

SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2021] SC EDIN 8

EDI-PN541-20

JUDGMENT OF SHERIFF ROBERT D M FIFE

in the cause

JOHN JORDAN

Pursuer

against

ANTHONY O'REILLY

Defender

Pursuer: McNaughtan, Advocate; Digby Brown LLP, Glasgow
Defender: MacLeod, Advocate; Clyde & Co (Scotland) LLP, Edinburgh

Edinburgh, 4 December 2020

Introduction

[1] In this action the pursuer claims damages caused by asbestos exposure, while in the employment of the now dissolved firm of N M Cafferty & Company ("N M Cafferty & Company") in the period from around April 1974 to April 1978. The pursuer was diagnosed as suffering from pleural plaques in March 2017. The defender is sued as the executor confirmed to the estate of the late Carlton O'Reilly who died in 2004. Mr O'Reilly retired in 1981, and was a surviving partner of the dissolved firm. The case called for debate on 10 November 2020.

[2] The following authorities were placed before the court:

1. *Stewart's Trustee v Stewart's Executrix* 1896 23 R 739;

2. *Fogo's Judicial Factor v Fogo's Trustees* 1929 SC 546;
3. *Forbes v McLean* 2018 SLT 877;
4. *Assets Co Ltd v Falla's Trustee* 1894 22 R 178;
5. *Assets Co Ltd v Bain's Trustees* 1904 6 F 676;
6. *Smith v Tasker* 1955 SLT 347;
7. *Forrest v Forrest* (1863) 1 M 806;
8. *A (Aitchison) v Glasgow City Council* 2010 SC 411;
9. MacPhail, *Sheriff Court Practice* (3rd Edition);
10. Partnership Act 1890;
11. Executors (Scotland) Act 1900;
12. Trusts (Scotland) Act 1921;
13. Succession (Scotland) Act 1964;
14. Stair Memorial Encyclopaedia, *Trusts, Trustees and Judicial Factors* Reissue at para 216;
15. Wilson and Duncan, *Trusts, Trustees and Executors* at 449;
16. Rules of the Court of Session, Parliament House Book, Vol 8 at 13.3.2(C);

Submissions for pursuer

[3] The pursuer adopted the written submissions. The law operates in such a way as to fix the liability of N M Cafferty & Company to make reparation to the pursuer. It is competent and relevant for the pursuer to sue the defender as an executor, for the purpose of constituting a claim against the estate of a deceased partner and, in turn, the former firm of his employers.

Motion for pursuer

[4] The pursuer moved to exclude from probation the defender's averments in relation to (i) the designation of the defender as an individual; (ii) the ingathering and distribution of the estate of the late Carlton O'Reilly; and (iii) his termination of office as executor, as not relevant to the issues for proof. Thereafter, the pursuer moved for a proof before answer with all the pursuer's pleas standing.

Issues for proof

[5] The issues for proof are (a) whether the employers negligently or in breach of statutory duty exposed the pursuer to asbestos; and (b) what injury has been suffered by the pursuer as a result of that exposure.

Response to defender's submissions

[6] The defender had approached the case in the wrong way, focussing on substance and not procedure and assets rather than liabilities.

[7] The pursuer relied on sections 9, 17 and 36 of the Partnership Act 1890. Those provisions indicated the way liability for wrongs to the pursuer can survive the dissolution of a company and the death of partners in a partnership.

Partnership Act 1890

[8] Section 9: Liability of partners.

"9 Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied..."

[9] Section 17: Liabilities of incoming and outgoing partners. “17(2) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement”.

[10] Section 36: Rights of persons dealing with firm against apparent members of firm.

“36(3) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively”.

[11] The liability remains so long as the obligation remains unsatisfied. Liability stays with a partner following retirement from the firm. The partner remains liable for all debts and obligations prior to his death, and continues to remain liable until such times as the claims are satisfied.

[12] Absent any limitation or prescription point, there was no authority for the limiting of time. The defender has no plea of prescription. The firm’s liability rests in the estate of the deceased.

[13] In employers’ liability claims, there is no direct right of action against the insurer. The only way for the pursuer to constitute a claim was to serve a writ on the extant legal body who is still around, in the present case being the executor of the estate of the deceased.

[14] The raising of proceedings against the executor was to enable the pursuer to find a mechanism for opening up a claim against the employer and, in turn, the employer’s liability insurers. The defender, as executor, had no personal liability.

[15] The executor was the only live person against whom proceedings could be raised by the pursuer. It was not the pursuer’s position that the executor remained in office. The proceedings were raised against the executor to constitute a claim. The pursuer relied on the decision of Lord Clark in *Forbes v McLean* 2018 SLT 877.

Forbes v Maclean (“Forbes”) and decree cognitionis causa tantum

[16] The authorities on competency and relevancy to sue an executor of a deceased partner as defender were considered by the Lord Ordinary.

[17] The Lord Ordinary held at [27] to [30] and following the Inner House Decisions in *Assets Co Ltd v Falla’s Tr* (1894) 22R 178 and *Assets Co Ltd v Bains Trs* (1904) 6F 694 it was competent for a pursuer to raise an action against an executor for constitution, even if discharged.

[18] The court should deal with questions of competency and relevancy as the Lord Ordinary did at [34]:

“In my view, no sound reasons exist for concluding that the claim in the present case, which, based on the authorities, is competent, can be said to be nonetheless irrelevant. I conclude that the pursuers’ case is competent and relevant.”

[19] The Lord Ordinary allowed a proof before answer, all pleas standing. The issues were the same in the present case but, in *Forbes*, there were no pleas to the relevancy of the defender’s averments in relation to distribution of the estate and discharge of the executor.

[20] The pursuer could amend to seek a decree *cognitionis causa tantum* against all known next-of-kin to constitute the debt, as suggested in *Smith v Tasker* 1955 SLT 347 and commented upon in *MacPhail Sheriff Court Practice* (3rd Edition) at 4.106. The least expensive option for the pursuer was to raise proceedings against the executor.

[21] The defender was being sued as the legal person, so that a writ could be served. That was the only reason proceedings were being brought against the defender as executor. The live issues for any proof were found at Statements 4 and 5 of the record, being the factual basis on which the pursuer claims damages for asbestos exposure.

Relevancy of the defender's averments

[22] The defender's averments as to the extent of the estate were irrelevant and should be excluded from probation. An executor can be sued, regardless of whether there are any funds in the estate of the deceased. The defender avers the estate has been ingathered and distributed. It is not a defence to an action of reparation to say there are no funds to meet any decree.

[23] In any event, the pursuer has no interest in the extent of the estate to which confirmation was obtained. The pursuer would give an undertaking to make no claim against the defender as an individual.

[24] The defender avers in Answer 2: "The designation of the defender as an individual is admitted." That averment is irrelevant and should be excluded from probation. The defender is sued as executor and not as an individual. The defender has neither title nor interest to defend the action as an individual, see Rules to the Court of Session, Parliament House Book, Vol 8 at 13.3.2 (C) and *MacPhail* at 4.34 to 4.36.

Submissions for defender

[25] The motion was to dismiss the action as (i) incompetent; and separately (ii) lacking in specification and irrelevant, with expenses in favour of the defender.

[26] A person confirmed as executor has certain rights and obligations, but their liability, their rights and obligations are fixed with reference to the estate confirmed to, see Executors (Scotland) Act 1900.

[27] The defender was decerned executor dative because the deceased died intestate. The pursuer's case is predicated on the hypothesis the executry is ongoing and that the executor remains in office.

[28] Section 20 of the Succession (Scotland) Act 1964 (“the 1964 Act”) assimilates the powers of an executor dative to that of a trustee:

“An executor dative appointed to administer the estate of a deceased person shall have in his administration of such estate the whole powers, privileges and immunities, and be subject to the same obligations, limitations and restrictions, which gratuitous trustees have, or are subject to, under any enactment or under common law, and the Trusts (Scotland) Acts 1921 and 1961 shall have effect as if any reference therein to a trustee included a reference to such an executor dative:

Provided that nothing in this section shall exempt an executor dative from finding caution for his intromissions or confer upon him any power to resign or to assume new trustees”.

[29] The pursuer argued the cases of *Forbes, Assets Co Ltd v Fall’s Trustee and Assets Co Ltd v Bains Trustees* should be followed. Those cases related to the duties of trustees, assimilating an executor-dative’s powers to that of a trustee.

[30] The defender submitted the duties of an executor differ to that of a trustee in light of the distinction between the purpose of a trust and the purpose of an executry.

[31] That distinction was considered in *Fogo’s Judicial Factor v Fogo’s Trustees* 1929 SC 546. That case post-dates the *Assets Co* series of cases, and was not before the Lord Ordinary in *Forbes*.

[32] *Fogo’s JF* was a special case before the Inner House (Second Division) concerning the liability of a deceased executrix. The distinction between the duties of an executor and trustee was commented upon by Lord Ormidale at page 551:

“The normal duty of an executor is to ingather the estate of the deceased and to ingather it in kind, to pay the deceased’s debts [known about at the time of the deceased’s death] and to satisfy the legacies bequeathed by him...”

Lord Anderson explained the distinction as follows at page 554: “The ordinary duty of an executor is, however, not to hold and invest, but to realise and distribute”.

[33] The distinction in the office of executor and trustee had two important consequences in the present case.

[34] First, an executor is not a trustee for the creditors of a deceased. In *Stuart's Trustee v Stuart's Executrix* (1896) 23 R 739 - a case which was not before Lord Clark in *Forbes* - the Inner House (First Division) approved the Lord Ordinary's decision about the relationship of an executor to the deceased's creditors. The Lord Ordinary's opinion, reported at page 743 of the case report, was:

"An executor is not a trustee for the deceased's creditors. He is no more so than an heir entering *cum beneficio inventarii*. He is, in a question with creditors, the proprietor of the estate, under burden of payment of their debts. He is not a depositary. He is a debtor, and the equities which result from the position of a depositary, - that is to say, of a trustee, - are wholly applicable".

[35] Secondly, the executor's office terminates upon performance of their tasks. In *Fogo's JF* Lord Ormidale stated at page 551:

"The duties with which the executrix is charged are only two, and they are proper executorial duties, (1) to pay the deceased's debts, and (2) to pay herself a legacy of £300. These duties being performed, any right she had to continue in possession or to intromit with the estate came to an end".

Lord Anderson's view at page 553 was to the same effect:

"It was her duty, as executrix, to realise so much of the deceased's estate as would enable her to make these payments; but, on these payments being made, her office of executrix automatically came to an end".

[36] Accordingly, an executor is not a trustee for the deceased's creditors. His liability is limited to the extent of the estate to which he is confirmed. His office ends. The defender's duties can be summarised with reference to three particular tasks:

- (i) to identify the deceased's estate and obtain confirmation;
- (ii) to ingather the estate;

(iii) to distribute the estate under the rules of intestacy after payment of the deceased's debts and any legal rights claimed.

[37] The defender, *qua* executor, stands *eadem persona cum defuncto* (ie in the shoes of the deceased). In this case, the pursuer's claim for damages did not amount to a debt which existed at the time when the deceased died. The inventory for Confirmation did not include any right under insurance that was *in bonis* of the deceased at the time of his death.

[38] The pursuer does not offer to prove there was a right under insurance which remains vested in the defender. The pursuer avers it was not until 2017 that he suffered from ill health, see Statement 5.

[39] It could not be asserted the defender remained vested in an item of estate, such as a right under a policy of insurance, following distribution of the estate to the deceased's heirs.

[40] As a matter of law, the defender's office *qua* executor has terminated. There is no basis on which the pursuer could lead contradictory evidence. The pursuer's averments were lacking in specification and irrelevant, and incompetent against the defender *qua* executor. The action should be dismissed.

Comments on *Forbes*

[41] It did not appear from the Lord Ordinary's reasoning that either of the authorities of *Fogo's JF* or *Stewart's Trustee* were considered.

[42] The decision in *Forbes* was based on an acceptance of the application of the two *Assets Co* cases. The Lord Ordinary stated:

“[34] While the case law deals with testamentary trustees, I do not see any material distinction between trustees and executors for the purposes of the issues raised in the present case”.

[43] The factual circumstances in the *Assets Co* cases can be distinguished from the present case. The *Assets Co* cases concerned the liability of a trust estate.

[44] In the present case (i) there was no extant claim against the deceased at the date of his death; (ii) there was no allegation of bad faith against the deceased; and (iii) if the right under an insurance policy is an item of estate *in bonis* of the deceased at the time of his death, there are no averments that the defender has intromitted with it.

[45] In *Forbes*, the Lord Ordinary was referred to *Johnston's Executor v Dobie* 1907 SC 31. The Lord Ordinary rejected the argument that a discharge by beneficiaries could bring an end to the executor's role. That case was fact sensitive concerning competing claims for executor dative, whereas the defender predicated his case on *Fogo's JF*, which was an Inner House authority.

[46] The Lord Ordinary failed to recognise the distinction in the duties of a trustee and an executor. The decision in *Forbes* should not be followed.

[47] Another important distinction was that in *Forbes* there was an executor nominate. In this case there was an executor-dative. It could not be said in this case there was an ongoing trust. For example, if the defender was to die, the pursuer could not say there was a lapsed trust and appoint a new trustee.

Practical and legal consequences

[48] There would be a number of practical issues were the court to find the defender had a liability after undertaking his duties, having been confirmed to a certain estate.

[49] As examples, what would be the requirements on the defender? Who would pay for caution? The additional estate would have to be confirmed to. What if the defender failed

to act? What if the defender declined to engage with the insurer or, having made a claim, he receives money under the insurance policy and fails to make payment?

[50] There were other remedies available to the pursuer. The pursuer could seek appointment as executor creditor or confirmed *ad omnia* to an estate.

The scope of an action of constitution

[51] The pursuer avers the purpose of the action is to constitute a claim against the deceased's estate.

[52] An action of constitution is "to have judicially determined a liability to pay and the amount payable, without demanding payment" (Walker: Civil Remedies, Chapter 16).

[53] In general terms such a remedy is competent where a party dies intestate and a creditor seeks decree *cognitionis causa tantum*, in order to constitute a claim against a deceased's estate.

[54] The pursuer was not correct that he could just amend the pleadings (i) for declarator that he was a just and lawful creditor; (ii) for an order that the defender (as next of kin of the late Carlton O'Reilly) confirms as executor to the estate of the late Carlton O'Reilly and pay damages to the pursuer or renounce his rights in the estate; and (iii) in the event of the defender renouncing his rights, for declarator *cognitionis causa tantum*. That would not include the defender as he was sued as executor. If next of kin renounced their rights then what was the need for the action?

[55] It was irrelevant and incompetent to sue the defender in lieu of the next of kin, unless he was the extant representative of the deceased. The defender did not represent the interests of the next of kin. They had a different interest. The defender was not a trustee for

creditors. He had distributed the estate confirmed to, which excluded any right under insurance, and his role had terminated. There may be other remedies open to the pursuer.

Supplementary submissions for pursuer

[56] The pursuer could not constitute the debt until he has the decree. The defender has a liability, but there was no established debt.

[57] The court should not get into a consideration of executry cases. If the pursuer was successful, he could seek an eik to have the same confirmed in addition to the estate originally confirmed, exactly the sort of technicality considered in *Smith v Tasker*, but none of these were live issues for any proof, more so how to enforce any decree.

Reasons and decision

[58] Many of the submissions were before the court in *Forbes*, and addressed by the Lord Ordinary in his judgment. It is not necessary to repeat these arguments here. The decision in *Forbes* was not reclaimed.

[59] At para [34] the Lord Ordinary stated: “While the case law deals with testamentary trustees, I do not see any material distinction between trustees and executors for the purposes of the issues in the present case.”

[60] At para [34] (duplicate) the Lord Ordinary continued:

“In my view, no sound reasons exist for concluding that the claim in the present case, which, based on the authorities, is competent, can be said to be nonetheless irrelevant, I conclude that the pursuers’ case is competent and relevant.”

[61] The issue for determination is narrow. Whether I decide to follow the decision in *Forbes* may turn on the cases of *Stewart’s Trustee* and *Fogo’s JF* relied on by the defender.

Stewart's Trustee

[62] *Stewart's Trustee* concerned the liability of an executrix-dative to the trustee in sequestration of the deceased, for profits made carrying on the business of licensed premises after the death of the deceased. The creditors of the deceased were as at the date of his death. The Inner House approved the Lord Ordinary's decision that the executrix was not a trustee for the creditors of the deceased. The executrix was only liable to account for the value of the estate as at the date of death. The executrix incurred no liability to account for profits made from the use of the estate.

General comments on Stewart's Trustee

[63] In *Stewart's Trustee*, the court was addressing a different question to the present case. The trustee's position was that the money made by the executrix carrying on the business, and the existing stock and furniture of the business, were to be treated as a *surrogatum* for the goodwill, stock and furniture left by the deceased. To succeed in that argument the pursuer would have to show the executrix was a trustee for the creditors of the deceased. The court rejected that argument. Lord McLaren stated that because creditors were at a disadvantage in obtaining payment through the executor who was not a trustee for them, that was the reason for the remedy of sequestration of a deceased's estate in terms of the Bankruptcy Act 1856.

Fogo's JF

[64] *Fogo's JF* was a special case before the Inner House. The testator (the late Mr Fogo) appointed his widow executrix nominate in terms of a trust disposition and settlement. The widow was directed to pay his debts and a legacy of £300. The testator then disposed his

whole means and estate to her in liferent. On termination of the liferent, the estate was disposed to trustees to realise the estate, pay various legacies and the residue to certain beneficiaries.

[65] Following the widow's death, questions arose as to her liability for loss and depreciation of certain investments. The court held that the widow's duties as executrix ceased when she had paid the debts and the legacy. Thereafter, she was in possession of the estate qua liferentrix. Her appointment as liferentrix did not constitute her as a trustee and, under the powers of the settlement, she was entitled to retain non-trustee securities and to re-invest the proceeds of sale in non-trustee securities.

[66] Lord Ormidale stated the testator was well aware of the nature of a proper trust, drawing a distinction between his widow's appointment as executrix with no mention of any trust, and his disposing the estate to persons as trustees when the liferent ceased. There was no obligation on the executrix to realise the deceased's estate and invest it in trust securities. The executrix was not appointed a trustee proper.

[67] Lord Anderson stated it was essential to determine in what capacity the executrix may be held to be accountable. That decision turned on the construction and effect of a clause in the testator's settlement. The ordinary duty of an executor was not to hold or invest but to realise and distribute.

General comments on Fogo's JF

[68] The court was concerned with the construction and of a clause in a testamentary settlement and how that affected the accountability of the widow as executrix and as liferentrix.

Overview of Stewart's Trustee and Fogo's JF and constituting a claim

[69] The two cases can be distinguished from the circumstances of the present case. The pursuer is not seeking any liability to account on the part of the defender as executor.

[70] The deceased was liable to the pursuer for an obligation of the dissolved firm incurred while he was a partner, in terms of sections 9 and 17(2) of the Partnership Act 1890. The estate of the deceased had a liability in terms of section 36(3) of the 1890 Act. That liability continues so long as the obligation remains unsatisfied. There was no debt as at the date of death. The pursuer wishes to constitute a claim in damages. There is no debt until he has a decree.

[71] The authorities are in favour of a person being entitled to bring an action against an executor who has ingathered and distributed the estate, to constitute a money claim.

Falla's Trustees

[72] The Lord Ordinary's opinion (Lord Kyllachy) stated at page 179: "...I am not prepared to say that it is incompetent to sue even a discharged trustee for the purpose of constituting a claim against the trust-estate."

[73] The Lord President stated succinctly at page 181:

"...I think the reclaimers exaggerate the importance of the conclusion against the trustee, for he is brought into the action only as trustee to see something being done with the trust-estate. It is for him, as the Lord Ordinary says, to consider whether he will appear to defend or not, but to say that was in any way incompetent for the pursuers to call him appears to me to be out of the question."

Bain's Trs

[74] The Lord President stated at pp704/705:

"...it is to be observed that the pursuers do not ask any decree for payment against the testamentary trustees of Mr Bain personally, but merely desire to have the sum

sued for constituted as a valid debt against his testamentary trust-estate... I think it may be correctly stated as a general proposition that a person is entitled to bring an action of constitution against the representatives of his debtor, for the purpose of establishing the liability of his (the debtor's) executry estate for a money claim..."

[75] The Lord President continued at p705:

"...In this connection I may refer to the case of the present pursuers v. *Falla's Trustees*, in which it was held (affirming the judgment of Lord Kyallchy) that it was competent to sue a trustee who has distributed the whole trust-estate, and been discharged by the beneficiaries, for the purpose of constituting a claim against the trust-estate."

[76] The Lord President set out a general proposition that an action to constitute a claim, such as made in the present action, was competent.

Decision

[77] The defender predicates his case on *Fogo's JF*, which was an Inner House decision.

Fogo's JF has to be considered in its own context.

[78] *Fogo's JF* concerned the construction and effect of a testamentary clause and the potential accountability of the widow as executrix, who was also appointed liferentrix, in the performance of investments made by her after the deceased had died.

[79] The court in *Fogo's JF* was considering assets of the estate, not a liability arising from the Partnership Act 1890, for the purpose of constituting a claim against the estate of the deceased. The present case is not about personal accountability. *Bain's Trs* was not considered in *Fogo's JF*.

[80] As said by the Lord President in *Falla's Trustees*: "...he (the defender) is brought into the action only as trustee to see something being done with the trust-estate."

[81] In my view, the defender has taken too broad an approach of what can be taken from *Fogo's JF*, and applied to this case.

[82] In all the circumstances and, standing the authorities in *Falla's Trustees* and *Bain's Trs*, I have concluded the action is not incompetent for the purpose of constituting a claim and therefore relevant, for the reasons stated by the Lord Ordinary in *Forbes*.

[83] The averment as to the designation of the defender as an individual is irrelevant and excluded from probation.

[84] I will repel the defender's plea to the competency of the action. I will exclude from probation the last two sentences in Answer 2: "After distributing the estate of the late Carlton Dunlop O'Reilly, the defender's office, as executor, terminated. The action is therefore incompetent."

[85] I will allow parties a proof before answer on the remaining averments, on dates to be afterwards fixed.

[86] I was not addressed on expenses. The sheriff clerk will fix a hearing on expenses. If agreement on expenses is reached, the matter can be dealt with administratively.