SHERIFF APPEAL COURT

[2022] SAC (Civ) 28
HAM-A453-21

OPINION OF THE COURT

delivered by APPEAL SHERIFF ANDREW M CUBIE

in appeal in the cause

JOHN CARSWELL

Pursuer and Respondent

against

ELIZABETH SKELTON

First Defender and Appellant

MARK CARSWELL

Second Defender

DAVID CARSWELL

Third Defender

First Defender and Appellant: Upson; Harper Macleod Solicitors
Pursuer and Respondent: Whyte; Whyte Fraser and Co Solicitors

28 September 2022

[1] This is an appeal by the first defender only from an interlocutor of the Sheriff at Hamilton. The second and third defenders took no part in the appeal. The Sheriff granted the respondent's motion to allow a minute of amendment to be received and refused the appellant's motion for summary decree. I will refer to the appellant as Mrs Skelton and to the respondent as Mr Carswell for the purposes of this note.

The nub of the appeal

[2] What is a litigant to do if they seek to rely on an original document that has been lost to show the testamentary wishes of a deceased, and that document itself is short of the formalities imposed by the Requirements of Writing (Scotland) Act 1995 (the 1995 Act)?

[3] Mr Carswell says that firstly, he can seek to prove the tenor of the missing document and then, having done so, that he can seek to establish that the document can be treated as if it did comply with the requirements of the 1995 Act. Mrs Skelton in contrast says there is no remedy as there is no document and separately any such remedy cannot be achieved in the context of one action; such an action cannot be a vehicle for an application to prove the tenor, an application under the 1995 Act, and an application to establish liability for payment of sums due.

Background

[4] The background to this is an action for declarator in relation to a document (a letter said to be a codicil to a will ("the letter") by John Carswell the father of both parties, who died on 15 October 2017.

[5] Mr Carswell offers to prove that the letter has testamentary effect. If he succeeds there will be consequences for the division of the estate of the deceased amongst all the litigants who are the children of the deceased. The principal letter is not produced and is agreed to have been lost. Mr Carswell has lodged what is said to be a copy of the letter at 5/1 of process. There is a significant dispute about the nature and extent of the estate and the nature, provenance and effect of the letter. An extensive record narrates the details.

The interlocutor appealed

[6] Mr Carswell sought to amend the pleadings by the addition of a crave to prove the tenor of the letter. That motion was opposed and Mrs Skelton sought summary decree of absolvitor. The sheriff allowed the minute of amendment to be received and refused the motion for summary decree on 14 March 2022. That interlocutor is now appealed.

[7] I am grateful to both parties for the helpful written material provided which included not only written submission but an agreed number of legal propositions. That allowed the appeal hearing to focus on the principal matter at issue – was the remedy sought by the combination of the proof of the tenor and the application under the 1995 Act a competent route for Mr Carswell?

Summary of agreed propositions

[8] The court's power to allow amendment is discretionary; any amendment must be necessary for the purpose of determining the real question: OCR 18.2. It is competent by amendment to add a different conclusion or crave from one initially sought: *Summerlee Iron Co Ltd* v *Caledonian Railway Co* 1911 SC 458.

[9] In considering whether to grant summary decree the court undertakes a scrutiny of the pleadings and analysis of material; the existence of a dispute of fact does not make a proof inevitable; summary decree can only be granted if the court is satisfied that there is no issue raised by the other party that can properly be resolved only at proof and on the facts which have been clarified in this way a party has no case in respect of all to any part of the action; summary decree is only appropriate where the judge can properly be satisfied that the party is bound to fail, OCR 17.2. *Henderson* v *3052775 Nova Scotia Ltd* 2006 SC (HL) 85.

[10] The court can consider the pleadings and any productions: *Whiteway Laidlaw Bank Ltd* v *Gordon F Green* and others 1993 SCLR 968; *Macphail* 4th Edition para 14.82.

[11] The sheriff court can deal with actions of proving the tenor: Courts Reform (Scotland) Act 2014 section 38. An order proving the tenor of a document may be brought as part of a single action seeking various other orders where the proving of the tenor is a necessary preliminary to the other remedies: *Promontoria (Henrico) Ltd* v *Friel* 2020 SC 230.

[12] The effect of a decree proving the tenor is that the order has the same effect that the original document would have and "the extract of the decree becomes as valid and effectual as the deed which has been lost": *James Dunbar & Co* v *The Scottish County Investment Co Ltd* 1920 SC 210.

[13] I proceed on the basis that it is accepted that, if the proposed step is competent, the sheriff was entitled to exercise his discretion in the way in which he did, by allowing receipt of the minute of amendment and by refusing the motion for summary decree. The note of argument argues that the precise machinery to be invoked was not competent, in that separate proceedings should have been raised. That was, rightly in my view, not pressed with any particular vigour before this court. I deal with it briefly in due course.

[14] The primary point is this; even if the tenor of the letter were to be established, that would not avail Mr Carswell because the document thus established would not comply with the 1995 Act without a certificate from the court, and such certification cannot be provided in respect of a document established by proof of its tenor. Mrs Skelton challenges the competency of the Mr Carswell's course of action; her position before the sheriff and appeal court was that the pursuer cannot reconstruct the document in the manner contended for.

Mrs Skelton's submissions

[15] The primary position was that in the absence of the principal letter, there was no "traditional document" lodged in accordance with the definition given in the 1995 Act, a prerequisite to engagement of the 1995 Act. Section 1A of the 1995 Act says:

> "This Part of the Act applies to documents written on paper, parchment or some similar tangible surface ('traditional documents')."

[16] In Mrs Skelton's' submission there was not and could never be a traditional document in this case. Proof of the tenor of the document could not elevate that document into the status of a "traditional document". There was no document; the writing does not exist, there is accordingly no prospect of proving a testamentary writing because Mr Carswell could never establish that it was properly executed. The only possible outcome of an application in these proceedings under the 1995 Act was a declarator that it did not meet requirements of the Act.

[17] For those reasons Mrs Skelton submits that sheriff erred; it is not a document. The action is rendered fundamentally incompetent.

[18] Mr Carswell wished to proceed to proof, but that is insufficient to meet the summary decree test; it is not enough that there is a disagreement on the facts; there must be some purpose to a proof and in this case there would be no such purpose.

[19] Essentially Mr Carswell cannot establish the testamentary nature of the letter, even if he can prove the tenor; the "traditional document" as required by the 1995 Act does not exist; the endorsation cannot be made on the decree.

[20] Mrs Skelton submitted that there was no power to grant a certificate to say that a document, the tenor of which has been proved, has been subscribed by the granter. It may have been an unintended consequence of the wording of section 1A, but, in her submission

it was a clear and unambiguous provision which Mr Carswell could not satisfy. There was no remedy which would allow the reinstatement of the document to give it testamentary effect. No amount of evidence amendment could avail Mr Carswell.

Mr Carswell's submissions

[21] In allowing the amendment, the sheriff had exercised his discretion; it meets the test for amendment in *Pompa's Trustees v Edinburgh Magistrates 1942 SC 119*; Mr Carswell wishes to distribute estate in accordance with any testamentary writing. The letter is capable of being a document in terms of the 1995 Act. He submitted that the copy letter would be the document. He submitted that it could not be the law that such a deed would not be a document. The 1995 Act would require to set out in very clear terms that such a document is not included.

Decision

[22] As indicated at the outset of the opinion, the appeal crystallises in one question; can a document, the tenor of which has been proved, be regarded as a traditional document for the purpose of the 1995 Act.

[23] I consider that it can.

[24] In the first place the phrase "traditional document" requires to be seen in context; sections 1A and 9A of the 1995 were introduced in to the 1995 Act by the Land Registration etc. (Scotland) Act 2012. Section 1A dealt with "traditional documents" to distinguish them from "electronic documents" as defined by section 9A, that is documents created in an electronic form. It does not of itself form a barrier to the route which Mr Carswell has adopted.

[25] Each party misunderstood for different reason the effect of proving the tenor. Mrs Skelton argued that it meant the sheriff's signature of the document was the signature on the missing document. That is wrong; the document is reconstituted in the interlocutor which will include or at least recreate the original signature details, if any. So the missing document is still "signed" by the original party. Mr Carswell in contrast submitted that the copy document took the place of the missing document. That is also incorrect. But that copy could be an adminicle of evidence in any application under the 1995 Act. The effect of the decision in *James Dunbar & Co* is clear; the extract of the decree becomes as valid and effectual as the deed which has become lost.

[26] One of the ways in which that validity and effectuality are manifest is in the ability to seek to make use of the 1995 Act to establish the document has testamentary effects. I consider that the document if established can be regarded as a traditional document in accordance with section 1A of the 1995 Act. The course adopted by Mr Carswell is not incompetent.

[27] I address the point, not strongly pressed, about the need for separate proceedings; the pursuer offers to set up the tenor of the document and then offers to establish that it was prepared in accordance with the 1995 Act both of which matters are susceptible to proof, and susceptible to proof in the Sheriff Court. I consider that there is something unattractive in the proposition that a multiplicity of actions might be required; there is no barrier either in practice or principle or rule or procedure to this approach.

[28] Neither a crave for proving the tenor nor applications under the 1995 Act need to be in a particular form (in terms an application under the 1995 can be made as incidental to and in the course of other proceedings, section 4(4)). The court has had the power to assess the tenor of a documents in gremio of another action since the case of *Elliot* v *Galpern* 1927 SC 29;

Promontoria is a more modern expression of the same principle. The sheriff's approach does not give rise to any unfairness, incompetency or any radical change in procedure being adopted. Mrs Skelton will still have the opportunity to challenge the factual and legal basis of Mr Carswell's craves. There is no merit in the suggestion that, in proceeding in the way which he did, the sheriff acted incompetently.

[29] The appeal accordingly fails. Mr Carswell is entitled to the expenses occasioned by the appeal.

Postscript

[30] A crave seeking to prove the tenor should so far as possible reproduce in its entirety the document to be proved, avoiding any lack of clarity in the decree or extract. *Begbie* v *Fell* (1822) 1 S 391 remains authority for the proposition that the terms of the deed should be incorporated in the crave; the decree and subsequent extract, which takes the place of the deed, will require to be a stand-alone document which in gremio narrates the tenor of the deed: *RW* v *AW* 2022 SC GLW 2: *Macphail* 4th Edition para 20-22.