

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

[2022] EDIN 1

PIC-PN362-21

JUDGMENT OF SHERIFF JOHN K MUNDY

in the cause

JOHN RIDDELL, as Executor Dative of the late Valerie Riddell

Pursuer

against

ARCUS SOLUTIONS (HOLDINGS) LTD

Defender

Pursuer: Miller, Advocate, instructed by Thompsons Solicitors, Edinburgh
Defender: Stringer, Solicitor, DAC Beachcroft Scotland LLP, Glasgow

Edinburgh, 3 November 2021

The sheriff, having resumed consideration of the cause, dismisses the action; finds the pursuer liable to the defender in the expenses of the cause insofar as not otherwise previously dealt with; allows an account thereof to be given in and remits same, when lodged, to the auditor of court to tax and report.

NOTE

Introduction

[1] This is an action for damages at the instance of the husband of the late Valerie Riddell (“the deceased”) purportedly in his capacity as executor dative of his late wife arising from an accident in which she was involved on 23 February 2018. It is averred

by the pursuer that the deceased, while working as a bakery assistant in a supermarket tripped over a mat, which had been rolled up and left in the foyer by a cleaner in the employment of the defender. The pursuer avers that the defender is vicariously liable for the negligence of the cleaner in leaving the rolled-up mat in the thoroughfare. The defender admits the basis of the pursuer's claim subject *inter alia* to their contention that the pursuer has no title to sue. It is relevant to explain the background to the plea of no title to sue being taken by the defender.

Background to plea of no title to sue

[2] The accident occurred on 23 February 2018. The deceased passed away on 28 July 2018. It is not suggested that her death was in any way connected with the accident. A claim arising from accident was been intimated to the defender's insurers on 7 July 2020. Breach of duty was admitted on 8 October 2020. The present action was subsequently served on 22 February 2021 at the instance of the pursuer who was the husband of the deceased. As noted, the action has been brought in his capacity as executor dative of his late wife. In July 2021, a motion was enrolled on behalf of the pursuer to sist the cause for a period of three months to allow the pursuer "to be confirmed as executor dative relative to his deceased wife's estate". The defender says that this was the first time it had become aware that there was an issue with the pursuer's status and the motion was opposed on the basis that it inferred that the pursuer was not in fact the executor dative of his late wife and that if that was so at the time of raising the action then there was no title to sue. The defender therefore moved the court to dismiss the action or at any event to refuse the pursuer's motion to enable the defender to enrol a motion for summary decree of dismissal, if so advised. In the Note of Argument lodged on behalf of the pursuer for the purposes of

this opposed motion it was submitted that as the deceased's spouse the pursuer was a *de facto* beneficiary in her estate and was entitled as a matter of right to be appointed executor dative. It was stated in the Note that the pursuer was not at that time appointed or confirmed as executor dative but that it was understood that a petition for his appointment was in the process of being presented. It was accordingly submitted that the cause ought to be sisted to allow the petition for the pursuer's appointment to be presented and for confirmation to be granted. On 26 July 2021, the sheriff refused the pursuer's motion (number 7/1 of process) *in hoc statu* and varied the timetable *inter alia* to allow further adjustment of the pleadings. Subsequently, a record was tendered on behalf of the pursuer along with the motion (number 7/2 of process) to allow a proof. This was opposed by the defender and on 6 September 2021, the sheriff refused the motion insofar as it sought a proof and he signed a diet of debate, appointing parties to lodge Notes of Argument.

The debate

[3] At the debate, which called before me the pursuer was represented by Mr Miller, Advocate and the defender by Mr Stringer, Solicitor.

[4] At the outset, Mr Stringer invited the court to dismiss the action on the basis that the pursuer had no title to sue. On the other hand, Mr Miller on behalf of the pursuer asked the court to reject that argument and appoint the matter for proof or alternatively a preliminary proof before answer on the question of title to sue.

Submissions for defender

[5] On behalf of the defender Mr Stringer submitted that the pursuer could not be said to be executor dative. He had not followed due process to be appointed such. He had not

petitioned the court to be appointed and had not been confirmed as executor dative. There was therefore a fundamental issue in relation to his title to sue. He contended that in order to sue a pursuer must have both title and interest at the date of raising the action or at least a substantial right, which requires merely a subsequent formality to complete it. If he has not it could not be cured by a subsequent assignation or retrocession or other mechanism (Macphail, Sheriff Court Practice, 3rd Ed. at paras. 4.29-4.36; *Symington v Campbell* (1894) 21R 434; *Bentley v MacFarlane* 1964 SC 76; *Jack v Mackay* 1990 SCLR 816).

[6] An executor dative was an appointment of the court where an individual did not leave a valid will and therefore died intestate. The position of an executor dative could be distinguished from an executor nominate in terms of a will. An executor nominate had already been appointed by the deceased. It might be said that he had a *de facto* title, which might be perfected by confirmation. An executor dative must first petition to the court. As far as the defender was aware, the pursuer had not petitioned to the court and in any event had not done so prior to the raising of the action. However, even if he did do so this would not cure the defect in his title. It would be more than just an act perfecting title. In response to the defender's position as set forth in its Note of Argument that the pursuer had title because he was a *de facto* beneficiary, it was submitted that the purpose of the debate was not to consider whether the pursuer was a beneficiary but to consider whether he had title to sue at the outset of the action. The position was to be distinguished between the situation of an executor who has title to sue although has not completed confirmation before the action is raised, it only being necessary for him to do so before extract (Macphail *sup.* paragraph 4.105). Here, there was no appointment. Section 20 of the Succession (Scotland) Act 1964 referred to an executor dative who is "appointed" to administer the estate of a deceased having the same powers as gratuitous trustees. The pursuer was not appointed. It

mattered not whether or not the process of appointment was regarded as an administrative or judicial function. If the pursuer had a right to be appointed as executor dative this had not, as far as is known, been exercised. Accordingly, in the circumstances, there was no title to sue and the action should be dismissed.

Submissions for Pursuer

[7] On behalf of the pursuer, Mr Miller submitted that that the defender's plea of no title to sue should be repelled and adopted the written submission that had been submitted to the court on his client's behalf. I was asked to find that the pursuer had title to sue in a capacity of executor dative of his late wife and to refuse the defender's motion for dismissal. As indicated, he had an alternative position, which was to allow a preliminary proof before answer on the issue of title to sue to which I will return. He submitted that the pursuer had raised proceedings against the defender in the capacity of executor dative of his late wife and had done so by virtue of being the deceased spouse and *de facto* beneficiary of her estate for the purposes of Part II of the Succession (Scotland) Act 1964. The sole means by which the estate could bring proceedings against the defender was by way of executor and by designating the pursuer as executor dative in her estate. He was the nearest in line of succession to the deceased's estate. He was entitled as a matter of right to be appointed as executor dative. No judicial discretion existed, the function of the court being purely administrative rather than judicial (*Russo v Russo* 1998 SLT (Sh Ct) 32; and *Ford v Campbell* 2015 GWD 12-221 (Sheriff Court Glasgow)). It was explained however that at the present time the pursuer had not been appointed or confirmed as executor dative. It was understood that a petition for his appointment was in the process of being presented. After conferring with those instructing him, Mr Miller further explained that a petition had now

been presented to Aberdeen Sheriff Court for the appointment of the pursuer as executor dative to his late wife's estate. Decree had not yet been granted.

[8] Counsel accepted "as a generality" that title to sue must exist at the outset of an action. That was not disputed. Macphail (*sup* at para. 4.32) referred to a pursuer having title to sue or at least a substantial right, which requires merely a subsequent formality to complete it. As I understood the submission, it was contended that the pursuer in the present case had a substantial right or as counsel put it an imperfect title which could be perfected by appointment and subsequent confirmation. It was submitted that the defender was attempting to conflate the position of a beneficiary nearest in the line of succession to that of a perspective assignee prior to an assignation of rights (as in *Bentley v MacFarlane*). It was submitted that the former has an absolute right to be appointed executor dative under common law, the rights of the latter to enforce assigned rights or obligations only following from assignation. In the present case, the pursuer's right to be appointed executor dative existed in law on the date on which the court proceedings were raised and his title could be perfected during the course of the proceedings. The court did not have a discretion to refuse the pursuer's appointment. There was no functional distinction between executors nominate and executors dative as regards *de facto* authority prior to confirmation. It was only following confirmation that authority was granted for executors nominate and executors' dative to exercise their power and authority as to trustees of the deceased's estate. There was in the circumstances no practical or logical distinction between the executors nominate and executor's dative for the purposes of title to sue. The rights of executors nominate arose through the will specifying their appointment whereas the rights of executors dative arose by virtue of the common law in respect of which the court had no discretion. It was not unforeseeable that the imminence of a triennium for the purposes of

the Prescription and Limitation (Scotland) Act 1973 may necessitate the raising of court proceedings in circumstances where a confirmation had not been completed. It was illogical to suggest that a litigant should be prejudiced in their ability to raise proceedings within the limitation period prescribed by Parliament specifically in the context of an absolute right for which title to sue would arise when proceedings are raised with the formality of confirmation merely serving as a necessary precondition of the extraction and enforcement of decree.

[9] Mr Miller put forward an alternative position that if the court was not satisfied that the pursuer had title to sue by virtue of his common law right to be appointed executor dative then he had in any event the right conferred upon him by the operation of section 9(1), (2) and (4) of the Succession (Scotland) Act 1964 entitling him to appointment subject to proof that he was the surviving spouse of the deceased and that the value of the intestate estate was less than the amount he would be entitled to receive for the purposes of section 9. If the court accepted the proposition that this right would confer upon the pursuer title to sue which merely required the formality of confirmation prior to extract and enforcement of decree, a preliminary proof before answer ought to be assigned in respect of the matters which required to be proved to bring the pursuer within that provision viz. an entitlement to the whole intestate estate.

Discussion

[10] The starting point to any discussion on the issue is logically the passage from Macphail *sup cit.* at paragraph 4.32 as follows:

“The pursuer must have a title to sue at the date of the raising of the action... and a continuing title to pursue the action to final judgment. At the date of the raising of the action, the pursuer must have a title to sue or at least a substantial right, which

requires merely subsequent formality to complete it. If he has not, the lack cannot be cured by a subsequent assignation or retrocession or by the consent and concurrence of the person to whom the right of action truly belongs. If basically the title is in the pursuer, although it is not complete or subject to some qualification, he may complete the steps required to clear his title of defects or qualifications during the action”.

[11] The principle authorities relied upon by the author are *Symington v Campbell* and *Bentley v Macfarlane*.

[12] That brings us to consider the nature of the pursuer’s position as at the time of raising the present action. In submissions the word “confirmation” seemed to be used interchangeably, firstly for the act of appointment of an executor dative and secondly for confirmation to an estate. These are of course two separate things. This is not a case where the pursuer has been appointed executor dative and merely requires to obtain confirmation before extracting any decree. In this case, there has been in fact no appointment as yet of the pursuer as executor dative to his late wife’s estate. The difference, in a different context was highlighted in *Symington v Campbell*. That was a case involving an assignation where the pursuer sued for damages as an individual and also as an assignee arising from damage to a vessel. However, the assignation of competent claims was only made to the pursuer the day after the action was served. At page 436, the Lord President said:

“At the date when the summons was signeted and served, both things being done upon the same day, the pursuer had no assignation from Robert Symington; and accordingly, so far as regards the injuries alleged to have been inflicted upon the owner of the vessel during the ownership of Robert Symington, this pursuer had no title to sue, and valid objections have been raised to the action going on. This is not the case of a person having at the time of raising the action a substantial right, requiring only formal completion. The title of the pursuer here depends on the assignation, which he does not say had been gone into at all before the action was raised. The whole transaction took place after the summons had been served. This sweeps away, on the pursuer’s own shewing, his title to nearly all that he is suing for...”

[13] At page 437, Lord Adam, in agreeing with the Lord President, said:

“The question before us is whether at the date of raising the action the pursuer had a title to sue. I think he had not, and that suspecting this he procured the assignation next day in order that he might have a good title. It has been suggested that this case is like that of executors who have been held able to sue competently before getting confirmation and that in consequence it is competent for the pursuer here to sue. But the difference between the cases is that the executors had a good title at bottom, which they only require to have formally made absolute, while the pursuer here had absolutely no title, until the assignation had been entered into”.

[14] In this case, counsel for the pursuer sought to distinguish between the position of his client and the position of a respective assignee prior to assignation of rights. His position was, as indicated, that his client, as the beneficiary nearest in the line of succession to a deceased, had the absolute right to be appointed executor dative under the common law and in any event by virtue of section 9(4) of the Succession (Scotland) Act 1964. Being in that position, the appointment as executor dative was the sort of formality spoken of in the authorities to complete his title.

[15] It is the case that the entitlement to apply to be appointed executor is in large part, still governed by the common law. The order is (1) general disponee, universal legatory or residuary legatee (2) the next of kin (3) creditors (4) special legatees and (5) the procurator fiscal (“*Orders to be Observed in the Confirmation of all Testaments*” issued in 1666 by the Archbishops and Bishops with the authority of the Supreme Court given by Act of Sederunt; *Crawfurd v Ure* (1755) Mor. 3818; Erskine’s *Institutes* III, ix, 32; Currie on *Confirmation of Executors* 9th Ed.(Scobbie) paras. 6-02 to 6-04).

[16] The 1964 Act introduced new categories of heirs entitled to claim on an intestate estate and, by virtue of section 9(4), gives to a surviving spouse, in the event of her being entitled to the whole of the intestates estate, the “right to be appointed executor”.

[17] Subject to that, the commissary practice is to follow the order of preference above and, in practical terms, the person with the beneficial interest in the deceased’s estate will in

general be the person to be appointed as executor dative. However, the deceased's next of kin (as distinct from the surviving spouse) are still eligible to be discerned. The author of Currie states that while the commissary practice appears to be to treat the surviving spouse on intestacy whose rights exhaust the whole intestate estate as having an exclusive right to be appointed executor dative, this is not in fact what is prescribed by section 9(4) of the Act. The terms of the provision are that the surviving spouse has a right to be appointed executor dative, not an exclusive right. Next of kin are entitled to apply to be appointed (*ibid.* paras. 6-06 and 6-28 *et seq.*).

[18] Accordingly, it is not correct to say that the pursuer in the present case, on the hypothesis that he would take the whole intestate estate, has an absolute right to be appointed executor dative to his late wife's estate if that is meant to suggest that his right is an exclusive one. However, even if it was, the critical fact is that the right had not been exercised at the time this action was raised. Accordingly, the pursuer had not in fact been appointed as executor dative when the action was raised. Putting to one side the question of confirmation to an estate, any authority an executor has is derived solely from appointment by the court:

“Executors not named by the deceased are called dative, because they are given by the judge, and derive their authority solely from him”. (Erskine, III, ix; 32; Wilson and Duncan *Trusts, Trustees & Executors* (2nd Ed.) para. 32-36).

This is not a situation where there is any title at all on the part of the pursuer at the time the action was raised. It is not a situation where there is a title, which only requires to be perfected. The pursuer is not in the position of an executor nominate or dative who merely requires to confirm to the estate in order to obtain authority to intromit with the estate and so enforce any decree. It is accordingly not the sort of situation alluded to by Lord Adam in *Symington v Campbell* nor can it be the “substantial right, requiring only formal completion”

mentioned by the Lord President in the same case. The right to apply to be executor dative either at common law or in terms of statute does not change that, the right not having been exercised. It matters not in these circumstances whether or not the act of appointment is a judicial or administrative one. None took place. Section 20 of the 1964 Act does not therefore operate to vest in the pursuer the powers of a trustee at common law or under statute, including the Trusts (Scotland) Acts, which would include the power to raise court proceedings. As at the raising of the present action, the pursuer had no authority to act as executor and no power to instigate proceedings.

[19] In the circumstances, it is clear to me that the pursuer had no title to sue at the time the action was raised and that the defender's plea is well founded on the averments.

[20] The result must be the dismissal of the action, there being no room for a preliminary proof before answer on the question of no title to sue. Further, in accordance with the agreed position of the parties, expenses will follow success. The interlocutor I have pronounced reflects the foregoing.