

**SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES & GALLOWAY AT
HAMILTON**

[2025] SC HAM 54

HAM-A453-21

JUDGMENT OF SHERIFF LOUISE GALLACHER

in the cause

JOHN CARSWELL

Pursuer

against

ELIZABETH SKELTON

First Defender

MARK CARSWELL

Second Defender

DAVID CARSWELL

Third Defender

Pursuer: Brown, advocate; Whyte Fraser and Co Solicitors

First Defender: MacKenzie; Harper Macleod LLP

Second Defender: Self Representing

Third Defender: Colquhoun, advocate; Moore Macdonald

Hamilton, 11 July 2025

The sheriff, having resumed consideration of the cause, finds the following facts admitted or proved:

- (1) John Carswell (known, and hereinafter referred to, as Jack Carswell) who resided latterly at 770 Old Edinburgh Road, Uddingston, died on 15 October 2017.
- (2) The late Jack Carswell and his late wife, Mrs Elizabeth Carswell, ran a farming business from 1964 until Elizabeth Carswell's death on 16 May 1999.

(3) The said farming business was conducted as a partnership, the two partners being the said Jack Carswell and Elizabeth Carswell, and traded under the firm name J & E Carswell.

(4) In 1979, Jack Carswell and Elizabeth Carswell purchased Midtown Farm, Kirkmuirhill, Lesmahagow, Lanarkshire.

(5) Title to Midtown Farm was acquired by virtue of a Disposition by East Kilbride Development Corporation in favour of the Jack Carswell and Elizabeth Carswell dated 29 May 1979 and recorded in the General Register of Sasines applicable to the County of Lanark on 7 June 1979.

(6) In 1981, Jack Carswell and Elizabeth Carswell purchased Bent Farm, Strathaven Road, Lesmahagow, Lanarkshire.

(7) Title to The Bent Farm was acquired by virtue of a Disposition by Thomas Young in favour of Jack Carswell and Elizabeth Carswell dated 11 November 1981 and recorded in the General Register of Sasines (Lanark) on 10 March 1982.

(8) The Dispositions of Bent Farm and Midtown Farm, in favour of Jack Carswell and Elizabeth Carswell, both contained survivorship destinations.

(9) In 1987 Jack Carswell and Elizabeth Carswell sold that part of the Bent Farm lying to the northwest of Strathaven Road, including the farm steading buildings, to Robert Pollock Struthers for consideration of £86,000. At the time of the sale they retained eight fields which lay to the southwest of Strathaven Road and adjacent to Midtown Farm.

(10) The Midtown Farm fields and the fields retained from the sale of Bent Farm were both farmed as one farming unit known as Midtown Farm.

(11) On the death of Elizabeth Carswell in 1999, Jack Carswell became the sole infeft proprietor of the heritable title to Midtown Farm and of the heritable title to the fields which had been retained from the sale of Bent Farm.

(12) The partnership of J & E Carswell dissolved upon the death of the late Mrs Carswell in 1999.

(13) Following Elizabeth Carswell's death, Jack Carswell continued to operate the farming business at Midtown Farm as a sole trader.

(14) Jack Carswell and Elizabeth Carswell had four children, John Carswell, Elizabeth Skelton, Mark Carswell and David Carswell, who are the pursuer and first, second and third defenders, respectively.

(15) The pursuer John Carswell Junior worked with his father on the farm since leaving school in 1979 until his father's death.

(16) The third defender David Carswell worked on the farm from around 1980 to 1996 and, thereafter, sometimes assisted during busy periods.

(17) The second defender Mark Carswell assisted on the farm from time to time over the years.

(18) The first defender Elizabeth Skelton never worked on the farm.

(19) On 1 August 2004 Jack Carswell entered into a partnership with his son, the pursuer John Carswell Junior, named "J & J Carswell".

(20) The sole activity carried out by the firm of J & J Carswell was the farming business it conducted at Midtown Farm which included the fields that had been retained from the sale of the Bent Farm.

(21) Jack Carswell and the pursuer farmed both the Midtown fields and retained Bent fields together as part of the same farming operation and they made alterations to mutual boundaries of certain of the fields to benefit the overall farming operation at Midtown Farm.

(22) The plant, machinery and livestock used as part of the farming operations for both the Midtown fields and the retained Bent fields were kept in the Midtown Farm buildings.

(23) The water pipe used to feed the cattle out in the fields passed through both the Midtown fields and the retained Bent fields.

(24) The farming business subsidies were used for the benefit of the Midtown fields and the retained Bent fields as a whole.

(25) The telecoms mast used by the farming operation at Midtown Farm is erected on "Mast Park", a field which previously formed part of Bent Farm.

(26) All invoices were billed to Midtown Farm.

(27) Jack Carswell referred to all of the fields he farmed, including the retained Bent fields, and the farming business as Midtown Farm.

(28) On 9 May 2009 Jack Carswell conveyed to the pursuer, a one-half pro indiviso share of the title to the Midtown Farm fields (Midtown fields) and a one-half pro indiviso share of the retained Bent Farm fields (retained Bent fields).

(29) Annual Accounts were prepared for the firm J & J Carswell for the years ending 31 July 2011, 31 July 2012, 31 July 2013, 31 July 2014, 31 July 2015, 31 July 2016 and 15 October 2017. For each year the following were listed assets of the firm - land and buildings, motor vehicles, plant and machinery, sales from livestock and produce, grants and other income received and the sums held in the Royal Bank of Scotland bank account. In the accounts for years ending 31 July 2014 to 2016 and 15 October 2017, fixtures and fittings were added as fixed assets. The Fixed Asset Register gives a detailed description of

all fixed assets owned by J & J Carswell as at year end 31 July 2015 (Production 5/8/23)(11), page 305 of the Joint Bundle).

(30) With the exception of the date of death accounts for year ending 15 October 2017, Jack Carswell signed off each set of accounts as representing the assets of the partnership operating the farming business at Midtown Farm.

(31) The partnership between Jack Carswell and the pursuer subsisted until the death of Jack Carswell on 15 October 2017.

(32) At the date of Jack Carswell's death, his testamentary writings comprised:

- a. his will dated 25 March 1981; and
- b. a handwritten letter dated 16 March 2009 addressed to his solicitors
Messrs Smail and Ewart, Lanark ("the Letter") (Production 5/4/7)(2), page 204
of the Joint Bundle).

(33) The 1981 will contained a residue clause that, in the event of Elizabeth Carswell predeceasing, the residue of the estate was to be shared between his four children equally.

(34) The Letter was written and signed by the late Jack Carswell, albeit he signed using his birth name, John Carswell.

(35) The Letter was in the following terms:

"SMAIL & EWART
LANARK

MIDTOWN FARM
KIRKMUIRHILL
LESMAHAGOW
LANARKSHIRE
16/3/09

I JOHN CARSWELL BEQUEATH MY SHARE OF MIDTOWN FARM TO MY SON
JOHN CARSWELL 118 LABURNUM ROAD VIEWPARK UDDINGSTON
GLASGOW G71 – 5DB & ANY CASH OR INVESTMENTS TO BE SHARED
EQUALLY BETWEEN JOHN, ELIZABETH, DAVID & MARK.

**Yours Sincerely
John Carswell"**

(36) The references in the Letter to “John, Elizabeth, David and Mark” are references to the late Jack Carswell’s children namely, the pursuer, the first defender, the third defender and the second defender, respectively.

(37) The Letter was found within a correspondence file held at Messrs Smail and Ewart, on a date shortly after 15 October 2017, by a member of their office staff.

(38) When the Letter was found it was filed on a treasury tag and stapled to another document (“the Addresses Sheet” – Production 5/4/7)(1), page 203 of the Joint Bundle).

(39) The Addresses Sheet lists the names, addresses and dates of birth of Jack Carswell’s children in order of chronological age, namely the first defender, the pursuer, the third defender and the second defender, respectively. It is set out as follows:

“MRS ELIZABETH SKELTON 33 33 LYNNHURST DRIVE TANNOCKSIDE UDDINGSTON GLASGOW G71-6SA	D.O.B 31/5/61
--	---------------

JOHN CARSWELL, 118 LABURNAM RD VIEWPARK UDDINGSTON GLASGOW G71- 5DB	D.O.B 26/8/63
--	---------------

DAVID CARSWELL 12 MYERS COURT BELLSHILL LANARKSHIRE ML4-3PP	DOB 24/9/64
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MARK CARSWELL 87 HEATHER GARDENS VIEWPARK UDDINGSTON GLASGOW G71 5DF”	DOB 7/7/73
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(40) The Addresses Sheet was written by the late Jack Carswell in the same notebook as the Letter.

(41) At the time of writing the Addresses Sheet in the notebook, the notebook page on which it was written preceded the page where the Letter was written.

(42) The Letter was written and signed by Jack Carswell while it was still within his notebook.

(43) The Addresses Sheet was written by Jack Carswell prior to him writing the contents of, and subscribing, the Letter.

(44) Jack Carswell wrote the Letter as a standalone document, which was signed at the bottom of the page.

(45) Jack Carswell prepared the Addresses Sheet to provide information regarding the beneficiaries.

(46) The Letter and Addresses Sheet have been stapled together 11 times, both with the Addresses Sheet being on top of the Letter when stapled and folded and, at some point, with the Letter on top of the Addresses sheet, when it was stapled.

(47) In using the term "my share of Midtown Farm" Jack Carswell intended that to mean the Midtown and retained Bent fields and all of the other assets of the farming business known as Midtown Farm which he carried on in partnership with the pursuer under the firm name, J & J Carswell (whether held solely or jointly in his name or in the name of the firm) as detailed in the partnerships accounts referred to in finding in fact (29) above.

(48) It was Jack Carswell's wish that the pursuer inherit the farming business at Midtown Farm after his death.

(49) Around 2 to 3 months after leaving hospital, in February 2009, Jack Carswell told his brother James Carswell that he had (a) made a will and (b) recently transferred half Midtown Farm to John Carswell Junior.

Findings in fact and law

- (1) The Letter was subscribed by Jack Carswell as required by section 2 of the Requirements of Writing (Scotland) Act 1995.
- (2) The Letter is a valid testamentary writing which should receive effect.
- (3) The Letter expressed Jack Carswell's concluded testamentary intentions to bequeath, inter alia, his whole right, title and interest in Midtown Farm to the pursuer.
- (4) The term "my share of Midtown Farm" means the land (Midtown and retained Bent fields) and all of the other assets of the farming business known as Midtown Farm, which Jack Carswell carried on in partnership with the pursuer under the firm name, J & J Carswell (whether held solely or jointly in his name or in the name of the firm) as detailed in the partnerships accounts referred to in finding in fact (29) above.

Finding in law

- (1) The Letter is a valid testamentary writing which has been subscribed and should receive effect.
- (2) The Letter should be endorsed with a certificate in accordance with section 4(1) of the Requirements of Writing (Scotland) Act 1995 that it was subscribed by Jack Carswell.
- (3) The Letter is a codicil to Jack Carswell's Will dated 25 March 1981 and requires to receive effect along herewith.

(4) The term “my share of Midtown Farm,” means the land (Midtown and retained Bent fields) and all of other assets used to operate the farming business at Midtown Farm as detailed in the partnership accounts of J & J Carswell referred to in finding in fact (29) above. Accordingly, sustains the pursuer’s third to tenth pleas in law, repels the pursuer’s first and second pleas in law, repels the first, second and third defender’s pleas in law, grants the pursuer’s first, second, and third crave and in terms thereof:

1. Finds and declares that the Letter of the late John Carswell, which is dated 16 March 2009, is a valid testamentary document, and that accordingly the will executed by the said late Mr John Carswell dated 25 March 1981 requires to be read subject to the 2009 Codicil.
2. Endorses the 2009 Codicil with a certificate to the effect that it was subscribed by the said late Mr Carswell in accordance with section 4(1) of the Requirements of Writing (Scotland) Act 1995; and
3. Finds and declares that the phrase “my share of Midtown Farm” in the 2009 Codicil means the late John Carswell’s share of the farming business known as Midtown Farm which he carried on in partnership with the pursuer under the firm name, “J&J Carswell”, which share comprised the late John Carswell’s capital in the said firm and his whole right, title and interest in all of the assets used by the firm in connection with its business (whether held solely or jointly in his name or in the name of the firm) including:
 - (i) the entire land which the firm farmed as part of its business namely,
 - (a) the subjects described in the Disposition by East Kilbride Development Corporation in favour of John Carswell and

Elizabeth Carswell dated 29 May 1979 and recorded in the General Register of Sasines for the County of Lanark on 7 June 1979; and

- (b) the subjects described in the Disposition by Thomas Young in favour of John Carswell and Elizabeth Carswell dated 11 November 1981 and recorded in the General Register of Sasines for the County of Lanark on 10 March 1982 under exception of those subjects now known as Bent Farm, Strathaven Road, Lesmahagow, Lanark ML11 0JD which are registered in the Land Register of Scotland under Title Number LAN34477;

- (ii) the livestock which it kept,
- (iii) the plant and machinery which it used,
- (iv) all entitlements which it had to farming subsidies, and
- (v) all sums held on its behalf by Royal Bank of Scotland plc.

and assigns a hearing on expenses.

Note

Evidence

[1] A joint minute of agreed facts, agreeing (with the exception of specified productions) the provenance of copy documents and the admission of further documents without parole evidence, was admitted. The joint minute also agreed that, subject to all questions of relevancy and admissibility, the evidence of James Carswell which was taken on commission on 3 May 2023, be admitted as evidence.

[2] In the course of proceedings, ten separate Notes of Preliminary Pleas were lodged by parties. Prior to the commencement of the proof before answer, I requested confirmation of

the preliminary pleas and issues that remained in dispute. In consequence, parties lodged the following signed Joint Statement of Issues:

“With reference to Pursuer’s production 5/4/7 (page 203 to 204 of the Joint Bundle) the parties agree the principal issues which require to be determined by the court are as follows:

1. Was the letter dated 16 March 2009 (P204 of the Joint Bundle) (“the letter”) subscribed by the late Jack Carswell?
2. Was the letter intended to be of testamentary effect?
3. What is the meaning of the phrase ‘my share of Midtown Farm’ which appears in lines 1 to 2 of the letter?”

I have therefore confined my decision making to answering those three questions.

Evidence for pursuer

John Carswell Junior

[3] The pursuer John Carswell Junior is the son of the late Jack Carswell and Elizabeth Carswell. The first, second and third defenders are his siblings.

[4] The pursuer started working with his father as a farmer when he left school in 1979. He began working on Spindlehow Farm which was owned by his parents. He thereafter worked on Midtown Farm and the Bent Farm. Those farms were purchased by his parents in 1979 and 1981, respectively, and both were farmed together.

[5] In 1987, his parents sold those parts of Bent Farm lying to the northwest of Strathaven Road to Robert Struthers and retained eight fields to the southeast of Strathaven Road, which had previously formed part of Bent Farm.

[6] With reference to the Title Plan LAN34477 (page 426 of the Joint Bundle of Productions) he showed the close proximity of the retained fields to those which formed part of the Midtown title and described them as being “right next to them.”

[7] His father used particular names when referring to the retained Bent fields. He and his father did not differentiate between the retained fields that once had been part of Bent Farm. They were part of one farm, Midtown Farm. He and his father farmed both the Midtown fields and retained Bent fields together as part of the same farming operation and they made alterations to mutual boundaries of certain of the fields to benefit the overall farming operation, Midtown Farm.

[8] The plant, machinery and livestock used as part of the farming operations, for both the Midtown fields and the retained Bent fields, were kept in the Midtown Farm buildings. The water pipe used to feed the cattle out in the fields passed through both the Midtown fields and the retained Bent fields. His father received farming subsidies and those subsidies were used for the benefit of the Midtown fields and the retained Bent fields as a whole. The telecoms mast used by the farming operation is erected on "Mast Park", a field which previously formed part of Bent Farm.

[9] In respect of his siblings, his sister Elizabeth Skelton never worked on the Farm, his brother Mark Carswell would come up and give a hand from time to time and his brother David Carswell worked on the farm from around 1980 to 1995. Thomas Hotchkiss, a friend of the family, also worked on the farm from 1978 until 2017.

[10] After his mother died in 1999 he continued to work on the farm with his father. He entered into partnership (J & J Carswell) with his father in 2004. It was a partnership at will.

[11] In 2009 his father transferred to him one half of the heritable title to the fields retained from the sale of Bent Farm and one half of the heritable title to the subjects which had originally formed Midtown Farm. The transfer of title followed his father suffering a stroke in February 2009 for which he was hospitalised. One of the reasons for the transfer was to make a Capital Gains tax saving.

[12] Following the partnership being formed, the farming operation continued as it always had. All invoices were billed to Midtown Farm. He did not take much to do with the finances for the partnership. His father took responsibility for the annual accounts but he and his father signed the accounts until his father died on 15 October 2017.

[13] On 26 October 2017, the pursuer attended a meeting at the office of his father's solicitors, Messrs Smail and Ewart. He met with Ailie Lothian who told him that they held a will from his father dating from 1981.

[14] About a week after the meeting, he received a telephone call from Ms Lothian to advise that she had found another will and asked him to come and see it. He attended and was shown a letter (the Letter) handwritten by his father to Smail and Ewart dated 16 March 2009 (page 204 of the Joint Bundle of Productions). He had not seen the Letter before but recognised it to be his father's handwriting. He was sure that when he was shown the Letter, it comprised of one loose sheet headed number 17. When he left he was given a photocopy of the Letter and another sheet of paper headed number 11 (The Addresses Sheet - page 203 of the Joint Bundle of Productions).

[15] He provided a number of documents to his solicitor containing his father's handwriting and signature, and two note books belonging to his father, in order that Dr Evelyn Gillies could compare his father's handwriting and signature with the Letter. He also provided a number of documents containing his own signature.

[16] The pursuer viewed the Letter as demonstrating concluded testamentary intent that was clear and unambiguous in its terms. The term "my share of Midtown Farm" means his father's share of the farming operation at Midtown Farm. He knew his father's intentions as his father had told him, in his lifetime, that he wanted him to have the farm.

William Fulton

[17] Mr Fulton is a farmer who owns Townhead Farm, a neighbouring farm to Midtown Farm. He knew Jack Carswell as a neighbour since he bought Midtown Farm. They would talk farming. Jack Carswell sold part of Bent Farm to Robert Struthers but kept the fields on the Midtown side. He farmed the fields that remained as Midtown Farm. He discussed the farm with Jack Carswell. Jack Carswell always used the name Midtown Farm and never referred to it as Bent Farm.

Ailie Lothian (also on the third defender's list of witnesses)

[18] Ms Lothian is a director of Smail and Ewart, solicitors, Lanark but when she met the pursuer John Carswell Junior on 26 October 2017 to discuss Jack Carswell's estate, she was the sole solicitor at the Lanark office of the firm. She started with the firm on 31 May 2017. The late Jack Carswell had been a client of the firm.

[19] She received a telephone call from the pursuer sometime between 15 October 2017 and the date of the meeting. She had a vague recollection of the meeting but steps would have been taken before the meeting to check if the firm held a will. A will dated 1981 was found. The purpose of the meeting was to start gathering information about the estate.

[20] She was not familiar with the business affairs of Jack Carswell. She prepared an Attendance Note of the meeting (page 434 of the Joint Bundle) in which she noted that Jack Carswell owned Midtown Farm and land at Bent Farm as this was what she was told by the pursuer. She also noted that

“there is a partnership between Mr Carswell Snr and Mr Carswell jnr where they each had a 50/50 share of the business and Mr Carswell jnr believes that the business may include the farm and land.”

She also noted that John Carswell “is the one who has worked the family farm for the last 30 years and he had hoped that his father had dealt with the farm and gifted it to him.”

[21] She instructed a member of office staff to undertake a search of Jack Carswell’s file principally to look for a partnership agreement for J & J Carswell. Shortly thereafter she received a phone call from the staff member who advised that she had found a letter (the Letter) from Jack Carswell addressed to Smail and Ewart which looked on face of it to be a will. The Letter and Addresses Sheet were found within a file of papers for previous unrelated work undertaken for Mr Carswell involving a quarry transaction.

[22] She personally undertook a search of the file. The Letter and Addresses Sheet were filed on a treasury tag in the correspondence file. She believed the Letter and Addresses Sheet were stapled together when she saw them but she was not 100% sure. The Letter page came before the Addresses Sheet in the file but she was not able to say whether they arrived in that order, whether they were stapled at that time and when and who stapled them together.

[23] She believed the Letter was a will. She sent a copy of the Letter to the partners of the firm and they shared her view that it was will. She highlighted that the Letter contained the word “bequeath.”

[24] She contacted the pursuer to show him the principal copy of Letter and took steps to verify the signature as being that of the late Jack Carswell.

[25] A copy of a draft will (page 598 of the Joint Bundle) reflecting the terms of the Letter and a copy covering letter from Smail and Ewart to Jack Carswell dated 6 April 2009 (page 597 of the Joint Bundle) were also found within the correspondence file sitting behind the document she considered to be a will. Nothing else of relevance was found.

[26] Ms Lothian entered into correspondence with David Boyd at Scott Moncrieff Accountants to gather information regarding the partnership of J & J Carswell (page 435 of the Joint Bundle).

[27] She made an application to court at the end of 2017 under the Requirements of Writing (Scotland) Act 1995 (court reference HAM-B616-18) to have the Letter set up as a will (page 498 of the Joint Bundle). She withdrew from acting as solicitor prior to the action concluding.

[28] She accepted that her standard practice was that she would not prepare a will for a client without instructions and that clients will not usually pay for work they have not instructed.

[29] It was Ms Lothian's practice to store a client's will within the firm's safe. In 2009 Jack Carswell's matters were being handled by Jennifer Gallagher, a former solicitor of the firm, and, as a result, Ms Lothian was unable to speak to what had happened at that time.

Thomas Hotchkiss

[30] Mr Hotchkiss is a self-employed carpet fitter who has known the Carswells since the mid 1970's when he was aged around 14 years. He had a close relationship with Jack, John and David Carswell albeit he had a fallout with David Carswell in the late 1980s. He helped out on the farm now and again. When Bent Farm was sold, the fields which were retained were used as part of the farming operations at Midtown Farm and "were all classed as Midtown Farm." On 31 July 2012 Jack Carswell told him what he wanted to happen to Midtown Farm and that he had written a will. He recalled the exact date as he had taken a video that day of himself and Jack working.

[31] Mr Hotchkiss was shown the principal copy of the Letter (Production 5/4/7(2), page 204 of the Joint Bundle) in early 2018 when the third defender David Carswell attended at his house with it to compare his father's signature on the Letter with a cheque. Mr Hotchkiss did not accept that it was copy of the Letter that he was shown by David Carswell. He was adamant that it was the principal copy of Letter. In his affidavit dated 16 January 2022 he described the Letter that he saw as being

“on Shorthand Notebook size paper and that he could see here the letter perforations had been torn away from the notepad on the left-hand side. The perforations were slightly ragged.”

Robert Struthers

[32] Mr Struthers is a farmer who purchased the Bent Farm buildings and the land lying to the northwest of Strathaven Road in 1987 from the late Jack Carswell and Elizabeth Carswell. He uses the name “Bent Farm” to describe the subjects he bought. Jack Carswell would refer to the land which he farmed as Midtown Farm.

Dr Evelyn Gillies

[33] Dr Gillies is a Forensic Handwriting and Document Examiner. On 12 September 2024 she was instructed by the pursuer's solicitors to:

- (i) Examine the writing within the Addresses Sheet and the Letter, regarded as questioned, including the signature “John Carswell” and page numbers and compare with various writings regarded as having been completed by John (Jack) Carswell to determine if they are of common origin.

- (ii) Carry out a thorough document examination, examining the paper, folds, staples, ink and any indentations, and to provide an opinion as to the sequence in which the documents were produced, stapled and stored.

[34] Dr Gillies was provided with the principal Letter and Addresses Sheet and the various documents bearing writings for comparison listed at appendix 1 of her principal report dated 22 September 2024 (Production 5/5/8, starting at page 206 of the Joint Bundle).

[35] On 3 October 2024 Dr Gillies was further instructed by the pursuer's solicitor to examine a single sheet of paper, described as "Page 21" (Production 6/33, page 596 of the Joint Bundle) for indentations, authorship and to provide a supplementary report (Production 5/6/9, starting at page 264 of the Joint Bundle).

[36] The sheet of paper described as "Page 21" is a letter which bears the address of "MIDTOWN FARM" is addressed to "SMAIL AND EWART" and signed "John Carswell" and dated "24/3/09."

[37] Dr Gillies adopted her findings and conclusions contained in both her principal report dated 22 September 2024 and her supplementary report dated 5 October 2024. She detailed the examination processes undertaken by her, in particular the ESDA (ElectroStatic Detection Apparatus) process used to reveal indentations on documents.

[38] In summary her opinion was that:

- (i) The block writing and numerals on the Addresses Sheet and the Letter were written by Jack Carswell (paragraph 88, page 215 of the Joint Bundle).
- (ii) The signature on the Letter was written by Jack Carswell (paragraph 89, page 215 of the Joint Bundle).
- (iii) The Addresses Sheet and the Letter were both taken from the same notebook (paragraph 101 page 216 of the Joint Bundle and conclusion vi on page 221).

- (iv) There are indentations from the Addresses Sheet on the Letter (paragraph 98, page 216 of the Joint Bundle).
- (v) The Addresses Sheet was written prior to the contents and signature of the Letter being written (paragraph 100 and conclusion v, page 216 and 221 of the Joint Bundle).
- (vi) There are no indentations from the Letter on the Addresses Sheet (paragraph 96, page 216 of the Joint Bundle) which indicates that the Letter was not written and signed with the Addresses Sheet lying underneath.
- (vii) The Addresses Sheet and the Letter were separated by other pages when in the notebook (paragraph 138, page 221 of the Joint Bundle).
- (viii) The Addresses Sheet and the Letter have been stapled together 11 times (paragraph 122, page 219 of the Joint Bundle).
- (ix) Examination revealed indications that the Addresses Sheet was on top of the Letter when stapled and folded (paragraphs 131, 135, and conclusion ix, page 221-221 of the Joint Bundle).
- (x) There are also indications that the Letter was on top of the Addresses sheet at some point when it was stapled (paragraphs 132, 136 and conclusion ix, page 221-222 of the Joint Bundle).
- (xi) The stapling and folding of the Letter and Addresses Sheet cannot be sequenced and it was not possible to determine how the Addresses Sheet and Letter were associated when they were sent to Messrs Smail and Ewart or if they were stapled or folded at that time (paragraph 138, and conclusion x, page 221-221 of the Joint Bundle).

- (xii) The writing and signature on “Page 21” were written by Jack Carswell
(paragraph 13, page 265 and conclusion i and ii, page 266 of the Joint Bundle).
- (xiii) “Page 21” was completed on paper similar to that used for the Addresses
List and Letter and all three pages were removed from the same notebook
(conclusion iii, page 266 of the Joint Bundle).
- (xiv) There are indentations from the Letter, including partial indentations of the
signature “John Carswell” on “Page 21” (Production 5/6/9, paragraphs 16-20,
page 265 of the Joint Bundle).
- (xv) “Page 21” was below the page 17 (the Letter) when it was written
(Production 5/6/9, paragraphs 16-20, page 265 of the Joint Bundle).
- (xvi) All of the writing on the Letter, including the signature “John Carswell”
on page 17, was completed while it was still within the notebook
(Production 5/6/9, paragraph 22, page 255 and conclusion iv, page 266 of the
Joint Bundle).

David Boyd (also on the first defender’s list of witnesses)

[39] Mr Boyd is a chartered accountant for Azets, formerly Scott-Moncrieff. His firm acted for the late Jack Carswell and subsequently the firm of J & J Carswell. From around 2013 onwards he replaced a previous partner in providing compliance accounting services for completion of annual accounts and tax returns for J & J Carswell.

[40] With reference to the accounts for the firm to the date of Jack Carswell’s death (Production 5/8/23, starting on page 296 of the Joint Bundle) he explained how accounts for a partnership are compiled, the profit and loss sections, the balance sheet, and how the shares of the partners (also referred to as capital) in a partnership are derived.

[41] Mr Boyd dealt primarily with Jack Carswell but would meet both Jack and John Carswell when nearing filing dates for tax returns and annual accounts. The accounts were discussed at a relatively high level. The meeting usually lasted about an hour.

[42] The accounting information provided by Jack Carswell was fairly poorly assembled and would arrive in a carrier bag.

[43] The principal office for the business J & J Carswell was referred to as Midtown Farm. He understood the business J & J Carswell to be Midtown Farm.

[44] The tangible fixed assets of J & J Carswell included land and buildings, plant and machinery, motor vehicles and fixtures and fittings and are noted on the Fixed Asset Register (page 305 of the Joint Bundle). Midtown and Bent are listed as the heritable property separately due to them being separate acquisitions. Separate entries for the acquisition costs of the Bent land and the Midtown land were kept in the books due to those parcels being acquired at different times as such information would be required in connection with any taxable gain arising on a sale of those parts.

[45] In his letter to Smail and Ewart dated 4 December 2017 (page 436 of the Joint Bundle) he referred the land comprising "Midtown and Bent Farms" as he was reflecting the wording used by Ailie Lothian in her letter dated 10 November 2017 when she asked if "Midtown Farm and Bent Farm are listed as assets on the business books" (page 435 of the Joint Bundle).

[46] In the accounts for the year ending 31 July 2015, the split of the net assets between Jack Carswell and John Carswell was recorded as £242,960 and £10,603, respectively (page 302 of the Joint Bundle). In the unsigned accounts for the year ending 31 July 2016, the split of the net assets between Jack Carswell and John Carswell was recorded as £232,099 and £11,652, respectively (page 579 of the Joint Bundle). In the date of death accounts dated

15 October 2017, it is recorded that the share of the capital between Jack Carswell and John Carswell as at 1 August 2016 was £129,335 and £114,416, respectively (page 588 of the Joint Bundle). The substantial difference in the share of capital between the date of death accounts to the earlier accounts was due to the fact Mr Boyd had been unaware that there had been a gift of a half share of the land from Jack Carswell to John Carswell a number of years beforehand. On being advised of this by John Carswell, the capital accounts dated 15 October 2017 were updated to reflect that there had been a transfer of a half share of the partnership interest from Jack Carswell to John Carswell. There is no particular need for the transfer of land to be reflected in the accounts but Mr Boyd felt it appropriate to make the change.

[47] No evidence was led on behalf of the first or second defender.

Evidence for third defender

James Gerard Moore

[48] Mr Moore is the solicitor acting for the third defender in this action and was instructed by the first to third defenders in a separate count, reckoning and payment action. He lodged a specification of documents at court to recover the Executry file held by Smail and Ewart where the Letter was found. He recovered the following Productions from on Smail and Ewart's file namely; 6/10, 6/27, 6/30, 6/31, 6/32, 6/35, 6/36 and 6/37 (pages 516, 589, 592-594, 602 and 604 respectively of the Joint Bundle) which all relate to the Executry estate of the late Elizabeth Carswell.

David Carswell

[49] Mr David Carswell is the son of Jack Carswell and the sibling of the pursuer and first and second defender. After leaving school, he worked on Spindlehow Farm then at Bent Farm and Midtown Farm for around 16 years until approximately 1996. Thereafter, he worked on the farm during busy times, particularly around harvest, up until his father died. His father used the name “Bent Farm Grounds” or “Bent Grounds” when referring to the fields which were retained from the sale of Bent Farm. His father used the term “Bent” in the name of each retained field from Bent Farm.

[50] He came across a copy of the will dated 1981 when he was looking through his father’s paperwork. He was unaware that there was potentially another will (the Letter) until legal proceedings under the Requirements of Writing (Scotland) Act were served on him in 2017. He instructed Mr Moore to oppose the action. He showed Thomas Hotchkiss a copy of the Letter that was attached to his citation sometime around March to May 2018. He wanted to compare his father’s signature. He has never had the principal Letter in his possession. He was aware that principal Letter went missing at one point. Thomas Hotchkiss lied when he stated that the third defender showed him the principal Letter.

*Evidence taken on commission*David Greenshields

[51] Mr Greenshield’s evidence was taken on commission on 4 April 2023. He has since died. Mr Greenshields is Jack Carswell’s brother in law. He adopted two earlier affidavits dated 9 November 2017 and 17 January 2022, respectively. He regularly reminded Jack Carswell to get his affairs in order, including the making of a will. While Jack Carswell

was in hospital in February 2009 he pestered him once more to make a will (page 579B-C of the Joint Bundle). He was not aware whether Jack Carswell ever made a will in 2009 (page 581D of the Joint Bundle).

James Carswell

[52] Mr James Carswell's evidence was taken on commission on 3 May 2023.

James Carswell is Jack Carswell's brother. He adopted two earlier affidavits dated 9 November 2017 and 17 January 2022, respectively.

[53] He visited Jack Carswell in hospital in February 2009 following his stroke/heart attack and spoke to him about making a will. He reminded him that he should make one.

He kept "nagging him" about making a will (Joint Bundle, page 664 D) and encouraged his brother to make a will as soon as he got out of hospital (Joint Bundle, page 662 B).

Jack Carswell told him he wanted John Carswell Junior to have the whole farm (Joint Bundle, pages 656 E-F). Prior to Jack going into hospital, he told him a number of times that it was his intention to, while he was alive, to transfer half the farm to John Carswell Junior (Joint Bundle, pages 659 D-E). A few months after he came out of hospital Jack Carswell told him that he had recently transferred half Midtown Farm to John Carswell Junior (Joint Bundle, pages 659 F - 660 A). Approximately 8 weeks after leaving hospital in February 2009 Jack Carswell told him that he had made a will (Joint Bundle, pages 661 B, 664 E and 665 A) but he was not told what was in the will (Joint Bundle page 664 F and 664 E).

Submissions

[54] Detailed written and oral submissions were provided by parties. These are not reproduced in detail but summarised briefly below. As outlined above, parties agreed that the principal issues which require to be determined by the court are as follows:

1. Was the Letter dated 16 March 2009 (P204 of the Joint Bundle) subscribed by the late Jack Carswell?
2. Was the Letter intended to be of testamentary effect?
3. What is the meaning of the phrase “my share of Midtown Farm” which appears in lines 1 to 2 of the Letter?

[55] For the pursuer it was submitted:

1. The Letter is a will and consists of a one-page document which was subscribed by Jack Carswell at the bottom of the page. The Letter was clearly intended to be a standalone document. Esto, it is not a standalone document, then the Addresses Sheet and the Letter together form part of the same document, subscribed by Jack Carswell.
2. Jack Carswell had testamentary capacity. Jack Carswell intended the Letter to be of testamentary effect. Jack Carswell’s definite testamentary intention is made clear by his use of the word “bequeath” in the Letter. The Letter is unequivocally expressive of Jack Carswell’s testamentary intention.
3. The meaning of the phrase “my share of Midtown Farm” is Jack Carswell’s share of the whole assets and undertaking of the farming business which was conducted from Midtown Farm by Jack Carswell and the pursuer through the partnership vehicle known as J & J Carswell.

[56] For the first defender, it was submitted that:

1. The Letter is not a will. It consists of a two page document signed by the late Jack Carswell on the first page only and was therefore not subscribed by the late Jack Carswell on the last page.
2. Jack Carswell did not intend the Letter to have testamentary effect. It was a letter of instruction to Smail and Ewart to prepare a will.
3. The phrase "my share of Midtown Farm" refers to the physical farm - Midtown Farm.

[57] For the second defender it was submitted that:

1. The Letter is not a will. Jack Carswell did not have it witnessed. It does not say "my last will and testament." He did not destroy or reference the 1981 will in the Letter. He signed it "yours sincerely" which is how you finish a letter not a will. It was written on after Jack Carswell's death to manufacture a will.
2. Jack Carswell did not intend the Letter to have testamentary effect.
3. The phrase "my share of Midtown Farm" is unclear and ambiguous.

[58] For the third defender it was submitted that:

1. The Letter is a two page document in which the first page is drafted as a letter addressed to Smail and Ewart and the second page is a list of addresses, signed by the late Jack Carswell on the first page only. The Letter cannot be given effect as a testamentary document as it was not properly subscribed. Subscription means a signature by the grantor at the end of the last page. The second page not having been signed, it cannot be said that the Letter is subscribed.
2. Jack Carswell did not intend the Letter to have testamentary effect. The purpose of the Letter was to instruct the preparation of a new will, which was done,

but which remained unsigned at the date of Jack Carswell's death. The Letter is, in form, a letter rather than a codicil.

3. The phrase "my share of Midtown Farm" is solely a reference to the heritable property of Midtown Farm. It means the deceased's share in Midtown, to the exclusion of the Bent and subject to the interests of the deceased's wife. It cannot be read as referring to the broader business.

Law

Subscription

[59] There is no dispute that sections 2(1) and 7(1) of the Requirements of Writing (Scotland) Act 1995 ("the 1995 Act") require that a testamentary writing must be subscribed for it to be validly executed and that subscription, for the purposes of the execution of documents, means a signature by the grantor at the end of the last page.

[60] Section 2(1) of the 1995 Act states:

"No traditional document required by section 1(2) of this Act shall be valid in respect of the formalities of execution unless it is subscribed by the grantor of it or, if there is more than one grantor, by each grantor, but nothing apart from such subscription shall be required for the document to be valid as aforesaid."

[61] Section 7(1) of the 1995 Act states:

"Except where an enactment expressly provides otherwise, a traditional document is subscribed by a grantor of it if it is signed by him at the end of the last page (excluding any annexation, whether or not incorporated in the document as provided for in section 8 of this Act)."

[62] The fact a testamentary writing is not witnessed does not deprive it of having any testamentary effect. It is possible to "set-up" the writing (section 4(1) of the Requirements of Writing (Scotland) Act 1995).

[63] The statutory requirements for subscription codified the pre-existing common law as set out in *Foley v Costello* (1904) 6F 365, per Lord Traynor (at pages 369-370):

“I think the law of Scotland requires subscription as the essential and only admissible evidence of a concluded expression of will on the part of a testator. ... In my opinion the rule is inflexible — no subscription, no will — and to admit the consideration of facts and circumstances to modify that rule would be very inexpedient and dangerous.”

[64] In the same case, Lord Moncrieff stated (at page 371): “Subscription is the test of a holograph will and ... the want of subscription cannot be supplied by parole proof.”

[65] Similarly in *Taylor’s Executrices v Thom* 1914 SC 79, a full bench of the Inner House agreed that there was no question that subscription is an absolute requirement for the validity of testamentary writings (per the Lord President at pages 82-3).

[66] Subscription of the last page of a document is required as “proof of a concluded intention to complete the document” [*Robbie and Another v Carr and Others* 1959 SLT (Notes) 16 per Lord President Clyde at page 17].

[67] For the purposes of subscription, the last page means the last page of the document containing a substantive provision.

Testamentary effect

[68] Apart from the requirement for subscription, for a testamentary writing to receive effect, the deceased must have had testamentary capacity, there must be a written document and it must be “unequivocally expressive of a present testamentary intention” (MacLeod, *Contentious Executries: Commissary and Executry Litigation in Scotland* (2nd Ed) paragraph 2-042; *Draper v Thomason* 1954 SC 136 at 141/142 per Lord Mackintosh).

[69] In the *Draper* case, a widow died without issue and without leaving a formal will. Many years previously she had despatched a letter to her sister, which was written entirely

in her own handwriting and which, in addition to news and gossip, contained the following passage:

"By the way while speaking of dying! Should anything happen to me, (which it will one day) I haven't made a Will, but everything I have is for Billy. Knowing that he will do the right thing."

As was her custom when writing to her sister and other relatives, she had signed the letter with her Christian name. The "Billy" referred to in the letter was her sister's son. It was Held that:

- (1) that the letter was habile to constitute a holograph will,
- (2) that in the circumstances the subscription by Christian name was sufficient authentication; and
- (3) that the letter expressed a concluded testamentary intention to dispose of her whole estate.

[70] In his opinion of Lord Mackintosh, said that:

"a letter such as is here founded on may be treated as being or containing in gremio of it a valid holograph will, provided that the letter or the passage therein particularly founded on is unequivocally expressive of a present testamentary intention. In the present case there can be no question from the language used in the letter that the writer was contemplating the event of her own death and what was to happen to her estate in that event. The words which she uses are that in the said event 'everything I have is for Billy.' No clearer or more unequivocal expression of her intention as to what was to happen to her estate on her death could, in my opinion, have been made by the writer of the letter, and the language which she uses seems to me to exclude altogether the idea that in this passage of the letter she was merely stating what she intended to do at some future date with regard to the disposal of her means and estate after her death. She was, in my opinion, expressing her fixed and concluded intention as to the destination of her estate in the event of her death. The words 'I haven't made a Will, but everything I have is for Billy' mean, in my opinion, that while she had made no formal will she had definitely made up her mind that on her death her whole estate was to go to Billy, and accordingly said so. The writer of the letter lived for a further sixteen years, but, so far as appears, she never by any writing under her hand altered the testamentary intention expressed by her in her said letter."

[71] Further assistance with the criteria which must be fulfilled if a writing is to receive testamentary effect is to be found in McLaren, *The Law of Wills and Succession As Administered in Scotland* (3rd Ed) paragraph 638, where he opines that:

“It has been observed before, and is at all events self-evident, that a will to be effective must have a subject and an object, and must express with respect to these a definite testamentary intention.”

[72] Informal letters and even diary entries have been held to indicate concluded testamentary intent (see *Hamilton, Petr* 2015 SLT (Sh Ct) 176, *Draper v Thomason* 1954 SC 136; *Ritchie v Whish* (1880) 8 R 101).

[73] No particular wording is required, especially where the testator has drafted the will himself, but the document must demonstrate a present (as opposed to future) concluded (as opposed to tentative) testamentary intent. A note of future intentions is not sufficient.

[74] An instruction to a solicitor to prepare a will on a particular basis is not sufficient (*Jamieson’s Executors v Fyvie* 1982 SC 1; *Stuart v Stuart* 1942 SC 510).

[75] In *Stuart v Stuart* a letter addressed to a solicitor was held to be an instruction rather than a concluded expression of testamentary intent. The decision appeared to have been reached having particular regard to the wording of the letter rather than the mere fact it had been sent to the deceased’s solicitor. See Lord Justice Clerk, Cooper at page 513 where he said:

“Now, the first two sentences and the last sentence of the third paragraph of the letter appear to me to be eloquent as to the writer's purpose and intention. ‘I also would like you to draw up a will,’ he says, ‘I have not yet made one’ and the letter concludes with the request, ‘Please submit a draft for my approval’. It is thus plain that the writer contemplated and intended that all that should emerge from the execution of his instructions should be a draft, and that that draft should be subject to his further consideration.”

[76] It is well settled by a series of cases, that where there is doubt raised as to the testamentary character of the document by its wording or by the terms of a covering letter,

it is competent to admit extrinsic evidence for the purpose of resolving the doubt

(*Jamieson's Executors v Fyvie* 1982 SC 1; *Stuart v Stuart* 1942 SC 510; *Wilson v Hovell* 1924 SC 118).

[77] Should it be necessary to refer to extrinsic evidence, each case has to be decided on its own facts and circumstances. Previously decided cases are of little assistance (*Jamieson's Executors v Fyvie* 1982 SC 1, per Lord President Emslie at page 4).

[78] In the case of *Wilson v Hovell* 1924 SC 118, the Inner House considered the status of a document which appeared to be clearly testamentary in nature, but which had been sent to the deceased's solicitor together with a covering letter which indicated that it was intended to be a draft and merely a note for the instruction of a new will. The law-agent, treating the enclosed document as notes which he already had requested for the preparation of a formal will, drafted a trust disposition and settlement which he submitted to his client. The question for the court was whether they were able to take account of that covering letter. The court held that they could, as per the opinion of the Lord Justice Clerk (Alness):

"I am of opinion that the Lord Ordinary is right in thinking that, whether the doubt is created by the deed itself or by the terms of a holograph letter accompanying it, the same principle applies, namely, that extrinsic evidence is competent in order to clear up the doubt so created."

[79] In the similar case of *Young's Trustees v Henderson* 1925 SC 749, the Inner House held that the extrinsic evidence indicated that there was no testamentary intent. Even though the document in question began with the words "My last will and testament" the covering letter which accompanied indicated that it was merely a draft. The covering letter was in the following terms: "I am sending you a rough draft of what I would like my will to be." Lord Anderson, in holding that the terms of the covering letter were crucial in that case, commented that:

“My view is that these two documents fall to be read together; that the one controls the other; and that it is impossible to decide this case without reading these two documents together and giving effect to what they jointly say.”

[80] By contrast, in *Scott v Scales* (1864) 2M 613, a letter which the deceased had sent to one of her executors, who was also her solicitor, was held to be a writing which she intended to have testamentary effect. At page 621, the Lord Justice Clerk, who was in the majority which found it had testamentary effect, said:

“I do not think we get much aid to the solution of the question, whether this letter was a testament, or merely a paper of instructions. To determine that, we must look to the terms of the letter itself. And, in examining for this purpose the internal evidence furnished by the letter, the question arises, whether the words used are testamentary, —that is, whether they are words expressive of a desire, or wish, or purpose, presently existing in the mind of the testator; or whether it contains merely words expressive of the desire of the testator, that something should be done in the way of a preparation of some other paper expressive of the purpose and intention of the testatrix. Now, the words are sufficient as expressions of the will of the deceased. She expresses herself in this way, —I mean all the legacies in my will left to my grandchildren to be taken from them, —Jaffray and Robert shall have the L.2000. It is plain that if Mrs Scales intended this letter to be part of her will, it is sufficiently expressed; because whatever is expressive of a testator's will or purpose then presently entertained, is sufficient, if the testator intended the paper to be testamentary.”

[81] In *Robb v Robb* (1872) 10 M 692 page 697, it was held that when dealing with an unexceptional will which had been sent by the deceased to his solicitor, the Lord Ordinary should not have allowed proof to establish that the writing relied upon was an instruction to the solicitor to prepare a will. In that case, the late James Robb was survived by an only son, the defender. The deceased had executed a holograph settlement of this property in the following terms:

"Dundee Nov 3/69, I James Robb Proprietor and owner of a Property on the west side of hilltown. Dundee Presently Numbered 36 38 & 40 I do hereby bequeth to my two Nephews namely John and Alex. Robb 8 houses Belonging to me withe the ground in front of Each tenement,'&c.' My Nephews Can add to the said Property as Much as the Pleas and my wish is that Peter Robb Be one trustee and Alex. Smith be the other and Thomas Robb my Son he may get from John Robb his Son and Proprieter of said Propert £3 10 yearly and from Alex. Robb £3 10 yearly, '&c.'"

Witness my hand James Robb Proprieter of the above mincluied Property
JAMES ROBB."

At the date of the testator's death this writing was in the possession of his law-agent.

Interpretation of the phrase "my share of Midtown Farm"

[82] The interpretation of wills (and testamentary documents more generally) is, fundamentally, a matter which turns on the words actually used. The cardinal principle of construction is that:

"No rule of interpretation can ever safely be adopted, which is not to bend to satisfactory expressions or proof of the testator's intentions on the face of the particular deed which is to be construed" (*Robertson v Richardson* (1843) 5 D 1117 at 112).

[83] Testators are entitled to express themselves as they like (particularly when it comes to home-made wills), provided that they make their intentions reasonably clear. (*Young v Robertson* (1862) 4 Macq 314, at 325).

[84] First, the will should be read as a whole. So far as possible, all of the words in a will should be reconciled and given effect to (*Yeats v Paton* (1880) 8 R 171, per Lord Gifford at 174).

[85] Interpretations which lead to intestacy are to be avoided if at all possible (*Macduff v Spence's Trs* 1909 SC 178, per Lord McLaren at 184). There is a general presumption that the testator intended that his provisions should take effect (*McLachlan v Seton's Trs* 1937 SC 206, at 222).

[86] Interpretation of a will starts, and almost invariably ends, with the words used in the deed; a court will only admit evidence extrinsic to the deed in certain circumstances (*Blair v Blair* (1849) 12 D 97, at 107).

[87] Although the general rule is that extrinsic evidence should not be admitted for the purposes of interpreting a will, there are exceptions. In the case of latent ambiguity in the description of a bequest, extrinsic evidence is competent to assist with interpretation of the will.

“The question what is meant by a particular expression used to designate the subject-matter of the conveyance ... is always a matter of evidence, it does not come within the description of a latent or patent ambiguity, but is a matter of description, and that is a matter of evidence” (McLaren, *The Law of Wills and Succession As Administered in Scotland* (3rd Ed) paragraph 715-6).

[88] In every case of ambiguity in a testamentary writing, the court has the right to ascertain all the facts which were known to the testator at the time of making the will and thus place itself in the position of the testator... in order to ascertain whether there exists any person or thing to which the whole description given in the will can, reasonably and with sufficient certainty, be applied (Walker and Walker, *The Law of Evidence in Scotland* (5th Ed), paragraph 26.21.3 (*Charter v Charter* (1874) LR 7 (HL)N364; *Devlin's Trs v Breen* 1943 SC 556; *Fortunato's JF v Fortunato* 1981 SLT 277).

[89] Where the meaning of a particular provision in a will is ambiguous, a distinction is drawn between patent ambiguities (ie those which are obvious from the wording of the provision), and latent ambiguities (where the wording is clear, but what the wording refers to is not). Evidence is generally only admissible in dealing with latent ambiguity. The rule is explained by Bell as follows: (Bell, *Principles of the Law of Scotland* (10th Ed), s 1871):

“Ambiguities in Wills are frequent and are of two kinds: either such as arise on the face of the ‘deed,’ and from the uncertain meaning of the words used; or such as arise from the uncertain application of the words to external circumstances... The general rule resulting from all the cases is that a patent ambiguity can be cleared only from the context or rest of the Will; and that a latent ambiguity, as it arises from outward circumstances, may be resolved by extrinsic and parole evidence.”

[90] In the case of *Young's Trustees v Henderson* (referred to para [79] above), Lord Anderson observed that: "[I]t is trite law that it is incompetent by parole evidence to contradict or amplify the terms of a written deed. You may explain it, but you cannot contradict it." (1925 SC 749, at 756).

[91] In the English case of *Miller v Travers* [131 ER 395] - cited with approval by Lord McLaren in *Wills & Succession* (3rd Ed, Edinburgh: Bell & Bradfute, 1894), s 718a - a testator left a legacy of "all his freehold and real estates whatsoever, situated in the county of Limerick, and in the city of Limerick". Whilst he owned property in the city of Limerick, he had no estates in the county of Limerick, and had extensive estates in County Clare. The plaintiff sought to argue that the words "county of Limerick" could be extended to include "county of Clare". The Court of Common Pleas refused to allow that argument, on the basis that it would be

"calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will. It is not simply removing a difficulty, arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect, as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parole evidence, to the making of a new devise for the testator, which he is supposed to have omitted." (per the Lord Chief Justice at p397).

[92] Where extrinsic evidence is allowed, the function of the court is to discover the meaning of the words used in the will; it is not to find the "true intention" of the testator when drafting it. As opined by Lord Dunedin in *Nasmyth's Trustees v NSPCC* 1914 SC (HL) 76:

"The effect of a question of ambiguity arising is this, that it allows of an inquiry not into intention, but into any such facts and circumstances as may help to give you a key to the meaning of the words which the testator used."

[93] In the *Nasmyth's Trustees* case, there was a dispute between the National Society for the Prevention of Cruelty to Children and the Scottish National Society for the Prevention of

Cruelty to Children as to which was entitled to a bequest stated to be for the benefit of “The National Society for the Prevention of Cruelty to Children”. The testator, a Scotsman living in Scotland, had left other legacies to charities, all of which were Scottish. The fact that the description corresponded exactly to one of the claimants did not preclude inquiry into the question of whether another claimant, whose description did not exactly correspond, was the intended legatee; but there is a strong presumption in favour of the party exactly described which cannot be overcome except by cogent positive evidence. It was held that the legacy fell to be paid to the English society in the absence of clear proof that the testator intended that it should go to the Scottish society.

[94] In delivering his opinion, the Earl of Loreburn observed (at p81) that the fact that one person or object matches a description exactly:

“creates a strong presumption against any rival claiming who is not the possessor of the name mentioned in the will. It is a very strong presumption, and one which cannot be overcome except in exceptional circumstances.”

[95] Lord Dunedin, in reaching a similar conclusion, explained his reasoning in the following terms:

“I do not myself put it... as a presumption, but I put it thus that here you have an accurate description of the one person, and a description which is admittedly not quite accurate of the other. You must, I think have positive evidence of some cogent sort to make you prefer the latter to the former. Such evidence, unfortunately, in this case I do not find.” (at page 83).

[96] The principles to be applied to the question of construction of disputed writings are as set out in the judgment of Lord Neuberger in *Marley v Rawlings* [2015] AC 129 at paragraphs 17 to 26. In that case the Supreme Court made it clear that the approach to interpreting wills is the same as the approach to interpreting a contract.

[97] At paragraph 19, 20 and 23, Lord Neuberger stated:

“When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party’s intentions...

20. When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context. As Lord Hoffmann said in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667, para 64, No one has ever made an acontextual statement. There is always some context to any utterance, however meagre. To the same effect, Sir Thomas Bingham MR said in *Arbuthnott v Fagan* [1995] CLC 1396, 1400 that courts will never construe words in a vacuum...

23 ... Indeed the well known suggestion of James LJ in *Boyes v Cook* (1880) 14 Ch D 53, 56 that when interpreting a Will the Court should ‘place itself in the testator’s armchair’ is consistent with the approach of interpretation by reference to the factual context.”

[98] These principles of interpretation, set out by Lord Neuberger in *Marley v Rawlings* have been quoted with approval in several recent Scottish authorities (Lord Pentland’s opinion in *Fulton & Ors v Muir* [2017] CSOH 25; Sheriff Hall’s judgment in *Scott-May v Scott May* [2021] SC PER 13; and the Sheriff Appeal Court decision in *Alexander v Farroll* 2024 SLT (SAC) 267).

[99] In *Fulton & Ors v Muir*, Lord Pentland adopted Lord Neuberger’s approach in *Marley*, that when interpreting a will, the court “should place itself in the testator’s armchair.” Lord Pentland also referred to *Arnold v Britton* [2015] AC 1619 , paragraph 15 (decided a few months after *Marley v Rawlings*) where Lord Neuberger cited with approval the well-known statement by Lord Hoffman in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 (paragraph 14) that when interpreting a written contract, the court is concerned to identify the intention of the parties by reference to:

"... what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean."

Analysis of evidence

[100] I found the evidence of the pursuer to be credible and reliable. He gave his evidence in a straightforward manner and, although he was rigorously cross examined on a change of position in pleadings as to his interpretation of what his father meant when he bequeathed "my share of Midtown Farm," I accepted his position that he believed, and always had believed, that his father meant his share of the farming operation at Midtown Farm and that he knew his father's intentions as his father had told him that he wanted him to have the farm.

[101] I wholly rejected the first defender's submission that the "pursuer has contorted himself through numerous irreconcilable positions, to the end of ensuring that he is the only effective beneficiary of his late father's estate."

[102] The provisions in the Letter are specific bequests of the assets specified therein. All of the parties are to share equally in any cash and investments. Further, under Jack Carswell's 1981 will (Production 6/1, page 428 of the Joint Bundle) all of the parties are entitled to a share of the residue of Jack Carswell's estate which includes the house at 770 Old Edinburgh Road, Uddingston.

[103] The crucial question is not whether the pursuer's pleadings were amended over time, but what Jack Carswell meant by the term "my share of Midtown Farm".

[104] In any event, I rejected the first defender's the pursuer "has ventured fundamentally different meanings" for the phrase "my share of Midtown Farm" and disagree that the updated pleadings, allowed by Minute of Amendment procedure, have fundamentally

different meanings and are irreconcilable. The first defender has inaccurately quoted the earlier pleadings and neglected to include the important words that followed the averment that “my share of Midtown Farm” means “the heritable property known as Midtown Farm and the heritable property known as the ‘the Bent’,” namely “both of which were farmed as one whole farm.” It is not disputed that firm J & J Carswell (a partnership between Jack Carswell and the pursuer) was the vehicle through which the farming business at Midtown Farm was operated and therefore I cannot see how the amended pleadings can be described as fundamentally different or irreconcilable and they do not, in my view, cast doubt on the credibility of the pursuer.

[105] The pursuer’s credibility was also challenged on the basis that his pleadings, prior to November 2024, described the Letter as consisting of a page document signed only on the first by the deceased. The pursuer’s position in evidence was that he was sure that that when he was shown the Letter by Ms Lothian it was on one loose sheet headed number 17. When he left he was given a photocopy of the Letter and the Addresses Sheet. Ms Lothian’s evidence was that she found the Letter and Addresses Sheet filed on a treasury tag within the correspondence file held at Smail and Ewart. She believed the Letter and Addresses Sheet were stapled together when she saw them but she was not 100% sure. The Letter page was on top of the Addresses Sheet in the file but she was not able to say whether they arrived in that order, whether they were stapled at that time and when and who stapled them together.

[106] Whilst the averments in the historic action raised by Smail and Ewart in 2017 under the Requirements of Writing (Scotland) Act 1995 (HAM-12341-17), described the will as two separate sheets attached together but signed by the deceased on the first page, the pursuer

maintains in his pleadings in this action that the Letter is a one-page document which was signed by Jack Carswell at the end of that page.

[107] At no time did the pursuer have possession of the principal copies of the Letter and Addresses Sheet. In the absence of having the principal copies, he had no factual basis to aver the order of the sheets and presumably relied on his instructed solicitor at the time to provide a description of the documents. The principal copies of the Letter and Addresses Sheet were lost between 2018 and 2024. When found, forensic analysis was undertaken by Dr Gillies which provided a basis for the pursuer to aver the order in which the sheets were prepared and thereafter signed by Jack Carswell. The pursuer's averments on the ordering of the pages as set out in his pleadings were also not tested by any of the defenders during their respective cross-examinations of him.

[108] It is a question of fact and law whether the Letter is considered to be a one or two page document and, if determined to be a two page document, the order in which those pages written and signed. For all of the above reasons, the differing historical averments on the description of the documents found did not detract from the pursuer's credibility or reliability, particularly given the fact he was not cross-examined on this issue.

[109] I accepted the pursuer's position that he was the primary person who worked the farming business with his father since leaving school, until his father's death and to date. This is supported by the fact that, in 2004, he entered into partnership with his father in respect of the farming operations conducted from Midtown Farm and, in 2009, his father transferred to him one half of the heritable title to the fields retained from the sale of Bent Farm and one half of the heritable title to the subjects which had originally formed Midtown Farm.

[110] I accepted the pursuer's evidence that he and his father farmed both the Midtown fields and retained Bent fields together as part of the same farming operation operating under the name Midtown Farm and that the retained fields from the sale of Bent Farm did not have a separate identity, despite the word Bent being used as part of the description to identify certain of the retained fields. This was amply supported by the evidence of Mr Struthers, Mr Fulton and Mr Hotchkiss and Mr Boyd. Whilst the third defender maintained that his father used the term "Bent" to describe each retained field from the sale of Bent Farm, I rejected the submission that, even if that were the case, any inference could be drawn from such a description that the fields retained from the sale of Bent Farm were farmed as a separate entity to that of Midtown Farm. Indeed it is noted in the third defender's written submissions (at page 30, paragraph 79) that, "there is no dispute that Midtown and the Bent were farmed together as a single unit."

[111] I accepted, as credible and reliable, the evidence of Mr Fulton, Mr Struthers and Mr Hotchkiss that they had known Jack Carswell for many years and that he always referred to all of the land he farmed (including the retained Bent fields) as Midtown Farm. I accepted Mr Hotchkiss evidence that in 2012 Jack Carswell told him that he had made a will and what he wanted to happen to the farm.

[112] Mr Hotchkiss' credibility was challenged robustly on his assertion that he was shown the principal Letter by David Carswell, as opposed to a copy document, sometime between March and May 2018 and, despite being given a warning against self-incrimination, he remained steadfast in his position. In cross-examination by the first defender, it was suggested that the principal Letter had been lodged at court at the time and therefore could not have been seen by him. It is a matter of court record that the principal Letter was borrowed from process on 27 February 2018 and returned by Beltrami and Co Limited (who

briefly acted for the first defender) on 30 July 2018. Mr Hotchkiss' position is supported by the detailed description he gave, in his affidavit dated 16 January 2022, of the physical features of the Letter (which were not present in the photocopied document) at time when the principal Letter was lost. The issue of which version was seen by Mr Hotchkiss is not relevant to the matters for determination in this action but it is relevant to assessment of the credibility and reliability of Mr Hotchkiss and the third defender. I preferred the evidence of Mr Hotchkiss to that of the third defender in this regard.

[113] All parties agree that Ms Lothian was a credible and truthful witness. She accepted she could not fully recollect events from 2017 and that she did not have any dealings with the deceased during his lifetime and knew nothing about the business he operated. Whilst it was Ms Lothian's practice to store a client's will within the firm's safe, she conceded that as a result of the deceased's matters being dealt with by a former solicitor of the firm, she was unable to speak to what had happened at that time. When the Letter and Addresses page were found by her on a treasury tag in a correspondence file, relating to an unrelated matter, the Letter was on top of the Addresses Sheet. She believed they were stapled together but was not 100% sure and candidly accepted she was not able to say whether they arrived at the office in that order, whether they were stapled at that time and when and who stapled them together. As an experienced private client solicitor, she viewed the Letter as a will, highlighting that it contained the word "bequeath."

[114] Dr Gillies is an experienced and skilled Forensic Handwriting and Document Examiner. Her qualifications and experience are set out in her reports and her expertise was unchallenged. Her reports were comprehensive and her evidence helpful in explaining the processes of analysis undertaken and reasons for her findings. Her conclusions were not

challenged by any of the defenders (other than an assertion of irrelevance which I reject) and I accepted her findings and conclusions that ESDA examination revealed that:

- a. The Addresses Page and Letter were written by Jack Carswell in the same notebook;
- b. the Addresses Sheet was written by Jack Carswell prior to him writing the contents and signature of the Letter;
- c. the page on which the Addresses were written was above the page that the Letter was written, separated by other pages;
- d. the Letter was written and signed by Jack Carswell while it was still in the notebook;
- e. there are indications that the Addresses Sheet was on top of the Letter when stapled and folded;
- f. there are also indications that the Letter was on top of the Addresses sheet at some point when it was stapled.

I also accepted her evidence that the stapling and folding of the Letter and Addresses Sheet cannot be sequenced and it was not possible to determine the order in which they were sent to Messrs Smail and Ewart or if they were folded or stapled at that time.

[115] Mr Boyd was a credible and reliable professional witness and there was no material challenge to the evidence he gave. He understood the business of J & J Carswell to be the operation of Midtown Farm. He was cross-examined on there being separate accounting entries for the Bent Farm and Midtown Farm. He explained that separate entries for the acquisition costs of the Bent land and the Midtown land were kept in the books due to those parcels being acquired at different times and that such information would be required in connection with any taxable gain arising on a sale of those parts.

[116] He was cross-examined on the substantial difference in the share of capital between the date of death accounts to the earlier accounts and confirmed that this was due to the fact Mr Boyd had been unaware that there had been a gift of a half share of the land from Jack Carswell to John Carswell a number of years beforehand. Whilst there is no particular need for a the transfer of land to be reflected in the accounts, he felt it appropriate to make the change.

[117] He could not comment on the mechanism by which partnership property was transferred from J&E Carswell to J & J Carswell.

[118] It was agreed by joint minute that, subject to questions of relevancy and admissibility, the evidence taken from James Carswell, on commission on 3 May 2023, is admitted as evidence in the proof. Whilst it is contended by the first defender that the evidence taken is entirely irrelevant, I respectfully disagree.

[119] Evidence was given by James Carswell that prior to his brother's hospital admission in February 2009, Jack Carswell told him a number of times that it was his intention, while he was alive, to transfer half the farm to John Carswell Junior. James Carswell visited his brother in hospital in February 2009 and kept "nagging him" about making a will, encouraging him to make a will as soon as he came out of hospital. Jack Carswell told him he wanted John Carswell Junior to have the whole farm. A few months after he came out of hospital Jack Carswell told him that he had recently transferred half Midtown Farm to John Carswell and that he had made a will but that he was not told what was in the will.

[120] I consider that such evidence is eloquent of the testamentary intent of Jack Carswell around the time that he wrote the Letter in 2009 and the subsequent transfer of one half *pro indiviso* share of the land farmed by the partnership to the pursuer.

[121] The evidence of Mr Greenshields, taken on commission on 4 April 2023, spoke to visiting Jack Carswell in hospital in February 2009 and pestering him to make a will. In the circumstances it is a reasonable inference that the pressure applied by James Carswell and Mr Greenshields, whilst he was in hospital, played a part in motivating Jack Carswell to put his affairs in order prior to his death.

[122] For the third defender evidence was led from Mr Moore, solicitor and the third defender David Carswell. Mr Moore's evidence, that he was instructed by the first to third defenders in a separate count, reckoning and payment action and recovered a number of documents from the Executry file held by Smail and Ewart, was of limited relevance to the issues for determination. Mr Moore's evidence, that he lodged a specification of documents at court to recover the Executry file held by Smail and Ewart where the Letter was found, was uncontroversial and relatively unchallenged.

[123] I found the evidence of the third defender to be credible and reliable on certain aspects and not so credible and reliable on others. It was not in dispute that third defender worked on the family for around 16 years until 1996 and I accepted his evidence that, thereafter, he assisted on the farm during busy periods such as harvest. I did not accept that his father used the terms Bent Farm Grounds or Bent Farm when referring to the retained fields from the sale of the Bent Farm. I preferred the pursuer's evidence in this regard. I was also not persuaded by the third defender's evidence that a copy of the Letter was shown to Thomas Hotchkiss when visited him sometime around March to May 2018. For the reasons stated in para [112] above, I preferred the evidence of Thomas Hotchkiss in this regard.

Decision

Subscription

[124] In short, the pursuer's primary position is that the Letter is a one page document that bears the signature of Jack Carswell at the end and is validly subscribed by him in accordance with the statutory requirements.

[125] The first and third defender's positions are aligned. The first defender adopted the submissions of the third defender on question of subscription namely that the Letter was not subscribed as it consists of a two page document signed by the late Jack Carswell on the first page only and that therefore

“there is no need to consider whether the 2009 Letter was intended to operate as a testamentary document, because it is not a validly executed deed; the fact that it was signed on the first page only is fatal.”

[126] The second defender submits that the Letter is not a will. Jack Carswell did not have it witnessed. It does not say “my last will and testament.” He did not destroy or reference the 1981 will in the Letter. He signed it “yours sincerely” which is how you finish a letter not a will. It was written on after Jack Carswell's death to manufacture a will.

[127] There is no challenge to Jack Carswell having had testamentary capacity at the time of signing the Letter.

[128] Both the Letter the Addresses Sheet were written by Jack Carswell and the Letter bore his signature at the end of that document. This was established by the expert forensic analysis undertaken by Dr Gillies, which was not challenged by any of the defenders.

[129] For the purposes of subscription, the signature must be placed at the end of the substantive text of the document. I am satisfied that the Letter is a standalone document containing the testamentary intent of Jack Carswell, subscribed at the end.

[130] The Letter bears the hallmarks of how a letter starts and finishes. It begins with an address for the sender on the top right-hand side and concludes with “Yours sincerely” followed by a signature. It does not contain any words which link it in any way to the Addresses Sheet or which give the reader cause to think it is necessary to refer to the terms of another document. Jack Carswell’s definite testamentary intention can be determined from its terms without any need to refer to the Addresses Sheet.

[131] In my opinion, the Addresses Sheet is ancillary to the Letter, with the administrative purpose of providing the addresses of the beneficiaries named in the Letter, who are readily identifiable, in the Letter, as the children of the deceased.

[132] These conclusions are supported by the findings and conclusions of Dr Gillies and I reject the submission by the first and third defender that her evidence is irrelevant to determining the question of subscription. Whilst the Addresses Page and Letter were written in the same notebook, they were separated by other pages. The Addresses Sheet was written by Jack Carswell prior to him writing the contents of, and subscribing, the Letter. The Letter was written and signed by Jack Carswell while it was still in the notebook.

[133] There are no indentations from the Letter on the Addresses Sheet. Following the explanation which Dr Gillies provided as to how indentations on lower sheets are made from writing on upper sheets, it is reasonable to conclude that if the Letter had been signed while resting on top of the Addresses Sheet, indentations from the signature on the Letter would have been detected on the Addresses Sheet.

[134] If subscription of the last page of a document is required as proof of a concluded intention to complete the document, evidence of such intention is available in this case given the sequence of the preparation of the Addresses Sheet and the Letter and the fact the Letter was signed by Jack Carswell while still in the notebook.

[135] The defenders argue that the Addresses Sheet and the Letter form a two page document. They rely primarily on the evidence of Ms Lothian that when she found the Letter and Addresses sheet they were filed on a treasury tag in the correspondence file, it consisted of two pages with the Letter on top and the Addresses Sheet below and that they were stapled in that order albeit she was not 100% sure. They also submit that the historical averments by the pursuer and Dr Gillies support such a conclusion as does the internal evidence of the Letter itself.

[136] Whilst Ms Lothian confirmed to the best of her recollection the manner in which the documents were filed and stapled when she recovered them, she was not able to say whether they arrived in that order, whether they were stapled at that time and when and who stapled them together.

[137] I cannot agree that the evidence of Dr Gillies supports the contention that the Letter was a two page document. She was able to state that it was apparent from the principal version of the Addresses Sheet and the Letter that they have been stapled 11 times. In Dr Gillies' opinion there are indications that the Addresses Sheet was on top of the Letter when stapled and folded (paragraphs 131, 135, and conclusion ix, page 221-221 of the Joint Bundle). There are also indications that the Letter was on top of the Addresses sheet at some point when it was stapled.

[138] There is no evidence before the court that the Addresses Sheet and the Letter were stapled by Jack Carswell before being sent to Smail and Ewart.

[139] The stapling and folding of the Letter and Addresses Sheet cannot be sequenced and it was not possible to determine the order in which they were sent to Messrs Smail and Ewart or if they were folded or stapled at that time.

[140] In relation to the reliance placed on averments contained in historical pleadings, I have addressed this fully in paras [107] and [108] above and do not consider that such historical pleadings render any assistance in determining the issue of subscription.

[141] The first and third defenders rely on the case of *Knapman, applicant* [2024] SC JED 3 (referred to as Weatheritt's Executors in pursuer's submissions) as authority for the proposition that the order in which the Addresses Sheet and the Letter were prepared is irrelevant and that the physical order of the pages is the only consideration when assessing whether a document has been signed at the end of the last page.

[142] In the *Knapman* case, the contested "will" consisted of three sheets of paper stapled together and had "all the hallmarks of a homemade will." There was evidence from one of the applicants that he had found the principals of the three pages, stapled together, in the possessions of the deceased and that he found the same documents on the deceased's computer. The order of the stapled pages, as found, were as follows:

- a. The top page (first page), which was typed and bore to have been signed, started conventionally with the words "MY LAST WILL & TESTAMENT. Being of sound mind I, Jean Dorothy. "It went on to appoint the pursuers' as her executors. It then gave her instructions for her funeral. It is signed, dated 27 January 2016 and witnessed.
- b. The page underneath (second page) was headed "Financial State as at November 2015". It appeared to be a list of assets. It was not signed.
- c. The last page set out instructions in relation to beneficiaries and is dated 24 November 2015. It was not signed.

In summary the three pages were stapled together in the order of the signed page, list of assets and finally the page setting out beneficiaries. Only the first page was signed and there was no reference of any of the pages directly or by implication to the other two pages.

[143] The sheriff's opinion was that there could be no doubt that the deceased intended the signed page to be the first page on the basis that he had "never known a will whether it be professionally drafted, a 'will form' or 'homemade' that did not, in the first few words, state the name of the testator."

[144] The sheriff took the view that it was to be inferred from the circumstances that the deceased put the three pages together in the order in which they were found. He accepted that it was likely that the three pages were created in the order that the dates on the pages suggest and therefore that the signed page was the last document created chronologically. The sheriff concluded that, given his opinion that the signed page was the first page, then there could not have been subscription.

[145] Unlike the circumstances in the *Knapman* case, there is no compelling evidence in the present case that Jack Carswell intended the Addresses Page, which was written before the contents and signature of the Letter, to be the last page of a two page will. There is no evidence that Jack Carswell ordered and stapled the documents together before being sent to Smail and Ewart and there was expert evidence that, at some point, the Addresses Sheet was on top of the Letter when stapled and folded.

[146] A further critical distinguishing feature between the circumstances of the *Knapman* case and that of the present case is that the page signed by the deceased in the *Knapman* made no reference to her beneficiaries nor to her bequests. In the present case there is ample evidence to support the conclusion that Jack Carswell wrote and signed the Letter which

contained both the detail of his bequests and names of his beneficiaries and that he did so after he wrote the Addresses Page.

[147] There is no evidence to support the second defender's contention that the Letter was written on after Jack Carswell's death to manufacture a will.

[148] For all of the above reasons, I conclude that Jack Carswell intended the Letter to be a standalone document, that the Letter amply fulfils the criteria set out by McLaren, (*The Law of Wills and Succession As Administered in Scotland* (3rd Ed) paragraph 638) and the case of *Knapman* can be distinguished from the facts of the present case. I am satisfied, on the balance of probabilities, that the Letter was subscribed on its final page.

Testamentary intent

[149] The pursuer submits that the Letter is, and of itself, sufficient to express the testamentary intention of the late Jack Carswell.

[150] All of the defenders submit that Jack Carswell did not intend the Letter to have testamentary effect. The first and third defenders contend that the Letter was an instruction to prepare a will.

[151] For the reasons outlined below, I am satisfied that the Letter written by Jack Carswell, on 16 March 2009, is unequivocally expressive of a present testamentary intention.

[152] In terms of the contents, the Letter clearly sets out what *McLaren* describes as the subjects, the objects and an expression of a definite testamentary effect. The subjects are "my share of Midtown Farm" and "any cash or investments". The objects are John Carswell and his siblings, Elizabeth, David and Mark. The pursuer is designed as "my son" with his address also being given. Elizabeth, David and Mark are referred to only by their forenames with no addresses being provided for them but there is no doubt that Jack Carswell was

referring to his four children and that he intended them all to be beneficiaries under the Letter. There is no requirement to look beyond the Letter to understand who is being referred to. In the case of *Draper v Thomason* 1954 SC 136, the testator referred to her beneficiary as “Billy” (her nephew) and this was held to be sufficient.

[153] Jack Carswell’s definite testamentary intention is clear given that he starts the Letter with the words “I JOHN CARSWELL BEQUEATH”. The word “bequeath” is commonly used in testamentary writings and there is no doubt as to the meaning of the word. The Oxford English Dictionary defines it as:

“To make a formal assignation of (Property of which one is possessed) to any one, (a) ... (b) so as to pass to the recipient after one’s death: To ‘leave’ by will (The only surviving sense for which it is the proper term)”

[154] The Shorter Oxford English Dictionary defines the word as: “Leave (an estate or piece of property) to a person by will”.

[155] Ms Lothian’s belief was that the Letter was a will and she highlighted the use of word “bequeath,” by way of explanation for her belief.

[156] The introduction Jack Carswell chose to use is indicative of the fact Jack Carswell believed he was preparing an important document which would have a legal effect.

[157] Given the form, content and language used, in particular the use of the words “I JOHN CARSWELL BEQUEATH” at the start of the writing, my view is that the Letter is a testamentary writing, sent by Jack Carswell to his solicitor, which he intended to be read alongside his existing will.

[158] The defender’s challenge to the testamentary character of the Letter is primarily based on the fact that the Letter was not stored in a will safe and that file copies of a draft will (mirroring the terms of the Letter) and a covering letter from Smail and Ewart, dated

6 April 2009, were found in the correspondence file held at Messrs Smail and Ewart. The covering letter dated 6 April 2009 was in the following terms:

“We thank you for your letter dated 24th March 2009 and now enclose a draft Will for your perusal. Please contact our offices to confirm whether any changes are required [sic] to the Will and to advise us of the identity of the Executors you wish to appoint. Thereafter we will arrange to prepare a copy of your Will for signing by you.”

[159] The covering letter from Smail and Ewart refers to a letter dated 24 March 2009 which was received from Jack Carswell. The principal copy of a letter of that date was produced (Production 6/33, Joint Bundle page 596) but it clearly relates to the potential transaction with Patersons regarding a quarry. There is no reference in that letter, nor in any other correspondence, to a request to prepare a draft will.

[160] Beyond the existence of a file copy of a draft will and cover letter addressed to Jack Carswell, there is there is no other extrinsic evidence to support the contention that the Letter sent by Jack Carswell to Smail and Ewart was intended to be a letter of instruction to prepare a draft will as opposed to a letter which contained a concluded and definite testamentary intention. Just because Smail and Ewart appear to have, perhaps understandably, chosen to interpret the Letter as instruction to prepare a formal document in standard form, does not deprive it of testamentary intent.

[161] The Letter itself does not include any words which expressly, or by inference, indicate that it was intended by Jack Carswell to be an instruction to Smail and Ewart to prepare a will. There are no file notes of telephone conversations or other letters to or from Smail and Ewart regarding the preparation of a will. Whilst Ms Lothian agreed under cross-examination that she would not draft a will without an instruction to do so and that her practice was to store wills in the firm’s will safe, she confirmed that she could not speak to the practices and procedures of the previous solicitor at her firm who dealt

with Jack Carswell and there was no evidence that Smail and Ewart rendered a fee for the preparation of the draft will.

[162] There is also no evidence that the Letter and Addresses Sheet, sent by Jack Carswell to Smail and Ewart, were accompanied by a covering letter in which Jack Carswell asked the firm to prepare a will. Had there been such a covering letter, it is reasonable to assume it would have been sent to Smail and Ewart along with the Addresses Sheet and the Letter, and that it would have been found in their file along with those documents.

[163] The first and third defenders invite me to conclude that “a clear inference may be drawn that such a covering letter from Jack Carswell existed” (third defender’s submissions at paragraph 39) and that “the strong likelihood is that Mr Carswell had discussions with his solicitors which made it clear to them that the 2009 Letter was not intended to be testamentary.” I am not persuaded that any such inferences can be drawn and for me to arrive at such conclusions would be based purely on speculation.

[164] James Carswell’s evidence, that approximately 8 weeks after leaving hospital in February 2009, Jack Carswell told him that he had made a will, lends further support to the conclusion that Jack Carswell intended the Letter (which is dated 16 March 2009) to have testamentary effect.

[165] In *Jamieson’s Executors v Fyvie* 1982 SC 1, Lord President Emslie (at page 4) made it clear that each case has to be decided on its own facts and circumstances and that previously decided cases are of little assistance. The first and third defenders have cited a number of authorities in support of their contention that the Letter sent by Jack Carswell to Smail and Ewart was intended to be a letter of instruction to prepare a draft will as opposed to a letter which containing a concluded and definite testamentary intention. For the reasons outlined

below, all of the cases cited are, in my view, distinguishable from the facts of the present case.

[166] In *Jamieson's Executors* is (referred to by the third defender in paragraph 47 of his submissions) the court took into account the particular phrases used in the writing, namely, "I should like if"; "I should like"; "I do hope this can be done"; "I just wanted to note this down." The court also had regard to the fact that in the second paragraph, the original word "amount" had been bracketed, and the word "excess" had been written above it. The court concluded that the wording made it far from clear that the deceased had made up her mind about the changes she thought of making and that she was not sure if what she was thinking about could be done. The court accordingly concluded that the writing was a note of matters on which she wanted her solicitor's advice.

[167] By contrast, there is no sense of uncertainty or hesitation is discernible from the wording of the Letter nor is there any indicator that Jack Carswell was looking for advice from Smail and Ewart on what he wished to achieve. The language used by Jack Carswell was formal and instructive and without qualification or query.

[168] Similarly, in *Stuart v Stuart* 1942 SC 510, the letter addressed to the solicitor contained the terms "I also would like you to draw up a will," and "I have not yet made one." The letter concludes with the request "Please submit a draft for my approval." This is manifestly different to the wording used by Jack Carswell in the Letter which contained no such instruction to prepare a draft will.

[169] The third defender cites the case of *Wilson v Hovell* 1924 SC 1 (paragraphs 34 and 45 of his submissions) as being "on all fours" with the current case. In *Wilson*, the court clearly had regard to the terms of the covering letter when determining the effect it had upon the writing. Both the Lord Ordinary and Inner House took into account the evidence led from

the solicitor that the document was sent to him in pursuance of an arrangement between him and Mrs Wilson in the previous August that she should send him a written note of what she desired in order that he might prepare a draft will for her consideration, and that he did prepare and send her a draft will for her consideration (per the Lord Ordinary's opinion starting at the foot of page 6 and the opinion of the Lord Justice Clerk at page 11).

[170] In *Young's Trustees v Henderson* 1925 SC 749 (third defender in paragraph 35 of his submissions), the document began with the words "My last will and testament," but the covering letter which accompanied it was in the following terms: "I am sending you a rough draft of what I would like my will to be."

[171] I consider that all of the cases cited by the defenders can readily be distinguished as being examples where the writing concerned is eloquent of an instruction rather than concluded testamentary intent. In the present case there is no evidence of there ever having been a covering note of instructions and no evidence of any prior or later discussions between Jack Carswell and his solicitor regarding the will.

[172] Finally, I do not find merit in the second and third defender's contention (paragraphs 12 and 48(ii) of the second and third defender's submissions, respectively) that the use of the words "Yours Sincerely" at the end of the Letter "is an internal indication that it was not viewed by Mr Carswell as a testamentary document, but merely a letter to his solicitors."

[173] As noted by the third defender in paragraph 49 of his submissions, the courts have upheld letters as being valid testamentary writings. Jack Carswell was a farmer and not legally qualified. It is unsurprising that, as a layman preparing a testamentary writing in letter form, he would follow the standard format for concluding a letter. In the case of

Scott v Scales, the letter ended “I am dear Sir, yours truly”. That phrase appears not to have troubled the court whose emphasis was on the wording of the letter itself.

[174] Whilst cognisant that each case turns on its own facts and circumstances and that previously decided cases are of little assistance (*Jamieson’s Executors v Fyvie* 1982 SC 1, per Lord President Emslie at p4), having considered all of the authorities referred to in submissions, I am of the view that the circumstances of the cases of *Robb v Robb* (1872) 10 M 692 page 697 and *Scott v Scales* (1864) 2M 613 are most aligned the circumstances of the present case given that the wording used in the Letter is clearly expressive of a desire or wish, presently existing in the mind of Jack Carswell which he intended to have testamentary effect rather than containing words expressive of the desire that something should be done in the way of a preparation of some other paper expressive of the purpose and intention of the testatrix.

[175] Having regard the terms and wording of the Letter, I am satisfied on the balance of probabilities that it expresses Jack Carswell concluded testamentary intention and that he intended it to have testamentary effect.

The meaning of the phrase “my share of Midtown Farm”

[176] The final disputed issue is the interpretation of the phrase “my share of Midtown Farm.” I agree with the pursuer’s contention that, given the latent ambiguity in the description of the bequest, extrinsic evidence is competent and required to assist with the interpretation of what Jack Carswell meant by “my share of Midtown Farm.” Indeed, two potential ambiguities could be said to arise from the phrase, namely the meaning of “my share” and “Midtown Farm.” The court’s duty is to ascertain all the facts which were known to the testator at the time of making the will and thus place itself in the position of

the testator... in order to ascertain whether there exists any person or thing to which the whole description given in the will can, reasonably and with sufficient certainty, be applied. (Walker and Walker, *The Law of Evidence in Scotland* (5th Ed), paragraph 26.21.3 and the authorities cited in footnote 310).

[177] Applying the principles of interpretation as set out by Lord Neurenburg in *Marley v Rawlings*, it is clear to me that if placing oneself in Jack Carswell's armchair, applying common sense and having regard to the factual context in which the farming business was, and had been for some time, conducted, that by using the phrase "my share of Midtown Farm" Jack Carswell wanted his son John, the pursuer, to inherit his entire share of the farming business, namely the land and whole assets and undertakings of the business so that, following his death, the pursuer could continue to operate the farming business as he had done with his father for his entire adult life. In the mind of Jack Carswell the assets listed in the year end accounts for J & J Carswell were all part and parcel of Midtown Farm.

[178] This interpretation is wholly supported by the factual context existing at the time that Jack Carswell wrote the Letter: That factual context was that:

- (1) Jack Carswell always referred to the entirety of the farming business as Midtown Farm, notwithstanding it was conducted under the partnership entity J & J Carswell. David Boyd (the accountant responsible for the accounts of J & J Carswell) confirmed that he understood the business J & J Carswell to be Midtown Farm.
- (2) Jack Carswell was not a lawyer or an accountant. He had been a farmer all of his life. He did not draft the Letter with the precision which is expected of a legal draftsman. It is to be expected that he would refer to the farming business operated through J & J Carswell, as Midtown Farm as he had done throughout his

lifetime. He would not have been thinking in legal entity terms but rather using language that he was in the habit of using to describe the business - "Midtown Farm."

(3) Both the retained Bent fields and the Midtown fields were farmed as one farming unit.

(4) The livestock, plant and machinery were all housed in the buildings which formed part of Midtown Farm.

(5) As a farmer, he would have been aware that all of the assets of the farming business operated at Midtown Farm were required to continue to operate the farm including the land (both the retained Bent fields and the original Midtown fields), the buildings, the plant and machinery, and the livestock.

[179] Looked at from the perspective of common sense (paragraph 19 of *Marley v Rawlings*), it would be illogical and impractical that Jack Carswell would leave only his share of the farm land without the buildings, plant, machinery, fixtures, fittings, livestock and subsidies required to farm it, when such division would potentially risk viability of the farming business, that he had operated with the pursuer in his lifetime, after his death.

[180] I do not accept the third defender's position that "there is abundant evidence to suggest that the deceased was aware of the distinction between the farm land and the farming business" and that "the only real evidence to suggest that 'my share of Midtown Farm' referred to (or included) the deceased's share in the firm of J & J Carswell came from the Pursuer" (paragraph 83 of submissions). On the contrary there was ample evidence (from the pursuer, David Boyd, William Fulton, Thomas Hotchkiss and Robert Struthers) that Jack Carswell always referred to the farming business as Midtown Farm.

[181] In submissions, the first and third defender repeatedly referred to the construction and meaning to be given to the words “Midtown Farm”. The phrase under consideration is not “Midtown Farm” but rather “my share of Midtown Farm.” The factual position, as described by David Boyd when considering the accounts of the business J & J Carswell, is that Jack Carswell’s share of the business operated as Midtown Farm comprised the land from which it operated (ie, the original Midtown fields and the retained fields), the buildings, the plant and machinery, the livestock and all other assets used in connection with the farming business conducted at that location. Whilst Jack Carswell did not use the words “his share of the partnership assets of J & J Carswell,” his share of Midtown Farm was just that.

[182] I rejected the submissions made on behalf of the first and third defender that the interpretation, being advanced by the pursuer, would be “making the will speak upon a subject on which it is altogether silent, and ... filling up a blank which the testator might have left in his will.” (per the Lord Chief Justice in *Miller v Travers* at page 397).

Jack Carswell was explicit in bequeathing “my share of Midtown Farm” to the pursuer, his partner in the farming business operated at Midtown Farm. He also explicitly stated, in the same letter, and immediately following his bequest to the pursuer, what he intended to bequeath to his remaining children (the first, second and third defenders) when he wrote the words “any cash or investments to be shared equally between John, Elizabeth, David and Mark.” Had he intended to bequeath a specific part or parts of his share in the farming business operated from Midtown Farm to his remaining children, he would surely have explicitly said so.

[183] Whilst it is evident that there remains a dispute arising from the winding up of the estate of the late Mrs Carswell, that is the subject of a separate action and not relevant

to the disputed issues in the current action and the three questions that I am tasked to determine. On Elizabeth Carswell's death in 1999, Jack Carswell became the sole party infeft in the heritable titles by virtue of the survivorship destinations in the dispositions in their favour. After Elizabeth Carswell's death in 1999, Jack Carswell continued to operate the farming business as sole trader until 2004 when he entered into a partnership with the pursuer. Whilst the earlier accounts of J & J Carswell made reference to a debt to the late Elizabeth Carswell, I was not persuaded by the argument of the first and third defender, that this accounting record gave rise to any inference that Jack Carswell intended his bequest to the pursuer of his "share of Midtown Farm" to be subject to the interests of the deceased's wife.

[184] There is no reference in the Letter to Elizabeth Carswell and to import any such condition would be to write words into the Letter "making the will speak upon a subject on which it is altogether silent" as expressly condemned in *Miller v Travers*.

[185] Similarly, I reject the first and third defender's submission that Jack Carswell "assumed that there was an encumbrance over Midtown Farm, owing to the fact it had been a partnership asset of the firm J&E Carswell" (paragraph 41 of first defender's submissions) and that the words "my share" are a reference not to the business as it existed in 2009, but to the deceased's ongoing obligation to compensate the estate of his late wife (paragraph 85 of third defender's submissions). There was no evidence led to support the contention that Jack Carswell thought there was an encumbrance over Midtown Farm.

[186] The third defender also submits that it would make little sense for the words "my share" to refer to the business operated by J & J Carswell as, at the time the Letter was written, in March 2009, Jack Carswell held the only capital share in the business. The evidence of James Carswell supports the contrary view that, at the time Jack Carswell

wrote the Letter, he had in his mind that he was writing a will to execute his wish that the pursuer inherit the whole farm after his death and, in addition, in his lifetime and shortly thereafter, he transferred half of Midtown Farm to the pursuer.

[187] The first and third defenders have cited a number of authorities in support of their submission that phrase “my share of Midtown Farm” is solely a reference to the heritable property of Midtown Farm. For the reasons outlined below, all of the cases cited are, in my view, distinguishable from the facts of the present case.

[188] *Nasmyth’s Trustees v NSPCC* 1914 SC (HL) 76, can be distinguished on the basis that there were two charities whose title included the words “National Society for the Prevention of Cruelty to Children” but only the English Society’s name corresponded exactly with the testator’s description. Beyond evidence that the testator was Scottish and that the other legacies he left were to Scottish charities, there was no evidence before the court in *Nasmyth’s Trustees* to suggest that that the testator, in referring to the NSPCC, actually meant the Scottish NSPCC.

[189] Whilst it is accepted that “the accurate use of a name in a will creates a strong presumption against any rival claiming who is not the possessor of the name mentioned in the will,” unlike the court in *Nasmyth’s trustees*, my conclusion is not that Jack Carswell “meant something different from what he said.” As stated above, the name under consideration in the present case is not “Midtown Farm” but the phrase “my share of Midtown Farm.” There is, in my view, factually only one asset which answered the description of “my share of Midtown Farm” at the time the Letter was written and that is Jack Carswell’s share of the farming business operated at Midtown Farm. Lord Dunedin, in *Nasymth’s Trustees*, opined:

“that here you have an accurate description of the one person, and a description which is admittedly not quite accurate of the other. You must, I think have positive evidence of some cogent sort to make you prefer the latter to the former. Such evidence, unfortunately, in this case I do not find. (*Nasmyth’s Trs*, at 83)”

[190] Unlike the circumstances *Nasmyth*, there is ample credible and reliable evidence in the present case (as set out in paras [110], [111] and [115] above) that Jack Carswell referred to the farming business operated under the partnership vehicle of J & J Carswell, as Midtown Farm.

[191] The evidence led by the pursuer and his witnesses, in particular Mr Boyd who was the accountant for the partnership J & J Carswell, assisted in explaining what Jack Carswell meant by the phrase. There was no attempt to “contradict or amplify” what was meant (per Lord Anderson in *Young’s Trustees v Henderson* 1925 SC 749). The interpretation contended by the pursuer accords with the factual position of what Jack Carswell’s share in the farming business, operated at Midtown Farm, was at that time.

[192] The third defender cited the case of *Fortunato’s Judicial Factor v Fortunato* 1981 SLT 277, as a case which bore “clear factual similarities” to the circumstances of the present case, albeit he conceded that there are differences, not the least of which is the fact that the will in question in *Fortunato* case was professionally prepared and that the Lord Ordinary was able to draw conclusions from other provisions of the will which is not possible here.

[193] I reject the third defender’s submission that, like the court in *Fortunato*, I am able to discern the referent of the term “Midtown Farm” and that there is therefore no need to have regard to extrinsic evidence. In submissions on this point, the third defender again refers to the name “Midtown Farm” as opposed to the phrase under consideration which is “my share of Midtown Farm.” For the reasons outlined at para [176] above, I am satisfied that

extrinsic evidence is permissible and necessary, in the present case, as an aid to interpretation of that phrase.

[194] Indeed, in the pleadings of the first and second defender, they contend that:

“The item ‘Midtown Farm’ could reasonably mean any one of three things: (i) the heritable property known as Midtown Farm, together with the heritable property known as Bent Farm; (ii) the heritable property known as Midtown Farm only; or (iii) the farming business operated at Midtown Farm” (see Closed Record dated 4 November 2024, Answer 6 at page 75, lines 32-26 and pages 77 line 42, to page 78, lines 1-7, of the Joint Bundle for the first and second defender, respectively).

Whilst the third defender’s ultimate position was that the phrase means the heritable property forming Midtown Farm, in earlier pleadings, he too contended that the phrase could reasonably mean one of the three things outlined above (see Closed Record dated 9 October 2023, Answer 6 at page 45, lines 40-44 and page 46, line 1 of the Joint Bundle).

[195] I also reject the submission that the *Fortunato* case is one which bore “clear factual similarities” to the circumstances of the present case. The *Fortunato* case can be distinguished on a number of key points:

- (1) In *Fortunato*, the bequests referred to the specific names of two public houses, namely Bolag Bar and the West End Bar, which were each identifiable as distinct heritable properties. In the present case, the bequest is “my share of Midtown Farm” rather than a precise indication of the heritable property at Midtown Farm.
- (2) The disputed document in *Fortunato* was not a holograph will, but one which had been professionally drawn up by a solicitor, after he had been given instructions, albeit on averment it was done in somewhat hurried circumstances. On that point, the Lord Ordinary opines (page 278, right-hand column, second paragraph):

“To introduce a varying degree of latitude into the interpretation of a professionally drawn testamentary writing according to the circumstances in which it came to be drawn seems to me to be a quite novel approach to the problem of construction.”

By contrast Jack Carswell wrote the Letter. He could not have been expected to approach the preparation of the Letter with the precision of a legal draftsman and, in these circumstances, some latitude in interpretation is justified. On this point, the Lord Ordinary in *Fortunato* made reference to the observations of Lord Justice Clerk Alness in *Elrick's Trs v Robinson* 1932 SC 448, namely:

“I should be disposed to accord more elasticity to the construction of a deed which is prepared by a person who is not a qualified lawyer, in order to give effect to the intention of the writer, even if imperfectly expressed, than I should accord to the construction of a deed prepared by a firm of solicitors.”

(3) The will in *Fortunato* was a detailed document with several clauses relating to specific heritable properties. In this regard the Lord Ordinary opined (at page 280, left-hand column, final paragraph):

“It is certainly right that these provisions should be read in the context of the other testamentary provisions, all relating to heritable property. In certain circumstances the will may become the dictionary from which the meaning of words used can be ascertained: *Borthwick's Trs. v. Borthwick* (1955 S.C. 227).”

The Lord Ordinary highlighted that Mr Fortunato stated in unequivocal terms that the bequest of the shop in clause third was to carry with it the dwelling-house above, in contrast to clause fourth which referenced only the Bolag Bar and the West End Bar. He drew a similar contrast with clause six where the bequest was two businesses along with a heritable property.

By contrast, the Letter written by Jack Carswell is a very short document that cannot readily serve as the dictionary from which the meaning of the phrase “my share of Midtown Farm” can be ascertained. If it were to be so used, the only observation that could be made is that, in the Letter, immediately following his bequest of “my share of Midtown Farm” to the pursuer, he expressed a further bequest to all of

his children, namely “any cash or investments to be shared equally between John, Elizabeth, David and Mark.” As commented above, had he intended to bequeath a specific part or parts of his share in the farming business operated from Midtown Farm to his remaining children, he would surely have explicitly said so.

(4) Whilst the Lord Ordinary in *Fortunato* made reference to a further contention in pleadings that the dwelling-house and shop were part of the business known as the Brechin Bolag Ltd (which included both public houses, two dwelling-houses and the shop) he observed that he did not recall any argument that it was a business which was the subject matter of the bequest. The Lord Ordinary also took account of the fact that where Mr Fortunato had made provisions for the disposal of a business, as in clause sixth, he had made that clear - see page 281 (left-hand column, line 15 of first full paragraph).

By contrast, in present case, there has been significant argument, and indeed compelling extrinsic evidence led, that Jack Carswell always referred to the farming business as Midtown Farm.

[196] *Miller v Travers* can also be distinguished. In that case, the plaintiff sought to prove that the testator intended to bequeath not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare, and that the will was to be construed as if the word Clare stood in the place of or in addition to that of Limerick. In the present case, there is no such attempt by the pursuer to make the will speak upon a subject on which it is altogether silent. Rather the extrinsic evidence led by the pursuer has sought to address the latent ambiguity arising from what could be described as a defective legal description of the farming business in light of the existence of the partnership named J & J Carswell. Placing oneself in the arm chair of Jack Carswell, and considering the factual

context existing at that time, I am of the view that his use of the phrase “my share of Midtown Farm”, could only have been a reference to Jack Carswell’s share of the farming business operated at Midtown Farm.

[197] For all of the above reasons, I am satisfied, on the balance of probabilities, that when Jack Carswell bequeathed “my share of Midtown Farm” he meant his whole right, title and interest in, and to, the constituent parts of the farming business operated at Midtown Farm. This comprises the land from which it operates (ie, the original Midtown fields and the retained Bent fields), the buildings, the plant and machinery, the fixtures and fittings, the livestock and all other assets used in connection with the farming business conducted at that location.