation and focus. In my opinion that can only be achieved by the involvement of suitable experts to consider the issues relevant to negligence, causation and loss injury and damage. The pleadings in this case are in my opinion irrelevant and lacking in specification and in any event should not be sent to proof in the absence of proper expert assessment to provide a foundation for the case.”

and per Lord Glennie at [73]:

“[73] ... the Court has an inherent power, in appropriate cases, to dismiss an action as an abuse of process in a variety of situations, including where a claim for professional negligence is not, as it should be, supported by an expert report: *Tods Murray WS v Arakin Limited*.”

There were no exceptions to the rule; if there were, they concerned situations so obvious that no report could sensibly be thought necessary, and did not extend to the circumstances of the present case, which sought to call into question matters of judgment on the part of the defender. Neither before nor after the raising of the action had the pursuer produced a supportive expert report, save that in May 2022 she had lodged a report from a solicitor suggesting that the defender had failed to act as a reasonably competent executry practitioner in the calculation of legal rights, which appeared to have been overpaid, and that there remained a question concerning the appropriate division of certain expenses which had been incurred. A significant period of time in which to obtain a report in relation to any other issue had elapsed, and it was appropriate to conclude now that one was not going to be produced.

[8] In these circumstances, the pursuer’s claim should be dismissed save insofar as relating to the expenses division issue, no complaint about the legal rights issue having been raised in the pleadings.

[9] Secondly, in relation to the defender’s eighth plea, it was submitted that, on the hypothesis upon which the action proceeded, the estate and the pursuer had suffered certain heads of loss and damage, supposedly as a result of the defender’s breaches of duty, more than five years before the pursuer had made a relevant claim in relation to them.

[10] In particular, the alleged failure to remove Steven Cockburn as a director of the companies had appeared in the summons served on the defender on 15 February 2021. The

defender's interim appointment had been on 26 November 2015. Any obligation which might have been previously incumbent upon the defender to make reparation had accordingly prescribed prior to service of the summons. Averments dealing with complaints concerning (i) a failure to carry out an independent inventory of the estate upon the defender's appointment; (ii) the division of expenses incurred in relation to one of the heritable properties; (iii) a supposed failure to provide the beneficiaries with a full and final copy of the Scheme of Division since April 2019; (iv) wasted expense incurred on or around 3 September 2021 in an allegedly premature application for discharge; (v) wasted expense caused by a failure to deal with a claim for debt against one of the companies by March 2016; (vi) wasted expense caused by an excessive reaction to refusal of an appeal against a planning enforcement notice in February 2016; (vii) failure to make an insurance claim for storm damage in June 2016, and payment for corresponding repair works in August that year; and (viii) the transfer of £20,000 from the estate to one of the companies on an unspecified date, had been added to the pleadings by adjustment on 22 June 2022. That was when the pursuer had first made a relevant claim in relation to those allegations for prescription purposes. They were distinct allegations of breach of duty from those which featured in the summons. The relevant prescriptive period was five years. Any obligation previously incumbent upon the defender to make reparation in respect of those alleged breaches of duty had accordingly prescribed.

[11] The pursuer's case in relation to those allegations should be dismissed. If the defender's ninth plea was also to be sustained, that would result in dismissal of the case as a whole.

[12] Thirdly, in relation to the defender's fourth plea, it was contended that the pursuer had no title or interest to sue to recover losses on behalf of the estate of her late father, and

that the first conclusion of the summons, which was directed at recovery of the supposed loss to the estate as a whole in consequence of the defender's breaches of duty, should therefore be dismissed.

[13] The pursuer's pleadings referred repeatedly to "loss to the estate". That was the basis upon which she sought to quantify her claim. The pursuer was only one of several beneficiaries to the estate. She had title and interest to seek damages in respect of any loss which she might have suffered, as an individual, due to breach of duty by the defender. However, she did not aver any relevant basis for an entitlement to seek damages on behalf of the estate as a whole. It was accepted that the second conclusion of the summons sought to recover the pursuer's personal loss, and that averments supporting that conclusion appeared in the pleadings. Although those averments were very inspecific in relation to the claimed quantum of loss, that was not insisted upon on its own as a ground for dismissal of the second conclusion.

Pursuer's submissions

[14] In a somewhat diffuse response, the lay representative for the pursuer re-iterated and elaborated upon the grounds of complaint maintained against the defender. Amongst the allegations was one that misrepresentations had been made by the defender to HMRC in or around August 2021 in order to create a false appearance that the estate was solvent, to the end of avoiding an investigation into her conduct. A thorough investigation into the defender's actions and decisions on breach of her fiduciary duty was needed.

[15] The pursuer had first complained to the Accountant of Court about the defender's conduct in May 2017. The Scottish Legal Complaints Commission had been involved five months after that, and took a year to consider matters. The pursuer had first appointed

a solicitor in February 2019 and had spent over £40,000 in attempting, unsuccessfully, to obtain guidance and assistance in what to do about her concerns. There was at least a basis for suspicion that the Accountant of Court had co-operated with the judicial factor to an unwarranted degree.

[16] The current proceedings were complex and overwhelming for individuals not well-versed in legal matters. The legal system's intricacies, rules and procedures created significant barriers for those seeking justice. The pursuer remained unclear as to the correct course of action to advance her claim. The pursuer's younger brother James had sought legal representation, but could not find any. When attempting to seek information about the process he should follow, he had been sent from pillar to post between the Accountant of Court and the Scottish Public Services Ombudsman. The defender had retained £158,000 which should have gone to the beneficiaries of the estate. Reference was made to sections 6 and 21 of the Judicial Factors Act 1849 in relation to the forfeiture of a factor's commission in the event of misconduct or failure to discharge duties. The behaviour of the defender as judicial factor rendered any expert opinion unnecessary.

[17] It was accepted that, in general, beneficiaries did not have title to sue on behalf of an estate, but there were exceptions if a beneficiary had sustained patrimonial loss due to the handling of the estate. Further, an executor appointed by the court could raise an action on behalf of the estate. If given the opportunity, the pursuer would ask the court to appoint her father's widow as executor-dative, to that end. The court should, if necessary, sist the present proceedings to enable an examination in depth of what had occurred to take place. Otherwise, there was a substantial risk of a miscarriage of justice.

Decision

Absence of expert report

[18] Despite the popularity of the view that an allegation of professional negligence must in every case be supported by a suitable expert report, I remain unconvinced that any such universal proposition is warranted in principle or authority. As a matter of principle, the function of an expert witness, like any other witness, is to furnish the court with material to enable it to answer the questions of fact and law arising in the case before it. In a case involving an allegation of professional negligence, those questions will naturally include whether the familiar test in *Hunter v Hanley* 1955 SC 200, 1955 SLT 213 has been met. In very many cases, it will be quite impossible for the court to determine that the test has been met without an expert witness (normally speaking to a report lodged in process) providing the evidential material necessary to inform such a conclusion. That is particularly the case where the profession in question is concerned with a specialist scientific or technical discipline outwith the knowledge and understanding to be expected of the court. However, questions of professional negligence may arise in a very wide variety of circumstances and in some of them, particularly those not concerning the deployment of any specialist field of knowledge, but rather involving questions of decision-making in more mundane settings, the question thrown up for decision may be one in relation to which the court can be expected to understand the relevant background and not to require further assistance in order to determine the issue. That is the point which I understand Lord Diplock to have been making in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 220G - 221B, [1978] 3 WLR 849 at 861F - H, as follows:

“... The kind of judgment which a barrister has to exercise in advising a client as to who should be made defendant to a proposed action and how the claim against him should be pleaded, if made with opportunity for reflection, does not seem to

me to differ in any relevant respect from the kind of judgment which has to be made in other fields of human activity, in which prognosis by professional advisers plays a part. If subsequently a barrister is sued by his own client for negligence on what he advised or did in the particular case, he has the protection that the judge before whom the action for negligence against him will be tried is well qualified, without any need of expert evidence, to make allowance for the circumstances in which the impugned decision fell to be made and to differentiate between an error that was so blatant as to amount to negligence and an exercise of judgment which, though in the event it turned out to have been mistaken, was not outside the range of possible courses of action that in the circumstances reasonably competent members of the profession might have chosen to take.”

Although the court may most frequently find itself in the position described by Lord Diplock when dealing with issues of professional negligence concerning members of the legal profession in either of its branches, the scope for such an approach, as identified by his Lordship, is wider: does the act or decision being criticised differ in any relevant respect from the kind of acts or decisions which have routinely to be made in many other fields of human activity? Put another way, does the question being asked resolve itself into one of what reasonable decisions or courses of action were or were not open in a particular and ascertained or agreed set of circumstances? If it does, then expert evidence may well be unnecessary to resolve it, and indeed risks falling into the category of evidence described by Oliver J (as he then was) in *Midland Bank Trust Co Limited v Hett, Stubbs & Kemp* [1979] Ch 384 at 402C - E, [1978] 3 WLR 167 at 179H - 180 B as lacking value or even inadmissible. That approach to matters is, as I understand it, relatively frequently applied in the English courts and, given that the judicial function being performed in this respect is the same there as here, it is a rather unsatisfactory response to that situation simply, in effect, to say that England is another country and they do things differently there.

[19] I do not consider that the Scottish authorities compel any other conclusion. In *JD*, a complex medical negligence case based on an allegation of misdiagnosis, and the only Inner House authority cited to me, Lord Brodie in the passage already set out noted that an expert

report should have been lodged if it was proposed to lead an expert in evidence, but came nowhere near suggesting that a failure to lodge such a report would inevitably result in the ultimate dismissal of the action at debate, that being described being merely as one option that would then be open if fair notice of the pursuer's case could not otherwise be given. Lady Clark stressed the need for a proper foundation for pleadings and noted that that "may include, for example" an expert report as to whether there had been some act or omission falling below an accepted standard of care. Given the subject matter of *JD*, her Ladyship concluded (entirely unsurprisingly in the circumstances of the case) that the absence of any such report meant that the pleadings had no proper foundation. There was no prospect in the case of the court being able to determine unaided the *Hunter v Hanley* question. Lord Glennie referred to an inherent power in the court to dismiss an action as an abuse of process, referring to the decision in *Tods Murray WS*, to which I shall revert. His Lordship's observations that that option may arise "where a claim for professional negligence is not, as it should be, supported by an expert report" is somewhat ambiguous and can be read as suggesting that not every such claim requires the support of an expert report. In any event, it is in my view appropriate to read all of the observations made in *JD secundum subjectam materiam*, in which context they are entirely unremarkable.

[20] Counsel referred in passing to *Chisholm v Grampian Health Board* [2022] CSOH 39, 2022 SCLR 253 at [24], where Lord Clark observed (*emphasis added*) that "*In a clinical negligence case of this kind, expert evidence must be provided to support causation ... The absence of such a report results in this case requiring to be dismissed.*" Again, in the context of that case (and I do not read his Lordship's observations as having been intended to extend beyond that context), it is impossible to think that any other conclusion could have been arrived at.

[21] Reference might also have been made to *Ronnie O'Neill Freight Solutions Ltd v MacRoberts LLP* [2023] CSOH 75, 2023 SLT 1196, a solicitors' negligence case in which Lord Braid noted at [44], in relation to *Levicom International Holdings BV v Linklaters* [2010] EWCA Civ 494, [2010] PNLR 29, another such case dealing with a similar situation, that it was "striking" that at least two members of the Court of Appeal had reached their own conclusions on the question of negligence without any expert evidence having been led on the matter. His Lordship then observed that "whatever the position may be in England, in Scotland expert evidence would always be required before the court could find negligence established", under reference to *Tods Murray*, and without adding any further analysis.

[22] It may be seen from that review of the Scottish authorities that in this matter the decision of Lord Woolman in *Tods Murray WS* has exerted a considerable and perhaps somewhat curious gravitational pull. That was a case with an extended and tortuous procedural history in which a notorious party litigant alleged professional misconduct and professional negligence in a counterclaim to an action in which a firm of solicitors sued for its fees in respect of professional services rendered by it. His Lordship dismissed the counterclaim as an abuse of process, noting that such an abuse occurred if a case wastefully occupied the time and resources of the court in a claim that was obviously without merit. While I have little doubt that the counterclaim in question was indeed obviously without merit and thus an abuse of process, it is something of a leap of reasoning to maintain that that lack of merit flowed from the absence of a supportive expert report. That there was no expert report appears to have been, in the whole circumstances of the case, an indication or badge of the lack of merit rather than its fount, which was inherent in the evidently random nature of the allegations made. The suggestion that it was the absence of an expert report which rendered the counterclaim an abuse of process begs, rather than answers, the

question of whether there are circumstances, and if so what they are, in which the court is able to determine a question of professional negligence without an expert report. For the reasons already stated, I consider that such circumstances do exist and were identified by Lord Diplock in *Saif Ali*. Had it been necessary to do so, I would have concluded that the present case fell within those circumstances. There is no material dispute about the background circumstances in which the defender took or failed to take the decisions and actions in question, and it would be entirely within the capabilities of the court to determine whether the *Hunter v Hanley* test was met, since the judgments which the defender had to make were no different to those which have to be made in many other fields of human activity, and resolve themselves into questions of what courses of action were or were not reasonably open to her in those circumstances.

[23] I have addressed the issue of the absence of an expert report at some length since that was the principal matter on which counsel relied. However, that is not the ground on which I reject counsel's submissions that the case should be dismissed by reference to the defender's ninth plea-in-law. I reject those submissions on the much simpler ground that I do not regard this as truly being a case turning on any issue of professional negligence at all. There is no recognised profession of judicial factor; rather, that is an office to which the court appoints an individual to administer the property and affairs of a person, natural or legal, in circumstances where such administration appears necessary or expedient. Although it is most common for a solicitor to be appointed to the office of judicial factor, that is by no means a uniform practice. Accountants or members of other professions can be and are often appointed if the nature of the duties of the factory are expected to align with the skillsets of such a person. Any person appointed to the office is not in performing his functions discharging the duties incumbent on members of whichever profession to which

he may happen to belong, but is discharging the responsibilities of the role itself. I did not understand counsel to dispute that proposition when pressed on it. A judicial factor is also a trustee within the meaning of the Trusts (Scotland) Act 1921. Questions of whether a trustee's duties have been breached or not are matters of law for the court, and do not fall within the ambit of the *Hunter v Hanley* jurisprudence. Whatever the position may be in other kinds of case, it is unnecessary for criticisms of the performance of a judicial factor to involve allegations of professional negligence by the standards of the factor's own profession, and an expert report supporting such allegations is not a pre-requisite for a claim based on alleged breach of duty by a judicial factor.

[24] I recognise that there are elements of the pursuer's case which strongly suggest that a case of professional negligence is what is being put forward. Those elements have been set out in the note of counsel's arguments above. On the other hand, there are also more broadly-stated formulations of the nature of the complaint. For example, Article 1 of Condescence refers simply to "breach of duty" on the part of the defender, and Article 7 to "failures in her handling of the estate". The exercise of construction of the pleadings must take into account the fact that the pursuer has no understanding of what she should say or do in order to progress (in good faith, so far as I can see) towards her entirely understandable goal of having the incidents of the administration of her father's estate objectively examined and assessed; rather, she is bewildered by the process. That is no criticism of her; no lay person could reasonably be expected to navigate surely through this somewhat arcane area of law. Although I quite accept that the law must apply entirely equally to a party litigant as it does to those represented by professional advisers (*Barton v Wright Hassall llp* [2018] UKSC 12, [2018] 1 WLR 1119), I do not consider that it confers any unfair advantage on a party litigant if her pleadings are construed (benevolently, if need be)

with a view to ascertaining the real issues in dispute, rather than concentrating on the inadequacies of pleading formulae designed to apply in rather different situations which she happens to have used. I stress that no question of fair notice arises in relation to the pursuer's pleadings; they set forth in ample detail what it is that the defender is said to have done that is the subject of criticism. I read the pursuer's pleadings as setting forth a clear case of alleged breach of duty on the part of the defender which does not require the support of any expert report, and repel the defender's ninth plea-in-law accordingly.

Prescription

[25] Counsel's submissions in relation to prescription proceeded on the assumption that the quinquennial prescriptive period set out in section 6 of and Schedule 2 to the Prescription and Limitation (Scotland) Act 1973 applied to the obligations relied on in the case, as arising out of alleged negligence. I have already indicated that I do not consider that actually to be the true ground of claim. Schedule 3 to the 1973 Act provides that 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; or (iii) to make forthcoming 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 are imprescriptible obligations. "Trustee" for those purposes includes a judicial factor.

[26] As has been already noted, one of the complaints advanced by the pursuer is a supposed failure on the part of the defender to present a final Scheme of Division, inevitably raising questions as to the sufficiency of any account of intromissions which would

necessarily underlie any such Scheme. As to potential fraudulent breach of trust, in addition to the frank allegations of false submissions to HMRC which have been made, questions arise as to the meaning of the concept of fraud in this context. In English law, at least, it has been said that that word is used in the context of time bar provisions is used “in the equitable sense to denote conduct by the defendant or his agent such that it would be ‘against conscience’ for him to avail himself of the lapse of time”: *King v Victor Parsons & Co* [1973] 1 WLR 29, per Lord Denning at 33G - H, see also *Tito v Waddell (No 2)* [1977] Ch 106 per Megarry V-C at 245B - C, [1977] 2 WLR 496 at 623E - F. Further, it has been alleged that the defender retained £158,000 which should have gone to the beneficiaries of the estate, and the impact (if any) of the provisions of the Judicial Factors Act 1849 mentioned by the pursuer remains unascertained. The interplay between or amongst any of these factors is, similarly, currently unclear. Complex questions of fact and law are likely to arise and I consider that it would be most unwise, and potentially most unjust, to proceed as matters stand and on the papers alone to attempt to identify which obligations owed by the defender may ultimately be found to be subject to the short negative prescription and which to an altogether different prescriptive regime. I shall accordingly reserve the defender’s eighth plea-in-law for proof before answer.

Title to sue

[27] The defender’s submission that the pursuer has no title to sue for losses to the estate in general falls to be upheld, for the reasons advanced in argument and set out above.

I shall accordingly sustain the defender’s fourth plea-in-law and dismiss the first conclusion of the summons.

Postscript

[28] After this case was taken to avizandum, the court received correspondence from the pursuer seeking, in effect, *inter alia* to amend her pleadings to make her reliance on breach of fiduciary duty on the part of the defender express rather than implicit. Separately, her brothers Conner and James Cockburn have sought to sist themselves as additional pursuers in the action. Neither of these matters has yet progressed to the making of formal motions for the court's consideration. The fact that there are defended proceedings in the Sheriff Court in which the present defender seeks approval of accounts and a Scheme of Division, and seeks her discharge, also remains to be addressed. Those proceedings were sisted, it appears by consent, on the basis that it was more appropriate for this superior court to deal with, at least, the matters in common between the two litigations. For my own part, I should have thought that the court which created the judicial factory was the natural forum for dealing with approval of the draft accounts and Scheme of Division, and to consider the application for discharge. However, it may be that, at least if parties agree, this court can in effect deal with those matters in substance if not in point of form. In any event, it is in the interests of all concerned, and in the interests of justice more generally, that the matters in dispute are resolved as soon as possible, and that a clear and expeditious route to that end is identified directly.

Conclusion

[29] For the reasons stated, I shall sustain the defender's fourth plea-in-law and dismiss the first conclusion of the summons; reserve her eighth plea-in-law for proof before answer; and repel her ninth plea-in-law. The case shall be put out by order so that the outstanding

matters just identified may be dealt with and a decision taken as to how and where the dispute is finally to be resolved.