SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT PERTH

[2022] SC PER 14

PER/A42-21

JUDGMENT OF SHERIFF GILLIAN A WADE QC

in the cause

IAN ALEXANDER WILLIAM HARLEY

Pursuer

against

BERYL ANITA HARLEY, qua Executrix-Nominate of the late JAMES MILLAR HARLEY

Defender

Pursuer: RAS MacLeod Advocate
Defender: CO'Neill QC

Perth, 25 January 2022

The Sheriff having resumed consideration of the cause, sustains the defender's first and second pleas in law, repels the pursuer's first plea in law and dismisses the action appoints parties to be heard on all questions of expenses and assigns 6 April 2022 as a diet therefore.

Procedural background

[1] This matter came before me for debate on the 10 January 2022 in respect of the defender's first and second pleas in law. At the Options Hearing the pursuer had not lodged a note of basis of preliminary plea and accordingly his preliminary plea was repelled. However on 30 November 2021 the pursuer lodged a Minute of Amendment which sought to reintroduce the plea to the relevancy and also sought decree *de plano*.

[2] The defender was afforded time to answer the Minute of Amendment which she duly did and the matter came before my brother Sheriff on 5 January 2022 at which time the defender argued that the Minute of Amendment should not be allowed because it purported to introduce a new preliminary plea which had already been repelled at the Options Hearing on 18 August 2021. Separately and in any event it was argued that the pursuer had not complied with rule 18.8 OCR in that he had not lodged or intimated a note of basis of preliminary plea with his Minute of Amendment. Rule 18.8(2) provides that if no such note is provided at the same time as the as the minute itself then the plea shall be repelled.

[3] The pursuer argued that this was an administrative oversight and accordingly the learned sheriff at the rule 18 hearing allowed the Minute of Amendment and answers subject to an award of expenses.

[4] That procedure has somewhat changed the landscape in advance of the diet of debate and when the matter came before me both parties sought to advance arguments in support of their preliminary pleas and in addition the pursuer moved a motion for summary decree which was also opposed.

Factual background

[5] This action arises out of a claim for legal rights by the pursuer in relation to the estate of his late father. The defender is the widow and Executrix-Nominate of the late James Millar Harley (hereinafter referred to as "the late Mr Harley"). In terms of his Will, dated 9 January 2008 and a Codicil thereto dated 19 June 2015, the defender was appointed Executrix-Nominate to the late Mr Harley together with two others, Fiona Holmes and Campbell Watson, solicitor, both of whom have since resigned.

[6] Following the death of the late Mr Harley, the pursuer, his son, who was not nominated as a beneficiary under his late father's testamentary writings, instructed agents, Macnabs LLP to intimate a legal rights claim on his behalf.

[7] Such a claim was intimated on 18 November 2019 to Andersons LLP, solicitors, where Mr Watson was then practising as a solicitor.

[8] Macnabs sought from Andersons a legal rights calculation for Mr Harley, as is standard practice. On 19 February 2020, Mr Watson, then an executor of the late Mr Harley, emailed to Macnabs a legal rights calculation in the sum of £227,542.24.

[9] The pursuer avers that this calculation

> "was finalised save for deduction of the relevant proportion of Andersons' professional fees attributable to the legal rights claim, which was to be calculated by an independent Auditor of Court and Law Accountant. This was agreed by Macnabs."

[10] The primary moveable asset in the late Mr Harley's estate was made up of shares in the company Alexander Harley Seeds Limited (hereinafter referred to as "AHSL"). The calculation prepared by Mr Watson was based upon a valuation of the shares in AHSL which made no provision for any minority shareholder discount on the share value. That valuation was used in the inventory for confirmation.

[11] Lorna Millar, a partner of Andersons, emailed Macnabs on 10 April 2020 to confirm that Andersons' fee had now been assessed and the legal rights claim finalised at £226,460.84. The pursuer avers that "Macnabs confirmed to Andersons on behalf of the pursuer that the legal rights claim could be agreed in that sum which is the sum sued for."

[12] The pursuer also avers that even if the defender is correct and a discount should have been applied to the shares then the discount rate of 75%, proposed by the defender is grossly excessive.

[13] The defender's position is that the legal rights calculation emailed by Mr Watson to Macnabs on 19 February 2020 was based on an "in house" valuation of AHSL prepared by the finance director of AHSL in terms of which she calculated the value of Mr Harley's shareholding at £1,984,930.88. That calculation treated all shares in AHSL as having a value of £32.29. However the defender explains that, as it is the duty of the executrix to provide a correct valuation, she then instructed Campbell Dallas to carry out a valuation of the shares as at the date of the deceased's death bearing in mind that he was a minority shareholder and had no control over the company. Mr Harley held 61,472 shares in ASHL, being 15% of the total of 409,823 shares issued.

[14] Inevitably the methodology used by Campbell Dallas was entirely different from that used by the in house financial director and therefore the valuation arrived at by Campbell Dallas was significantly less than that originally suggested in the email correspondence. Their professional opinion was that a minority discount of 75% should be applied to the late Mr Harley's shareholding. That opinion is produced and it is averred that "the figure produced in Mr Harley's confirmation and indeed in our legal rights calculation was inflated and therefore incorrect and now needs to be adjusted appropriately".

[15] Andersons produced a fresh legal rights calculation which valued the pursuer's legal rights at £61,049.93. The defender maintains that the proper approach to Mr Harley's shareholding is a valuation based on market value. That market value is affected by the fact that Mr Harley's shareholding represented a minority stake in AHSL and that, in consequence, Mr Harley had limited control and influence over AHSL.

[16] The defender maintains that no agreement had been reached by parties on the value of said shares and that having obtained the correct valuation the executrix could not,

consistent with her duty to all beneficiaries, make payment to the pursuer of the higher sum sought by him.

[17] The defender avers that she is willing to settle the legal rights claim for the lower figure but the pursuer maintains that as a result of

a) the agreement purportedly entered into between the parties

b) the fact that the higher valuation was inserted into the confirmation statement lodged with Companies' House, he is entitled to the higher amount together with accrued interest.

[18] At debate before me the pursuer therefore insisted on his first plea in law and maintained that if I were in agreement with the central proposition advanced by him in relation to the valuation of the legal rights claim then he should be entitled to decree *de plano* or indeed summary decree in the reduced amount averred by the defender.

[19] The defender sought to rely on her first and second preliminary pleas being:

1. The pursuer's averments being irrelevant *et separatim* lacking in specification, should not be admitted to probation.

2. The pursuer's averments being irrelevant *et separatim* lacking in specification, the action should be dismissed.

Submissions

The pursuer

[20] By agreement between the parties the pursuer opened the debate. The essential question which he asked the court to determine was whether the executrix could in effect value the deceased's estate differently from the value recorded in the inventory for confirmation for the purposes of quantifying the pursuer's legal rights. He submitted that if

not then the defender was bound by the valuation in the inventory and that was a complete answer to the issue for debate.

[21] Counsel for the pursuer commenced by noting that the record which had been lodged in advance of the debate was incorrect in that it purported to reintroduce three pleas in law when in fact only the first plea in law was to be relied upon. He moved to delete what appeared as the second and third pleas in law. I allowed that amendment to be made and the remaining pleas to be renumbered accordingly.

[22] The pursuer then invited me to have regard to his written submissions augmented by a number of points which he would make orally under six heads. He signposted his submissions as dealing with

1. The factual context to the dispute
2. Comments regarding legal rights generally
3. The authorities
4. Discussion in relation to the propositions which can be taken from the authorities
5. A response to the defender's criticisms of the pursuer's case
6. Comments in relation to disposal of the case and motion for summary decree

Factual context

[23] Under reference to the pursuer's first inventory of productions 5/1 of process, being the confirmation granted on the 23 December 2019, the pursuer drew attention to the terms of the inventory of assets and the declarations which was to be found at paragraphs 5 and 6 thereof. Item 3 on the inventory was a valuation of the shares in question and recorded a 15% shareholding in AHSL being 61472 shares at £32.29 each. This brought out a total

asset value of £1,984,930.88. The declaration stated that the inventory was a "full and complete" inventory of the deceased's estate and at paragraph 6 a valuation of that estate was provided in the sum of £2,072,485.71. That declaration requires to be signed by the executor.

[24] The court was then referred to the terms of the confirmation itself in terms of which the estate is vested in the executor for the purposes of administration, which would include settling any claims from those who may have an interest including, beneficiaries, creditors and legal rights claimants. It was submitted that a person who holds legal rights is akin to a creditor.

[25] In relation to the factual context the pursuer went on to submit that the shareholding had not been realised. It was observed that although the defender denies that fact in general terms the defender does not aver that the shareholding has been realised. Accordingly there is no basis upon which the court can determine what price the shares actually achieved on sale.

[26] Under reference to the joint bundle of authorities I was taken to *Currie on Confirmation of Executors* (19th Edition) chapter 12-03 where the learned author comments

> "Unless the estate is classed as an 'excepted estate' (see paras 12–04—12–06), all executors are under a statutory duty to deliver to the Board of HM Revenue & Customs an account specifying all property which formed part of the deceased's estate immediately before his death, as well as the value of any chargeable transfers made by the deceased within seven years of his death. Each item of estate must be accurately valued, or it must be clearly shown that the executors have been unable to ascertain the exact value of a particular item, and that the value shown is a provisional estimate. Failure to do so may result in the executors having to pay penalties (see para.12–09). The account must be completed on the official inheritance tax account or 'form'."

[27] It was further submitted that as a result of the operation of section 261 of the ITA 1984, which gives effect to section 38 of the Probate and Legacy Duties Act 1808, the Form C1 sets out the value of the testator's estate for the purposes of inheritance tax.

[28] Acknowledging that there could be situations in which an error arose in the completion of the proper form, it was submitted that in that event the proper course was "to lodge an Eik." In fact that proposition is incorrect. The Eik is the document issued by the court as an addendum to the original confirmation. What is lodged in such a case is an additional inventory.

[29] In any event the pursuer submitted that the position was as stated in *Currie on Confirmation* (*supra)* paragraph 17-02 which stated,

> "Further, where an item of estate was erroneously described in the original confirmation, and cannot in consequence be engathered, an additional inventory may be prepared in which the item of estate wrongly described in the original confirmation is correctly shown, and an eik to the original confirmation then obtained."

[30] The point was made that the executor retains a duty to account for any additional inheritance tax which may fall due and much of what was submitted in relation to an additional inventory or Eik related to HMRC requirements.

[31] Paragraph 17-09 of *Currie* goes on to say that

> "an eik may also correct any error that may have been made in the original inventory. Thus, estate which has been overestimated may be set out at its true value, and the difference deducted."

[32] On behalf of the pursuer it was therefore submitted that "the defender has not averred that they have or intend to submit an Eik". The value of the estate is that which was recorded in the C1 and the defender was therefore bound by that valuation.

Comments in relation to legal rights generally

[33] The second point made in the pursuer's oral submissions was in relation to legal rights which, it was submitted were akin to a debt and arise as an operation in law. In what I understand to be an uncontroversial submission counsel for the pursuer added that they are a form of protection against disinheritance, exigible from the net moveable assets calculated with reference to the date of death unless the estate is realised in the ordinary management of an executry without undue delay.

The authorities

[34] The court was then referred to *James Watson Gilchrist* v *Young Pentland and Another* (1889) 16 R 1118 (1889) as authority for the proposition that the true value for the purposes of the satisfaction of legal rights was the value of the asset at the date of the testator's death. However that case related to a situation where shares in steamers had significantly increased from the time of the testator's death and the claimant was seeking to share in the enhanced but later valuation.

[35] That case seemed to me of little assistance to the matter before me where there is no real dispute that the valuation is to be the date of death valuation. The issue in this case appears to me to be properly articulated as determining what the correct date of death valuation should be.

[36] Under reference to the pleadings it was pointed out that although the pursuer avers that the shares have been transferred to the beneficiaries that has not been admitted expressly in the pleadings. Furthermore it is not averred that the shares have been realised. I did not understand it to be any part of the defender's case that they had been. In short it was the pursuer's submission that having stated a valuation for the purposes of obtaining

confirmation the executrix was bound by that and could not seek to value the shares differently in relation to the claim for legitim. There was no averment that the value of the shares had somehow changed or reduced and there had been no attempt to lodge a corrective inventory or seek an Eik to the confirmation.

[37] Turning then to the opinion of Lord Shand in *Gilchrist (supra)* it was submitted that the executrix in this case fell foul of that *dicta*. In support of this proposition counsel for the pursuer referred to the passage which reads,

> "if parts of an estate are realised in the ordinary course of an administration and have risen in value since the day of the testator's death, the benefit of that increase should be taken into account in fixing the amount of the estate of which the legitim fund is a fixed part. In short, if the estate is to be realised as for all concerned, then the actual realisation in the ordinary course carried out with due diligence and prudence is the amount to be looked to. If executors or beneficiaries resolve to hold and not to realise, they cannot, as it seems to me, thereby diminish the legitim fund. The value of the estate as at the deceased's death should, I think, still be fixed by ascertaining in the best way possible what would have been the amount if a diligent but prudent realisation for the best advantage had actually taken place."

[38] It was submitted that the executrix in this case was doing precisely what Lord Shand warned against and because the shares had not been realised the executrix was diminishing the legitim fund. Interestingly this passage was also referred to by the defender but clearly the opposite interpretation was placed upon it, which is a point to which I shall return in the course of my discussion and decision.

[39] The pursuer also highlighted the section of Lord Shand's opinion which states,

> "And I must further add that where trustees or beneficiaries in answer to a claim for legitim say—it may be at a considerable interval after the testator's death - that they mean to hold particular parts of the estate for the beneficiaries, it appears to me that they ought not on that mere statement to be allowed to take the entire benefit of an increased value which has arisen in the interval of these parts of the estate which it is in the general case to be assumed they held for realisation. If they can shew clearly that a resolution was definitely and finally formed at a certain date to retain and hold the property, the case would be different, but, I think, in so far as the property has risen before that resolution was formed, the additional value should be taken into

> view in ascertaining the value of the deceased's estate in order to fix the amount of legitim."

[40] On behalf of the pursuer it was conceded that if the executrix in this case had sought to realise the estate and it was subsequently realised at a lesser amount than that stipulated in the valuation it would be difficult to maintain the present objection. In that situation the executrix would need to seek an Eik. It was recognised that in such a situation that could affect the value of the inheritance tax ultimately payable and indeed it might mean that there may not be any inheritance tax payable at all. It was accepted that realisation of the estate at loss may have implications for taxation purposes.

[41] However the pursuer maintained that the date of death valuation falls to be determined with reference to the C1 if the executor has not sought an Eik. On specific questioning about applicable time limits were the executrix to seek an Eik it was further conceded that although confirmation had to be sought within 6 months. There is no time limit for seeking an Eik.

[42] The pursuer then referred to paragraph 24 of his written submissions which had been lodged 23 December in which he submits that *Alexander* v *Alexander* 1954 SC 436 supported the pursuer's position.

Legal propositions

[43] Moving to the fourth point which the pursuer sought to advance it was submitted that he could find no authority directly in point. The question it seemed to him was whether you can you treat estate differently for legitim that for estate duty purposes. The choice is between realising the estate and obtaining a valuation from so doing and submitting a valuation for the purposes of calculating inheritance tax.

[44] He went on to highlight the connection between the valuation and the purpose of confirmation itself, submitting that it would be inconsistent if the value of the estate could be calculated one way with reference to one debt but that the basis of valuation could be changed for the purposes of working out another debt, in this case legal rights.

[45] Again it was conceded that if the defender "had lodged an eik" or if she had realised the property then the pursuer may not have been able to make this argument.

Response to the defender's criticisms of the pursuer's pleadings

[46] The pursuer's principal point was that if court was with the pursuer in respect of the argument advanced in the written pleadings and supplemented by the oral submissions that is the answer to everything.

[47] However in response to the defender's submissions and in relation to the criticisms about specification he reiterated that as legal rights arise as an operation of law, strictly speaking there is no question of an agreement or the requirement to plead one. The issue was more properly characterised as one of quantum.

[48] In response to paragraph 12 of the defender's submissions he stated that there is sufficient to go to proof. In any event there was correspondence lodged. There was no suggestion that the defender did not know about that and the defender herself has referred to the dates of the emails upon which the pursuer relies. What was intended in terms of those emails, it was suggested, was subjective and would require evidence.

[49] Counsel for the pursuer summarised by asserting that the starting point had to be the value in the inventory. The defender had not offered to prove that that valuation had changed and failing the obtaining of an Eik or realisation of the assets themselves the executor was bound by the valuation provided.

[50] Finally counsel acknowledged that he may have been incorrect in his assertion that the estate would have attracted inheritance tax and accepted the defender's submission that no such tax was payable on either the higher or the lower valuation. However he maintained that that does not detract from the primary argument as there would require to be an accounting for inheritance tax purposes in any event.

Further procedure and motion for summary decree

[51] It was the pursuer's position that I should accept that the valuation in the inventory was the one which had to be used for the purpose of calculation of the pursuer's legal rights claim and that being so decree should be granted in the whole amount craved. However even if the pursuer's submission was not accepted in whole or in part decree should still be granted for the lower amount because there was no defence to the claim for legal rights *per se.* An alternative was to fix a procedural hearing to determine further procedure depending on the outcome of the debate.

[52] Accordingly the pursuer, in reliance on both his written and oral submissions, renewed the motions made at the outset of the hearing.

The defender

[53] The defender's position moved the court to sustain her first and second pleas in law and to repel pursuer's first and third pleas in law. She observed that repelling the first plea in law for the pursuer leads to dismissal of the action.

[54] Senior counsel for the defender began by responding to the points made by the pursuer in relation to the confirmation and what she characterised as the pursuer's "new case".

[55] The only averment in support of this, which had been added by way of the Minute of Amendment, was to be found in Article 2 of condescendence at page 3 line 91. The averment reads "That valuation is recorded in the said inventory for confirmation which is produced herewith".

[56] There is no averment that the defender has failed to do anything to correct that valuation or to obtain an Eik although that seemed to form a substantial part of the oral argument advanced at the debate. Equally there was no averment that the defender was in fact bound by the valuation contained in the confirmation although that now appeared to be the fundamental proposition upon which the pursuer was relying. Even if that proposition were well founded in law it was observed that the pursuer has no plea in law which makes reference to the confirmation or the inventory or the binding nature of any value contained therein. There is simply a generic plea that the pursuer is entitled to payment and that the sum sued for is reasonable.

[57] It was pointed out that there was no plea in law that the defender having confirmed on an inventory of a particular value, the pursuer is entitled to payment at that value. Given the paucity of pleadings and the absence of a plea in law that, it was submitted, should be the end of the new case.

[58] Put short the defender's submission was that the pursuer is entitled to his legal rights and is entitled to the correct value of his legal rights and that the correct value is not determined by the value that was included in the original inventory.

[59] The pursuer's position appeared to be that the only means by which the original valuation can be changed is by applying for and obtaining an Eik or by realisation of the asset in the normal course of administration of the estate. However, it was submitted, none

of the authorities support a proposition that where a value is wrong then the executors are nevertheless bound by it unless there has been an Eik to confirmation.

[60] If that was the case then a person seeking revaluation would have no remedy.

[61] I was then addressed in relation to paragraph 21 of the pursuer's written submissions where he asserts that the estate bears inheritance tax which falls to be deducted before legal rights are calculated. In the first place the defender submitted that there are no pleadings about this on record and therefore no opportunity for the defender to deal with this in on record. In any event the pursuer now accepts that this is factually incorrect. The legal rights calculation which was prepared by the defender's agents was clear that there was no inheritance tax to be deducted from the estate. Reference was made to the productions and the email of the 9 February 2020 in which it was said the computation was subject to IHT clearance that there was no inheritance tax payable.

[62] Accordingly it was known by the pursuer from the outset that there was never going to be any need to account to the revenue or recoup overpaid tax. There was no inheritance tax charge to the estate because spousal and other reliefs applied. Accordingly an Eik is not required as a precursor to meeting the legal rights claim of a person such as the pursuer. He is entitled to payment of his legal rights at the correct value and to be given an explanation as to how that valuation has been arrived at. An Eik would serve no purpose and would have done no more (and possibly less) that to provide the information which the pursuer already has. He has had it explained to him why the correct valuation might differ from that originally stated and he has been given an opportunity to vindicate his rights by bringing this case.

[63] The defender's counsel submitted that that proposition was supported by the very existence of the authorities to which I had been referred and in which individuals who were

not satisfied with the valuations of their shares brought claims which were adjudicated upon by the court. The court did not respond by saying that the pursuers in those cases they were not entitled to come seeking a remedy because the value is what is stated in the original inventory. Rather the court said that the correct approach was to establish the correct value of the estate and the correct value of the legal rights claim.

[64] Adopting paragraph 22 of her written submissions she reiterated that the propositions set out there (paragraphs 22.1-22.6) are not disputed but were irrelevant to my considerations in this case. The qualifications to any of those propositions were noted in the written submissions but did not bear on the valuation.

[65] Paragraph 24 of the written submissions dealt with the pursuer's remaining proposition in law which was premised on the assumption that the value in the C1 will also be the value upon which the legal; rights must be calculated.

[66] In this regard the defender submitted that *Gilchrist (supra)* is more helpful to the defender in that it said,

> "A right to legitim is a debt to be measured by the actual value of the moveable estate left by the father at his death, and its ascertainment does not involve realisation of his estate. In an action for payment of legitim the Lord Ordinary, Fraser, while recognising the rule that legitim is to be calculated on the value of the estate at the date of the father's death, held that shares of certain ships which were not marketable at the date of the father's death, but soon after increased in value, were to be estimated at the increased value, and allowed a proof of the market price."

[67] Having regard to this she submitted that the very existence of this case demonstrated that the response is not to proceed on the basis that the inventory is binding but instead to ascertain the correct value at the date of death. Reference was made to the opinion of Lord Adam in that regard.

[68] I was also taken to the opinion of Lord Mure where it was observed that where there was difficulty in arriving at a valuation , as in the instant case expert, advice could be taken in relation to obtaining a proper valuation. It was accepted that it was open to the pursuer to challenge that valuation if he did not accept it and that was what he had purported to do by bringing this action, although the flaws in his pleadings were such that the action should not be allowed to proceed any further.

[69] Senior counsel also founded upon the opinion of Lord Shand which was relied upon in the pursuer's submissions drawing attention in particular to the requirement to establish a valuation. He had observed that where the asset had not in fact been realised it should be valued "by ascertaining in the best way possible what would have been the amount if a diligent but prudent realisation for the best advantage had actually taken place."

[70] It was further submitted that the valuation exercise must be done in good faith and that was precisely what had been done here.

[71] The defender's counsel then took me again to *Alexander* v *Alexander's Trustees, (supra)* and submitted that far from providing authority for the proposition that the value of the estate was that included in the inventory for tax purposes it supported the defender's position that if the asset had not been realised then the proper approach to valuation was to determine the amount which it would have fetched on realisation in the course of ordinary and prudent trust administration. That, it was submitted, was categorically not done by simply taking the value provided for estate duty purposes.

[72] The defender's submission was that the authorities anticipate parties looking to the date of death valuation and that has to be an accurate valuation arrived at by reference to expert advice.

[73] In conclusion in relation to the new case, or more accurately the case based upon the binding effect of the valuation in the C1 it was submitted that a fresh calculation was made and the absence of an Eik is nothing to the point. The pursuer's entitlement is to payment of an amount which represents an accurate representation of his claim. It is not for him to regulate an approach which the revenue might take. While the defender agreed that in a situation where a person entitled to legal rights disputes the valuation he is entitled to challenge that and seek a different basis for valuation she made clear that the pleadings before the court did not achieve that in a coherent and relevant manner and should not be admitted to probation.

[74] The defender then turned to the question of methodology. As originally pled the pursuer objected to the approach to valuation which had been taken by saying that the articles of association precluded a discounting approach. Those averments were deleted leaving only limited averments as to the appropriate approach to valuation. Those are found in Article 2, page 3 of the record line 89-90 and are restricted to the averment that a discount of "75% is grossly excessive". Those are the only averments which refer to valuation. No notice has been given as to why there should be no minority discount and no notice is provided of what would be an appropriate alternative discount figure. Accordingly the defender has no notice of what the pursuer is offering to prove by way of alternative methodology for valuation and could not proceed to offer evidence of such alternative basis at proof.

[75] The final chapter of the defender's submission was in relation to the question of an agreement as to valuation. It was submitted that the pursuer has not pled a sufficiently clear case as to what amounts to this agreement. If, however it was being suggested, although not pled, that the so called agreement was concluded by the e mailed correspondence of 16 April

2020 it was the defender's submission that email cannot be read as accepting any offer and is at best a qualified acceptance and a separate fresh proposal.

[76] The defender referred the court to *Wolf and Wolf* v *Forfar Potato Co* 1984 SLT 100 and submitted that the exchange of correspondence in that case has similarities to the exchange in this case. In *Wolf* it was held that on the making of a qualified acceptance and counter-offer, the original offer falls and that on the failure to obtain the terms requested in the counter-offer, the party cannot fall back on and accept the original offer.

[77] In conclusion she submitted that the email of 16 April, if indeed it is being relied upon as concluding the bargain, does no such thing. It did not demonstrate any sort of agreement and there are insufficient averments to allow this matter to proceed to proof. The court is entitled to conclude at debate that there is no agreement of the sort suggested by the pursuer and the averments about a contract fall to be excluded. Those averments were to be found at lines 79-85 of Article 2 of condescendence and in Article 4 of condescendence at lines 209-212.

[78] In conclusion the defender submitted that if she was correct in her analysis there would be no averments anent an agreement, no pleadings in relation to discounting the value of the shareholding, an alternative methodology or an alternative valuation and no plea in law in relation to either the agreement or the binding nature of the valuation in the inventory. All that would remain is a plea in law to the effect that the pursuer is entitled to his legal rights and a crave for payment. While the defender conceded that the court could accede to the motion for summary decree in the sum of £61,049.93 an alternative approach of dismissal was more appropriate because the offer of the reduced amount had always been available and accordingly the action was not necessary. This would result in the executrix

being entitled to expenses and accordingly the executrix could make payment to the pursuer under deduction of judicial expenses as taxed to which she would be entitled.

Decision

[79] In considering the respective positions of parties it appeared to me that but for the allowance of the amendment at a very late stage in the proceedings the pursuer would have had very little to say at the debate.

[80] It is also clear from the pleadings that from the outset the pursuer approached this claim as a simple payment action based on a purported agreement between the parties which was said to finalise the assessment of the pursuer's legal rights claim at £226,460.84. The case as originally pled did not depend on the binding nature of any valuation inserted into the confirmation and even by the time of the debate, after the amendment procedure had concluded, there was no plea in law to reflect the proposition that such a valuation was binding on the executors for all purposes including the satisfaction of legal rights.

[81] Initially what the pursuer attempted to do was to found a case on the basis that an agreement on the valuation had been reached and decree should be granted for that amount. That is patent from the terms of his third plea in law to the effect that "The sum sued for being an agreed, and in any even a reasonable, calculation of the extent of the pursuer's legal rights claim, decree should be granted therefor."

[82] At the last minute the pursuer has attempted to either change horses or, at best, ride two horses by relying first and foremost upon the terms of the C1 and the valuation provided therein. It is unfortunate and probably fatal to that argument that there is no plea in law to support that proposition in law and would suggest that the change of position was hasty and perhaps ill thought through.

[83] However, the amendment having been allowed I have considered whether there is any merit in the proposition advanced by the pursuer in paragraph 23 of his submissions which is that the shareholding not having been realised

> "the extent of the Pursuer's legal rights is dependent on the net moveable estate as calculated by the inventory in the C1, being the value of the Testator's net moveable estate as at the date of the Testator's death".

[84] In support of this position the pursuer relied on the dicta in *Alexander* v *Alexander's Trustees (supra)*. However in my view he has been somewhat selective in the passages upon which he seeks to rely. When one considers the whole case it is more supportive of the defender's contention that the value of an estate contained in an inventory of confirmation is not determinative for the purposes of a legal rights claim. It is not in point in terms of fact, but as submitted by the defender, the court did not approach that case by finding that as a matter of law the value submitted for estate duty purposes was also the correct valuation for determination of legal rights. In assessing how best to approach the valuation of the estate for the purposes of a legitim claim a methodology was suggested which makes clear that value ultimately arrived at for the purposes of satisfying legal rights may be different from that contained in any inventory prepared for confirmation by which the executor obtains authority to intromit with the investments themselves.

[85] It should also be noted that the case of *Alexander* is an Outer House decision and that it was raised as an action of accounting when a dispute arose over the valuation of the estate, which is arguably what out to have happened in this case.

[86] Since the pursuer predicated his position at debate on the proposition for which he says this case provides authority it is worth affording the decision some consideration.

[87] The facts of the case were that the widow and children of a testator elected to claim their legal rights in his estate in place of their testamentary provisions. Without any fault on

the part of the testator's trustees, the realised value of his moveable estate proved to be substantially less than its value as estimated for estate duty purposes.

[88] Accordingly it is immediately apparent that the estate suffered an actual diminution in value when realised. In the instant case the issue is around what methodology should be used to value the asset. There is no averment that it has actually gone up or down in value since the testator's death.

[89] In *Alexander* the Lord Ordinary (Guthrie) held that although the legal rights fell to be valued as at the date of death, their values for the purposes of satisfaction of legal rights fell to be determined by reference to the realised value of the moveable estate and not by the estimated value which had been provided for the purposes of estate duty.

[90] The difference, of course, is that the estate in *Alexander* had been realised. The dispute between the parties was, therefore, limited to the question of whether the amount of the legal rights of the pursuers was to be determined in accordance with the estimated values for estate duty purposes of the assets of the estate, valued as at the date of the testator's death, or on the basis of the actual sums obtained on the realisation of the various assets.

[91] Various authorities were referred to in the course of the ensuing debate including *Gilchrist*. All of those cases looked at situations where there had been an actual change in the value of the asset. That is not the case here. The issue is how one should go about valuing the asset and whether the methodology adopted by the in house finance director was flawed. I have not been referred to any case where an erroneous or unduly inflated value has been placed on the assets at the time of submission of the inventory and that has subsequently transpired to be incorrect.

[92] In all of the cases cited and discussed in *Alexander* the issue was related to the timing of the valuation of the legal rights claims involved where the asset had gone up or down in value since the date of the testator's death. It is also clear that where an asset is in fact realised "then the actual realisation in the ordinary course of administration of the estate carried out with due diligence and prudence is the amount to be looked to."

[93] The very most which can be taken from *Alexander* is that in conclusion the Lord Ordinary stated,

> "It appears to me that the authorities are conclusive in favour of the contention of the trustees in the present case, and that they establish that, where there has been realisation in ordinary course, the actual realised value and not the estimated value as at the date of death of the deceased determines the quantum of the moveable estate for the purpose of determining the value of legal rights."

[94] In my opinion the case provided no authority whatsoever for the proposition advanced by the pursuer to the effect that the value in the C1 is binding upon the executors for the purposes of establish legal rights. It is precisely what Lord Guthrie described it as - "an estimate".

[95] It seemed to me that the pursuer's approach conflated the two very different purposes of the inventory and the confirmation itself. The confirmation is vehicle by which the estate becomes vested in the executors for the purposes of administration of the estate and the inventory places a value on that estate for the purposes of assessing any inheritance tax liability accruing. If estate is left out of account in error an amended inventory can be prepared and an Eik obtained to cover the additional estate. Similarly should it transpire that the estate is worth less than originally assessed or estimated HMRC can be alerted by the preparation of an amended inventory and a reassessment of the tax can take place. It surely cannot be suggested that HMRC can claim more tax than that to which they are entitled by operation of the statutory provisions simply because an error arose in completing

the inventory lodged at an early stage in the administration of the estate or an early estimate subsequently transpires to have been quite different from the reality.

[96] The defender meets this point head on in her submissions by observing that the pursuer seeks to ignore the reality of executry administration, in terms of which corrections to inventories (as to the inclusion or exclusion of items or as to their value) is an acknowledged and accepted part: see *Currie on Confirmation of Executors* (19th Edition), chapter 17.

[97] I accept the defender's submission that there may also be cases where there has been an error as to the valuation of an asset for the purposes of IHT and that may have consequences, including tax penalties, but those again have no bearing on the valuation of a legal rights claim (cf *Currie on Confirmation of Executors* (19th Edition), paragraphs 12-03, 12-14, 12-15). As counsel put it

> "that possibility also underlines the fact that values included in an inventory for confirmation are subject to revision and challenge for IHT purposes and are not binding even for those purposes, much less in respect of legal rights claims."

[98] The pursuer also sought to rely upon *Gilchrist* v *Gilchrist's Trustees* (1889) 16 R 1118 (paragraph 18 of his submissions) but I struggle to see how that assists him. In that case the shares in steam ships were not capable of sale at the time of the testator's death but subsequently they were seen to rise in value. The shares had not been realised and the court concerned itself with the timing and methodology of valuation in those circumstances.

[99] It also supports the view that the value of an estate for the purposes of a legal rights claim is ascertained by reference to the value that the assets would have realised in the market.

[100] The pursuer in his consideration of *Gilchrist* also fails to draw attention to the passages in the opinion of Lord Shand which are directly relevant in that they discuss the

difference between values contained in an inventory for confirmation and values for the purposes of settling a legitim claim.

[101] In conclusion in relation to the central proposition advanced by the pursuer, but not supported by a plea in law, I reject the submission that as a matter of law the defender is bound by the estimated value of the net moveable assets included in the C1.

[102] That being so the defender's criticisms of the pursuer's case must now be considered.

[103] Her principal contention is that the pleadings regarding both the approach to valuation of the pursuer's legal rights and the so called "agreement" as to that valuation are lacking in specification and ought not to be admitted to probation.

[104] As I have already observed the pursuer has substantially deviated from his original line of argument which patently focussed on the fact that the pursuer and the defender through correspondence between their respective agents had "agreed" the value of the legal rights claim.

[105] The averments in this regard are to be found in Article 2 and the relevant plea in law is the third plea in law to the effect that the sum sued for being an agreed and in any event a reasonable calculation of the extent of the pursuer's legal rights claim, decree should be granted therefor.

[106] That being so, what is required are relevant pleadings giving fair notice as to the terms of the so called agreement. The only averments about the agreement are as follows

> "At the time of intimating the claim, Macnabs sought from Andersons a legal rights calculation for Mr Harley, as is standard practice. Correspondence was entered into between Macnabs and Andersons on the matter. On 19th February 2020, Mr Watson, then an executor of the late Mr Harley emailed to Macnabs a legal rights calculation in the sum of £227,542.24, which was finalised save for deduction of the relevant proportion of Andersons' professional fees attributable to the legal rights claim, which was to be calculated by an independent Auditor of Court and Law Accountant. This was agreed by Macnabs. The primary moveable asset in the late Mr Harley's estate were shares in the company Alexander Harley Seeds Limited

> (hereinafter referred to as 'AHSL'). The calculation prepared by Mr. Watson as hereinbefore condescended upon was based upon a valuation of the shares in AHSL of £244,199.72 that would form part of the Pursuer's legal rights. That valuation correctly made no provision for any minority shareholder discount on the share value. That valuation is recorded in the said Inventory for Confirmation which is produced herewith. Lorna Millar, a partner of Andersons, emailed Macnabs on 10th April 2020 to confirm that Andersons' fee had now been so assessed and the legal rights claim finalised at £226,460.84. Macnabs confirmed to Andersons on behalf of the Pursuer that the legal rights claim could be agreed in that sum. This is the sum sued for."

[107] There is no averment of the date upon which the email from Macnabs was sent and its terms are not incorporated into the pleadings by the pursuer. In fairness the defender does refer to the same email exchange and does incorporate the documents into the pleadings. Accordingly it is appropriate for me to consider those when determining whether as a matter of law there could be said to be a concluded agreement capable of enforcement. This would of course require *consensus in idem.*

[108] Having has regard to the terms of this correspondence I do not consider that the email of 10 April 2020 constituted an offer which was capable of being accepted to constitute a binding agreement between the parties. This is made clear when one considers the terms of the email of 16 April 2020 which actually rejects the proposals made by the defender. I have referred to the detailed submissions made by the defender in respect of *Wolf and Wolf* v *Forfar Potato Co* 1984 SLT 100 but consider that on the face of the correspondence there was no binding agreement capable of enforcement and in any event the pursuer's pleadings in this regard are so lacking in specification as to render them irrelevant. I shall therefore exclude them from probation.

[109] On one view that leave the question of *quantum* of legal rights. Having rejected the proposition that as a matter of law this should be the value contained in the inventory the

dispute between the parties is really how the shares in AHSL should be valued for the purposes of quantifying the legal rights entitlement of the pursuer.

[110] To this end the defender has suggested one method which involves a discount to reflect the fact that the asset is no more than a minority shareholding. The pursuer simply avers that the discount suggested is excessive and does not offer any other mechanism or means by which the court could determine whether the defender's valuation was appropriate or not. Because the pursuer has predicated his case initially on the terms of the purported agreement and then on the fact that the C1 valuation was binding there is no basis upon which he can advance an alternative position at proof even if such a proof were to be allowed. His pleadings do not offer any basis upon which an alternative calculation can be based or explain why a discount of 75% is excessive.

[111] For the reasons advanced by the defender I therefore agree that the defender's pleadings in relation to *quantum* are irrelevant and should not be admitted to probation.

[112] That being so I require to consider further procedure. It is clear to me that this action, as currently pled will not be the appropriate mechanism by which to resolve the central issue between the parties which is the true valuation of the shares as at the date of the testator's death. If the pursuer's central proposition is incorrect and in any event not supported by a plea in law then an alternative means of arriving at a valuation must be considered.

[113] Under reference to the cases cited to me that is most probably to be done by ascertaining in the best way possible what would have been the amount if a diligent but prudent realisation for the best advantage had actually taken place.

[114] In my view that will require the input from experts and of course that is the approach which the defender took by instructing Campbell Dallas. Had the pursuer

approached the dispute differently, perhaps by way of an action of accounting or by way of an action for valuation of the shares, then the court would have been in a position to assess competing valuations and a proof on this matter could have been assigned to assess the credibility and reliability of the experts and their opposing approaches. That is not possible in the context of the current action standing the decisions I have made.

[115] I have considered whether it would be appropriate to grant decree for the lower sum of £61, 04.93. However I am not persuaded that this action was necessary to secure that result and the litigation arose entirely as a result of the pursuer's refusal to accept a valuation short of the sum sued for. In that event there seems to me to be an illogicality in granting a court order compelling the executor to do something which she was intending to do in any event.

[116] The pursuer brought the action on a certain basis and has been unsuccessful. Accordingly in my view the most appropriate course is to sustain the defender's first and second pleas in law and dismiss the action.

Summary

[117] From the foregoing discussion the following conclusions can be distilled

i) The pursuer's proposition that as a matter of law, the extent of the pursuer's legal rights is dependent on the net moveable estate as calculated by the inventory in the C1, being the value of the testator's net moveable estate as at the date of the testator's death, is incorrect, unfounded in law and is not supported by a plea in law which the court would be capable of sustaining. Accordingly that proposition falls to be rejected and any averments pertaining thereto shall not be admitted to probation.

ii) The pursuer's original proposition to the effect that the emails passing between the parties constituted a binding agreement as to the value to be placed on the shareholding also fails. On the face of that correspondence there was no binding agreement capable of enforcement and in any event the pursuer's pleadings in this regard are so lacking in specification as to render them irrelevant. I shall therefore exclude them from probation.

iii) Finally, while it is not disputed that the pursuer is entitled to payment of his legal rights claim from the net moveable assets, the pursuer's pleadings challenging the defender's valuation are lacking in specification and accordingly irrelevant. The pursuer simply avers that the discount suggested is excessive and does not offer any other mechanism or means by which the court could determine whether the defender's valuation was appropriate or not. Accordingly there is no basis upon which the pursuer could offer an alternative valuation at proof. Accordingly I shall not admit the averments anent valuation to probation.

iv) On the basis of the cases cited to me the correct approach to valuation, where the asset has not been realised, is the date of death valuation to be determined by ascertaining in the best way possible what would have been the amount if a diligent but prudent realisation for the best advantage had actually taken place. That process may very well be best achieved by the instruction of experts.

[118] Accordingly having considered the extensive submissions on behalf of the pursuer and the defender in this case it is my view that the current action is not the appropriate vehicle by which to resolve the issue between the parties which is one of quantum rather than liability to pay legitim to the pursuer. The defender accepts that the pursuer is entitled

to payment but the pursuer has failed relevantly to aver any reason why a discount should not be applied, why the proposed discount is excessive or how the shareholding should instead be valued. For these reasons the action falls to be dismissed.

[119] In the ordinary course expenses will follow success but it may be that parties will require a hearing if this is not a matter of agreement as I was not addressed on this issue at the debate. Accordingly I have fixed a further diet for a hearing on expenses should this be necessary.