OUTER HOUSE, COURT OF SESSION

[2025] CSOH 36

A279/23

OPINION OF LORD COLBECK

In the cause

LOUISE WYLLEE DAVIES

Pursuer

against

LORNA MARY CASSIE

Defender

Pursuer: Upton, (adv); Gilson Gray LLP
Defender: Jones KC (sol adv), Reekie (sol adv); Brodies LLP

8 April 2025

[1] William Andrew Cassie, who I refer to in this opinion as "the deceased", was a farmer. He died on 27 January 2023. The defender is his sister and was confirmed as his executrix dative on 17 November 2023. The value of the deceased's total estate for confirmation was slightly in excess of £2,600,000.

[2] The pursuer avers that she met the deceased in 2010 and that they enjoyed a close relationship. She further avers that on many occasions the deceased advised her (and others) that most of his estate would be passed to her. The deceased did not leave a will. The defender's position is that had the deceased had any settled testamentary intent, he would have done so.

[3] In terms of her second conclusion, the pursuer seeks declarator that the deceased promised to bequeath his heritable and moveable estate (excepting certain land at Portstown Farm, Inverurie) to her; and, in terms of her third conclusion, seeks an order ordaining the defender, as executrix dative, to convey to the pursuer the aforesaid estate, which failing for payment of £3,500,000. In addition, in terms of her first conclusion, the pursuer seeks delivery by the defender to her of a number of items of moveable property, which failing payment.

[4] The pursuer avers that the deceased's statements about the succession to his estate bore to include his interest in Portstown Farm. She waives and does not seek to enforce such right or title as she may have in respect of the heritable property of Portstown Farm or its value. Accordingly, it is unnecessary to consider further the exception in the second conclusion relative to Portstown Farm.

[5] Following sundry procedure, the cause was appointed to the procedure roll on the first and second pleas-in-law for the defender. Ultimately, senior counsel for the defender came to accept that the pursuer's case in respect of her first conclusion was sufficiently relevant and specific to be admitted to probation.

[6] In respect of the second and third conclusions, the defender contended that the pursuer's averments in article 6 fail to meet the required legal standard to be promises and consequently they should be excluded from probation. It following that the pursuer's fifth, sixth, seventh and eighth pleas-in-law should be repelled. The pursuer argued that her averments were sufficiently relevant and specific to be admitted to probation.

[7] The Requirements of Writing (Scotland) Act 1995 provides that for the constitution of a gratuitous unilateral obligation there must be a document which complies with section 2 of that Act, unless the beneficiary can bring herself within section 1(3). In the present case

there is no such document, however, before one can turn to consider whether the pursuer has relevantly averred a case that would bring her within the scope of section 1(3), it is first necessary for her to aver a gratuitous unilateral obligation, or promise.

[8] In *Macfarlane* v *Johnston and others* (1864) 2 M 1210 at 1214, Lord Neaves described a promise as, "the delivered expression of the serious engagement by the person promising that he will do the thing promised. For that purpose there are no particular words required." There are three acts of the promisor where a promise is binding: desire, resolution and engagement. Only engagement is obligatory (see *Countess of Cawdor* v *Earl of Cawdor* 2007 SC 258 at 290).

[9] As to what is required for a binding promise, the opinion of the Lord President (Gill) in *Regus (Maxim) Ltd* v *Bank of Scotland plc* 2013 SC 331 at para [37] is instructive:

> "In my opinion, an obligation of this kind can be created only by clear words. Since any promissory obligation is intention-based, the court's task is to consider whether the evidence, objectively assessed, discloses an intention on the part of the alleged promisor to incur a legally binding engagement … That question, in my view, is to be decided on a consideration of the alleged promisor's own words. Bearing in mind the stringent consequences of a valid promise that I have described, I consider that a promise is binding only if the promisor's own words are clear and unambiguous."

[10] The pursuer avers that the deceased promised to bequeath his heritable and moveable estate to her. Where, therefore, are the deceased's clear and unambiguous words to that effect to be found?

[11] Whilst much of the debate focussed upon the averments made by the pursuer in sub-paragraphs (a) to (i) of (the second) article 6 (to which I return below), those averments are immediately preceded by an averment that, "The promise was <u>reiterated</u> over a number of years." (My emphasis). Sub-paragraphs (a) to (i) are averred to be particular examples of the promise being reiterated. It is implicit in such an averment that the promise had been

made previously. It is therefore necessary to consider the pursuer's preceding averments in article 6.

[12] Article 6 opens with the averment, "On many occasions, the deceased advised the pursuer and others that most of his estate would be passed to the pursuer." And, prior to the specific examples set out in sub-paragraphs (a) to (i), contains the averment, "All of the deceased's heritable and moveable estate was promised to the pursuer." Neither of these assist the pursuer. They do not set out clear and unambiguous words by the deceased. The use of "most of" in the former contradicts the pursuer's position and is unexplained. Prior to the specific examples set out in sub-paragraphs (a) to (i), there are, what may be conveniently divided into, four groups of averments in article 6. I consider each in turn.

[13] Firstly, it is averred that:

> "In about 2015 or 2016 the deceased met a solicitor in an office of the firm of Blackadders, in the presence of a friend of the deceased's named Donna Parlay. The deceased told the solicitor that he wished the pursuer to inherit some of his estate, including land in Caithness and at Skares Farm."

[14] Clear words are required to constitute a promissory obligation in every case (see *Regus (UK) Ltd* at para [41]). There are no such words. The use of "some of" contradicts the pursuer's position and is unexplained. It is not averred that the deceased promised to bequeath his heritable and moveable estate to the pursuer in the course of this meeting.

[15] Secondly, it is averred that:

> "Stephen Taylor was a friend of the deceased who occasionally assisted him with farm work. The deceased told Mr. Taylor on more than one occasion that the pursuer would inherit Skares Farm and the remainder of his estate. On other occasions the deceased told Mr. Taylor that his money and a vehicle on the farm would be included in the pursuer's inheritance."

[16] Again, there are no clear words constituting a promissory obligation. It is not averred that the deceased promised to bequeath his heritable and moveable estate to the

pursuer in the course of these discussions with Mr Taylor. Notably, there is no indication as to when these discussions are said to have taken place.

[17] Thirdly, it is averred that:

> "On another occasion the deceased told the pursuer's partner, Gary Anderson, that Skares Farm would belong to the pursuer '*at the end of the day*'. On another occasion the deceased told Mr. Anderson that the pursuer would '*keep the farms*'."

[18] Again, there are no clear words constituting a promissory obligation. It is not averred that the deceased promised to bequeath his heritable and moveable estate to the pursuer in the course of these discussions with Mr Anderson. Again, there is no indication as to when these discussions are said to have taken place.

[19] Finally, it is averred that:

> "Adam Wood assisted the deceased with farm work. On another occasion the deceased told Mr. Wood that the pursuer would inherit livestock at Skares Farm. On other occasions the deceased told Mr. Wood that the pursuer would inherit his estate."

[20] Once more, there are no clear words constituting a promissory obligation. It is not averred that the deceased promised to bequeath his heritable and moveable estate to the pursuer in the course of these discussions with Mr Wood. Again, there is no indication as to when these discussions are said to have taken place.

[21] In conclusion, the pursuer's averments in article 6 which precede the specific examples set out in sub-paragraphs (a) to (i), contain nothing by way of clear and unambiguous words of the deceased whereby he promised to bequeath his heritable and moveable estate to the pursuer.

[22] The pursuer's averments in sub-paragraphs (a) to (i) of article 6 are stated to be reiterations of the promise, not the promise itself. As such, they cannot assist the pursuer. Lest I be wrong in that analysis, I turn to consider each of sub-paragraphs (a) to (i).

[23] Sub-paragraph (a) narrates a discussion between the deceased and the pursuer in which it is averred that the deceased said "Everything will be left right for you and the little lad", that being a reference to the pursuer and her son.

[24] Counsel for the pursuer conceded that this averment was not his best point. He was correct to do so. There are no clear words constituting a promissory obligation. It is not averred that the deceased promised to bequeath his heritable and moveable estate to the pursuer in the course of these discussions. The averments in sub-paragraph (a) do not assist the pursuer.

[25] Sub-paragraph (b) narrates a further discussion between the deceased and the pursuer, relative to the building of a home by the pursuer. In the circumstances set out in this sub-paragraph the pursuer avers that the deceased told her "she could choose to build wherever she wanted because the land would be hers".

[26] Counsel for the pursuer conceded that this was not the strongest averment, it being a factual prediction on the basis that the deceased had bequeathed the land to her. Again, there are no clear words constituting a promissory obligation. The averments in sub-paragraph (b) do not assist the pursuer.

[27] Sub-paragraph (c) narrates a further discussion between the deceased and the pursuer. It is averred that "the deceased said to the pursuer that (as) he had nobody else to leave his estate to, … he would be leaving it to the pursuer and her son." The pursuer goes on to aver that, "The deceased said that he wanted the pursuer to take on the farms and livestock when he died."

[28] The first averment in this sub-paragraph gives rise to two issues of significance for the pursuer. Firstly, and once again, there are no clear words constituting a promissory obligation. Secondly, the averment directly contradicts the pursuer's case that the deceased

promised to bequeath his heritable and moveable estate to her alone. The averments in sub-paragraph (c) do not assist the pursuer.

[29] Sub-paragraph (d) contains the averment that, in the circumstances narrated, "The deceased told the pursuer that she was going to receive the land, farms and equipment."

[30] Counsel for the pursuer suggested that this was a categorical statement capable of being construed as a commitment. Again, there are no clear words constituting a promissory obligation. The language, at its highest, is redolent of affirming something that has already been put in place. It might equally be regarded as a statement of future intention. Even were it to be the former, there are no relevant and specific averments to constitute a promise prior to the period referred to in this sub-paragraph (between 23 and 28 August 2021). The averments in sub-paragraph (d) do not assist the pursuer.

[31] Sub-paragraph (e) avers that during a conversation the deceased reminded the pursuer that "everything was coming to [her] and she needed to come and look after things".

[32] Counsel for the pursuer described this as a factual prediction. The language is, perhaps, redolent of affirming something that has already been put in place. For the reasons given in relation to sub-paragraph (d) (see para [30] above), the averments in sub-paragraph (e) do not assist the pursuer.

[33] In sub-paragraph (f) it is averred that the deceased said that the pursuer's son would "… have to argue with [the pursuer] … as the farms were being left to [her]". My conclusion in relation to the preceding two sub-paragraphs applies equally to this one. The averments in sub-paragraph (f) do not assist the pursuer.

[34] Sub-paragraph (g) can be dealt with briefly. It is first averred that, "In the latter days of his life, the deceased repeated his promise to the pursuer". It is not suggested that the

promise was first made at this time. That averment does not assist the pursuer. It is subsequently averred in this sub-paragraph that the deceased told Mr Wood that he was "leaving everything" to the pursuer. Again, there are no clear words constituting a promissory obligation. The averments in sub-paragraph (g) do not assist the pursuer.

[35] Sub-paragraph (h) was conceded by counsel for the pursuer to be less than strong. It contains no language that might be said to be affirmative of a prior promise, far less clear words constituting a promissory obligation. The averments in sub-paragraph (h) do not assist the pursuer.

[36] The view I have reached in relation to sub-paragraph (h) applies equally to the pursuer's averments in sub-paragraph (i), in which it is averred that the deceased said that the farms were "now yours to look after" to the pursuer. The averments in sub-paragraph (i) do not assist the pursuer.

Decision

[37] Since any promissory obligation is intention-based, the court's task is to consider whether the pursuer's averments, objectively assessed, disclose an intention on the part of the deceased to incur a legally binding engagement. In this case they do not. A promise is binding only if the promisor's own words are clear and unambiguous. The pursuer avers no such clear and unambiguous words of the deceased.

[38] I will sustain the first plea-in-law for the defender to the extent of dismissing the action insofar as it relates to the pursuer's second and third conclusions; and allow a proof before answer in relation to the pursuer's first conclusion. I will repel the pursuer's fifth, sixth, seventh and eighth pleas-in-law. The pursuer will be found liable to the defender in the expenses of the debate.