

OPINION OF LADY CLARK OF CALTON OUTER HOUSE, COURT OF SESSION. 29<sup>th</sup> September 2006

## Outline and overview

[1] The pursuer (born 18 September 1935) by her own description is the divorced, former wife of Mr James Clark and mother of his four children. Mr James Clark was a farmer, who formerly resided at Nether, Pitlochrie, Gateside, Strathmiglo, Fife. He died on 5 December 1985. The pursuer and said Mr James Clark agreed a Minute of Agreement dated 7 October 1977 which was collateral to their divorce settlement. It is provided by clause (2) of said Minute of Agreement (6/1 of process) that: "*the husband and his executors shall pay to the wife for her maintenance until her remarriage or death but in any event, if the wife shall remain in life, for a minimum period of five years commencing with the date upon which the decree of divorce is pronounced that sum which will under deduction of the standard rate of tax then prevailing, produce Two Thousand Four Pounds (£2,400) Sterling net per annum. The husband will account to the Inland Revenue for the tax which falls to be deducted*".

In terms of the fourth clause there is provision *inter alia* for monthly payment in advance and for an annual increase "by such proportion as the Retail Price Index shall have increased compared to the Retail Price Index at the date of decree of divorce". The said terms of the said Minute of Agreement became effective on the date upon which decree of divorce was pronounced. After his divorce said Mr James Clark married Mrs Anne Meldrum Maclehose or Clark (Mrs Anne Clark) who is the fourth defender in the present action.

[2] The parties to the action need some explanation. The pursuer is a creditor of the estate of said Mr James Clark in terms of said Minute of Agreement. Article 2 of condescendence sets out the defenders. This article does not explain the history but as this is necessary information to understand the pleadings, I set this out. The original executors of the estate of the said Mr James Clark, in terms of his will dated 20 November 1985 were Mr John Simpson Wilson, solicitor and Mrs Anne Clark, the wife of said Mr James Clark at the date of his death. She resigned as executrix by Minute of Resignation signed 25 August 1986 which was acknowledged as intimated on 2 September 1986. Mrs Anne Clark was also a beneficiary under his will along with the surviving children of the pursuer. The first defender who is sued as executor was assumed as additional executor conform to Deed of Assumption dated 13 December 1985 and he remains as executor. The second defender was assumed as an executor by Deed of Assumption by the first defender dated 13 and 21 June 1991 and he remains as executor. The third defender is the surviving partner of the former firm of J & G Wilson, solicitors in which Mr John Simpson Wilson was a partner at the time of his executorship. Mr John Simpson Wilson died on 27 May 1991. The fourth defender is Mrs Anne Clark. The fifth defender, Mr J H Macfie, WS, was appointed Judicial Factor *ad interim* in 1999 and confirmed as Judicial Factor on 8 November 2000. The sixth defender, Mr G Innes, WS, is a solicitor and partner in a solicitor's firm Bennett and Robertson LLP and appears to be sued on the basis that he took responsibility acting as Judicial Factor on the retirement of his solicitor partner, the fifth defender.

[3] As it is difficult to understand the chronology of the events referred to in the pleadings, it was agreed that for the purposes of the procedure roll debate some assistance in understanding the chronology reflected in the pursuer's pleadings could be obtained from a chronology (41 of process) prepared by the pursuer which represents her summary of events deemed important. That summary was not agreed by the parties but it was agreed that assistance with the chronology could be derived from the report by the fifth defender on the executry estate of the said Mr James Clark. His report (6/2 of process) dated 11 October 2000 gives a history to that date of some of the problems in the executry which included problems which the pursuer had in relation to her rights under said Minute of Agreement. The outstanding matters in relation to the pursuer's rights under said Minute of Agreement were not resolved and in 2003 the pursuer raised an action for payment of the sum of £76,466.33 for unpaid arrears due under said Minute of Agreement and an instruction to reinstate her monthly maintenance payment. The history and outcome of said action is explained in the Opinion of the Lord Ordinary dated 21 May 2004. It should be noted that the action which he considered was directed against the persons sued in this action as the fifth and sixth defenders. They were the first and second defenders in the earlier action. At paragraph 11, the Lord Ordinary states: "In so far as the action was directed against the second defender, who was the solicitor for the first defender, the action was misguided and completely irrelevant". Said action did not finally resolve the pursuer's concerns and in particular she continued to be apprehensive that there would be insufficient money in the estate to meet her debt as creditor under said Minute of Agreement. In December 2003 the fifth defender raised proceedings against the executors in office at the time of raising the proceedings. They are the first and second defenders in the present action. That action (6/21 of process) was sisted in February 2004. In about February 2004 the Judicial Factor paid to the pursuer sums which had become due to her for arrears of payments due under said Minute of Agreement and in addition interest thereon. Thereafter payments due under said Minute of Agreement were paid until late 2005 after which date the pursuer was informed by letter from the sixth defender dated 11 October 2005 (6/29(a) of process) that there were insufficient funds in the executry estate to make payment. I understand from the pursuer's oral submission that the pursuer was provoked into raising the present action when she was informed by the sixth defender that the Judicial Factor did not intend to proceed with said sisted action. The present action was signeted on 19 March 2004 and called on the 15 April 2004. Thereafter there was extensive adjustment and amendments. The value of the monthly payment due under said Minute of Agreement as at October 2005 was approximately £1,200.

[4] In summary, the events relating to the disposition by Mr James Clark of his property prior to his death and the later administration of his estate created controversy and litigation involving a variety of parties over many years. *Clark v Clark's Trustees* 1989 SLT 665, *Sarris v Clark* 1995 SLT 44 are reported cases involving the beneficiaries. Actions have also been raised in the name of the pursuer and the fifth defender. The pursuer

described the history of the executry of the estate as a troubled tale stretching over nineteen years. I certainly agree with her about that. Whatever the rights and wrongs of the history, it has resulted in a situation whereby by the date of the procedure roll, it was not disputed that the estate of said Mr James Clark does not have money to meet the legal obligation to the pursuer set out in terms of said Minute of Agreement. The pursuer is a creditor, now unpaid since the end of 2005, despite the fact that large sums of money have been paid to beneficiaries over the years.

#### **Procedure**

- [5] The case came before me for the first time on procedure roll on 6 June 2006 set down for eight days. Prior to the commencement of the debate on that date, the pursuer made a motion to allow amendment in terms of Minute of Amendment number 38 of process. This six page Minute of Amendment sought *inter alia* to add new conclusions declaring that the alleged agricultural lease dated 4 December 1985 was void, that it was gratuitous alienation of certain heritable lands and sought the production and reduction of the alleged contract of co-partnership between the said late James Clark and the fourth defender dated 4 December 1985 and production and reduction of the Minute of Agreement of October 1997. Amongst others matters new averments about alleged undue influence upon the late James Clark were introduced and averments that the said Mr James Clark was of unsound mind. This Minute of Amendment had previously come before a different Lord Ordinary on 4 April 2006 who had refused the motion *in hoc statu* in light of the close proximity of the diet on the procedure roll. The pursuer's motion was opposed on behalf of all the defenders. I had no hesitation in refusing the motion because it was far too late, raised new matters, the form of the Minute was lacking in focus and relevancy and potentially affected the interest of persons who were not parties to the action.
- [6] The pursuer was unrepresented and acted as party litigant. As the issues were many and varied and technical, I attempted to minimise the formality of the proceedings. I was assisted in this by the defenders legal representatives who produced at my request further outline of Notes of Argument to assist in following their submissions. The pursuer worked hard to try to comply with the court proceedings and produced detailed written submissions (40 of process) to which she spoke in her response at procedure roll. The nature of the Closed Record made any focused debate a challenge. With the assistance of all parties, the case concluded on day seven.

#### **The Pleadings**

- [7] The conclusions, averments and pleas-in-law are not brief but are covered in the closed record (39 of process) in 76 pages with many references incorporated from other documents. There are seven conclusions to consider, 14 articles of condescence and the parties have generated a total of 62 pleas-in-law. In order to put the issues into context, I give an overview of the pleadings but it is no more than that. No summary could capture the detail of the pleadings. In reaching my opinion I have considered the pleadings in detail.

#### **The Conclusions**

- [8] The first conclusion is for declarator that the executry estate make payment of £350,000 or such other sum as the Court shall assess may properly fall due under and in terms of said Minute of Agreement, with the demand that in the event of insufficient funds the first to fifth defenders make payment to the estate or to the pursuer of said sum, along with payment in reparation for nineteen years of delays to the pursuer for breach of duty. The second conclusion is for declarator that the estate of said Mr James Clark has suffered loss caused by breach of duties by Mr John Simpson Wilson and the first to fourth defenders and seeking repayment, to restore to the estate the sums lost to the estate, together with various interest payments including compound interest. The third conclusion is for payment to the pursuer as creditor, by the first to fifth defenders, of a sum in excess of £1,000,000 in reparation of the lost opportunity costs to the pursuer, by the non payment £175,000 which should have been settled on the pursuer in March 1987 along with various interest payments including compound interest. The fourth conclusion is for payment to the pursuer, by the first to sixth defenders of £146,000, or such sum as the Court may assess, in respect of reparation and restoration of the pursuer's legal fees and related outlays over the past nineteen years, caused by the defenders' breach of duties along with compound interest. The fifth conclusion seeks payment to the pursuer by the first to sixth defenders of £240,000 in respect of compensation for the pursuer's time, expenditure and outlays of the past nineteen years caused by the defenders' breach of duties together with interest. The sixth conclusion is for payment to the pursuer by the first to sixth defenders of £199,500, in respect of £10,500 per annum, by way of compensation in damages for *solatium* and loss of support to the pursuer over the past nineteen years together with interest. The seventh conclusion seeks payment to the estate of James Clark by the first to fourth defenders of a sum in excess of £4,000,000, or such other sum as the Court may assess, in repetition, restitution and recompense of the losses suffered by the estate of said Mr James Clark, which the defenders are alleged to be liable in respect of various breach of duties.
- [9] It is plain from Article 1 of condescence that the only starting point of the pursuer's claim is said Minute of Agreement. The pursuer avers that she has been, since 1988, the only ordinary creditor left unsettled and seeks settlement of debt due to her from the estate and to restoration of sums to the estate so that it may settle her claim.
- [10] Article 2 narrates the defenders and I have explained this in paragraph 2.
- [11] Article 3 relates to the usual jurisdiction issues.
- [12] Article 4 is the pursuer's summary of the administration of the estate of said Mr James Clark. The pursuer makes averments which relate to the history and actings of the executors. This extends to give the pursuer's account of

the history of events commencing with the will of the said Mr James Clark on 20 November 1985 and other documents, in favour of the fourth defender, concluded shortly before his death which are averred by the pursuer to have injured the heritable estate and caused huge legal costs. This history also refers to the period in 1989/90 when payments are made which, according to the pursuer, amount to fraudulent preference. Reference is made to more detailed averments about these matters in Articles 6 and 7 of condescendence.

- [13] In Article 5 of condescendence the pursuer again refers to the Minute of Agreement and the duty on the executors to fulfil the obligations of the said Mr James Clark undertaken prior to his death. It is averred that the obligations of said Mr James Clark to the pursuer under said Minute of Agreement were properly intimated to the executry, were acknowledged by the executry and were recorded in the inventory of his estate prepared for confirmation. It is further averred that the inventory specified the sum of £115,000 owed to the pursuer as the capitalised value of the income for life, as a lump settlement, in lieu of a purchased annuity. It is averred that the Capital Taxes Office agreed that said debt at death had a capital value in excess of £109,000. It is averred that it is the duty of the executors to settle all creditors prior to the distribution of the residual estate to the beneficiaries. Further, and in any event it is averred that between 1985 and 1999 it was apparent that unless, with the pursuer's agreement, an annuity was obtained for her, or a capital sum equivalent to the actuarial value of her right was paid to her, the estate of the late Mr James Clark might be unable to pay the future debt to her as it fell due. It is alleged to be the duty of the various executors at various dates to set aside for, or settle on, the pursuer such an annuity or capital sum. They failed to do so and thus they were in breach of their said duties. This theme is developed and various specific complaints are made, in Article 5 .1 and 5.2 of condescendence.
- [14] It is averred that after the realisation of the estate and payment of other debts, there remained sufficient capital to compromise the pursuer's claim or to purchase an annuity or to set aside and invest sufficient funds such as might be required to purchase the same or which would allow the estate's obligations to the pursuer to be met for the remainder of her lifetime, if the administration of the payments were to remain in the executors hands. It is alleged that the then executors in 1987 failed to take any such measures and then various failures at various periods are averred. The averments specify various duties which were breached, for example, a duty to invest, a duty to make a settlement or purchase an annuity, failure to consider investing sufficient funds to cover the long term liability due under said Minute of Agreement. In Article 5.3 of condescendence it is set out that at various times and in various combinations the first, second and fourth defenders (along with Mr Wilson from 5 December 1985 to 27 May 1991) were responsible for all the decision making of the estate until its sequestration in 1999. On that basis it is alleged that any breaches of trust were the responsibility, jointly and severally and or severally of the executors holding office at the time the said breaches of trust occurred. It is on that basis that the first, second, third and fourth defenders are said to be liable to the estate and to the pursuer and justifies the various declarators and conclusions for payment.
- [15] Article 6 of condescendence focuses on averments about acts and omissions said to be breach of trust and breach of fiduciary duties founding a liability to restore to the estate such sums lost to the estate. Averments are made against the executors in relation to gross negligence, *mala fide* and breach of fiduciary and trust duties said to be illustrated by information which became available to the pursuer for perusal and study in about October 1997. Reference is then made to various documents alleging breach of the duty of trustees to have a proper motivation, breach of the duties of trustees to secure the trust assets and *auctor in rem suam* in respect of the first and fourth defenders. Against the background of these averments it is averred that the first, third and fourth defenders have a liability to restore to the estate all funds found to have been misapplied and all costs thereby improperly incurred, with judicial and compound interest. This is the basis for the second declarator and the seventh conclusion. Under various subheads, Article 6 of condescendence continues in relation to various specific payments which allegedly should not have been paid as the payments had the effect of disabling the estate from meeting its obligations to the pursuer. Further averments relate to legal fees in excess of £100,000 which were averred to have been incurred as a result of breach of duty resulting in legal challenges by the beneficiaries. Finally averments are made in relation to the first and fourth defenders relating to alleged fraud in which reference is made to various documents and communings. These averments conclude in attacking the validity of various documents of the executry and alleging that the actions of the first and fourth defenders amounted to wilful fraud against the estate.
- [16] Article 7 of condescendence makes specific averments in relation to the second defender and his period as executor. These averments relate to his alleged knowledge of the history and problems of the executry, the alleged misapplication of funds during the executry and alleged failures in respect of the estate property. The pursuer avers that the second defender was in breach of duty as trustee to secure the estate assets and therefore liable to make good these losses to the estate with judicial interest applied and compounded at annual rests. In Article 7.2 against the background of averments that various payments were wrongfully made, there are averments that the first and second defenders were in breach of duty for failure to take reasonable steps to secure recovery of the sums lost to the estate from the executors of said Mr John Simpson Wilson. The averments in 7.3 then rely on Section 11 and 12 of the Partnership Act 1890 to maintain that the third defender is responsible therefor. This is based on averments that when said Mr John Simpson Wilson acted as executor he was acting within the scope of his apparent authority as a partner in a solicitor's firm, namely, J & G Wilson in which the third defender is a partner. The pursuer avers that the third defender was accordingly liable jointly and severally with the estate of the late Mr John Simpson Wilson. The case against the third defender is based on averments that said firm of J & G Wilson, was obliged to make good to the estate the losses incurred by the

misapplication of monies in the years of the executorship of Mr Wilson prior to his death in May 1991. It is averred that the third defender is liable to make good losses to the estate, with judicial interest applied and compounded at annual rests. Thereafter the averments in Article 7.5 depart from the above line and move on to *esto* averments that sums are recoverable under the *condictio indebiti* from the fourth defender and the children (of the pursuer and the late Mr James Clark) insofar as sums are needed to enable the estate to meet its obligations to the pursuer. I merely comment at this stage that said children are not defenders in the present action. In the remaining part of Article 7 of condescendence there are averments directed to failures by the first and second defenders to recover rent from two farms which were part of the estate. This culminates in averments that they were grossly negligent of their fiduciary duties to protect the estate and were in breach of their duties as trustees to secure repayment of debts due to the estate. It is averred that the first and second defenders are therefore liable to make good those losses to the estate with judicial interest applied and compounded at annual rests. Further averments are directed against the first and second defenders in respect of a mediation in October 1997 which compromised the various outstanding claims in relation to the estate but did not make any settlement with the pursuer, as a creditor of the estate in respect of her contractual claims. It is averred that payment of £100,000 to the fourth defender in terms of said mediated settlement rendered the estate insolvent, as it was unable to meet the capital claim of the pursuer or to continue to make payments to her for the remainder of her expected life time (as actuarially assessed). It is averred that said payment of £100,000 was made knowingly in gross negligence of their fiduciary and trust duties, by the first and second defenders, in the full knowledge that this would render the estate unable to meet its obligations to the pursuer. It is averred that they were grossly negligent of their duties as trustee and their fiduciary responsibilities and are therefore liable to the estate to make good any costs and losses incurred. It is further averred (p.43 - p.44) that the first and second defenders, are personally liable to the pursuer for any shortfall in the ability of the estate to meet said claim, along with any costs and losses incurred by the pursuer and damages and *solatium* resulting in the *interim* inability of the estate to make any payment to her, and/or the anxiety about her financial future caused by the uncertainty about and hazard to the long term implementation of the Minute of Agreement of October 1977. In the final section of Article 7, there are further averments in relation to the second defender about alleged excessive fees and it is averred that these misapplied fees and cost payments are therefore the property of the estate and should be restored to the estate by the first and second defenders.

- [17] In Article 8 of condescendence various averments are made in relation to the first, second and fourth defenders and Mr John Simpson Wilson that they allegedly deceived the Courts in a prior action raised by the children of the pursuer as beneficiaries against Mrs Anne Clark. (*Sarris v Clark* 1995 SLT 44). A variety of allegations including deliberate fraud, contempt of court and breach of trust are made.
- [18] Article 9 of condescendence is directed to averments about the fifth defender. It is averred that in 1999 the fifth defender made a report in which he stated that the contingent claim by the pursuer is a valid claim in the estate. The executors included the claim as a debt in the inventory of the deceased's estate. The Capital Taxes Office accepted the claim a valid debt. In the accounts from 5 April 1995 onwards, provision is made for payments to the pursuer of £100,000. Since April 1990 the trust funds had been depleted by payments made in respect of Capital Gains Tax, to the beneficiaries including the fourth defender and by substantial legal expenses. Interest rates had decreased. It is averred that as a result the funds in the estate are insufficient to meet the pursuer's claim. It is averred that the fifth defender considers that the executors should have dealt with contingent creditors in the same way as ordinary creditors reserving sufficient funds to meet the claims of creditors prior to making any distribution to residuary beneficiaries. It is averred that the fifth defender proposed to the Court in his report that a payment be sought from the executors, (the first and second defenders) as individuals, jointly and severally of such sums as is necessary to restore the estate to solvency. It is then averred by the pursuer that no such action was taken by the fifth defender or by the sixth defender until mid December 2003. The pursuer's case against the fifth defender is based on various averments about unreasonable delay in finding caution and failure to perform his duty as Judicial Factor causing the pursuer to take on his responsibilities instead. The averments in Article 9 of condescendence are then directed to the sixth defender. It is alleged that on the retiral of the fifth defender from the firm of solicitors in which he was a partner in 2001/2002 his fellow partner, the sixth defender took over the day to day running of the estate acting in the fifth defender's place. Both are blamed for failing to take action to restore the estate to solvency, at the very least to the extent of meeting the terms of said Minute of Agreement by settling in full with the pursuer as unpaid creditor. It is averred that the delay magnified the degree of agitation and suffering endured by the pursuer and caused her greatly increased stress and anxiety. There are then detailed averments about alleged failures and delay by the Judicial Factor in making due payment in the past. The pursuer avers that the fifth and sixth defenders are consequently liable for a share of the *solatium* and loss of support and the time and outlays she has had to endure and expend to have her financial security restored. Further averments are made about the difficulties which the pursuer has encountered as a result of the non payment of the sums due under the Minute of Agreement. The pursuer then sets out detailed complaints which flow into more general complaints about the proper delivery of justice and legal service by solicitors and others involved.
- [19] In Article 11 of condescendence the pursuer avers that between May 1999 and February 2004, she expended enormous amounts of time plus considerable outlays in seeking payment of her rightful maintenance/pension. She avers she suffered further emotional upset and huge disruption to her normal life and family responsibilities. She avers various costs and states that a fair estimate of her claim for time and outlays expended during the period

of the Judicial Factory is £76,500 and for the period of the previous executry £163,500. This totals £240,000 which sum is the basis of the fifth conclusion.

- [20] In Article 12 of condescence she avers that she has been forced to endure nearly nineteen years of unnecessary financial embarrassment, harassment and deep insecurity and continuous fear and mental anguish over her pension payment for her lifetime. She then expands on this to give details.
- [21] In Article 13 of condescence the pursuer makes averments about the Prescription and Limitation (Scotland) Act 1973 anticipating a plea by the defenders.
- [22] In article 14 of condescence averments are made about alleged fraudulent preference. At the end of the averments the pursuer makes reference to an updated Schedule of losses 6/30 of process which is adopted *brevitatis causa*. In this Schedule the pursuer sets out her calculations in support of the conclusions in the summons.

**Submissions on behalf of the first, second and third defenders**

- [23] Notes of argument on behalf of the first, second and third defenders were lodged prior to procedure roll and are respectively 25, 22 and 24 of process. At procedure roll, the first, second and third defenders were represented by the same counsel, Mr Clark. On their behalf he submitted that the action should be dismissed, failing that he identified substantial parts of the Closed Record which he submitted should not be remitted to probation.
- [24] In summary, Mr Clark submitted that to the extent that the pursuer's case is founded upon alleged duties of executors to the pursuer as trustees and averments that the executors are in breach of trust, or in breach of fiduciary duties, it is irrelevant. His primary submission was that no such duties are owed to the pursuer as creditor. He prayed-in-aid *Globe Insurance Company v McKenzie* (1850) 7 Bell's App.296, Lord Brougham at 319; *Stewart's Trustees v Stewart's Executrix* (1896) 23R 739, Lord McLaren, page 744-5; *Mitchell v Mackersy* 1905 8F 198, Lord Kyllachy at 199; *Lamond's Trustees v Croom* (1871) 9M 662, Lord President at 668, Lord Deas at 670, Lord Kinloch at 671; *Heritable Securities Investment Association v Miller's Trustees* (1893) 20R 675, Lord President 691, Lord Adam 700, Lord McLaren 701. He also referred to *Gloag & Henderson* (11<sup>th</sup> ed) para.46.07 and *Wilson & Duncan on Trusts* para.34-05 and 34-11. He emphasised that the basis for the pursuer's claim against the executors was entirely misconceived. The executor is not a trustee for creditors. His duty is a limited one to pay the deceased's debts to the extent of the fund amalgamated. That does not mean that the law does not provide a remedy in circumstances where executors have decided to pay beneficiaries where a creditor is unpaid or will become unpaid because of payments made to beneficiaries. It was not disputed that executors in distributing the estate of the deceased are obliged to make forthcoming the whole estate to creditors, if necessary to meet debts and that the rights of beneficiaries are entirely postponed to those of creditors. Mr Clark accepted that in most circumstances where executors have paid beneficiaries leaving a creditor unpaid, the executor will be personally liable for the debt to the creditor. It was neither necessary nor relevant for the creditor to investigate, challenge or prove the reasons why payment had been made to beneficiaries. The law did not require that. The law held executors personally liable as individuals in respect of sums paid wrongfully to beneficiaries leaving creditors unpaid. But the personal liability of the executor was up to the limit of the total value of the debt owed to the creditor. The creditor had no interest and no title as creditor to demand an investigation of the actions of the executors with a view to restoring sums to the estate well in excess of any debt owed. The remedy in law is a simple one by which the law held the executor personally liable to pay the unpaid debt if they had disbursed monies to beneficiaries with no justification. He accepted that justification in law was very narrow in such circumstances and might arise, for example, where a creditor had not given due notice of the debt or other circumstances amounting to personal bar.
- [25] Mr Clark submitted that on a proper construction of the Minute of Agreement, the pursuer is not, and has never been entitled, to a lump sum payment rather than periodic payment as set out in said Minute of Agreement. He accepted that there may have been an entitlement to compromise the pursuer's claim, but the executors were not obliged to do so. He pointed out that the pursuer's own pleadings (Article 5.1, p.19) recognised that the executors could have satisfactorily provided for her by means other than paying her a lump sum. The pursuer in her pleadings also contended that there was a breach of an obligation to purchase an annuity. But for similar reasons there was no such obligation in terms of said Minute of Agreement. Mr Clark submitted that the main thrust of the pursuer's averments on which she founds her case is the failure of the executors to pay a lump sum to her. In conclusion 5 and Article 11 of Condescence, the pursuer makes averments to the effect that for some 19 years she was "*seeking payment of her rightful maintenance/pension*". Mr Clark submitted that under said Minute of Agreement, there was no right to a lump sum in 1987 or at any other time. He submitted that there was no basis in fact or law for such a claim. At best for the pursuer she has a claim for payment since November 2005. That date is long after she raised the present action. She has in fact received payments in respect of the period up to November 2005. In respect of any delay in obtaining such payment, her only claim in law would be for interest.
- [26] Mr Clark submitted that the pursuer also makes a claim for *solatium*, "*loss of amenity*" and "*costs in lost opportunity*" in conclusions 3 and 6 and Articles 11 and 12. These claims are also predicated on an obligation incumbent upon the executors to make payment of a lump sum to the pursuer, apparently in 1987. Mr Clark explained that for similar reasons which I have summarised in paragraph 24, there was no such obligation. Further, and in any event, he submitted that there was no relevant basis for a claim for *solatium* by a creditor against an executor in respect of a debt due under contract with the deceased. The law does not recognise the type of "*costs in lost opportunity*" claim made by the pursuer. She has a contractual claim for money under said

Minute of Agreement. Failure to make timeous payment gives rise only to a possible claim for interest. The law does not permit compensation on the basis of speculation as to what opportunities may have arisen for use of sums allegedly due.

- [27] The pursuer also makes claims in respect of legal fees in conclusion 4. Mr Clark criticised the lack of specification and supporting averments in relation to this and submitted that the proper approach is to seek expenses of the action and that is covered in conclusion 9.
- [28] Mr Clark then went on deal with the averments of fraud and fraudulent preference. These averments, he submitted, were tied in with the pursuer's attempt to lead evidence about fraud and fraudulent preference with a view to restoring monies to the estate. I have already summarised his primary submission in relation to that in paragraph 23. His subsidiary position was to the effect that the averments were in any event irrelevant in that they did not support any of the heads of loss which are claimed. They also lack the detailed specification which is required when pleadings fraud. He referred to *Sheddon v Patrick* (1852) 14D 721, Lord Fullarton 727, 734 and 736-7; *Gillespie v Russell* (1856) 18D 677, Lord President 682 and 684. He submitted that the pursuer does not plead the specifics of a fraud but instead apparently seeks to infer fraud from a number of matters which are themselves consistent with there being no such fraud.
- [29] Mr Clark submitted that if the claims are not relevant, that is the end of the matter. The issue of prescription and limitation could only arise if the claims were otherwise relevant. The present action was signetted on 19 March 2004 and served shortly thereafter. The pursuer's averments are based on various alleged breaches of duties culminating in a breach of duty by the executors by entering into an agreement following the mediation in October 1997, thus rendering the deceased's estate unable to meet her claim. Mr Clark submitted that if the pursuer did sustain loss before the end of 1997, her claim has prescribed because she would be subject to the short negative prescriptive period of 5 years in terms of section 6 of the Prescription and Limitation (Scotland) Act 1973. He referred to *Jamieson v Clark* 10M 399 at 405. Mr Clark submitted that on the pursuer's own averments, she has known of the alleged breaches of duty for more than 5 years. In any event to the extent that the pursuer appears to make a claim for loss, injury and damage in the nature of personal injury for which she seeks *solatium*, a limitation period of 3 years is provided in terms of section 17 of the Prescription and Limitation (Scotland) Act 1973.
- [30] Mr Clark made a separate and freestanding point in relation to averments about the third defender and prescription. He pointed out that the third defender's partner, John Simpson Wilson, ceased to be an executor on his death in 1991. Plainly if a 5 year prescriptive period applied, for that reason alone, the third defender was entitled to absolver.
- [31] Mr Clark then turned to deal with the pursuer's averments about fraudulent preference which are mainly to be found in Articles 4, 5 and 14 and plea-in-law 19. He submitted that the averments disclosed no clear point in time at which it is said that the executors knew of the insolvency of the estate, and granted a fraudulent preference. The pursuer does not aver why the executors can be said to have known at the date of alleged wrongful payments, that in the light of uncertain future events upon which the pursuer's right is based, the estate was insolvent. In any event this whole chapter of the pursuer's pleadings are directed to alleged reasons why certain sums should be restored to the estate and said averments are fundamentally irrelevant.
- [32] In some of the conclusions the pursuer seeks compound interest. Mr Clark submitted that such a claim is irrelevant. The pursuer has a claim for payment, as a creditor. She has no relevant claim for breach of trust. To illustrate that a fiduciary relationship is required before such a claim might arise. Mr Clark referred to *Douglas v Douglas's Trustees* (1867) 5M 827 at 831 and 836 and *Heritable Securities Investment Association v Miller's Trustees* (1893) 20R 675 at 676.
- [33] Mr Clark then took particular exception to the averments that fees charged by the second defenders' firm to the executry estate were unnecessarily incurred, excessive or not incurred in the proper administration of the estate. He made the general point that it was not for a creditor to challenge such fees. But in any event he submitted that the averments were wholly inspecific and impossible to investigate properly. The history as averred by the pursuer makes it plain that the estate was involved in years of litigation and dispute and that on any view substantial legal fees required to be incurred.
- [34] Mr Clark in concluding his submissions pointed out that the pursuer's averments are directed at a number of defenders, convened on different bases and averred to have acted in different capacities at different times with different results. Nevertheless she maintains that each of the defenders is jointly and severally liable for the whole of the sums sued for. It was inappropriate and unacceptable to form the conclusions in the way which the pursuer has done based on a "mishmash" of averments when it is impossible to determine from the pleadings who is liable for what. Mr Clark sought dismissal but in the event that dismissal was not granted his submissions, he said, (1) supported dismissal of Articles 5, 11 and 12 on the basis that there was no relevant claim for breach of an obligation to the pursuer; (2) deletion of Articles 6, 7, 4, 5 and 14 on the basis that the claim was irrelevant insofar as it was a claim for sums to be restored to the estate; (3) the other heads of loss claimed by the pursuer, namely time and outlays in Article 11, *solatium*, "loss of amenity" and "cost and lost opportunity" in Article 12 and legal fees should not be admitted to probation for the reasons he had given; (4) the averments of fraud in Article 6.6, Prescription and Limitation, Article 4, 12 and 13, fraudulent preference, Articles 4, 5 and 14 for the reasons given should not be admitted to probation; (5) all references to compound interest throughout the Record, the

references to fees charged by the second defender's firm and references to the third defender in Articles 7.3 and 7.4 were all irrelevant for the reasons given and should not be admitted to probation.

**Submissions on behalf of the fourth defender**

- [35] The fourth defender was represented by solicitor-advocate, Mr Connell QC. His primary submission was that the fourth defender's plea-in-law 4, that is the general plea to the relevancy, be sustained. Alternatively, he submitted that pleas 1, 2, 3, 9 and 10 should be sustained if necessary in respect of specific arguments which he developed.
- [36] He pointed out that the fourth defender is a private individual named in all the financial conclusions and facing a claim in excess of £5 million. The pleadings make very serious allegations against her and contain many irrelevant comments, such as the reference to her marriage to said Mr James Clark being childless. He submitted that was against a factual background in which it was not disputed that the fourth defender ceased to be an executor in 1986, having held the office for about 8 months. By the time of procedural roll debate, the pursuer had received payment under said Minute of Agreement representing sums due for some 20 years. On a fair reading of the pursuer's pleadings, it appears that there was sufficient money in the estate to pay the pursuer under said Minute of Agreement when the fourth defender ceased to be executor. The fourth defender is not responsible for the actings of the executors and/or Judicial Factor appointed long after she ceased to be an executor. Even if the fourth defender had committed any unlawful act as executor (which is denied) during her short period of office, the title to sue about that in the circumstances did not lie with a creditor such as the pursuer. Mr Connell, QC adopted the submissions made on behalf of the first, second and third defenders. In further support of the main submission made by Mr Clark, Mr Connell, QC prayed-in-aid *Nielson's Executors* 2002 SLT 1100 and submitted that the law was plain that a creditor in the pursuer's position had no fiduciary or trust claim but a personal right against the executor. He submitted that the title to sue in respect of events and administration in relation to the estate not arising from the Minute of Amendment rested with the beneficiaries. Indeed the history of the executry had been one of disputes involving the beneficiaries and the executors. Disputes between the beneficiaries and the executors had eventually been resolved by mediation in 1997. He submitted that even if the mediation created a new problem in relation to any right of the pursuer and her debt under the Minute of Agreement, it was long after any involvement by the fourth defender as executor. Mr Connell, QC pointed out that there were vague averments at page 17A-B that the fourth defender carried out the effective role of "shadow executor" after her resignation. There is no such legal office and in any event this could only be a criticism directed at the executors in office if they were in some unspecified way being influenced by the fourth defender and failing to carry out their duties.
- [37] Mr Connell, QC described the approach of the pursuer as a "scatter gun" approach. He submitted this was particularly problematic in relation to the very serious allegations which were made in various parts of the pleadings. He submitted that the case might be considered as an abuse of process and was certainly an extreme case. The pursuer set out on an ill-founded attempt to re-litigate the history of the estate which had been resolved at mediation by those entitled to resolve the disputed issues. This attempt was made by the pursuer after a passage of time of some 20 years. Mr Connell, QC was particularly critical of the averments in relation to fraud and the way in which the pursuer made reference to parts of documents out of context to reach conclusions, which she may believe, but were not grounded in specific and relevant factual averments.
- [38] In relation to compound interest, Mr Connell additionally submitted that it was highly unusual for compound interest to be allowed and prayed-in-aid *Nash Dredging v Kestrel Marine* 1986 SLT 67.

**Submissions on behalf of the fifth and sixth defenders**

- [39] The fifth and sixth defenders were both represented by Miss Paterson. Her general submission was to the effect that the pursuer's averments against each of the fifth and sixth defenders were irrelevant and/or so lacking in specification that the action insofar as directed against them should be dismissed.
- [40] Dealing firstly with the case of the sixth defender, Miss Paterson made reference to the averments in Article 2, which appear to found the pursuer's case in relation to the sixth defender on the basis that the sixth defender took responsibility as acting for the Judicial Factor upon the retirement from Bennet & Robertson of his partner, the fifth defender. She made reference to the letter founded upon by the pursuer at Article 3D (6/19 of process). This letter, on the face of it, makes it plain that the sixth defender is acting as solicitor. In any event, as is obvious, the appointment of a Judicial Factor is a matter for the court and it is not averred that the sixth defender was ever appointed to that office. Under reference to *Midland Bank plc v Cameron, Thom, Peterkin & Duncans* 1988 SLT 611, she relied on the observation of Lord Jauncey at p.616 E-F. Lord Jauncey, having considered the matter in detail concluded "*that situations can arise in which a solicitor owes a duty not only to his client but to a third party who relies upon what the solicitor tells him. In my opinion, four factors are relevant to a determination of the question whether in a particular case a solicitor, while acting for a client, also owes a duty of care to a third party: (1) the solicitor must assume responsibility for the advice or information furnished to the third party; (2) the solicitor must let it be known to the third party expressly or impliedly that he claims, by reason of his calling, to have the requisite skill or knowledge to give the advice or furnish the information; (3) the third party must have relied upon that advice or information as a matter for which the solicitor has assumed personal responsibility; (4) the solicitor must have been aware that the third party was likely so to rely.*"

It was submitted on behalf of the sixth defender that the pursuer's case was misconceived as at the date of procedure roll, the only person acting as Judicial Factor was the fifth defender. The pursuer's averments fall far

short of relevant averments which might set up some duty of the sixth defender as solicitor owed to the pursuer. The mere fact that the fifth defender resigned from his partnership in a legal firm did not affect his appointment as Judicial Factor from which he has not been discharged.

- [41] In relation to the fifth defender, she submitted that there is set out in the note of argument (21 of process) the factual background to the appointment of the fifth defender. The appointment *ad interim* in March 1999 is followed by a report on 11 October 2000 (6/2 of process) at which date the fifth defender reported the funds in his possession were less than £150,000. The various legal issues which were outstanding required to be resolved and the distribution was approved by the Inner House on 10 June 2003 (6/17 of process). Thereafter in December 2003 the fifth defender raised proceedings against the first and second defenders and said action is presently sisted. In substance the averments about delay are irrelevant and contradictory. There are no averments to found a case that the outcome would have been different if actions had been taken more quickly, bearing in mind the legal problems and disputes which existed. Plainly the Judicial Factor is not liable for events which occurred before his appointment. The fifth defender is under no legal duty to fund an action himself. Any outstanding payments to the pursuer were dealt with in the Opinion of the Lord Ordinary dated 21 May 2004. Thereafter the fifth defender made any payments due to the pursuer under said Minute of Agreement until the funds of the estate were exhausted. Miss Paterson criticised the whole approach of the pursuer and the form of the averments in relation to the fifth and sixth defenders on the basis that no relevant case has been averred. She moved that her first plea-in-law seeking dismissal of the action should be upheld. She also founded on her sixth plea-in-law to the effect that the fifth and sixth defenders were not liable to restore to the estate sums wrongfully paid from the estate by third parties which the pursuer sought in plea-in-law 20. I understood her to accept the general submission made by Mr Clark in this respect.

#### Submissions by the pursuer in response to the defenders' submissions

- [42] The pursuer as a party litigant wished to rely on a detailed written submission in her response and I permitted her to do so. I directed the response to become part of the process (40 of process). The response was spoken to by the pursuer in her own submission and the full detail is therefore available if there is any further consideration of the matter. I do not think it would be helpful if I tried to summarise the response which was not always focused on the legal issues which I consider to be important. I have fully considered her response in reaching my conclusion. The following cases were produced by the pursuer and referred to by the pursuer in her submission and I have where possible and appropriate corrected the citations provided by the pursuer: *McNaught v McNaught's Trs.* (1916) 2 S.L.T. 291; *Fleming v Yeaman* 1883-84 A.C. p966; *Anderson v Grant* (1889-99) p484; *Clarke v Clarke's Trustees* (1925) S.C. 693; *Dingwall v Dow* (1909) 2 S.L.T. 311; *Inglis v Inglis* (1982); *Board of Management for Dundee General Hospital v Bell's Trs* 1952 S.C. (H.L.) p78; *Obers v Paton's Trs.* (1897) - 24R p719; *Grant v Grant* 1748 - *Morison's Dictionary of Decisions in the Court of Session*; *McCowan v Wright* 1853, 15D p494; *Cook v Sinclair* (1896) s. c. R23 p925; *Munro v Rothfield* 1920 S.C. (H.L.) p165; *McMenemy v James Dougal & Sons Ltd* (1960) S. L.T. notes of recent reports p84; *Hope v Hope's Trs.* 1898 S.C. (H.L.) p.1; *The Town and Country Board Limited v Walker and another* 1904 S.L.T. P411.

#### Discussion

- [43] In my opinion however one analyses this case, the pursuer's rights, if any, can only arise out of said Minute of Agreement. Indeed I did not understand even the pursuer to suggest that the starting point for any claim which she might have and her title to sue in respect of said claim was founded on anything other than said Minute of Agreement. By the date of the procedure roll debate, it was not disputed that albeit there had been delays and difficulties at different periods throughout the history, eventually payments in respect of sums due to the pursuer had been made up until November 2005. It was also not disputed that monthly payments which were due since November 2005 had not been paid because there was no money left in the estate of said Mr James Clark. Because of the nature of the Closed Record it took some time to elicit and clarify these simple points.
- [44] My starting point in consideration of this case was to construe said Minute of Agreement. In doing so I had no difficulty in concluding that *prima facie* the pursuer is entitled to payment in terms of clauses 2 and 4 of said Minute of Agreement of a sum in respect of maintenance by monthly payment. I do not consider that on a proper construction of said Minute of Agreement, the pursuer is entitled to a right to a capital sum at any period from the date when said Minute of Agreement became enforceable by her after decree of divorce. Said Mr James Clark did not in said Minute of Agreement or in his will direct that any special provisions or protections be accorded to the pursuer under said Minute of Agreement. There are no provisions, for example, that in the event of his death an annuity must be purchased or that the pursuer's rights be secured in some way, for example, over heritage owned by said Mr James Clark. The rights in said Minute of Agreement are in common form for this type of agreement creating a continuing obligation for monthly payment which survives the death of the grantor and is enforceable against his estate until the Agreement ends on the pursuer's marriage or death. It is not disputed in this case that the pursuer is an unpaid creditor and that the executors from time to time in office throughout the executry period have long known of the pursuer's entitlement under said Minute of Agreement. Her claim was made within the six month period for notification of claims. What is difficult to understand is how this relatively simple claim for some £12,000 per year in current value has become a claim set out over 72 pages of Closed Record, touching upon many and varied complex areas of law and resulting in claims against multiple defenders totalling in excess of £6 million. Even if the pursuer was correct in submitting that she was entitled to a capital sum, it is still difficult to understand how that claim transforms and translates into the claims which are made in this case.



- [45] Having considered the pursuer's submissions, I conclude that she has no satisfactory answer to the line of authority summarised in paragraph 24. The pursuer appears to approach the matter indirectly arguing that her debt under the said Minute of Agreement was governed by family law and was a debt due and eligible and for which the executors have themselves undertaken a long term obligation to pay the pursuer, thereby placing themselves in a fiduciary relationship to the pursuer. Having considered the cases referred to in paragraph 24 I have no difficulty in concluding that the pursuer's claim as a creditor is limited in nature and that the law provides a well recognised remedy which is not the extreme and far reaching remedy claimed by the pursuer.

*"An executor is not a trustee for either creditors or legatees, though he is bound to satisfy the claims of both, just as a testator is bound to satisfy the claims of his creditors during his lifetime. He is in the shoes of the testator deceased, and his capacity being representative, and not fiduciary, is the ground of all the duties imposed on him, and all the equities against him". (Globe Insurance Company v McKenzie, Lord Brougham at p.319)*

That is not to say that the executor owes no duty to a creditor but his duty is to satisfy the claim. It is not to account to the creditor in a fiduciary capacity for all the administrative and other actings by the executors in relation to the estate. The law, as I understand it, provides a simple remedy for a creditor who has made a timeous claim to executors and who has not been paid because the estate has been exhausted by prior payments to beneficiaries. In such a case Scots Law holds the executors personally liable to pay the creditor except in exceptional circumstances. Thus the pursuer in this case would have been entitled to plead a case to recover the periodic maintenance due under said Minute of Agreement personally from the executors currently in office. It was apparent from the pursuer's submission that she chose not to do so. She understood the difference in nature of a claim for arrears for sums of periodic monthly maintenance compared with the type of claim which she embarked upon in the present action. Indeed she had already raised a claim of such a limited nature in other proceedings against the persons who are now the fifth and sixth defenders. There was nothing in the pursuer's submission which persuaded me that a creditor in her position was entitled to embark upon a challenge to and investigations of the administration of the estate over twenty years in order to have the executors and others, not parties to this action, pay into the estate millions of pounds well in excess of any possible liability to the pursuer. This claim is of course against a background of circumstances where the beneficiaries and executors had settled in 1997 outstanding disputes in which they were involved. In dealing with the duties of an executor, the pursuer appeared to be confused and to misunderstand the different duties which may be owed in certain circumstances by a trustee under a trust disposition and settlement to beneficiaries compared with an executor to a creditor. This is illustrated, for example, by the pursuer's attempt to rely on *Clarke v Clarke's Trustees* (1925) S.C. 693. That case, in my opinion, is of no assistance to the pursuer as it is dealing with the duties of trustees following an action of count, reckoning and payment by beneficiaries in which one of the ways the trustees failed in their duties to the beneficiaries was to fail to make investment provision for an annuity payable to the widow of the deceased and delayed distribution to the beneficiaries. The case is of no assistance in relation to the duties of an executor to a creditor in the circumstances averred by the pursuer.

- [46] The pursuer did not construe the specific terms of said Minute of Agreement in order to clarify the legal meaning of the terms thereof. She appeared to approach the matter by drawing upon the factual history to illustrate various ways in which an alimentary obligation might be compromised or paid as a lump sum, to conclude that she was and is entitled to a lump sum payment. In my opinion this is not the proper approach. Even her own pleadings are not consistent with this submission as is plain from her averments at page 19, Article 5.1.
- [47] I consider that the main submission made by Mr Clark which I summarise in paragraphs 24 and 25 which I understand was accepted on behalf of all the defenders is well founded. In my opinion that is an end of the pursuer's case and would entitle the defenders to dismissal of the action. Even if I was wrong about that I consider that there is merit in the further points made on behalf of the defenders which I have summarised in paragraphs 26 to 42. The points made on behalf of the defenders were in my opinion correct in law and were not addressed adequately by the pursuer to persuade me that they were ill founded. But if these points are correct I would go further than submitted by Mr Clark. In view of the nature of the Closed Record I do not think it is possible to try to excise and exclude from probation the issues deemed to be irrelevant. The pleadings are too defuse and intermingled to attempt that. In my opinion dismissal would be the correct result.
- [48] Taking the most generous view of the pursuer's pleadings and her submissions, I accept that the pursuer does make reference in passing to her right to payment under said Minute of Agreement and the personal liability of executors for non payment. For example, her averments at pages 43 to 44. I did give consideration to whether it might be possible to carve out a very limited case in relation to the first and second defenders but concluded that this would ultimately be unhelpful as the averments were so inter related and interwoven with other material that the task was not one which should be attempted in this Closed Record as it was likely to lead to further difficulties. In any event, as I have explained, the pursuer appeared to have deliberately embarked upon an action of a very wide ranging nature against a multiplicity of defenders. She explained that in view of the difficult history in enforcing said Minute of Agreement she did not think it "worth the bother" of suing for only the periodic monthly payment. She wanted compensation and others remedies and sums as sought in the action. She also wanted a public forum to illustrate some of the wrongs and injustices which she perceived had been occasioned by the way in which the estate had been dealt with over the years. In adopting this approach, the pursuer has chosen to involve multiple defenders in legal action over a long period of time seeking very large sums of money and making very serious allegations. I consider that the case in relation to the third defender is self evidently without legal merit. That applies also to the case directed against the sixth defender. I agree entirely with the comments

made by the Lord Ordinary which I refer to in paragraph 3 when he considered another case in which the pursuer had involved the person who is the sixth defender in legal action on a similar basis. It does not appear that his comments were given sufficient consideration by the pursuer when she raised the present action.

- [49] This case is yet another chapter in the troubled tale of the executry of Mr James Clark. I have no doubt that it has caused distress and worry to the pursuer as well as the defenders. The pursuer has undoubtedly had many difficulties in obtaining the maintenance which her late husband intended she should have and so contracted. Standing the legal submissions made on behalf of the first and second defenders, they will no doubt consider their position in relation to any liability which they may have to the pursuer. Further litigation and expense does not appear to me to be in the interest of anyone involved in this history.
- [50] There was some discussion about the appropriate way to deal with this case in the event that I upheld the submissions on behalf of the defenders. Except in relation to the third defender where absolutor was sought as an alternative, I understood that the defenders sought dismissal. In all the circumstances I consider that dismissal is the appropriate course. I therefore sustain the first plea-in-law for the first, second and third defenders, the fourth plea-in-law for the fourth defender under deletion of the words "*with expenses for the fourth defender*". I have not heard any submissions from parties about expenses and have not dealt with that issue. I also uphold the first plea-in-law for the fifth and sixth defenders *quoad ultra* I repel the pleas-in-law for the pursuer.

Pursuer: Party Litigant

Defenders: Clark for the first, second and third defenders; Balfour & Manson

Connell, QC, Solicitor Advocate for the fourth defender; McGrigors

Paterson for the fifth and sixth defenders; Bishops