



SHERIFF APPEAL COURT

**[2024] SAC (Civ) 18
STR-A13-22**

Sheriff Principal A Y Anwar
Sheriff Principal C Dowdalls KC
Appeal Sheriff A M Cubie

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C DOWDALLS KC

in the appeal in the cause

(FIRST) EMMA ALEXANDER; (SECOND) LAURA ALEXANDER and
(THIRD) REBECCA ALEXANDER

Pursuers and Respondents

against

(FIRST) NEIL FARROLL and (SECOND) JOYCE MCMEIKAN

Defenders and Appellants

**Defenders and Appellants: G. M. Henderson (advocate); Michael G. Kilkerr
Pursuers and Respondents: McAndrew (advocate); McAndrew and Richardson**

26 April 2024

Introduction

[1] The appellants occupy a house in Stranraer (“the property”). The property is owned by the respondents. The first appellant has occupied the property, initially with Margaret Gulline (“the deceased”), since around 1990. His partner, the second appellant,

has latterly occupied the property with him. The respondents wish to evict both appellants and recover possession of the property with a view to selling it. Two issues require to be addressed: (i) whether the first appellant's right to occupy the property has expired and (ii) whether there is any legal basis for the second appellant to occupy the property.

Background

[2] The first appellant was the partner of the deceased. He lived with her at the property until her death on 17 June 2005. She died intestate. By way of a Deed of Family Arrangement registered in the Books of Council and Session on 27 January 2006 ("the Deed"), the executors of the deceased's estate agreed that they would convey the property to the respondents, while granting a right to the first appellant to occupy the property "for as long as he shall require".

[3] Following the conveyance, the respondents and first appellant agreed a Minute of Agreement, which was registered in the Books of Council and Session on 23 October 2006 ("the Minute"). The purpose of the Minute was to regulate the first appellant's use of the property.

[4] The preamble to the Minute includes reference to the Deed and the first appellant's right to occupy the property for "as long as he shall require". Clause First provides that he "shall be entitled to occupy the said dwellinghouse as long as he shall require the same ...". Clause Six provides that on the death of the first appellant "or on his giving written intimation that he no longer requires to occupy the [property], the [respondents] shall be entitled to resume possession of the property ...".

[5] Between 2006 and 2021, the first appellant's right to occupy the property was not disputed. On 30 August 2021, the respondents' solicitor issued a notice of eviction to the

first appellant. The notice stated that the first appellant had been granted a licence to occupy the property in 2006. The respondents contended the first appellant no longer required to occupy the property as he owned three other properties in Stranraer jointly with the second respondent.

[6] The appellants refused to vacate. In response, the respondents raised an action: (i) for declarator that the first appellant's right granted under the Deed and Minute was a licence to occupy; that the right of occupancy pursuant to said licence ceased by no later than 30 August 2021; and that the respondents are entitled to enter upon possession of the property and to dispose thereof at their pleasure; and (ii) to ordain both appellants to remove themselves from the property, failing which to grant warrant for summary ejection.

The sheriff's judgment

[7] Following sundry procedure, both parties sought a debate. The respondents sought to dismiss the defence and moved the sheriff to grant decree *de plano*; the appellants challenged the specification and relevancy of the respondents' pleadings and also argued that the action against the second appellant was incompetent.

[8] Before the sheriff a key dispute between parties was whether the first appellant's right amounted to an improper life rent or a licence to occupy; the respondents had sought declarator that the Deed and Minute had conferred upon the first appellant a licence to occupy. That dispute is no longer in issue as, during the appeal, the respondents' counsel amended their first crave by deleting all references to a licence to occupy.

[9] Having considered the terms of the Deed and the Minute, the sheriff found that, Clause Six of the Minute did not prescribe the circumstances under which the first appellant's right would terminate. Clause First of the Minute stated that the first appellant

was entitled to occupy the property as long as he shall “require”. As such, the sheriff considered that Clause First established an additional basis upon which the first appellant’s right to occupy the property could expire; namely, when he no longer required it. The sheriff, under reference to the Oxford Dictionary, interpreted “require” in Clause First of the Minute as meaning “need”. Whether the first appellant continued to require (or need) the property was a matter for evidence.

[10] As for the second appellant, the sheriff found that she had no right to occupy the property. Her averments challenging her removal were therefore irrelevant. The sheriff considered that the Minute could not have granted an incidental right to the first appellant to have another person reside in the property with him nor could such a term be implied. The sheriff refrained from granting decree against the second appellant. The appellants’ solicitor argued that the granting of decree to remove the second appellant would be contrary to her rights under Article 8 of the European Convention on Human Rights. Despite no such argument having been foreshadowed in the pleadings, the sheriff considered it prudent to hear evidence on the circumstances which would give rise to such a breach.

[11] The sheriff therefore dismissed all preliminary pleas at the debate with the exception of the respondents’ first plea-in-law; thereafter, he fixed a proof before answer.

The terms of the Deed and the Minute

[12] The relevant term of the Deed for the purposes of this appeal is as follows:

“(Second) The said [beneficiaries] renounce their claim to their Legal Rights in the estate of Margaret Hazel Gulline and agree that the estate of the said deceased should be divided in manner following:

(One) the [property] will be conveyed to [the respondents]... with a right of occupancy being granted to the deceased's partner [the first appellant] for as long as he shall require to occupy said property..."

[13] The terms of the Minute are as follows:

"WHEREAS [the respondents] have or are about to become infest as heritable proprietors of [the property] in terms of [the Deed] and in respect of the Estate of Margaret Hazel Gulline who resided at [the property] aforesaid: AND WHEREAS the [first appellant] in terms of said [Deed] has the right to occupy the said dwellinghouse and that for as long as he shall require the same: And now seeing that it is right and proper that the terms of the [first appellant's] occupation of the said dwellinghouse should be regulated therefore the parties hereto agree as follows:-

FIRST The [first appellant] shall be entitled to occupy the said dwellinghouse as long as he shall require the same and that without any rent being paid therefor

SECOND The [first appellant] shall not be allowed to assign his interest to occupy the said subjects to any other person.

THIRD The [first appellant] shall be responsible for the insurance, expenses of maintenance, renewal and repair of the said property and the payment of the Council Tax. The [first appellant] shall ensure that the interests of the [respondents] as heritable proprietors will be endorsed on the insurance policy.

FOURTH The [respondents] shall have the right, on reasonable notice being given, to inspect the said subjects, either themselves or through their representative.

FIFTH The [respondents] hereby undertake not to grant a security over their interest in the said subjects which would jeopardise the [first appellant's] right to occupy the same.

SIX On the death of the [first appellant] or on his giving written intimation that he no longer requires to occupy the said subjects, the [respondents] shall be entitled to resume possession of the property and dispose of it as they see fit.

SEVEN The Parties agree hereto that these presents are irrevocable and consent to registration hereof for preservation and execution:"

Submissions for the appellants

Appeal

[14] The key clause was Clause Six of the Minute: the language of that provision was clear and unambiguous. The first appellant's right could only expire upon either: (i) his death; or (ii) him providing written notice that he no longer required to occupy the property. The sheriff erred in holding that Clause Six of the Minute did not prescribe the circumstances in which the first appellant's right expired: it could only expire on two bases. For a term to be implied, it must not contradict an express term of the contract: *Marks & Spencer plc v BNP Paribas Securities Services* [2016] AC 742 per Lord Neuberger at para [18]. The sheriff had, effectively, held that the Minute contained an implied term that Clause Six was not prescriptive of the circumstances under which the first appellant's right expired; he had implied a term that directly contradicted the express terms of Clause Six of the Minute.

[15] The sheriff also erred in the manner in which he interpreted Clause First of the Minute by finding "require" meant "need". There is a significant difference between what someone requires and what someone needs. Moreover, the word "require" ought to be construed subjectively. It was for the first appellant alone to determine whether he still required the property. There was no basis for an objective assessment to be made of whether the first appellant required the property.

[16] The appellants maintained that the respondents' pleadings lacked sufficient specification. In particular, they criticised a failure by the respondents to aver that any of the other properties owned by the appellants are habitable or provide suitable alternative accommodation. In the absence of such averments, the action ought to be dismissed.

[17] With respect to the second appellant, there was no separate crave nor separate plea-in-law directed at evicting her from the property. The second appellant's right to reside at

the property was based on: (i) the first appellant's right to be at the property; and (ii) the first appellant having the right, under common law, to have others reside with him, including the second appellant, at the property.

[18] The second appellant's argument regarding a breach of Article 8 of the European Convention of Human Rights was not insisted upon on appeal.

Cross-appeal

[19] Standing the second appellant's position on Article 8, no opposition was made to ground 3 of the cross-appeal. Grounds 1 and 2 of the cross-appeal were opposed on the basis of the arguments made by counsel in relation to the appeal.

Submissions for the respondents

Appeal

[20] Counsel moved to amend the respondents' first crave by deleting the words; "was a licence to occupy; that the right of occupancy pursuant to said licence". No objection being made, the amendment was allowed.

[21] The sheriff correctly applied the principles of contractual interpretation: *Arnold v Britton* [2015] AC 1619 per Lord Neuberger at paras [43] – [44]. Those principles apply equally to documents of a testamentary nature: *Marley v Rawlings* [2015] AC 129 per Lord Neuberger at para [20]. It was necessary for the sheriff to consider how Clause First and Six of the Minute operated together. With respect to Clause First of the Minute, it was submitted that the dictionary definition of "require" includes to "need" something. The applicable definition was: 'To demand or call for as appropriate or suitable in the particular case; to need for some end or purpose': *The Oxford English Dictionary*, 2nd ed, Vol. XIII, (2004),

Clarendon Press: Oxford, pp 681 – 682. “Need” better reflected the parties’ intentions in the Minute. The parties could have used language giving the first appellant the sole discretion to determine whether he needed to remain in occupancy. The clause used by the testator in *Wemyss Trustees v Wemyss* 1921 SC 30 at 32 was an example of the language that could have been used to make the first appellant the sole arbiter of whether he required the property; however, such language had not been used in the Minute.

[22] The Deed and Minute inform what the parties intended when using the word “require” in the respective agreements. By creating a more restrictive type of occupancy right, the parties intended: (i) a narrower reading of “require” in Clause First of the Minute as being synonymous with “need”; and (ii) for the question of “need” to be determined objectively, not subjectively as the appellants contended. The sheriff was correct to find that Clause Six was not prescriptive of the grounds upon which the first appellant’s right expired.

[23] The respondents had made sufficient averments of the circumstances in which the first appellant no longer needed to reside at the property. In particular, they had averred that he had acquired other properties and that he had the ability to reside at those other properties. It was within the first appellant’s knowledge as to what he used the other properties for.

[24] The appellants’ submission that the respondents did not seek a standalone right to remove the second appellant was without merit. The removal of the second appellant did not depend upon whether the first appellant continued to have the right to occupy the property. The sheriff was correct to treat her separately; however, he was wrong to appoint consideration of her Article 8 interests to proof before answer.

Cross-appeal

[25] The sheriff erred in reserving the respondents' first plea-in-law and fixing a proof before answer. He ought to have upheld the respondents' first plea-in-law and, thereafter, granted their motion for decree *de plano*. The respondents had averred that the first appellant owned three other properties jointly with the second appellant. That was accepted by the first appellant. That led to an inference being drawn that the first appellant did not require to occupy the property, particularly in circumstances where the first appellant had failed to make any positive averments that would justify a different conclusion. Standing that inference, the sheriff ought to have granted the respondents' motion.

[26] Even if the sheriff was correct to have fixed a proof before answer, he erred as to what the scope of the proof before answer ought to be. Any proof before answer ought to be restricted to the question of whether the occupancy right had ceased, at any stage, prior to 30 August 2021.

[27] Finally, the sheriff erred in allowing the question of whether circumstances existed by which Article 8 prohibited removal of the second appellant to be determined at proof. As this ground of cross-appeal was no longer opposed, it fell to be granted.

Decision

[28] The Minute, and the rights and obligations created by it, is central to our deliberations in this appeal. The first appellant's right to occupy the property was agreed in the Minute. The duration of that right is set out in Clause First of the Minute and the right to terminate the arrangement is set out in Clause Six. The respondents no longer insist that the first appellant's right to occupy is a licence to occupy. Therefore interpretation of the parties' contractual arrangements, as set out in the Minute, does not depend upon on the

characterisation of the nature of the right as a licence to occupy or as an imperfect liferent.

Put simply, this is a contractual dispute and the question for this court is whether the sheriff was entitled to put the respondents to a proof of their averments, having regard to the terms of the contractual arrangements set out in the Minute.

[29] The issue in this appeal is whether the Minute provides a mechanism whereby the respondents may objectively determine when the first appellant no longer requires to occupy the property, such that they may eject him therefrom. The question then is: who is the arbiter of what the first appellant requires? The appellants argue that assessment of whether the first appellant requires to occupy the property is a matter for the first appellant, subjectively, to assess. The respondents argue that the assessment of the first appellant's requirement to occupy the property can be made objectively, by reference to the first appellant's circumstances and, in particular, the availability to him of alternative accommodation in properties that he owns jointly with the second appellant. To properly consider these competing arguments, it is necessary to consider the language used in the Minute and, in particular, Clause Six.

[30] In a field not short of authorities, including *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, *Arnold v Britton* [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] AC 1173, the principles of contractual interpretation, which apply equally to testamentary writings, are well distilled by Lord Neuberger in *Marley v Rawlings* [2015] AC 129 at paragraph [19]:

“When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions.”

[31] Clause Six of the Minute provides the only mechanism for bringing an end to the first appellant's right to occupy the property. Nowhere else in the Minute is there a right or obligation conferred on any party to terminate the first appellant's right to occupy for as long as he requires. One might have expected to see a clause providing that, in the event of his marriage or cohabitation with a third party, his right would come to an end; no such clause exists. The Minute does not provide for termination of the arrangement on the giving of notice by the respondents to the first appellant. The only clause that sets out the means by which the right may be brought to an end is Clause Six, which provides that the respondents shall be entitled to resume possession of the property and dispose of it as they see fit on the occurrence of one of two events. Those events are: (i) the death of the first appellant; or (ii) the giving by the first appellant of written intimation that he no longer requires to occupy the property.

[32] The first appellant has not given notice that he no longer requires to occupy the property. That being the case, his right to occupy continues. No question arises whether, on an objective analysis, he requires the property or not. Only he may give notice; it follows that only he may determine whether and when he no longer requires to occupy the property. That conclusion is an evitable consequence of the application of the principles of contractual construction. Had we preferred the respondent's analysis, that there was a mechanism for termination of the first appellant's occupancy in Clause First of the Minute, we would agree that, having regard to the overall purpose of the Minute, "require" means "need" and that an objective assessment of whether he needed to stay in the property was the correct approach.

[33] We have some sympathy for the respondents in this appeal, none of whom was party to the Deed which initially gave the first appellant a right to occupy the property, and only

one of whom had capacity to enter personally into the contractual arrangement reflected in the Minute. The first appellant has occupied the property for around 18 years. He has done so without payment of rent. The respondents are unable to benefit from the deceased's estate until one of the two events set out in Clause Six comes to pass. However, as observed by Lord Neuberger in *Arnold v Britton* [2015] AC 1619 at p1628

"The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language."

[34] Accordingly, the sheriff erred in determining that a proof was required on the question of whether the first appellant continued as at 30 August 2021 to need to occupy the property or continues to need to do so now. As neither of the two events set out in Clause Six has come to pass, the respondents are not entitled to the declarators sought.

[35] Insofar as the second appellant is concerned, her occupancy of the property is entirely dependent on the first appellant continuing to exercise his right to occupy. In any event, no question now arises in terms of Article 8 ECHR, the appellants' counsel having withdrawn opposition to the third ground in the respondents' cross-appeal to the extent that no such proof is necessary therefore, we will uphold ground three of the cross-appeal.

Disposal

[36] We will allow the appeal and allow the cross-appeal in part. We shall recall the interlocutor of 26 September 2023, sustain the second plea-in-law for the appellants and dismiss the action. We will sanction the appeal as suitable for the employment of junior counsel. Parties should seek to agree expenses within 21 days, failing which further procedure will be assigned.