



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 58

A58/21

Lord Justice Clerk
Lord Malcolm
Lord Tyre

OPINION OF THE COURT

delivered by LORD TYRE

in the Reclaiming Motion

by

LESLEY CURRIE

Pursuer and Reclaimer

against

SUSAN JANE BLAIR, as Executor Nominate of the late John Currie

Defender and Respondent

Pursuer and Reclaimer: Bowen KC, Kinnear; Drummond Miller LLP

Defender and Respondent: R MacLeod; Anderson Strathern LLP

20 December 2022

Introduction

[1] The reclaimer is the daughter and the respondent is the adopted daughter of the late John Currie. Mr Currie died on 16 January 2015 leaving a will in which he appointed the respondent as his executor and bequeathed his estate to the reclaimer and the respondent in equal shares. No confirmation has been obtained. During his lifetime Mr Currie had

executed a continuing and welfare power of attorney appointing the reclaimer and respondent as his attorneys. The power of attorney was exercised only by the respondent.

[2] In this action the reclaimer seeks (1) production by the respondent of Mr Currie's will; (2) decree ordaining the respondent in her capacity as Mr Currie's executor to seek a full account of her intromissions as attorney with Mr Currie's assets and property, failing which payment of the sum of £72,835.36; and (3) decree ordaining the respondent to produce a full account of her intromissions as executor with Mr Currie's assets and property, and payment of the sum of £69,545.85.

[3] The will has been produced. The respondent does not dispute that she has a liability to account to the reclaimer for her intromissions with Mr Currie's estate after his death, but she pleads that the reclaimer has no title to sue in respect of the second conclusion which relates to the respondent's intromissions as attorney during Mr Currie's lifetime. After a debate, the Lord Ordinary by interlocutor dated 10 February 2022 sustained the respondent's plea to relevancy and dismissed the second conclusion. The reclaimer now reclaims against the dismissal of that conclusion.

The respondent's intromissions as attorney: the parties' averments

[4] The reclaimer avers that after Mr Currie's death the respondent made a number of small payments to her in respect of his estate. She became suspicious regarding the apparently low value of his estate, and sought and obtained statements of bank accounts in his name for the period from April 2013 to April 2015. The statements showed payments amounting in total to £72,835.86 during the time from when he entered a nursing home in July 2014 until his death. These included transfers of funds to the respondent and expenditure on flights, toy shop orders and other items which were unlikely to be

attributable to Mr Currie's needs. The respondent had made regular purchases from retail outlets and large lump sum purchases. The reclaimer avers that Mr Currie was a generous but fair man. It was highly unlikely that, having modest assets, he would authorise the respondent to spend £72,835.86 of his money on gifts for herself and her family. Such extravagant expenditure would deplete his own resources in his final years, and would favour the respondent and her family over the reclaimer and her family to the latter's financial detriment.

[5] In response the respondent avers that she acted as Mr Currie's attorney with his knowledge and authority. She was his carer until he could no longer live at home. From November 2013 she intromitted with his bank accounts with his knowledge and authority and on his instructions. On account of his gratitude to the respondent for caring for him, he made gifts to her and to her family. He instructed her to purchase goods and services for her and her family and to uplift cash for herself. He had previously made gifts to the reclaimer.

The issue

[6] The only issue in this reclaiming motion is whether the reclaimer has pled a relevant case that she is entitled to an order requiring the respondent in her capacity as executor to obtain a full accounting from herself as attorney, which failing to payment of the sum that the reclaimer avers was expended by the respondent on herself and her family out of Mr Currie's funds.

The Lord Ordinary's decision

[7] The Lord Ordinary decided that the reclaimer's case in relation to the intromissions of the attorney was irrelevant. In *Anderson v Wilson* 2019 SC 271, it had been held that the

beneficiaries of a deceased's estate had no title to sue for a debt alleged to be owed to the estate. The same considerations applied here. The reclaimer had no right or interest in the composition of the estate: that was for the respondent as executor to determine. That the attorney was not required to account for her intromissions to beneficiaries was not only a necessary implication of *Anderson*, but also followed from the express terms of the power of attorney which provided that the attorneys were only bound to account for their intromissions to the grantor, ie to Mr Currie. The respondent as executor stepped into his shoes on his death, and it followed that the attorneys were only bound to account for their intromissions to the respondent.

[8] The Lord Ordinary was not persuaded that *Anderson* was distinguishable on the basis that the reclaimer in the present case was seeking decree ordaining the respondent as executor to seek an account of her intromissions as attorney. Such a distinction was artificial; to recognise it would be to permit an otherwise incompetent action to succeed through the back door. The reclaimer was not without a remedy: as Lord Rodger of Earlsferry had observed in *Roberts v Gill & Co* [2011] 1 AC 240 in the context of trustees, where the trustees decline to take proceedings but the beneficiary insists, he can require them to assign the right of action or to permit him to use their name, provided that he gives them an indemnity for any liability for expenses.

Argument for the reclaimer

[9] On behalf of the reclaimer it was submitted that her claim in relation to the attorney's intromissions was competent and relevant. Reference was made to *Wilson & Duncan, Trusts, Trustees and Executors* (2nd ed, 1995) at paragraph 34-02 and to the cases of *Donald v Hodgart's Trs* (1893) 21R 246, a claim by a beneficiary who alleged that the executors had

refused to ingather estate despite having been alerted to its existence, and *Clarke v Clarke's Trs* 1925 SC 693, an action of count, reckoning and payment at the instance of beneficiaries alleging negligence by trustees. According to Wilson & Duncan, an action calling on the executor to realise and account for an unrealised asset of the estate was the “usual remedy”. The respondent as executor owed a fiduciary duty to the reclaimer as beneficiary and could not lawfully become *auctor in rem suam* by refusing to seek an accounting in respect of Mr Currie’s attorney. It was irrelevant that the same individual was both attorney and executor.

[10] The Lord Ordinary had erred in finding the present case to be on all fours with *Anderson v Wilson*. In that case beneficiaries were held to have no title to sue a third party for a debt due to the estate. Here the reclaimer was not suing an alleged debtor; she was suing the executor for her failure to ingather an asset of the estate. *Anderson v Wilson* was distinguishable on that basis. Equally the observations of Lord Rodger of Earlsferry in *Roberts v Gill & Co* had no application where a beneficiary was taking action against the executor.

Argument for the respondent

[11] On behalf of the respondent it was submitted that the Lord Ordinary had not erred in dismissing the reclaimer’s second conclusion. A beneficiary of a deceased’s estate had no right to an accounting from the deceased’s former attorney. A relevant action of accounting only emerged where it was alleged that a defender had intromitted with estate in which the pursuer was interested. The power of attorney granted by Mr Currie expressly provided that the attorney bound herself to account to the grantor, and on his death the right to an accounting passed to his executor. As stated in *Anderson v Wilson*, a beneficiary is not

entitled to sue for a debt due to the estate. The Lord Ordinary had correctly applied the rationale in that case.

[12] The cases founded upon by the reclaimer were not in point. They were concerned with the intromissions of trustees with the trust estate. In the present case the reclaimer sought an order against the respondent as executor in respect of a different patrimony, ie that of the former attorney. That was an important distinction and the cases were not authority for the proposition that a beneficiary can sue a former attorney. They ought not to be relied on to allow indirect regulation of an executor in circumstances where, as here, the executor is satisfied about the extent of the executry estate but a beneficiary is not. The reclaimer was not devoid of a remedy: she could sue in the executor's name (subject to providing indemnity) or could seek to have the executor removed.

Decision

[13] The issue raised by this case is an important one. Since the enactment of the Adults with Incapacity (Scotland) Act 2000, the use of continuing and welfare powers of attorney has become widespread, and we understand that it is not uncommon for the same individual to be appointed as a person's attorney and also as his or her executor. Where, after the person's death, a beneficiary with an interest in the estate wishes to challenge the intromissions of the attorney, it is important for the law to be clear as to whether such a challenge may competently be pursued and, if so, how.

[14] It is well settled as a general rule that a beneficiary of a trust, including an executry estate, has no title to sue a debtor to the trust: see *Rae v Meek* (1888) 15R 1033 (affd (1889) 16R (HL) 31); *Morrison v Morrison's Exrx* 1912 SC 892, Lord President Dunedin at 85; *Roberts v*

Gill & Co (above), Lord Rodger of Earlsferry at paragraph 87; *Anderson v Wilson* (above) at paragraph 30. As Lord Shand put it in *Rae v Meek* at page 1050:

“If the trustees do not think fit to raise an action against the debtors for certain debts, having doubts it may be how far they may be certain of success, is it for a beneficiary or beneficiaries to do so in their own name? I think they have no such right. And I do not think this is a matter of mere form; it is, in my view, a matter of substance, because if the law were otherwise, then the debtors of trust-estates, including amongst them law-agents who may have been employed by the trustees, would be liable to actions at the instance of many different persons — of anyone having a beneficial interest in the trust-estate — requiring them to pay the amount of their debts to the trustees. I think such actions are not competent, and that the only persons who can maintain actions to recover debts due to an executry or trust-estate are the administrators of the estate, the trustees or the executors.”

It follows that in the present case it would not be competent for the reclamer, as a beneficiary in Mr Currie’s estate, to raise an action against the respondent in her capacity as attorney, seeking payment of a share of the sum alleged to be due to the executry estate.

[15] An executor is, however, accountable to beneficiaries for the proper performance of his or her fiduciary duty to ingather the deceased’s estate in order to pay the deceased’s debts and distribute the balance among the persons entitled to it. *Wilson & Duncan* state (*Trusts, Trustees and Executors* (2nd ed, 1995) at paragraph 34-02:

“An executor is liable to be debited with the value of any estate which he fails to realise. The fact that the executor has a beneficial interest in the estate is not an excuse for his failure to use due diligence in ingathering it. If a beneficiary claims that the executor has not realised an asset of the estate, his usual remedy is to raise an action against him calling on him to realise and account for the asset.”

[16] The cases founded on by the authors as authority for the latter proposition are *Donald v Hodgart’s Trs* (above), *Smith v Smith* (1880) 7R 1013 and *Reid v Reid* 1938 SLT 415. In each of *Donald v Hodgart’s Trs* and *Reid v Reid*, the beneficiaries in a deceased’s estate sought an accounting from the executor for the value of the goodwill of a business carried on by the deceased during his lifetime. In both cases the point at issue was whether, as a matter of fact, there was any goodwill to be accounted for as an asset of the estate. Neither contains

any discussion of the competency of the action or of the pursuers' title to sue, which do not appear to have been disputed.

[17] The brief report of *Smith v Smith* narrates that the pursuers sought an accounting from the executor-dative of their late father for monies that they alleged ought to have been included in the inventory of the estate. The pursuers averred that the inventory did not include the deceased's share of a daughter's estate which had not, as the defender maintained, been paid to the deceased and then paid in turn by him to the defender for board etc. It was further averred that the defender's statement of monies expended by him for behoof of the deceased was untrue. The sheriff-substitute dismissed the action on the ground that the pursuers had mistaken their remedy: they were not in the position of creditors and should have had themselves confirmed as executors *ad omnia*. That decision was upheld by the sheriff but reversed by the court, which held in a short judgment that the action was competent, if relevantly stated, and that the beneficiaries were indeed in the position of creditors.

[18] We are satisfied that these authorities adequately vouch the proposition that a beneficiary who claims that the executor has not realised an asset of the estate may competently raise an action calling on the executor to realise and account for that asset. The decision in *Smith v Smith* demonstrates in particular that the beneficiary's challenge may relate to an asset consisting of a debt said to be due to the deceased - and thus to the estate - which the executor has omitted to ingather. That is what is averred by the reclaimer to be the situation in the present case. Applying the test enunciated by Lord Dunedin in *D & J Nicol v Dundee Harbour Trs* 1915 SC (HL) 7 at 12-13, the reclaimer is a party to a legal relation with the executor which gives her the right to require the executor to implement her fiduciary duty by ingathering assets forming part of the estate for distribution to the persons

entitled thereto, including herself. She avers that a debt consisting of intromissions by the attorney in breach of her fiduciary duty was owed to Mr Currie prior to death and is now owed to the estate. As a matter of competency and relevancy, she is entitled to seek an accounting from the respondent, in her capacity as executor, in relation to the ingathering and realisation of such an asset. In this context it is irrelevant that the executor is the same individual as the attorney alleged to be the debtor; the executor is sued in the capacity of being the same person in law as the deceased, and not as the former attorney as an individual.

[19] For this reason the decision in *Anderson v Wilson* is distinguishable. In that case the pursuers attempted to sue, in their capacity as beneficiaries in the estate of their late mother, a person alleged to have been a debtor of their late father who had bequeathed his estate to his wife, who in turn had bequeathed her estate to the pursuers and others. In the present case the claimer is not attempting to sue the alleged debtor, ie the respondent as an individual in her capacity as the former attorney; she is exercising her right to receive an accounting from the executor. We do not agree with the Lord Ordinary's characterisation of this as permitting an otherwise incompetent action to succeed through the back door. A competent action has been raised against the correct defender.

[20] Counsel for the respondent founded upon certain observations by the court in *Anderson v Wilson*, notably the statements at paragraph 31 that "the right of beneficiaries to a deceased's estate does not amount to a right to determine what the estate constitutes" and that "[t]he right to determine what is in the estate (its composition and extent) rests with the executor as the representative of the former proprietor". Those observations were made in the context of the circumstances of that case where the pursuers were not attempting to sue as beneficiaries in the estate of the person to whom the debt was allegedly owed but as

beneficiaries in the estate of the beneficiary of that person. In such a situation there was no legal link between the pursuers and the estate to which the debt was allegedly owed. We do not read the court's observations as restricting the scope of an executor's fiduciary duty to ingather and realise the deceased's estate, or of a beneficiary's corresponding right to hold the executor personally to account for the value of any estate that he or she has failed to realise.

[21] We therefore hold that the reclaimer has pled a relevant case in support of the first part of the second conclusion, ie for decree ordaining the respondent as executor to seek a full account of her intromissions as attorney with the assets and property of the late Mr Currie, and that the Lord Ordinary's interlocutor sustaining the respondent's plea to the relevancy of the reclaimer's averments and dismissing the second conclusion must therefore be recalled.

[22] We are less convinced that the reclaimer has at this stage demonstrated title to insist upon the second part of the conclusion, ie for payment by the respondent to Mr Currie's estate of the sum specified or such other sum as the court shall determine. As the case law to which we have referred makes clear, title to demand payment by a debtor to the estate rests with the executor and not the beneficiary. We are not, however, inclined to dismiss the second part of the conclusion at this stage. The present dispute may not end with the granting of decree ordaining the respondent to seek an account of her own intromissions as attorney. If, for example, no account were produced, or if after production of an account the reclaimer remained of the view that monies which the executor did not intend to ingather were owed by the attorney to the estate, further action, such as the bringing of an action against the attorney in the executor's name, or an application for removal of the respondent as executor, might be considered necessary. It seems to us that the relevancy of the latter

part of the second conclusion will best be considered when the future direction (if any) of the present action is more certain. In the meantime we shall leave standing the respondent's plea to relevancy in case it requires to be argued on a future occasion.

Disposal

[23] We shall recall the Lord Ordinary's interlocutor dated 10 February 2022 in so far as he sustained the fourth plea in law for the respondent and dismissed the second conclusion for the reclaimer. *Quoad ultra* we shall remit the cause to the Lord Ordinary to proceed as accords.