OUTER HOUSE, COURT OF SESSION

[2023] CSOH 30

A73/22

OPINION OF LORD SANDISON

In the cause

GORDON JOHNSTONE as Executor-nominate of the late ELIZABETH KAYE

Pursuer

against

GORDON JOHNSTONE as former continuing and welfare attorney for the late ELIZABETH KAYE

First Defender

and

GORDON JOHNSTONE as Executor-nominate of the late PETER KAYE

Second Defender

and

BLIND VETERANS UK

Third Defender

Pursuer: Simpson, KC; Turcan Connell
First and Second Defender: Lord Davidson of Glen Clova, KC; Levy & McRae LLP
Third Defender: Welsh; MacRoberts LLP

16 May 2023

Introduction

[1] In this action the pursuer, as sole surviving executor-nominate of the late Elizabeth Kaye, seeks declarator that he and the late Susan Foster, the other such

executrix-nominate, were in breach of their duties as continuing attorneys for Mrs Kaye in entering into a Deed of Variation of the will of Mrs Kaye's late husband Peter, declarator that he and Mrs Foster had no power to enter into that Deed, and reduction of the Deed. The action is directed against Mr Johnstone in his respective capacities as former attorney for Mrs Kaye and as executor-nominate of Mr Kaye. That situation arises because in substance the pursuers of the action are three of Mrs Kaye's residuary beneficiaries, who conceive themselves to be grossly disadvantaged by the terms of the Deed. They have entered into an arrangement with Mr Johnstone to borrow his name as executor, against an indemnity for expenses, in order to raise these proceedings. This arrangement is said to be in accordance with the decision of this court in *Morrison* v *Morrison's Executors* 1912 SC 892. Reference was also made to *Roberts* v *Gill & Co* [2010] UKSC 22, [2011] 1 AC 240. I rather doubt whether the Instance of the action which has resulted in this case is truly something that falls within the contemplation of *Morrison*, which involved substantially different circumstances, or that *Roberts* has any light to shed on the issue. Further, in more modern times, when the existence of a significant interest has come to be recognised as beginning at least partially to eclipse the need for a very clear and crisp title in conferring a right of action even in private law situations, it may well have been the case that the disappointed residuary beneficiaries could have conceived a valid cause of action in their own names. Be that as it may, the present proceedings are not clearly incompetent on their face and no party urges on the court a close examination of the matter in order to assist it to the conclusion that that is what they indeed are. In these circumstances no more need be said about the matter.

Blind Veterans UK, a charity which stands to benefit from the terms of the Deed, also defends the action. The matter came before the court on the procedure roll for discussion of the preliminary pleas of all parties.

Background

[2] Mrs Kaye had made a number of modest donations to the third defenders over a period of years. She had executed a will on 28 April 2006 and a codicil thereto dated 15 October 2010. Mr Johnstone and Ms Foster were her executors-nominate. In the event of her husband's predecease, she left the residue of her estate to her nieces and nephews or their representatives. On 22 June 2010 Mrs Kaye granted a Continuing and Welfare Power of Attorney in favour of her husband and Mr Johnstone, with Ms Foster as a substitute should either of them become unable to act. Mrs Kaye was diagnosed with dementia in 2016. The Power of Attorney was registered with the Office of the Public Guardian on 7 July 2017, by which time Mr Kaye had died, and so Mr Johnstone and Ms Foster became her attorneys from that date. Mrs Kaye moved into a care home in November 2017 and remained there until her death on 26 March 2019. It is a matter of agreement that, by the start of 2019, it was known by all concerned that her death would not be long delayed.

[3] On 6 May 2017 Mr Kaye had made a will which appointed Mr Johnstone and Ms Foster his executors and bequeathed the residue of his estate to Mrs Kaye if she survived him, and to a charity named The Scar Free Foundation if she did not. He died on 22 May 2017. The value of his estate was in excess of £2.5 million.

[4] In 2018 Mr Johnstone and Ms Foster obtained counsel's opinion as to whether they had power to carry out a variation of Mr Kaye's will and, if they did, whether it would be appropriate for them to do so. It was opined that such a power did exist and various suggestions as to the circumstances in which it might be exercised were made. On 5 and 6 March 2019 Mr Johnstone and Ms Foster, acting on the one hand as Mrs Kaye's attorneys and on the other as Mr Kaye's executors, entered into a Deed of Variation of Mr Kaye's will.

The effect of the Deed of Variation was that instead of Mrs Kaye being due to receive the monetary residue of Mr Kaye's estate, being approximately £2.45 million, she would receive moveables of relatively small value, and the remainder of the residue of Mr Kaye's estate would go to the third defender.

Statutory provisions and terms of relevant documents

[5] The Adults with Incapacity (Scotland) Act 2000 ("2000 Act") provides:

> "1 General principles and fundamental definitions
>
> (1) The principles set out in subsections (2) to (4) shall be given effect to in relation to any intervention in the affairs of an adult under or in pursuance of this Act, including any order made in or for the purpose of any proceedings under this Act for or in connection with an adult.
>
> (2) There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.
>
> (3) Where it is determined that an intervention as mentioned in subsection (1) is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.
>
> (4) In determining if an intervention is to be made and, if so, what intervention is to be made, account shall be taken of–
>
> > (a) the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult;
> >
> > (b) the views of the nearest relative, named person and the primary carer of the adult, in so far as it is reasonable and practicable to do so …"
> >
> > …
>
> "81 Repayment of funds
>
> (1) Where–
>
> > (a) a continuing attorney;
> > (b) a welfare attorney;
> > …

> 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."

The Power of Attorney included the following terms:

> "2. General powers
>
> My Attorney may manage my whole affairs as my Attorney thinks fit and shall have full power for me and in my name or in his or her or their own name as my Attorney to do everything regarding my estate which I could do for myself and that without limitation by reason of anything contained in this Power of Attorney or otherwise.
> …
> My Attorney shall be subject to the requirements of the [Adults with Incapacity (Scotland) Act 2000].
>
> Without prejudice to these general powers my Attorney shall have the set powers set out in the following clauses.
>
> 3. Particular powers
>
> My Attorney may …
>
> 3.3 to [sic] sign and deliver deeds and documents;
> …
> 3.17 make gifts of my property of whatever sort and wheresoever situated to any of my spouse, my children and remoter issue, any other person, charity or organisation to whom I have been in the habit of making gifts, trusts established for the benefit in any way of these, and any trust for the administration of my affairs; establish any trust for the benefit of any of these persons; sign a deed of variation of any testamentary provision or right of intestacy in my favour for the benefit of any of these persons; and pay any tax chargeable in respect of such gifts and generally implement such tax planning or similar arrangements as my Attorney may deem suitable."

The Deed of Variation provided *inter alia*:

> "1. We, the Executors and we the Attorneys, as representative of the Beneficiary [i.e. Mrs Kaye] irrevocably direct and agree that the residue of the estate of the said PETER MACKENZIE KAYE will be administered as if in his Will he had directed us, as Executors as follows:
> a. That the household contents of Earlston and all the personal belongings of any sort of the said PETER MACKENZIE KAYE should be made over to the said Beneficiary, as an individual.

> b. That the residue of his Estate of the said PETER MACKENZIE KAYE should be made over to the Blind Veterans UK, Scottish Charity registered under SC039411, having its registered office at 12-14 Harcourt Street, London W1H 4HD."
>
> Mrs Kaye's will provided *inter alia*:
>
> "(EIGHT) In the event that my said husband shall predecease me or die with me as a result of a common calamity or fail to survive by the aforesaid period [thirty days] I leave and bequeath equally to such of my nieces and nephews, the said Rosemary Margaret Anne Webb, Patricia Stephen Goodbody, Judith Margaret Stephen Lockley, Mairi Stephen Berriman, John Stephen Forrest, Charles Edmund Forrest, Ranald James Stephen Law and Alexander Stephen Law as shall be in life at my death along with the issue of such of my nieces and nephews as shall have predeceased me, such issue taking equally between or among them *per stirpes* if more than one the share or shares original and accresced which his, her or their parent would have taken if he or she had survived me, the whole residue of my said means and estate."

First and second defenders' submissions

[6] On behalf of the first and second defenders, senior counsel submitted that, whatever principles of construction might be applied to the Power of Attorney, Mr Johnstone and Ms Foster had been granted the widest powers in terms thereof to manage Mrs Kaye's affairs as they thought fit. The extremely wide mode of expression of those powers in clause 2 of the Power of Attorney was such that the powers created by that clause could not properly be regarded as being subject to limitation by any other clauses of the Power of Attorney or by any external consideration other than the requirements of the Adults with Incapacity (Scotland) Act 2002, to which they were expressly made subject. If it was (contrary to that primary submission) necessary to rely on clause 3.17 of the Power of Attorney in this case, then the sole relevant qualification to the exercise of that power contained in that clause - that the beneficiary of the Deed of Variation should be a charity to which Mrs Kaye had been in the habit of making gifts - was demonstrably met given that the pursuer averred that:

> "In the course of the last 20 years of her life, Mrs Kaye made small donations to the Third Defender. The aggregate value of those donations was approximately £500."

The fact that such gifts had been made over such a period demonstrated a habit within the meaning of clause 3.17 and thus the gateway to the exercise of the power conferred by that clause was opened. There was no express or implied restriction in the Power of Attorney that the quantum of those gifts controlled in any way the amount properly capable of being conferred on the charity by way of a deed of variation entered into in reliance on the clause 3.17 power.

[7] It was accepted that the powers conferred by the Power of Attorney fell to be exercised by the attorneys as fiduciaries and thus had to be exercised by reference to what was reasonable in the circumstances (*Tibbert* v *McColl* 1994 SC 178, 1994 SLT 1227). In this regard it was appropriate to have regard to the undisputed facts that Mrs Kaye was independently wealthy, having no need of Mr Kaye's money, and was in a care home nearing the end of her life. She had made donations to the third defenders in the past. In executing the Deed of Variation, the attorneys had acted in good faith and in accordance with what they conceived Mrs Kaye would have wanted. That was not put in dispute by the pursuer. They had no conflict of interest in entering into the Deed. In these circumstances there was no relevant averment of any breach of fiduciary duty on the part of the attorneys.

[8] In relation to the requirements of the 2000 Act, the terms of section 1(2), requiring that there should be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention was satisfied that the intervention would benefit the adult and that such benefit could not reasonably be achieved without the intervention, had on averment been met in the present case. The attorneys averred that they were so satisfied because they understood that Mrs Kaye had not wished the residue of Mr Kaye's

estate to be subject to inheritance tax, but rather had wished it to go substantially to charity. The satisfaction of that wish was a benefit within the meaning of the section; there was no need for such benefit to be financial or even tangible. The pursuer did not relevantly aver either that the attorneys were not satisfied that entering the Deed of Variation met the requirements of section 1(2), or that any such satisfaction was unreasonable.

[9] Section 1(3) of the 2000 Act required that an intervention should be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention. In that connection, the pursuer claimed only that the purpose of the intervention, namely the transfer of the bulk of the residue of Mr Kaye's estate to charity, could have been achieved by the attorneys going to the sheriff to ask for a codicil to Mrs Kaye's will to be made, providing for a sum representing that residue to go to charity upon Mrs Kaye's death, but keeping it meantime as part of her own patrimony, which was claimed to preserve her financial freedom more amply than giving that sum away at once. However, assuming that it would - as the pursuer maintained - be necessary to go to court to enable a codicil to be executed, that would involve time and expense which it was reasonable for the attorneys to wish to avoid when Mrs Kaye was plainly reaching the end of her life and had no realistic need of Mr Kaye's money.

[10] The application of section 1(4) of the 2000 Act, requiring account to be taken of the views of the nearest relatives of Mrs Kaye insofar as it was reasonable and practicable to do so, had to be considered in the context of the present case, where the effect of entering into the Deed of Variation would be to remove a large sum of money from Mrs Kaye's estate, to which those same relatives were the residuary beneficiaries. That circumstance plainly gave rise to a direct conflict of interest on the part of the relatives, which made it reasonable for the attorneys not to consult them.

[11] The action should for these reasons be dismissed as irrelevant.

Third defender's submissions

[12] On behalf of the third defenders, counsel submitted that on a plain construction of the Power of Attorney, the attorneys had the relevant power to execute the Deed of Variation. Recent judicial decisions had been clear that unilateral deeds in a private client context were to be construed in the same manner as multi-party contracts: *Marley* v *Rawlings* [2014] UKSC 2, [2015] AC 129, followed in Scotland in *Gray's Executors* v *Manson's Executor* [2017] CSOH 25. Whether one approached the Power of Attorney on that basis or otherwise, it was beyond question that her attorneys were given an express power to execute deeds of variation on behalf of Mrs Kaye. She had previously made small gifts to the third defender over a number of years, but the size of those gifts did not limit the amount which her attorneys could give. The Power of Attorney merely prevented the attorneys making donations or gifts to charities or people with whom Mrs Kaye had had no relevant prior connection.

[13] The pursuer's averments claiming breach of fiduciary duty in the exercise of that power were irrelevant or at least devoid of necessary specification. The pursuer's case rested on mere assertion of such a breach, without any specification of how any relevant duty was said to have been breached. There was no suggestion that the attorneys had placed themselves in a position of personal conflict, nor that they had profited from their fiduciary office.

[14] As regards the supposed duty on fiduciaries to exercise reasonable care, if any such distinct fiduciary duty existed, there was no specification as to how it was said to have been breached. The attorneys had sought and obtained legal advice in advance of executing the

Deed of Variation. There was no claim that they had acted in a manner in which no reasonable attorney would have acted.

[15] The pursuer's reliance on the Adults with Incapacity (Scotland) Act 2000 was misplaced. In relation to section 1(2), it merely required the attorneys to be satisfied that the proposed intervention would benefit the adult. The burden of averring and in due course proving that the attorneys were not entitled to be so satisfied rested on the pursuer. He made no such claim. It had been judicially recognised that "benefit" in this context was not restricted to financial benefit: *Application in respect of Mrs HT* 2005 SLT (Sh Ct) 97 at 99. Given that the assessment of whether or not what was proposed would benefit the adult in a way which could not reasonably be achieved without the intervention was a question expressly conferred by the 2000 Act on the attorneys, the court could not simply substitute its own views for theirs; rather, the court could intervene only insofar as the attorneys' views amounted to the equivalent of a breach of the public law concept of reasonableness: cf *Braganza* v *BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661 (applied in Scotland in *Feidhm Mara Teoranta t/a Effective Offshore* v *OPITO Limited* [2018] CSOH 10); *IBM United Kingdom Holdings Ltd* v *Dalgleish* [2017] EWCA Civ 1212, [2018] ICR 1681.

[16] In relation to the section 1(3) requirement that the intervention should be the least restrictive option available, again it was for the pursuers relevantly to aver that there was a less restrictive option available to which the attorneys unreasonably failed to resort. The only alternative suggested by the pursuer was the possibility of having the sheriff approve the execution of a codicil. That was not a less restrictive option. Its effect would in practical terms be the same as the option actually chosen. It would have involved additional cost, and would have involved the delegation of decision-making to the sheriff where Mrs Kaye

had already made it clear that she wanted and trusted her attorneys to make such decisions on her behalf.

[17] For the avoidance of doubt, the third defenders did not accept the pursuer's suggestion that there was a general restriction on attorneys changing the devolution of an incapax's estate, either at common law or in terms of the 2000 Act, and so did not accept that an application to the sheriff in this context would have been strictly necessary in law. The Act permitted any intervention in the affairs of an incapax if (i) there was a power granted to an attorney, guardian or intervener, whether by deed or by the court, and (ii) the intervention complied with the requirements of the 2000 Act. The general principles of the 2000 Act had been found to be sufficiently broad to include the change of a testamentary document: cf *Ward, Appellant* 2014 SLT (Sh Ct) 15 per Sheriff Principal Kerr at [5]. The authorities cited by the pursuer did not support the proposition that the attorneys could not have executed a codicil without an order from the sheriff. However, even on the basis that they were entitled to proceed with a codicil at their own hands, they could not be faulted, on the *Braganza* principle or otherwise, for choosing instead another option which they regarded as having the same practical effect.

[18] Section 1(4) provided for no absolute obligation on the attorneys to consult with Mrs Kaye's relatives about the Deed of Variation. Section 1(4)(b) was clear on its face that such a requirement would only arise where it would be reasonable and practicable to take account of those views.

[19] In the present case, it would not have been reasonable and practicable for the attorneys to take account of the views of Mrs Kaye's nearest relatives because those relatives had a substantial and material conflict of interest rendering it entirely unreasonable for the attorneys to have had regard to their view. Those relatives had a vested interest in

Mrs Kaye's estate such as would have made it impossible for them to have given independent views in relation to the execution of the deed of variation. Had the attorneys given any regard to the conflicted views of the nearest relatives that in itself could have constituted a breach of the attorneys' fiduciary duties'. Mrs Kaye chose not to make her relatives her attorneys and it was for the latter to determine how best to take into account the present and past views of Mrs Kaye. They sought legal advice on the matter and were entitled, in the exercise of their discretion, to decide to proceed with the Deed of Variation. It was for the pursuer relevantly to aver that the attorneys had acted so unreasonably as to make the decision to enter the Deed of Variation one which they were not entitled to reach in the exercise of their discretion. *M, Applicant* 2007 SLT (Sh Ct) 24 did not assist the pursuer, indeed it indicated that a conflict of interest was an entirely relevant factor which could be taken into consideration.

[20] Even if the pursuer had relevantly averred that some rule or principle of law, or some mandatory statutory provision, had been contravened by the entering into of the Deed of Variation, it remained for him relevantly to aver that that contravention justified the remedy of reduction of the Deed. Although section 81 of the 2000 Act made provision for repayment by, *inter alios*, attorneys of sums wrongfully used by them, there was no automatic or even presumptive right to have any deed entered in without full compliance with the statutory requirements reduced. Reduction was an equitable remedy at common law requiring the court to balance the facts and circumstances presented to it: *Doherty* v *Norwich Union Fire Insurance Society Ltd* 1974 SC 213, 1975 SLT 41. The court could grant or withhold reduction on equitable grounds: *Royal Bank of Scotland plc* v *Donnelly* [2020] CSOH 106 at [94] - [97]. The attorneys would not be able effectively to make a new Deed of Variation because of the time limits for such a course of action imposed by section 142 of the

Inheritance Tax Act 1984 and section 62 of the Taxation of Chargeable Gains Act 1992. Therefore, any ground of reduction relied upon by the pursuers, even if ultimately made out by them, would need to be sufficiently weighty as to warrant the extraordinary removal from the attorneys of a discretion lawfully afforded to them by Mrs Kaye.

[21] The pursuer's pleaded case was irrelevant and should be dismissed.

Pursuer's submissions

[22] On behalf of the pursuer, counsel submitted that, though the Power of Attorney in principle permitted deeds of variation to be entered into by the attorneys, it did not on a proper construction permit this particular Deed of Variation to be entered into. The correct approach to interpreting a unilateral deed like this one was as set out in *Carleton* v *Thomson* (1867) 5 M (HL) 151, per Lord Colonsay at 153, namely to consider the words of the deed in the context of the circumstances at the time the deed was made. Taking that approach, when considering whether to enter into a deed of variation, the attorneys had to ensure that they were acting within the specific power given to them to that end, namely that contained in clause 3.17, and could not rely on the general and in-specific powers provided in clause 2. That meant that it was necessary that Mrs Kaye had been in the habit of making gifts to the third defenders as at the date the Power of Attorney was granted. The defenders did not offer to prove that. If regard could be had to any donations made after the date of the Power of Attorney, the power to make donations to charities to which Mrs Kaye had been in the habit of making gifts was to be interpreted, again by considering the words of the Power of Attorney in the context of the circumstances pertaining as at the date it was executed, as being limited in scale to being proportionate in value to the gifts she

had made. Conferring a benefit of £2.4 million on the third defenders was not proportionate to the sum total of £500 which Mrs Kaye had chosen herself to give to them.

[23] Apart from the question of their power to enter into the Deed of Variation, there was also the question of whether the attorneys had complied with their fiduciary duties to Mrs Kaye in deciding to execute it. Mr Johnstone and Ms Foster claimed to have taken into account, as his executors, the interests of Mr Kaye in deciding whether to execute the Deed of Variation as attorneys for Mrs Kaye. That was a conflict of interest; the attorneys, acting as such, ought to have acted solely by reference to, and in, the best interests of their author, which by their own admission they had failed to do. They had also failed to ensure that the transfer effected by the Deed of Variation was proportionate to any gifts made by Mrs Kaye to the third defenders, and had failed to comply with the requirements of the 2000 Act governing their powers to enter into the Deed. Those failings amounted to a failure to take reasonable care in the execution of their fiduciary duties to Mrs Kaye.

[24] The Deed of Variation constituted an "intervention" in the affairs of Mrs Kaye within the meaning of the 2000 Act. It could only lawfully have been carried out if certain mandatory conditions were met, specifically: (a) that the intervention benefited Mrs Kaye (2000 Act, section 1(2)); (b) that the intervention was the least restrictive option available to the attorneys consistent with the purpose of the intervention (2000 Act, section 1(3); and (c) that it was not reasonable and practicable for the attorneys to take account of the views of Mrs Kaye's nearest relatives before making the intervention (2000 Act, section 1(4)(b)). It was for the court, and no one else, to decide whether or not those mandatory conditions had been met. If one or more of them had not been met, then the consequence was that the intervention was invalid. Reduction of a deed entered into in breach of the statutory

conditions was not the result of an invocation of the court's equitable jurisdiction, but merely a necessary and obvious consequence of its illegal nature.

[25] Dealing with those points in turn, and firstly with the requirement in terms of section 1(2) that the attorneys should be satisfied, and were entitled to be satisfied, that the intervention would benefit Mrs Kaye, the defenders made no relevant claim that that requirement was satisfied. While resolution of that matter would depend on all the relevant facts and circumstances, a mere offer to prove that Mr and Mrs Kaye were reluctant that their estates should be subject to inheritance tax was insufficient. The Deed of Variation had deprived Mrs Kaye's estate of approximately £2.4 million. It did not save any inheritance tax on Mr Kaye's estate, and any such saving in relation to Mrs Kaye's estate could have been achieved by a codicil to her will. It might be different if Mrs Kaye had previously expressed a positive and particular wish that the intervention in question be carried out: *Application in respect of DM* [2006] ScotSC 38. So far as testamentary intention was concerned, one of the best sources from which to discern any such intention was any will granted by the adult: *Application in respect of Mrs HT* 2005 SLT (Sh Ct) 97. The terms of the wills of both Mr and Mrs Kaye did not support the suggestion that they were reluctant to have their estates subject to inheritance tax.

[26] As to the requirement in section 1(3) of the 2000 Act that an intervention should be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention, it was necessary to determine the purpose pursued by the intervention: *Application in respect of JMR* [2013] ScotSC 25. That purpose was that the sum left to Mrs Kaye by her husband would go to the third defenders. That could have been achieved by a less restrictive intervention, namely obtaining the authority of the sheriff to grant a codicil to Mrs Kaye's will so that the amount received by her from Mr Kaye's estate

would be left to the third defenders. It did not matter that going to the sheriff would be more expensive or inconvenient for the attorneys; the sole statutory criterion was that of the freedom of the adult. Similarly, it did not matter that in the circumstances the practical difference between a deed of variation and a codicil might have been nugatory or *de minimis*, and in any event no specific claim was made by the defenders that the codicil route would have been more complex or materially expensive in the context of the end it sought to achieve.

[27] An approach to the sheriff would have been necessary before a codicil could lawfully have been executed. It was not competent for an individual to authorise an agent to execute a will or other testamentary writing on the individual's behalf. The Requirements of Writing (Scotland) Act 1995, sections 1(2)(c) and 2, did not contemplate that a testamentary writing could validly be subscribed by anyone other than its grantor. The only exceptions to that were set out in section 9 of the 1995 Act, dealing with situations where the grantor was blind or unable to write, and had no application in the present case. *Henry* v *Reid* (1871) 9 M 503 implied that that had long been the position. Therefore, a power of attorney could not authorise the attorney to grant a testamentary writing. Section 15 of the 2000 Act could not, likewise, confer such authority by reason of the grantor's loss of capacity.

An intervention order from the sheriff was the only route by which a testamentary deed could come to be regarded as the act of the incapax, by dint of section 53(4) of the 2000 Act. That was consistent with the general principle that an agent could not change the destination of an individual's estate: *Macfarlane's Trustees* v *Macfarlane* 1910 SC 325, and *Turner* v *Turner* [2012] CSOH 41, 2012 SLT 877. However, if (contrary to the pursuer's primary position) it was not necessary to obtain the sheriff's agreement to the execution of a codicil, then *a fortiori* that was an option which the attorneys should have used in preference

to the immediate removal of £2.4 million from Mrs Kaye's estate which was the consequence of the Deed of Variation.

[28] Dealing next with the failure to take into account the views of nearest relatives in accordance with section 1(4) of the 2000 Act, the attorneys accepted that they had not even sought those views, and did not relevantly suggest that it was neither practicable nor reasonable to have done so. The facts that there might have been a conflict of interest on the part of those relatives, and that they would not have had a veto on the grant of the Deed of Variation (*Application in respect of Brown* [2005] ScotSC 1) did not have the consequence in law that it was unnecessary to seek their views. It was no part of the attorneys' function to make assumptions about the relatives' positions. The relatives might have been able to shed more light on Mrs Kaye's true attitude to the third defenders or charitable institutions generally, or have other suggestions as to how the residue of Mr Kaye's estate might be dealt with consistently with her wishes and their own. Reference was made to *Application in respect of DM* [2006] ScotSC 38; *Application in respect of JM and Mrs JM* [2013] ScotSC 5; and *Application in respect of D* [2013] ScotSC 12. The grant of the Deed of Variation was thus invalid.

[29] Decree *de plano* should be granted, which failing a proof before answer allowed.

Decision

Proper Construction of the Power of Attorney

[30] Clause 2 of the Power of Attorney, set out above, is in extremely wide terms, allowing the attorneys to do everything regarding Mrs Kaye's estate which she could have done for herself "without limitation by reason of anything contained in this Power of Attorney or otherwise". The question is whether the "set" power contained in clause 3.17

can be read as restricting the unlimited general power given in clause 2, thus enabling deeds of variation to be executed only in favour of those to whom Mrs Kaye had been in the habit of making gifts. It is certainly somewhat mysterious why clause 3 (which refers to a total of 21 set powers, many narrating distinct matters collected under a single heading) was thought at all necessary given the stated breadth of clause 2. However, the Power of Attorney itself provides, in the clearest of terms, the answer to any question as to the hierarchy of the clauses. In addition to the statement already noted that the clause 2 powers are to be exercisable without limitation by reason of anything else in the document, the clause 3 "set" powers are expressly introduced on the basis that they are without prejudice to the general powers contained in clause 2. In those circumstances it is not possible, whichever canon of construction one might apply, to regard the Power of Attorney as permitting the execution of deeds of variation only in the circumstances set out in clause 3.17.

[31] Accordingly, it is not necessary to form a settled conclusion on the questions of whether such a habit as is referred to in clause 3.17 is relevantly averred, or whether that clause restricts the benefit capable of being transferred by a deed of variation granted pursuant to it to something proportionate in amount to the gifts made by Mr Kaye.

[32] Had it been necessary to decide these questions, I would, in brief, have concluded that the pursuer's own averment that Mrs Kaye had made small donations to the third defenders in the course of the last 20 years of her life as sufficient to constitute such a habit, or "settled disposition or tendency to act in a certain way" (Shorter Oxford English Dictionary, 6th edition. *s.v.* "Habit"). I would have regarded the period during which Mrs Kaye's activities could have been scrutinised in order to determine the existence of a habit as lasting until the date the Deed of Variation was entered into or, if earlier (as here),

the date upon which her incapacity supervened, and not as being limited to the period before she granted the Power of Attorney, there being no obvious reason why the entirety of her own actions, whether before or after she granted the Power of Attorney, should not be taken into account in determining the presence or absence of a habit on her part.

[33] I would not have regarded the clause 3.17 power as containing any implicit restriction that the benefit conferred by a Deed of Variation should be proportionate to the value of the gifts made as part of the habit. The amount that a person may feel able to contribute to charity at points when his future lies uncertainly before him bears no necessary relation to the amount that he may wish his attorneys to be able to contribute on his behalf at a time when his future appears all too certain. The fiduciary nature of the attorneys' office and the provisions of the 2000 Act may limit the amount that may properly be transferred by a deed of variation in any particular set of circumstances, but clause 3.17 provides no such brake.

Breach of fiduciary duty

[34] The burden of averring, and if need be proving a breach of fiduciary duty, lies on the party alleging that it has occurred. The pursuer's allegation that there was an inherent and impermissible conflict of interest because the parties to the Deed of Variation were, on the one hand, Mr Johnstone and Ms Foster as Mr Kaye's executors, and on the other those same persons as Mrs Kaye's attorneys, is misplaced. It is entirely possible for the interests of the parties to a deed of variation to coincide, and the pursuer makes no relevant claim that they did not do so in this case. Where, as here, those executing the deed are doing so in different fiduciary capacities, an awareness on the part of all concerned of where the interests on both

sides lie is inevitable and satisfaction that those interests chime with each other does not in itself create a conflict of interest.

[35] I have already noted that I do not consider that the attorneys were, in executing the Deed of Variation, relying on clause 3.17 of the Power of Attorney, and further that I do not think that that clause in any event provides for a proportionality limit on the amount capable of being transferred by the Deed. It follows that any claim that the attorneys were in breach of their fiduciary duties by failing to observe any such proportionality limit is without foundation. No argument was advanced that the sum transferred by the Deed of Variation was in and of itself so great as to render the execution of the Deed a breach of fiduciary duty by Mrs Kaye's attorneys. That is unsurprising, given the terms of the Power of Attorney, her own wealth and very limited expectation of life at the time the Deed was granted.

[36] Clearly, fiduciaries ought to comply with any statutory provisions applicable to the discharge of their functions, though failure to do so may not always constitute a breach of their fiduciary duties. In this case, the Power of Attorney makes it clear that the discharge of the attorneys' functions is subject to the requirements of the 2000 Act, so a failure to comply with those requirements would equally represent a failure to discharge their fiduciary duties.

2000 Act, section 1(2)

[37] This subsection requires that the attorneys, rather than anyone else, should be satisfied that the proposed intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention. It was common ground at the debate that the benefit referred to in the subsection need not be financial, and that a benefit in the sense

of having one's apparent wishes while capax fulfilled might well suffice. The first and second defenders aver, albeit in the rather oblique manner of stating that they complied with their responsibilities under the Act, that they were appropriately satisfied, and refer in that context to their understanding of Mrs Kaye's wish that the residue of Mr Kaye's estate should not be subject to inheritance tax upon her own death. As when a breach of fiduciary duty at common law is alleged, it is for the party making an allegation that the requirements of the 2000 Act were not complied with relevantly to aver a basis for that allegation. I accept the third defender's submissions that it would not in this context suffice to persuade the court that it might or even would have been left unsatisfied by the material which persuaded the attorneys. Rather, the question is whether there is material before the court capable of giving rise to the conclusion that, in pronouncing themselves satisfied as to the requisite matters, the attorneys proceeded upon a view which was outwith the range of views on the matter reasonably open to them. The pursuer's averments singularly fail to provide any basis upon which the court might reach such a conclusion and are accordingly irrelevant to instruct a failure to comply with the requirements of section 1(2).

2000 Act, section 1(3)

[38] Subsection 1(3) imposes the requirement that an intervention should be the least restrictive option in relation to the freedom of the adult, consistent with its purpose. Unlike the position under section 1(2), that is an objective matter for the court and not the attorneys to determine. In the context of Mrs Kaye having, as at the date of the Deed of Variation, no remotely foreseeable need for the monetary residue of Mr Kaye's estate, and being herself incapable of giving any direction as to how it might be deployed, the notion that keeping that residue in her estate until her death promoted her financial or other freedom is

theoretical or even illusory. There was no material difference in relation to her freedom between on the one hand transferring that residue by way of the Deed of Variation and, on the other, making a codicil to her will so that it transferred only on her death (which was anticipated to be imminent and in fact transpired less than three weeks later). The pursuer's attack on the Deed of Variation as having been entered into contrary to the requirements of section 1(3) of the 2000 Act fails accordingly.

[39] In these circumstances it is, again, unnecessary to resolve the question of whether the attorneys could have executed a codicil to Mrs Kaye's will by themselves, or whether they indeed required the sheriff's authorisation to do so. However, it may assist to observe that nothing in the argument before me, at least in the context of a Power of Attorney conferring powers of the breadth in issue here, persuaded me that the intervention of the sheriff would have been necessary. The Requirements of Writing (Scotland) Act 1995 requires testamentary writings to be subscribed by their grantor, but leaves entirely open the question of whether that grantor may be a duly-authorised attorney. The specific facilities made available now and previously for grantors who are blind or unable to write instructs no conclusion as to whether the power to execute testamentary writings may lawfully be committed to an attorney, whether in the case of such grantors or more generally, and the authorities cited to me do not vouch the proposition that there is any general rule of law that prevents attorneys executing testamentary writings on behalf of their authors. The question is simply one of the proper construction of the extent of the powers granted by the relevant Power of Attorney.

2000 Act, section 1(4)

[40] This provision requires the views of the nearest relative (or, as applicable, named person and primary carer) of the adult to be taken into account, insofar as it is reasonable and practicable to do so, in determining if an intervention is to be made and, if so, what intervention is to be made. While the extent to which such views will carry weight in the making of the decisions at hand will be a matter for those making them, subject to intervention by the court only in the circumstances already discussed, the question of whether and to what extent it is reasonable and practicable to obtain and take into account those views is not a matter which the Act surrenders to the decision-makers. Although some attempt was made at debate to argue the issue of the practicability of seeking at short notice the views of Mrs Kaye's eight nearest relatives (two of whom live abroad), the first and second defenders' pleadings do not raise that matter and I place no weight upon it accordingly. The real issue is whether the presumed antipathy of those relatives to the proposed Deed of Variation (given that it would, subject to the incidence of inheritance tax, deprive them of a share of £2.4 million) and the supposed conflict of interest to which that situation is said to have given rise, makes it reasonable for Mrs Kaye's attorneys not to have sought their views. It does not. Section 1(4) plainly contemplates that the views of the relatives may be of some moment in coming to the decisions to be made, and some cogent factor (such as clear estrangement or alienation from the adult, or incapacity or relevant vulnerability on the part of the relative) would require to be present to make obtaining those views unreasonable. The extent to which any views expressed may be thought to be coloured by self-interest is something that the attorneys are entitled to take into account in coming to what are their own decisions as to whether to proceed with the proposed intervention or some variant thereof; presumed self-interest in the views is not in itself an

adequate reason for not seeking them. It follows that the requirements of section 1(4) were not met in relation to the Deed of Variation and, to that extent and on that account, the attorneys did not fulfil their fiduciary duties in executing it.

Remedy

[41] The remaining matter for decision is what consequence the failure of the attorneys to comply with the requirements of section 1(4) has for the validity of the Deed of Variation. The 2000 Act does not provide for the automatic invalidity of any intervention undertaken which is not in compliance with the requirements of section 1. Equally, it is not every irregularity constituting a breach of fiduciary duty which will result in a consequent dealing being invalid. Rather, both for the purposes of the statutory regime and at common law, the court requires to consider in the round the extent to which the failure to comply with an applicable requirement was serious in nature and what the consequences of invalidation of a resultant intervention might be. That is not a qualitatively different exercise from that undertaken by the court in determining whether to exercise its equitable power of reduction of a deed or document attended by some irregularity not resulting in its automatic nullity.

[42] In the present case, the failure to comply with the requirements of section 1(4) amounts to a failure to obtain the views of persons in circumstances where those views could influence, but not determine, the outcome of the decision-making process then in hand. While that does not render the failure venial or insignificant, it is necessary to bear in mind that, for reasons already canvassed, the attorneys reached a decision not susceptible to legal criticism that the execution of the Deed of Variation would constitute a benefit to Mrs Kaye which they wished to proceed with, and that they had already factored into that decision a presumed opposition on the part of the relatives to the transfer effected by the

Deed. It seems very unlikely in those circumstances that anything that might in fact have been said by the relatives, had they been consulted, would have been capable of deflecting the attorneys from the principle of their decision to proceed to transfer the residue of Mr Kaye's estate to charity by way of a Deed of Variation.

[43] It is theoretically possible, as was suggested in the course of the debate, that proper engagement with the relatives might have resulted in an acceptance that the Deed should benefit a different charity or charities from that actually selected by the attorneys, but the pursuer's pleadings put forward no specific case that any such suggestion, let alone one capable of representing an acceptable compromise, would have been made by either the attorneys or by some or all of the relatives. In such circumstances the suggestion that the attorneys should be regarded as having had no true power to enter into the Deed, or that it should now be reduced, begins to take on a somewhat unrealistic air. When one adds to the equation that it is now too late to enter into any alternative Deed of Variation because of the expiry of the statutory time periods permitting that effectively to be done, it becomes tolerably clear that the equities of the situation point firmly in favour of permitting matters to remain where they stand, rather than unravelling a position that cannot be remade on account of a clear but practically inconsequential failure to comply with one of the general principles of the 2000 Act.

Conclusion

[44] For the foregoing reasons, I shall sustain the first plea-in-law for pursuer to the extent that it claims that the Deed of Variation was entered into by Mr Johnstone and Ms Foster in breach of their duties as Mrs Kaye's attorneys and grant declarator to the same effect, as partially first concluded for. *Quoad ultra* I shall sustain the first plea-in-law for the

first and second defender, along with the first plea-in-law for the third defender, repel the pursuer's remaining pleas, and dismiss the remaining elements of the first, and the whole of the second, conclusions of the action. All questions of expenses are reserved meantime.