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Compromise agreements and heritable property

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Introduction

Not all disputes require the imposition of an outcome by the courts for their resolution. Even after litigation has begun, the parties may instead reach some form of compromise. This is very common, and there are various reasons why it might happen. Perhaps a case that initially seemed strong now appears, after further reflection or on the emergence of new information, somewhat weaker. Litigation is often an expensive and protracted business, with no certainty as to outcome, and even a party confident of ultimate success may prefer to compromise rather than take the risk of losing all. Alternatively, a negotiated agreement may be less harmful to an ongoing relationship than contentious court proceedings would be.

A compromise agreement is a form of contract, binding the parties to disposal of the matters at issue in a particular way. As is well known, most forms of contract have no special formal requirements for their constitution. Most contracts can be formed orally, and are fully binding without the use of writing. Of course, it is sensible to record important agreements in writing, but that is for ease of proof of what has been agreed. Assuming proof is possible, lack of writing is no obstacle to enforceability.

There are exceptions, however. Certain forms of contract require writing for their valid constitution. An example is a contract for the transfer of ownership of land. In such cases, writing is not just used for the purpose of proving the existence and terms of the agreement. Instead, an oral agreement for the sale of land will be entirely unenforceable, regardless of how convincing the evidence that may be brought to bear in its proof. This is subject only to the statutory personal bar contained in s. 1(3) of the Requirements of Writing (Scotland) Act

1995 ("the 1995 Act"), but that is limited in its scope, and so is only of assistance in restricted circumstances.

The question has sometimes arisen whether a compromise agreement concerning heritable property requires writing for its valid constitution. The point is disputed in the literature. On one hand, Gloag (*The Law of Contract* (2nd edn, 1929), p. 164) has said that the Court:

> "has refused to apply its rules [*i.e.* the rules requiring writing for contracts involving heritage] to contracts of a complicated character where some right to heritage is incidentally involved. Thus the compromise of an action, though relating to heritage, does not require a probative writing."

By contrast, for Walker, the category of contracts requiring writing includes "compromise agreements, one of the terms of which is an agreement which requires to be constituted in probative writing" (*The Law of Contracts and Related Obligations in Scots Law* (3rd edn, 1995), para 13.23).

Although both of these predate the 1995 Act, that Act does not expressly resolve the issue. The question has arisen once more in a recent sheriff court case.

In *DWS v RMS* [2016] SC GRE 47, the parties were spouses engaged in an action for divorce. The matrimonial property included the matrimonial home and also certain investment properties. The parties had been attempting for an extended period to agree a fair division of this matrimonial property. A proposal was made by the pursuer's agent that the defender (the wife) would convey to the pursuer her interest in the investment properties. In exchange, the pursuer would convey to her his interest in the matrimonial home. The defender would arrange for the pursuer to be released from the debt secured on the matrimonial home.

This, of course, is on the face of it a perfectly acceptable agreement in law. However, the letter containing the proposal contained the following words: "We also insist on agreeing a reasonable timescale for [the pursuer's] release. At this stage [the pursuer] is willing to remain on the mortgage product for at least twelve months or so and possibly longer."

No final agreement was reached on timescales. For this reason, the sheriff held that there was no binding compromise agreement.

On this point, the sheriff seems clearly correct. A term of "twelve months or so and possibly longer" is hopelessly vague, and clearly represents a negotiating position rather than anything capable of being construed as a binding obligation, even if agreed to. Something more precise is required before the defender can know what it is that she is obliged to do.

However, there was a preliminary point, with which this article is concerned. The agreement, such as it was, was never reduced to formal writing. Accordingly, the defender argued that, because it concerned rights in land, it was not enforceable.

The decision

The defender's argument was straightforward in its essentials. In terms of s. 1(2)(a)(i) of the 1995 Act (incorrectly cited at para [5] of the sheriff's opinion as "section 1 and section 2(a)(i)"), writing is required for the constitution of "a contract or unilateral obligation for the creation, transfer, variation or extinction of a real right in land". This, as mentioned above, is an exception to the general principle that writing is not required for the constitution of a contract. The 1995 Act goes on to provide for the required form of such writing. These requirements are not onerous: certainly they are less onerous than the previous law. In brief, a document is formally valid for these purposes if subscribed by the granter (*i.e.* signed at the end of the last page). Onerous or not, though, the requirements of the 1995 Act were not complied with. No issue of personal bar was raised, and no such argument would seem available on the facts. Accordingly, argued the defender, even if there was sufficient agreement for a valid contract, there was in fact no such contract because it was not in writing.

The sheriff, however, rejected this argument. For reasons that will be discussed below, the sheriff held that a contract for the compromise of an action did not require writing for its valid constitution, even when concerned with heritable property.

Discussion

The sheriff's decision in *DWS v RMS* may be criticised on two grounds: first, it is inconsistent with principle; and, second, it is inconsistent with earlier binding authority.

(i) The argument from principle

It is clear enough that writing is not required for an agreement just because it involves heritable property in some way. Some contracts affect land only incidentally, for example. The rules in the 1995 Act, as were the previous rules, are more precise than simply "all agreements concerned with heritable property need formal writing". Instead, as we have seen, writing is required for the constitution of "a contract or unilateral obligation for the creation, transfer, variation or extinction of a real right in land". Many contracts will have some relationship with heritable property without falling into that category.

With that in mind, it may be helpful to consider what compromise agreements actually do. Two possibilities may be identified. First, a compromise agreement may simply be an agreement of what the parties' rights currently are. For example, suppose that P raises an action against D for declarator that a particular area of ground belongs to P. If the parties enter into a compromise agreement in which D concedes that P's case is well-founded, then *ex hypothesi* no "creation, transfer, variation or extinction of a real right in land" is involved. The agreement does not envisage P <u>becoming</u> owner of the land in accordance with its terms. Instead, the agreement recognises that P is <u>already</u> owner. The 1995 Act would therefore not appear to require writing for such a compromise agreement.

Second, the compromise agreement may in some way regulate the parties' rights in heritable property anew. For instance, suppose that P and D are co-owners of an area of land. P raises an action for division and sale of the land. A compromise agreement is then entered into whereby a division of the land between the parties is agreed. Here new rights are

created. It is envisaged that P and D will go from being co-owners of the whole of the land to being respective sole owners of two separate areas of land. To bring this about, P must convey to D a *pro indiviso* share of one part of the land and D must convey to P a *pro indiviso* share of the remainder. Thus, new rights are created by the compromise agreement that did not exist before.

For the purposes of this article, we may call these two forms of compromise agreement respectively type 1 and type 2 compromises. A type 1 compromise agreement recognises existing rights; a type 2 compromise agreement creates new rights or varies existing rights. Of course, in practice many compromise agreements will be a mix of the two. For example, a compromise that recognises the pursuer's ownership of an area of land (type 1) may also make provision about liability for expenses of the action (type 2). Some compromises may also be difficult to classify. For example, suppose P and D, owners of neighbouring areas of land, are in dispute about the precise location of the boundary. A compromise is reached whereby it is agreed that the current boundary is on a particular line. To remove the possibility of dispute in the future, the parties are to execute an appropriate conveyance in each other's favour. On the face of it, this is a type 1 compromise, as it is an agreement as to the current position. Nonetheless, it must be given practical effect by formal conveyance, which looks like type 2. Nonetheless, the distinction seems sound in principle.

Assuming that this distinction can in principle be made, the important point for these purposes is the part of the compromise that is concerned with land, as that is where the dispute lies. On no view of things is an agreement on the expenses of litigation, for example, required to be in writing.

To illustrate the distinction, we may consider *Anderson v Dick* (1901) 4 F 68, one of the cases cited by Gloag in support of the statement quoted above. In that case, D was the feudal superior of land held by A. D raised an action against A for declarator of irritancy and for arrears of feuduty. A's agents wrote to D's agents offering to consent to decree in the action for irritancy, on the basis that D would not seek expenses. This offer was accepted by letter from D's agents. Neither letter complied with

the requirements for formal writing applicable under the law at the time (although, as they were subscribed by the respective agents, they would appear sufficient under the current law). Nonetheless, the Inner House held that the action had been effectively compromised. This, though, appears to have been a type 1 compromise. The irritancy had already been incurred. The agreement was in its terms merely recognition of that fact. D was not thereby granted any new right that he did not already have. On the argument presented here, therefore, formal writing would not be required.

By contrast, the alleged compromise agreement in *DWS v RMS* appears to be a type 2 compromise. The current ownership of the matrimonial home and of the investment properties was not in dispute. Instead, the alleged agreement was one creating a personal right in favour of each of the parties to become owner of heritable property belonging to the other. Those rights owed their existence to nothing other than the contract of compromise between the parties. The compromise, in other words, created new rights rather than simply expressing an agreed position on what those rights were already. The question then is whether a compromise agreement of this type requires writing for its constitution. The sheriff held that it did not. To see why the sheriff came to this view, we need to consider the sheriff's reasoning.

The sheriff considered (para [23]) that the question of law for decision was "whether a compromise agreement relating to heritage constitutes a 'contract...for the...transfer of a real right in land'." The text quoted by the sheriff is from the 1995 Act. As we have seen, contracts for the transfer of a real right in land require writing; other contracts, for the most part, do not.

The sheriff went on (paras [26]-[29]) to make a distinction between the contract of transfer, creating only personal rights; and the actual conveyance, transferring the real right in the property. This distinction is, of course, familiar from everyday conveyancing practice. The missives of sale give to the purchaser only a personal right to become owner; they do not themselves make the purchaser owner of the property. Only the disposition, when duly registered in the Land Register, can do that.

This is all very familiar, but it is not clear to this writer that it takes the sheriff to the conclusion that he has reached. After all, the distinction is recognised in the 1995 Act itself, which is clear that both contract and conveyance require writing when heritable property is involved. In addition to s. 1(2)(a)(i), requiring that the contract be in writing, s. 1(2)(b) requires writing for the "transfer...of a real right in land".

The sheriff's conclusion (para [29]) is that a compromise agreement "confers only personal rights. It is therefore not a contract for the transfer of a real right in land." With respect, that appears to be a *non sequitur*. Creating personal rights is all a contract for transfer of heritage ever does (unless, which is not relevant here, it also varies or discharges personal rights). Missives confer personal rights, and do not under any circumstances alter the real rights in the property. Nonetheless, it is accepted beyond any possibility of dispute that missives of sale constitute "a contract for the transfer of a real right in land".

The compromise agreement alleged to exist in *DWS v RMS* is a contract, by which each party is given a personal right against the other, requiring that other to transfer a right of co-ownership of land. It is not easy to see, therefore, how such an agreement can fail to be "a contract...for the...transfer of a real right in land" in terms of s. 1(2)(a)(i) of the 1995 Act. Such an agreement ought therefore to require writing for the very same reason that missives for sale of land require writing.

The 1995 Act does not directly address the issue of compromise agreements, but it is not easy to see any reason why they should be treated differently from other contracts. Erskine, in a passage cited by the sheriff in *DWS v RMS* (*Inst.* 3.1.2, cited at para [28]), gives the following justification for the special rule requiring contracts for the transfer of land to be in writing:

> "For in the transmission of heritage, which is justly accounted of the greatest importance to society, parties are not to be catched by rash expressions, but continue free, till they have discovered their deliberate and final resolutions concerning it by writing."

It is instructive to consider the views of the Scottish Law Commission, in making the recommendations that led to the 1995 Act. In its *Report on Requirements of Writing* (Scot Law Com No 112, 1988), while acknowledging that there are now other forms of property which have similar importance, the Commission argues (para 2.14) that transactions with heritage:

> "are *generally* still important. For most people, the purchase of their house is the largest, and most important, transaction they make in their lifetimes. There is still a strong case for a rule which gives parties to such a transaction time for consideration or reconsideration and which discourages them from concluding informal doorstep contracts without the benefit of legal advice."

This reasoning appears to apply just as well to compromise agreements. While the Commission does not here directly consider compromise agreements, it is noteworthy that its examples of contracts not to fall within this rule, although relating to land, are "contracts for gardening services and house maintenance which relate to heritage but only incidentally" (para 2.16). A compromise agreement, whereby the owner of land agrees to convey that land to another, has much more in common with everyday missives of sale than it does with a contract for gardening services: with the former, it is only the context that differs, not the substance of what is being done. A compromise agreement, if imposing an obligation to transfer ownership of land, is doing something that would certainly require writing if it was not done in the context of litigation. There seems no obvious reason why the context of ongoing litigation should make any difference to the question, and no such reason appears in the sheriff's opinion.

The same points may be made about the Outer House decision in *McFarlane v McFarlane* [2007] CSOH 75, relied on by the sheriff in *DWS v RMS* (paras [26]-[27]). That case involved a compromise agreement, constituted orally, that required one of the parties to convey heritable property to the other. Proceeding on a concession by counsel, the Lord

Ordinary held that such an agreement did not require writing. For the reasons already given, this decision also seems questionable.

(ii) The argument from authority

There is a further reason for thinking that the sheriff may have gone wrong in reaching the view that he did in *DWS v RMS*. In the course of his opinion, the sheriff referred to and purported to distinguish the decision of the Inner House in *Cook v Grubb* 1963 SC 1. This decision was not cited in *McFarlane v McFarlane*, the sheriff in *DWS v RMS* suspecting (para [26]) that this was because *Cook* "was thought to have been rendered irrelevant by the 1995 Act." Nonetheless, to this author at least, the decision in *Cook* appears highly relevant.

In *Cook v Grubb*, the pursuer had been an employee of the defender. He had previously raised an action against the defender on the basis that the defender had negligently caused injury to him in the course of his employment. This previous action was compromised through an oral agreement, including an agreement to re-employ the pursuer in a different capacity. The pursuer subsequently raised an action based on an alleged breach of that contract of employment.

The difficulty for the pursuer was that, according to the law as it stood at the time, a contract of employment for a term of more than a year fell into the category of *obligationes litteris* and so could only be constituted in writing. The pursuer therefore argued that this rule did not apply where the employment relationship was created in a compromise agreement.

Lord President Clyde, sitting in the Outer House, rejected this argument, holding (at pp. 7-8) that:

> “that new contract, whether arrived at independently or as an element in a compromise of some other claim, requires writ for its constitution...If therefore writing is necessary for the constitution of a right which one party seeks to enforce, that right must still be constituted by writ.”

The pursuer reclaimed. The Inner House, though, refused the reclaiming motion. They did so on the straightforward ground that a contract of this kind required writing, and that it made no difference that it formed part of a compromise agreement.

In *DWS v RMS*, the sheriff held (para [18]) that *Cook* could "easily" be distinguished. This was on the basis that it related to a contract of service rather than a contract for the transfer of ownership of land and that, in any case, the category of *obligationes litteris* had been abolished. On the latter point, the sheriff is clearly enough correct. The category of *obligationes litteris* has, however, been replaced. Simply to state that that category has been abolished does nothing to exclude the possibility that the same reasoning might apply in relation to obligations required by the 1995 Act to be constituted in writing.

As to the former point, it is notable that the court in *Cook* expresses itself in general terms. This is not a point specifically about contracts of employment. It is immaterial, therefore, that contracts of employment no longer require writing for their constitution. The *ratio* of *Cook* appears to be the following:

- There is a category of contracts that require to be constituted using writing in a legally prescribed form.
- The agreement presently before the court falls into that category. It is irrelevant that it was contained in a compromise agreement.
- Therefore, the agreement presently before the court requires to be constituted using writing.

This reasoning applies just as much to the alleged agreement *DWS v RMS* as it does to the agreement in *Cook*.

Conclusion

It is clear enough that a compromise agreement does not have to be in writing simply because it concerns land in some way, any more than that is the case with contracts generally. Equally, though, it has been argued here that the same rules apply to compromise agreements as to contracts

generally. There is no exception for compromise agreements from the requirements contained in the Requirements of Writing (Scotland) Act 1995. If a particular obligation requires writing, that is as much true in compromise agreements as it is elsewhere. Accordingly, if a compromise agreement is to create an obligation to transfer ownership of land, that obligation will only be validly constituted if it is created in writing.