SHERIFF APPEAL COURT

[2021] SAC (Civ) 14
HAM-A124-19

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL A Y ANWAR

in appeal by

JOHN THOMPSON

Pursuer and Appellant

against

MARY HOPKINSON

Defender and Respondent

Pursuer and Appellant: Thompson, solicitor
Defender and Respondent: Cheyne, Advocate; Jack Grant & Co Solicitors

22 March 2021

Introduction

[1] The pursuer and appellant (hereinafter "the appellant") raised proceedings seeking production and reduction of a will executed by his late brother, Samuel Thompson on 27 November 2018 ("the will"). Samuel Thompson died on 26 February 2019.

[2] The defender and respondent ("the respondent") is the principal beneficiary and residuary legatee in terms of the will. The respondent is a care worker, employed by the local authority. She provided care services to the deceased from 2012 and continued to care for him until his death. In a prior will dated 26 April 2012 ("the prior will"), the deceased

left his entire estate, with the exception of his home, to the appellant. The appellant had also executed wills in 2012 and 2016 leaving his entire estate to the deceased.

[3] The appellant sought reduction of the will on the basis that it was impetrated by facility and circumvention. In the alternative, the appellant sought damages arising from a breach of contract; the appellant contends that he and the deceased had entered into a binding contractual agreement in 2012 to make each other the principal beneficiary in their respective wills.

[4] The appellant appeals against the sheriff's interlocutor of 2 April 2020 in terms of which, following proof, the sheriff granted decree of absolvitor.

The sheriff's decision

[5] At the diet of proof, the appellant, a friend of the deceased and a consultant psychiatrist gave evidence. The respondent also gave evidence and on her behalf, evidence was led from Mr Steven, the solicitor who acted on behalf of the deceased in the drafting and execution of the will. Objection was taken to Mr Steven's evidence on the basis that there was no fair notice and no Record for such evidence; the respondent's averment that "the deceased was not facile" failed to provide fair notice of Mr Steven's observations and assessments of the deceased's mental capacity. The appellant's solicitor submitted that the defences were skeletal in nature and ought to be construed as an implied admission. The evidence was heard under reservation as to its admissibility. The sheriff found the evidence to be admissible.

[6] The sheriff found that during the period between 2012 and 2019, the respondent and the deceased became friends. The deceased's health deteriorated and by 2018 he was frail, suffering from a number of illness and was taking a range of medications, however he

remained mentally sound. The sheriff did not find it established that the deceased was facile when he made the will or that the terms of the will resulted from undue or improper influence by another person, or that it did not express his true intentions.

[7] The sheriff also rejected the appellant's claim based on breach of contract, concluding that the expressions of intent in 2012 made by the deceased and the appellant in relation to their respective wills did not form a binding contract nor was it legally enforceable.

Grounds of appeal

[8] Put shortly, the appellant advances the following amended grounds of appeal:

1. The sheriff erred in law by failing to imply admissions to the appellant's case on Record;

2. The sheriff erred in law by finding the evidence of Mr Steven admissible in circumstances where there was no foundation on Record for the evidence, no fair notice and where the respondent's pleadings lacked candour;

3. The sheriff erred in holding that the appellant could not object to a lack of fair notice after the Record had closed;

4. The sheriff erred in law in failing to accept the unchallenged evidence of the appellant. The sheriff gave no justifiable reason to reject the evidence of the appellant;

5. The sheriff erred in failing to infer that circumvention had taken place. He failed to place appropriate weight on the evidence of the appellant, the timing of the change of will and the unexplained nature of the legacies;

6. The sheriff erred in holding that the respondent was a credible and reliable witness.

Submissions for the appellant

[9] Mr Thompson invited the court to allow the appeal, recall the sheriff's interlocutor of 2 April 2020 and make various consequential deletions and substitutions to the sheriff's findings in fact. The respondent averred in Answer 2 simply that the 'the deceased was not facile'. Answer 7 consisted of a bare denial to a number of matters which were within the respondent's knowledge. The respondent's pleadings lacked candour. Having regard to Rule 9.7 of the Ordinary Cause Rules 1993 ("OCR"), the dicta in *Central Motor Engineering* v *Galbraith* 1918 SC 755 and *Urquhart* v *Sweeney* 2006 SC 591, and the commentary in Macphail, *Sheriff Court Practice* (3rd edition) at paragraphs 9.03, 9.19 to 9.26, the respondent's pleadings in particular in Answer 7 required to be construed as implied admissions. Every statement of fact made by a party requires to be answered by every other party. The respondent had simply answered "denied" to several statements of fact. The respondent ought to have used the expression "*Quoad ultra* denied." The respondent's case amounted to no more than a bare denial that the deceased was facile at the time of signing the will. There was no specification such as in what period it was claimed that the deceased was not facile. Moreover, there was no foundation in the respondent's pleadings for Mr Steven's evidence; there were no averments relating to his dealings with the deceased prior to the execution of the will or of his observations and assessment of the deceased at that time. Had the sheriff construed the respondent's averments as implied admissions of the appellant's case on Record and had he rejected Mr Steven's evidence as inadmissible, he would have been bound to find that the deceased was facile at the time of signing the will.

[10] At paragraph [67] of his note, the sheriff had concluded that by the time of the proof the opportunity to challenge the lack of fair notice in the respondent's pleadings had passed

and as such this could not form the basis of an objection to Mr Steven's evidence. That was plainly wrong and such objections at proof were commonplace.

[11] The appellant's evidence had been unchallenged and had not been contradicted in many material respects. Reference was made to pages 39, 43, 47-53, 71-74, 76, and 117-119 of the extended notes of evidence. The appellant had spoken to the agreement he had reached with the deceased. He had described the deceased as a frugal man with few friends and as someone who was suspicious of people. He had spoken to the deceased's deteriorating health in the last quarter of 2017. Standing this evidence, which was supported in all material aspects by the appellant's witnesses and by the respondent herself, the sheriff had not adequately explained why the appellant's evidence fell to be rejected nor why in these circumstances, circumvention should not be inferred.

[12] The sheriff had erred in assessing the respondent as a credible and reliable witness, standing the lack of candour in her pleadings and the contradictions in her evidence. In particular, the respondent had been asked when she first became aware that she was a beneficiary to the deceased's estate. The respondent had stated she first became aware when she read the will, but also maintained that the deceased had spoken about it prior to his death. Later during cross examination, she claimed never to have discussed the matter with the deceased. She accepted that the deceased was a frugal man and yet was unable to explain why he had left legacies to members of her family, a matter which had not been admitted on Record.

Submissions for the respondent

[13] Counsel for the respondent accepted that the sheriff had erred in concluding that the appellant could not object at proof to a line of evidence on the basis of a lack of fair notice in

the closed Record. However, while averments were designed to give fair notice, their principal function was not to signpost evidence to be led in rebuttal. Not all bare denials amount to skeletal defences. These were not defences designed as a dilatory tactic (*Ellon Castle Estates Co Ltd* v *MacDonald* 1975 SLT (Notes) 66); the respondent was entitled to put the appellant to proof (*McManus* v *Speirs Dick and Smith Ltd* 1989 SLT 806).

[14] Even if at proof the respondent's averments were found to lack candour that does not lead to the conclusion that any admissions must be implied. In particular, one requires to examine each of the averments in Article 7. While her pleadings might have been clearer, the propositions contained in the appellant's averments were also confused. The central issue was whether the deceased was facile when he signed the will. The appellant's averment to that effect is not only met with a denial but also with a positive contradictory averment in Answer 2. The respondent was entitled to lead evidence in rebuttal to the appellant's averments without pleading the evidence to be led.

[15] The onus of proof rested upon the appellant and he had failed to discharge it. It was for the appellant to satisfy the court that the deceased was facile when he made the will. There were averments of the deceased's physical difficulties but none in relation to the deceased's mental capacity beyond a bold assertion that he was facile. The appellant had simply failed to aver the circumstances which might allow the court to infer facility, such as those set out in *Matossian* v *Matossian* [2016] CSOH 21.

[16] The sheriff had been correct to allow Mr Steven's evidence. Answer 6 set out Mr Steven's involvement. Mr Steven spoke to the respondent's positive averment that the deceased was not facile when he signed the will. However, had the sheriff found Mr Steven's evidence to be inadmissible, in the absence of any evidence tendered on behalf of the appellant as to the deceased's state of mind at the time the will was entered into, the

appellant would necessarily have failed in his action. The appellant's expert did not provide any evidence of any cognitive deterioration on the part of the deceased.

[17] The appellant's case rested on the proposition that the deceased was such a suspicious, frugal man with few friends that a change in his testamentary intentions was so out of character one must infer both facility and circumvention. That position was not supported by the authorities.

Discussion

[18] As several grounds of appeal relate to the proper approach to be taken to the pleadings, it is helpful to set out the relevant passages of the pleadings in so far as they relate to the question of facility.

[19] In Article 2, the appellant avers that:

> "the [appellant] and the deceased have not kept in good health for a number of years. The deceased's health started to decline in the last ten years. . . in the last year of his life, the deceased's health deteriorated substantially. He was suffering from, inter alia, renal failure and prostate cancer. He was known to be receiving, inter alia, morphine. In the last year of his life, the deceased was facile."

In response, the respondent makes various averments regarding her involvement with the deceased, sets out the deceased's physical ailments and thereafter avers "the deceased was not facile". In Article 4, the appellant avers "the [appellant] recognised that the deceased was becoming more and more confused towards the end of his life". The respondent answers that averment with "not known and not admitted", however, the respondent avers in Answer 4 "believed and averred that the deceased was able to make decisions on his own care up until the weekend before his death". In Article 6 and in the answers thereto, reference is made to the will. The respondent's averments refer to "Watters Steven solicitors" as having prepared the will. Article 7 is in the following terms:

> "The new wills have been impetrated by facility and circumvention. The deceased was facile when he changed his wills. Legacies have been left to a number of unknown third parties. The third parties who have been left legacies are primarily the respondent's extended family members who were unknown to the deceased person. The deceased was known to be a frugal man who would not spend his money, and certainly not on unknown third parties."

These averments are denied by the respondent. In Answer 8, the respondent avers:

> "Believed and averred that the deceased was not facile when the will of 27 November 2018 was made in the presence of an independent solicitor and outwith the knowledge of the [respondent]."

[20] On the central issue, that of facility, both parties have been economical in their pleadings. While the appellant sets out the physical ailments suffered by the deceased, the averments regarding facility are bold assertions and bare statements without any specification, beyond a reference to "confusion" on the part of the deceased. It might have been entirely appropriate for these averments to have been met with a simple denial. They are not. The respondent instead avers that the deceased was not facile. That averment may be expressed in the negative however it is clearly a positive statement of fact and one which the respondent offered to prove.

[21] The first ground of appeal is, in my judgment, entirely misconceived and arises from a misunderstanding of the nature and function of written pleadings. It is general rule of pleadings that every statement of fact made by one party must be answered by the other party. Averments which are not explicit admissions will not be construed as such. However, admissions fall to be implied in one of the four situations set out in paragraphs 9.20 to 9.24 of Macphail, *Sheriff Court Practice* (3rd edition). The appellant in this case relies upon the second situation described in Macphail with reference to OCR 9.7 which is in the following terms:

> "Every statement of fact made by a party shall be answered by every other party, and if such a statement by one party within the knowledge of another party is not

> denied by that other party, that other party shall be deemed to have admitted that statement of fact."

[22] In *Central Motor Engineering Co* v *Galbraith*, upon which the appellant in this appeal relies, the Inner House dealt with an action for reduction of an award of sequestration. It was expressly averred by the defender, and not denied by the pursuer, that the pursuers were aware of the sequestration shortly after it was granted. This was a matter within the knowledge of the pursuers which, in the absence of a denial, they were held to have admitted.

[23] In the present appeal, the appellant maintained that because the respondent had not denied a specific averment within her knowledge, namely that "in the last year of his life, the deceased was facile", the defences should be construed as impliedly admitting this statement of fact. The premise for this proposition is incorrect. Unlike the circumstances in *Central Motor Engineering Co* v *Galbraith,* the averment referred to is not only answered with the expression "*Quoad ultra* denied", it is also met with a positive statement of fact that "the deceased was not facile". Far from constituting an implied admission, the pleadings made clear that the respondent was offering to prove the contrary position.

[24] It was submitted on behalf of the appellant that the respondent's pleadings lacked specification as she had not averred when the deceased was not facile. Standing the brevity of the appellant's pleadings on the central question of facility, this was a rather surprising argument. I am not persuaded that there was any obligation upon the respondent to specify a period; the averment was quite clearly directed at the entirety of the period she had known the deceased.

[25] The appellant also contended that the averments in Answer 7 ought to have been treated as implied admissions by the sheriff on the basis that the Answers were uncandid. The relevant averments in Article 7 are:

> "The new wills have been impetrated by facility and circumvention. The deceased was facile when he changed his wills. Legacies have been left to a number of unknown third parties. The third parties who have been left legacies are primarily the respondent's extended family members who were unknown to the deceased person. The deceased was known to be a frugal man who would not spend his money and certainly not on unknown third parties".

[26] Article 7 is answered "Denied". During her evidence, the respondent had identified several beneficiaries related to her. The appellant maintained that the respondent had been dishonest and uncandid in her Answers.

[27] However, paragraph 9.26 of Macphail upon which the appellant relied, does not support the proposition advanced; the consequences of pleadings which lack candour are identified as being a risk of an adverse finding of expenses, severe criticism of the pleader and a risk that the defences will be undermined and credibility prejudiced. Indeed, in *Gray* v *Boyd* 1996 SLT 60, the Inner House disapproved of any practice which may have developed since *Ellon Castle Estates Co Ltd* v *MacDonald* of treating a general denial as amounting to an implied admission, merely because there had been a lack of candour.

[28] I am satisfied that the sheriff did not err by failing to construe the respondent's averments as implied admissions.

[29] The second ground of appeal is without merit. The sheriff correctly concluded that one of the main issues in this case was whether the deceased was facile and, in light of the respondent's positive averment that the "respondent was not facile", there was fair notice that the evidence to be elicited from the solicitor would have included that which would address the deceased's state of mind. Moreover, the appellant appears to have completely

overlooked the averment in Answer 7: "believed and averred that the deceased was not facile when the will dated 27 November 2018 was made in the presence of an independent solicitor and out with the knowledge of the respondent". It is manifestly clear that the solicitor would likely be asked about his involvement with, and observations of, the deceased. There is therefore no error in the sheriff's approach to the admissibility of Mr Steven's evidence.

[30] In relation to the third ground of appeal, Counsel for the respondent properly conceded that there was no bar to objecting to a line of questioning at proof based on a lack of fair notice in the pleadings. In his submissions after proof, the solicitor for the appellant maintained his objection to the admissibility of Mr Steven's evidence on the basis that the defences were skeletal and should be treated as deemed admissions. He had relied upon the dicta in *Urquhart* v *Sweeney*. It is in that particular context that the sheriff addressed the question of whether the respondent's averments amounted to an implied admission and whether the opportunity to challenge the respondent's averments had passed. At paragraph [67] of his note, the sheriff correctly identified that in *Urquhart* v *Sweeney*, the Inner House was dealing with an appeal against a decision to grant summary decree on the basis of skeletal defences which had "shown a complete lack of candour". The Lord Justice Clerk (Lord Gill) made the following observations:

> "[41] Where a party lodges skeletal defences that are uncandid in their responses to positive averments of the pursuer, that party is not entitled to rely upon general denials to put the pursuer to the proof his averments. In such circumstances the only serious question to arise is whether the court should grant summary decree."

[31] In the present case, there has been no motion for summary decree. The matter had proceeded to proof. The sheriff's comment that the "opportunity to challenge" had passed is made in that context. In any event, the sheriff concluded that the defences were not

skeletal, that they were apt to provide the appellant with fair notice of the respondent's position on the central issue – whether the deceased had been facile when he made the will. The sheriff was correct so to conclude for the reasons set out at paragraph [29] above.

[32] The fourth ground of appeal related to the sheriff's assessment of the appellant's evidence. It is well established that where a trial judge has had particular advantages in having seen and heard the witnesses, an appellate court should only interfere with the findings of the trial judge if they are plainly wrong or unsupported by the evidence (*Thomas* v *Thomas* 1947 SC (HL) 45; *McGraddie* v *McGraddie* 2014 SC (UKSC) 12).

[33] It was submitted on behalf of the appellant that as his evidence has been unchallenged and had not been contradicted in many material respects, the sheriff had no justifiable reason to reject it. However, that is to state matters too simply. Unchallenged evidence nevertheless requires to be examined and assessed; the onus lies on the pursuer to prove his or her case on a balance of probabilities.

[34] The sheriff carefully examined the nature of the appellant's evidence and concluded that it did not assist him to establish that the deceased was facile nor that there was a prior binding agreement that the deceased would leave his estate to the appellant. At paragraph [72] of his note, the sheriff states:

> "The [appellant] was also well placed to speak to the deceased's condition around the time of making [the] will. He was to his credit remarkably candid and straightforward when giving evidence. Though saying that he did not think that the deceased was fit enough to make his second will, his evidence indicated that there was no real basis for that belief."

[35] The sheriff thus has not rejected the appellant's evidence in relation to the central issue of facility as lacking in credibility or reliability, but rather concluded that the evidence did not advance the appellant's case. He noted that according to the appellant, in November 2018, it did not appear that the deceased had any difficulty in engaging in

conversation with the appellant by telephone; that the deceased had advised the appellant not to call too often to avoid disrupting the nursing staff, which indicated that the deceased had an understanding of and sensitivity to their concerns; that the deceased had an awareness of and an ongoing interest in football; that the appellant described the deceased as "talkative, very precise and well educated"; and that when asked directly if he remembered anything happening in November 2018 that made him think "that the deceased was not well in the head", the appellant said "no". Finally, the sheriff noted that while the appellant spoke to sometimes forming the view that the respondent was hallucinating, might be drowsy and might slur his words, this did not appear to give the appellant any cause for concern.

[36] In relation to the question of whether there was a prior binding agreement between the deceased and the appellant, the sheriff explains clearly in paragraph [68] of his note, that the only witness who spoke to this was the appellant and his evidence did not support the formation of a binding contract. Indeed, he noted the appellant's concession that there had been nothing to prevent the appellant from changing his own will, thereby indicating the absence of any prior agreement not to do so.

[37] At paragraphs [73] to [74] the sheriff explains in clear terms why the evidence of the appellant's remaining witnesses did not assist to advance the appellant's case. The consultant psychiatrist had found nothing in the medical records to indicate any concern about the deceased's mental health. While he suggested that because of his physical ailments, the deceased may have been more susceptible to undue influence, he could not say that he was. The appellant's remaining witness had had very little contact with the deceased and had been unable to describe the appellant's condition at the relevant time.

[38] The sheriff noted at paragraph [71] that the person best able to describe the deceased's appearance and behaviour was Mr Steven who had spoken to three meetings with the deceased. He described the deceased as "quite assertive". The deceased had the presence of mind to ask questions of Mr Steven relating to inheritance tax, query Mr Steven's background and experience and discuss football with him (page 8 of the transcript of day 2 of the proof). Mr Steven was repeatedly asked and repeatedly stated that he had no concerns regarding the deceased's mental health. Under cross examination, Mr Steven stated that he regarded the deceased as "someone who would not be bullied".

[39] The sheriff carefully examined the evidence led for the appellant. He did not find it established that the deceased was facile when he made the will. That conclusion was amply supported by the evidence. There is no basis for concluding that the sheriff had been plainly wrong.

[40] The fifth ground of appeal related to whether the sheriff ought to have inferred that circumvention had taken place.

[41] The law relating to facility and circumvention is helpfully summarised by Lady Smith in *Horne* v *Whyte* [2005] CSOH 115, at paragraph [51]:

> "For the pursuers to succeed . . . it is necessary that they establish (1) the facility of the deceased at the time the codicil was made; (2) acts of circumvention or fraud which impetrated or procured the codicil; and (3) lesion. Direct evidence is normally required for the first and third of these elements but the second, for obvious reasons, is usually, where the granter of the challenged deed is dead, a matter of inference (see: *Clunie* v *Stirling (1854) 17D 15*; *Mackay* v *Campbell 1967 SC (HL) 53*; *Pascoe – Watson* v *Brock's Executor 1998 SLT 40*; *Gaul* v *Deerey & Others 2000 SCLR 407*). The three elements are clearly interrelated, they require to be looked at as a whole and the strength of a pursuer's case on one matter may compensate for weakness on other matters (*Mackay* v *Campbell*; *Pascoe – Watson* v *Brock's Executor*).

[42] As explained by Lord Uist in *Matossian* v *Matossian* at para [4], circumvention can be inferred from proof of facility and lesion, or a combination of both with circumstantial evidence. The sheriff correctly identified these legal principles.

[43] Few specific averments were made by the appellant of the deceased's facility or state of mind. The evidence of facility was inadequate and was directly contradicted by Mr Steven's evidence. The sheriff was entitled to conclude that it had not been established that the deceased was facile at the time he made the will. There was scant evidence of lesion. Thus on the issue of facility and lesion for which direct evidence is normally required, there was little such evidence. The sheriff correctly noted that there was no direct evidence of circumvention. Unlike the position in *Matossian* v *Matossian,* the circumstances in which the will had been signed were not "unusual and irregular". Mr Steven had held three meetings with the deceased, had offered him independent legal advice, had met with him privately and had found him to be quite assertive, able to ask pertinent questions, and assessed him as someone who would not be bullied. All of the direct evidence pointed to the will being a true reflection of the deceased's testamentary intention. The circumstantial evidence upon which the appellant relied in this appeal related to the inconsistency in the respondent's evidence in relation to whether she was aware of the terms of the will and the deceased's decision to leave legacies to members of the respondent's extended family. In relation to the former, a close examination of the transcript (page 137-138) does not in fact reveal an inconsistency in the respondent's evidence: the respondent spoke to being unaware that she was a beneficiary in terms of the will, but confirmed that she was aware that the deceased wished to change his will. In relation to the latter, the respondent spoke to being a friend of the deceased and spoke to the deceased visiting the homes of her extended family. The respondent's pleadings on the identity of her extended family members ought

to have been clearly and candidly pled on Record, however there was insufficient circumstantial evidence before the sheriff from which circumvention could be inferred.

[44] The sixth ground of appeal related to the sheriff's assessment of the respondent's evidence. The sheriff in fact does not make any assessment of the respondent's evidence. That is unfortunate. Ordinarily, a decision maker should make clear what assessment he or she has made of the evidence of each witness. However, this was not a case in which the court was faced with a stark choice between irreconcilable accounts such that the credibility and reliability of the parties' testimony was an issue of primary importance. The evidence led on behalf of the appellant was inadequate. The sheriff based his decision upon the poor nature and quality of the evidence presented on behalf of the appellant and the compelling nature of Mr Steven's evidence. The sheriff had been entitled to do so, his assessment was supported by the evidence and could not be described as being plainly wrong. Having examined the extended notes of evidence, while it is clear that the respondent admitted that there were legacies left to members of her family (an admission which had been absent from her pleadings), there was little in her evidence which would have assisted the court to determine the central questions of facility and circumvention.

[45] Accordingly, I shall refuse the appeal and adhere to the sheriff's interlocutor of 2 April 2020. Parties were in agreement that expenses should follow success. The appellant shall be found liable to the respondent in the expenses of the appeal. I shall also certify the appeal as being suitable for the employment of junior counsel.