OUTER HOUSE, COURT OF SESSION

[2021] CSOH 106

A121/20

OPINION OF LADY WOLFFE

In the cause

HUGH KENNEDY

Pursuer

against

(FIRST) THE RIGHT REVEREND PAUL BONNICI

(SECOND) THE RIGHT REVEREND JAMES WARREN CUTHBERT MADDEN

(THIRD) DENIS ALEXANDER

Defenders

Pursuer: E Mackenzie QC, Gardiner; Digby Brown LLP
Defenders: N Mackenzie QC, MacLeod; Keoghs LLP

20 October 2021

Introduction

The issues at debate

[1] The pursuer brings this action for personal injury as a consequence of alleged sexual and physical abuse said to have been perpetrated against him while he was a boarder in the mid-1970s at the Fort Augustus Boarding School ("the School") run by a Benedictine Community ("the Community"). The School was closed nearly 30 years ago; the trust associated with the Community's Abbey was (on the defender's averments) wound up

around a decade ago, and the then trustees may have been discharged. The trustees at the material time are all dead. However, the pursuer avers that there was insurance taken out and which, if a claim were made under it, would respond by indemnifying the trustees in respect of the pursuer's claim. He has therefore raised this action, calling two surviving trustees for the purposes of meeting his claim from the trust estate comprised of the (presumed) right of indemnity under that insurance.

The background

The pursuer

[2] The pursuer in this action seeks damages of £5,000,000 for alleged physical and sexual abuse while he was a boarder from about 1975, a year after he joined the School, and which continued for a time after he left the School in around 1977. On the pursuer's averments the principal abuser was the third defender, a monk and teacher at the School, but he alleges that two lay teachers, Taff Owen and the pursuer's PE and maths teacher, Hamish McDonald, also subjected him to abuse. The first and second defenders aver that Mr Owen and Mr McDonald are both dead.

The Abbey, the Trust Deed, the Trust and the Trustees

[3] A Benedictine community was established at Fort Augustus Abbey ("the Community" and "the Abbey", respectively) in about the 1920s. Initially the Community was an unincorporated association but a trust deed relating to the Abbey and the Community was registered in the Books of Council and Session in about May 1936 establishing a trust ("the Trust Deed" and "the Trust", respectively). It was explained in submissions that the Community was autonomous, in the sense that, while it was a member

of the Congregation of the Benedictines in England ("the English Congregation"), the English Congregation was not responsible for the Community, albeit it may be a repository for some papers relating to the School or the Community. The Community ran the School, which was fee-paying, as a business. The pursuer avers that members of the Community were appointed as trustees under the Trust Deed; that, consistent with the broad purposes of the Trust Deed, they employed teachers at the School; and that the trustees "exercised control over" the running of the School such as to render them vicariously liable for the delictual or tortious acts of the teachers, including the third defender and the lay teachers. (It is disputed that the express terms of the Trust Deed govern the operation of the School.) The pursuer identifies the four individuals who were the trustees under the Trust Deed in post at the time he was at the School ("the Serving Trustees"). All of these individuals are dead and are unlikely to have issue. Successor trustees were appointed from time to time, including the first and second defenders.

The defenders: the trustee defenders and the third defender

[4] The first defender and the second defender were assumed as trustees under the Trust Deed. They are both called as defenders in their capacity as trustees ("the trustee defenders"), not in their individual capacities. The second defender is averred to be the last known surviving trustee whose whereabouts are known. On the trustee defenders' averments, the School was closed in around 1993; the Abbey closed in 1999 and the Trust was wound up in around 2010 or 2011. The pursuer does not admit that the Trust has been wound up and it calls upon the trustee defenders to lodge the relative deed. On the first defender's averments, he was born in 1970 and was a trustee under the Trust Deed for only one year, from late 1999 to late 2000. The second defender was assumed as a trustee in late

2006 but (on his averments) ceased to have any involvement in the affairs of the Trust, after it was wound up. The pursuer does not admit these averments. The third defender, a former monk and teacher, did not enter appearance. At the time of the debate, he had been on remand awaiting trial on charges of sexual offences against the pursuer and against other boys who were at the School at the same time as the pursuer. By the time of the continued debate, the third defender had been convicted *inter alia* of lewd and libidinous conduct against the pursuer.

Debate

[5] While this action was not a commercial action, it was allocated to me shortly before the diet of debate. In light of the novelty and potential importance of some of the issues, I requested parties to produce reading lists in advance of the debate of the cases and productions to be referred to. Parties had also produced notes of arguments and one party took up the opportunity the court offered and provided an updated note of argument, responding to the other party's first note of argument. I am grateful to senior counsel for their careful and well-presented oral and written submissions, no doubt produced with the assistance of their juniors. I have had regard to all of these materials, together with the authorities produced in advance of the debate and the additional authorities provided for the continued diet of debate.

The parties' motions

[6] The trustee defenders assert that the pursuer's case is lacking in specification and irrelevant on a variety of grounds, and they seek dismissal of the pursuer's action (their first plea-in-law). In respect of the merits, the trustee defenders' position is that even if the

pursuer's averments were proved, it would not result in a finding of vicarious liability against the trustee defenders and that any insurance policy is neither a trust asset nor for the pursuer's benefit. Separately, they seek dismissal on the basis that a fair hearing is not possible for the purposes of section 17D(2) of the Prescription and Limitation (Scotland) Act 1973 (as amended) ("the 1973 Act" and "the fair hearing ground"), or that the substantial prejudice to the trustee defenders outweighs the interests of the pursuer for the purposes of section 17D(3) of the 1973 Act ("the substantial prejudice ground" and which, together with "the fair hearing ground" are referred to as "the limitation grounds"). The limitation grounds are the subject-matter of the second plea-in-law. Mr Neil Mackenzie QC, who appeared for the trustee defenders together with Mr MacLeod, confirmed that he was not instructed by the putative insurers and he had not seen any policy of insurance. He could not say if there was an extant policy. While separate answers had been lodged by the trustee defenders, he represented both of them at the debate. Mr Neil Mackenzie QC led at debate.

[7] The pursuer, represented by Mr Euan Mackenzie QC and Mr Gardiner, sought a proof or a proof before answer.

The core issues at debate

[8] The parties focused their submissions on the following issues:

1) <u>The trust patrimony issue</u>: Whether a trustee's (assumed) right to be indemnified under the insurance policy forms part of the Trust patrimony, and whether that patrimony subsists notwithstanding the winding up of the Trust (assuming it has been wound up);

2) The insurance issue: whether the pursuer has sufficiently specific or relevant averments of insurance or whether, in any event, any policy of insurance taken out by trustees in the past is *res inter alios acta*;

3) The vicarious liability issue: Whether the pursuer has relevant averments that the trustees at the material time (the Serving Trustees) were vicariously liable for the acts of the third defender and Mr Owen, or whether a term of the trust deed, of any discharge or of any other rule of law precludes liability of one trustee for another;

4) The limitation grounds: Even assuming the pursuer's case was otherwise relevant and specific, whether, nonetheless, his action is precluded by virtue of either subsections 17D(2) or 17D(3) of the 1973 Act.

The Trust Deed

The scope of activities covered by the Trust Deed

[9] At the beginning of his submissions, the trustee defenders' senior counsel appeared to put in issue whether the terms of the Trust Deed were habile to include the provision of education, the running of a school or to permit the employment of teachers by the trustees (he noted that there was no express power, for example, for the trustees to do so). In his submission, the objects of the Trust Deed were not expressly educational. There was nothing specific about running the School or the appointment of a head master. The Trust Deed was principally concerned with the management of the heritable assets of the Abbey and the Community, and he took the court through a number of the provisions of this character. In response to a question from the court, he confirmed that he was not inviting the court to consider whether the running of the School or the employment of teachers was

ultra vires the powers of the trustees (which appeared to be the implication of this submission, but from which Mr Neil Mackenzie QC drew back). He explained that for present purposes it sufficed to note the trustee defenders' position, because they relied on other defences.

The Trust purposes

[10] In respect of the Trust's purposes, the pursuer avers that:

> "The purposes of the Trust included to provide Roman Catholic schools, to maintain feeding, clothing and housing for children attending said schools and in doing and performing or causing to be done or performed any other act of an educational, religious or charitable nature benefitting or tending to benefit the Roman Catholic religion or the Order of Saint Benedict and the members thereof."

He also avers that the trustees held the assets in trust for the Community. The pursuer does not sue as a beneficiary under the Trust. In submissions, the pursuer's senior counsel took the court to the provisions he founds on (and of which the averments just quoted are a paraphrase). After defining the Trust estate, the Trust Deed contained an enabling provision to the effect that the trustees "hold and possess the right and power to administer as we consider fit and proper the Trust Estate", and that they do so *inter alia* for the "purposes and objects of religion, charity **or education**" connected with the Abbey "**in any manner of way**" (emphasis added). The Trust Deed also conferred specific powers on the trustees (a) for "maintaining … and enlarging … its heritable properties"; (b) for "**acquiring, providing, constructing, furnishing** … additional Roman Catholic **schools** …"; (c) for "**supplying books and all other** furnishings for the use of Roman Catholic **children attending the said and additional schools** and in awarding to them prizes and bursaries" (emphasis added).

Consideration of the Trust purposes

[11] The parties focused their submissions on the issues they identified (set out, above, at para [8]) and they were not, as I understand it, seeking a definitive ruling on the scope of the Trust Deed. Had this been a contested issue, I would not have been prepared to dismiss the pursuer's action on this basis (and which the trustee defenders did not move for). Having regard to the objects and purposes of the Trust Deed and the breadth of the powers conferred (see the words highlighted in the preceding paragraph), *prima facie* the terms of the Trust Deed were wide enough to encompass the running of the School, the employment of teachers (whether brother or lay) and the appointment of a headmaster as within powers incidental to and in furtherance of the objects of the Trust. If this is a live issue, it is one better resolved at proof and where parties have the opportunity to elicit any evidence relevant to the context in which the Trust Deed falls to be construed or the approach to be taken in circumstances where the Trust ostensibly supported the operation of the School for many decades.

The Trust Deed provision limiting liability of a trustee to his own intromissions

[12] The trustee defenders relied on a separate provision of the Trust Deed limiting a trustee's liabilities to his own intromissions with the Trust estate. (The trustee defenders' reliance on this provision of the Trust Deed *may* explain why they did not advance a *vires* argument: such a clause is unlikely to be effective in respect of a trustee's *ultra vires* acts.) The defenders relied on the following provision of the Trust Deed ("the limited liability provision"):

> "… we and our foresaids shall not be liable *singuli in solidum* nor for one another, but we declare that the liability of each of us and our foresaids shall be confined to his own personal intromissions with the Trust Estate or any part thereof committed to his

> individual charge; and further we declare that we and our foresaids shall be entitled to the whole other privileges and immunities of trustees according to the law of Scotland in relation to all questions, differences and disputes affecting and concerning ourselves and our foresaids and our respective rights privileges and powers relative to these presents and the Trust assets."

[13] On the hypothesis that the objects of the Trust and the powers of the trustees extended to the running of the School and the employment of teachers, the trustee defenders relied on the limited liability provision, as well as on the following propositions:

1) That as a matter of generality, a trustee was not normally liable for the acts or omissions of other trustees (much less were they liable for the acts of persons employed by other trustees). Reference was made to section 3 of the Trust (Scotland) Act 1921 ("the 1921 Act"), which implies a provision that "each trustee shall be liable only for his own acts and omissions and shall not be liable for the acts and intromissions of co-trustees and shall not be liable for omissions", unless the trust deed expresses the contrary;

2) That when new trustees are assumed, all that is conveyed to them are the assets of the Trust, not its liabilities;

I address this last proposition in my consideration of the Trust patrimony issue and the remaining matters in my consideration of the vicarious liability issue.

Discussion

Preliminary observations

[14] The starting point is that this is an action for personal injury arising from alleged historical abuse many years ago said to have been sustained while the pursuer was a child. By reason of the amendments to the 1973 Act, the usual limitation period that applied to such actions is disapplied (see section 17A(1) of the 1973 Act). No limitation period applies

to such claims and, indeed, by virtue of section 17D of the 1973 Act, the onus shifts to the defender to establish one or more of the grounds for withholding such an action from proof: these are the limitation grounds, discussed below. Assuming the pursuer has pled a relevant case and taking the pursuer's averments at debate *pro veritate*, he has suffered a legal wrong for which he seeks to hold the Serving Trustees vicariously liable, and which liability is to be satisfied by the Trust estate (if any) following his claim against the last known trustees.

[15] In the usual case (just described), the inability of a wrongdoer to satisfy a decree is irrelevant to the question of the wrongdoer's liability, though a wrongdoer's impecuniosity might be highly material to the utility of an action – if damages are the primary purpose of bringing it. In this case, by reason of the trustee defenders' averments that the Trust has been wound up (which is not a matter of admission), the pursuer seeks to overcome that difficulty by relying on a tract of authority that it is competent for a creditor on an estate to raise an action against the former testamentary trustees thereof, even if discharged, if it can be shown that there is a subsisting asset in the estate. If there is, then the estate cannot be said to have been finally wound up and an action by a third party creditor is competent. In this case, the pursuer seeks to extend that tract of authority to non-testamentary trustees and to found on the availability of the trustees' right of indemnity under an indemnity insurance as constituting the available asset and central to which was his analysis of the nature of the Trust patrimony (of which the right of indemnity is said to form part). The trustee defenders challenge the competency of these features of the pursuer's action, under the Trust patrimony issue. Parties were agreed that there is little authority on the nature of a trust's patrimony, which I now turn to consider.

The Trust patrimony issue

[16] While parties did not analyse the issues in this way, in my view, the pursuer's case on the merits is critically predicated upon four factors:

1) That, on the application of the dual trust patrimony analysis, there was a trust patrimony apart from the personal patrimonies of the individual trustees;

2) That the bundle of rights and liabilities of which the Trust patrimony was comprised included:

(i) The trustees' contingent right to be indemnified under the insurance in the event of a claim against them, *qua* trustee; and

(ii) The liability of the trustees for the acts and omissions of the teachers they employed and over whom they exercised control or conferred authority (giving rise to the vicarious liability issue);

3) That, given the existence of that contingent right to be indemnified, it could not be said that the Trust had been wound up and the Trust patrimony, at least to that extent, subsisted; and

4) That, the purpose of the pursuer's action, which was directed solely against the trustee defenders' in their capacity as trustees, was to make a claim in order, in practical terms, to compel the insurer to respond; and that such a constitutive action was competent.

The concept of a trust patrimony

The pursuer's submissions

[17] The pursuer relies on what has come to be known as the "dual patrimony" theory to argue that, in effect, the Trust's estate or trust patrimony has subsisted through time

regardless of the change of trustees and, further, that so long as there is an extant asset of the Trust, the Trust has not been fully wound up.

The trustee defenders' submissions

[18] The trustee defenders do not dispute dual patrimony, as a theory, but they contend that there is not one subsisting trust patrimony, but that there have been as many patrimonies as there have been trustees of the Trust. Each individual trustee's patrimony subsists only for the period during which he is a trustee. They also argue that the pursuer's reliance on the Trust estate or trust patrimony as a continuing entity involves an impermissible reification of the Trust, which in Scots law has no separate legal personality. This submission was developed as follows.

[19] The defender trustees submit that the pursuer's analysis conflates a partnership with a trust; while a partnership has separate legal personality (which, in some circumstances, will subsist notwithstanding a change in the partners), a trust does not. The pursuer's approach falls into the fallacy of reifying the Trust. The Trust patrimony does not subsist or have a continuing life of its own. Once constituted, a trust was no more than the bilateral relationship between the trustees and beneficiaries, and which was the essence of the fiduciary relationship or the fiduciary ownership by the trustees of a trust's assets.

[20] If the trust patrimony theory fell to be applied, properly understood, it meant that there were many trust patrimonies; there was not one trust patrimony with a continuing existence – which was the central fallacy of the pursuer's position. There was no scope for any transmission of any liability of the Serving Trustees to the trustee defenders. Any liability owed by the Serving Trustees was private to them. It was essential to know if the trustee concerned was acting in a personal or trust capacity; there was a presumption in

favour of the former. As a matter of specification, the pursuer simply asserted that the Serving Trustees were liable, but he failed to particularise what the individual Serving Trustees did or why they were liable.

[21] Even if the pursuer has pled a sufficiently specific case, he had failed to plead any relevant basis on which the trustee defenders could be liable for the (assumed) acts and omissions of the Serving Trustees.

Consideration of the dual patrimony theory

[22] The dual patrimony theory is a useful organising concept to explain the nature of a trust. Foremost in developing that concept were Professors *emeriti* GL Gretton and KGC Reid. Prof Gretton first explored the utility of the concept of "patrimony" to describe the bundle of rights and obligations comprising a trust's estate (the word "estate" itself being unhelpfully imprecise in meaning), as propounded by the French jurist Pierre Lepaulle in the early 20th century (see "Trust and Patrimony", in *Scots Law in the 21st Century: Essays in Honour of W A Wilson* (1996, Edinburgh) at pp 188 to 190). In a typically thought-provoking and incisive discussion, Prof Gretton considered the terminological advantages of "patrimony" (over, for example, the more common term of "estate"):

> "A more intelligent use of terminology would help us in many a tight stop. When we acquire rights, we tend to say they come into our ownership, then we end up in a muddle when we consider that many of these rights are not rights of ownership. A failure to distinguish patrimony from ownership underlies many of the muddles about trust, and indeed other matters.
>
> Patrimony (*patrimonium*, *patrimoine*, *Vermögen*) has in fact two senses. 'Estate' indeed shares this quality. In one sense it is the totality of assets, **but in a wider sense it means the totality of assets and liabilities… The broader sense is especially valuable for trusts,** because in a trust there is a segregation not only of assets but also (albeit subject to certain qualifications) of liabilities. So when we say that a trustee has two estates (or better, two patrimonies), we are using a rather effective concept." (Emphasis added.)

The concept was further developed, most notably in two articles by the same individuals, one by Prof Gretton "Trusts Without Equity' (2009) 49 (3) ICLQ 599 and the other by Prof Reid, 'Patrimony not Equity: The Trust in Scotland' (2008) 8 (3) ERPL 427; and their analysis was commended in the Scottish Law Commission's *Discussion Paper on the Nature and Constitution of Trusts* (Scot Law Com, DP no 133) 2006 ("*The SLC DP"*) (paras 2.16ff). The dual patrimony concept was given the judicial imprimatur of approval in *O'Boyle's Trustee* v *Brennan* [2020] CSIH 3; 2020 SC 217 ("*O'Boyle*"), in which Lord Drummond Young, giving the opinion of the court, observed: (at para 31):

> "…. The dual patrimony theory was put forward to explain the fact that the Trust estate is not liable for the trustee's own private debts, but is a distinct patrimony, with its own assets, rights **and liabilities**. This explains the fundamental principle, laid down in particular in *Heritable Reversionary Co Ltd* v *Millar*, that if a trustee is sequestrated or made subject to corporate insolvency procedures, the Trust property is not affected, but remains held for the purposes of the Trust." (Emphasis added.)

In the present context, several features of this analysis are worth emphasising: (i) that a trust is not a juristic person, but the trust estate or patrimony impressed with the Trust purposes exists as an autonomous or distinct fund; (ii) that a trust does not fail for want of any trustees; (iii) that the personal creditors of an individual trustee have no claim on the trust's patrimony held by that trustee and, conversely, a creditor of a trust (generally) has only a claim against the trust's patrimony and not against the personal patrimony of a trustee; and (iv) that the trust estate or patrimony is a fund whose constituent elements may change but without affecting the existence of the trust patrimony. What is uncertain, and sharply at issue in this case, is the nature of the trust patrimony (one patrimony or many patrimonies?), and of what it is said to be comprised (assets only, or assets and liabilities?).

One trust patrimony or many trust patrimonies?

[23] I first address the trustee defender's submission that the pursuer's approach involves an impermissible reification of a trust and that there are many trust patrimonies, the implication being that these were specific to each trustee and subsisted only for so long as an individual trustee remained in post. In relation to the first point, it is trite that, in contrast to a partnership or an incorporated company, a trust has no separate legal personality in Scots law. However, it has long been recognised (and it is implicit in section 22 of the 1921 Act), that the trust estate or patrimony will subsist even if at a given point in time there are no trustees in office. See Lord Drummond Young's comments to that effect in *Aitkenhead* v *Fraser* [2006] HCJAC 51, 2006 JC 231 ("*Aitkenhead*") at para [7]: "On occasion the trustees may fail, through death or resignation or because a corporate trustee is struck off. In such a case the **trust continues in existence** and the trust property remains impressed with the Trust purposes…" (emphasis added). A trust without any trustees in post does not mean a trust or its estate ceases to exist; it simply means that there is no one in whom the trust estate is presently vested and able validly to intromit with it or be held liable in respect of claims against it. While in those circumstances no one holds the trust estate as owner, the trust estate does not become *bona vacantia*. Upon the appointment of new trustees, the trust estate vests in them by operation of law. Accordingly, the fact that a trust estate subsists (notwithstanding the absence of trustees) may resemble the attributes of a juristic person, but it remains the case that the trust has no separate legal personality in Scots law. Contrary to the trustee defenders' submission, the trust patrimony analysis does not impermissibly reify the Trust or constitute incorporation by the back door.

[24] In relation to the trustee defenders' submission that there are as many trust patrimonies as there have been trustees, this appears to proceed on the misapprehension

that a trust's patrimony exists only when it is held by one or more trustee, and then only as discrete or divisible funds in the hands of each trustee. In my view, this is incorrect. Viewed from the perspective of an individual trustee, such a person is vested with his or her own patrimony and, separately, with a joint share of the trust's patrimony – hence the *dual* patrimony (trust and personal) in the hands of that individual. Each patrimony in the hands of an individual trustee – trust and personal – is insulated against the liabilities of the other. Their individual shares of the trust patrimony are separate from their individual personal patrimonies. If there is more than one trustee, each will have a joint share of the whole trust patrimony (ie his or her share of the trust patrimony) as well as hold his or her individual patrimony. It is trite that where there is more than one trustee, they own the trust property jointly and not as common property. That distinction is important because when a trustee ceases to be a trustee, his or her share reverts back to the remaining trustees; it does not subsist as a distinct asset or pass to the trustee's personal representative. If there are multiple trustees, each has a joint share in the trust estate. However, that is not the same as saying that the trust estate has many patrimonies – either because there is more than one trustee at any one time, or because there are successor trustees over time.

[25] Moreover, the divisibility of the joint ownership of the trust patrimony among several trustees (when there is more than one) does not mean that there are multiple trust patrimonies of the trust concerned. Rather, viewed from the perspective of the trust (as opposed to the individual trustee's interest in or joint ownership of the property it comprises), the trust patrimony continues in existence as a distinct unitary patrimony impressed with the trust purposes. If there are multiple trustees, having joint shares in the trust patrimony, this does not mean the trust patrimony becomes separate patrimonies in the hands of each trustee. By contrast, if there are no surviving trustees, the trust patrimony

nonetheless subsists (it does not disappear) even though for a time it is not vested in any person with powers to intromit with it. This is a crucial difference of a trust's patrimony from a juristic person. A wound up company must be restored, before a constitutive action against it may be made (as is now commonly done by individuals claiming against former corporate employers who have been wound up, seeking to hold them liable for alleged exposure to asbestos with a view to triggering indemnification under the corporate employer's liability insurance). As a trust has no separate legal personality, it cannot be revived. The pursuer's target in this case is not the Trust, but the asset it says exists in the form of the contingent right of indemnification under the insurance policy. Accordingly, I reject the contention that there are multiple trust patrimonies. In my view, the analysis that better accords with the features of a trust in Scots law, is that which recognises the subsistence and continuity of a unitary trust patrimony (even if owned by more than one trustee at a time, or over time). I next consider what comprises a trust's patrimony.

The nature of the trust patrimony: is it comprised of assets only, or assets and liabilities?

[26] In submissions, the pursuer referred to the Serving Trustees' right to be indemnified as an asset forming part of the Trust patrimony. (I use "assets" in this context in the broader sense of all physical and intangible assets or all real and personal rights.) While I consider the nature of a right of indemnification below, the prospect of indemnification does not generally arise until a claim is made or established against the trustee. Hence it is necessary first to consider whether the Trust patrimony includes liabilities. As is clear from the passages quoted above (in para [22]) from Prof Gretton's analysis, and adopted by Lord Drummond Young in *O'Boyle*, the wider definition of "trust patrimony" is accepted as being the position in Scots law, and it includes liabilities as well as the bundle of personal

and real rights. That case is binding on me but, in any event, the inclusion of liabilities as part of the trust patrimony (or, perhaps more precisely, that the trustees hold the trust assets subject to any liabilities established) is consistent with the nature of a trust and trustee's powers and duties as understood in Scots law. While in their analysis of this issue, the trustee defenders focused on the mechanics for the transfer of a joint share of the assets to an incoming trustee as the defining feature of a trust patrimony, in my view that is an incomplete analysis. It would be an extraordinary outcome if the effect of a change of trustees resulted in a form of "debt-washing", freeing the trust estate from any liabilities incurred by or during the tenure of the outgoing trustees while they were in office. (This is, of course, entirely separate from any individual liability incurred by trustees.) In my view, the trust patrimony that vests in a new trustee vests *tantum et tale*, in similar fashion to the vesting of the estate of a sequestrated debtor in his or her trustee in sequestration.

[27] In the present context, the fact that a trust's patrimony encompasses liabilities is relevant, because the pursuer's avowed purpose of the action is constitutive; that is, to establish a liability against the trustee *qua* trustees in order to have (it is hoped) the benefit of any indemnity provided by insurance to any trustee found vicariously liable. It must be stressed that, consistent with the trust patrimony concept, if one or more of the trustee defenders is found vicariously liable, the creditor of the trust patrimony (in this case, the pursuer, if successful), has recourse only against the trustee defenders' trust patrimony not their personal patrimonies. The personal patrimonies of the trustee defenders are not at risk, even if the pursuer's action is successful. It is important to stress this, as one of the trustee defenders' criticisms of the pursuer's case is that there are no allegations of personal wrongdoing on their part. This is correct, but misses the point. The pursuer emphasises that the trustee defenders are not called as individuals. The trustee defenders are also

critical that the pursuer does not explain how the trustee defenders – appointed years after the events the pursuer complains of – can be liable for the acts and omissions of their predecessor trustees. This may reflect the trustee defenders' misunderstanding of the pursuer's reliance on the continuity of the trust patrimony (assuming there is a relevant right of indemnity within the scope of an insurance policy). The pursuer is not, if I understand his case correctly, seeking to hold them personally liable for any default of the Serving Trustees. He is seeking to hold the last known trustees answerable in their status as trustees for a subsisting liability incurred by predecessor trustees and to be met from the trust patrimony.

[28] I return to the defender trustees' criticism. In my view, what the pursuer proposes does not involve the reification of a trust, nor does it lead to "incorporation by the back door", as the defender's senior counsel put it. The pursuer's case is not predicated on the Trust having separate legal personality. It is based on the prospect of:

(i) establishing that the Serving Trustees were vicariously liable for the acts of their employees, including the third defender and the lay teachers (I consider this below), and

(ii) holding the trustee defenders' liable as the last known trustees, on the hypothesis that the Trust patrimony subsists (giving rise to the insurance issue).

I next consider the trustee defenders' challenge to the competency of pursuer's action.

The trustee defenders' challenge to the competency of the pursuer's action

[29] The trustee defenders challenge the competency of the pursuer's action. In support of his submission, senior counsel for the trustee defenders referred to the case of *Dunn* v *Britannic Assurance Co Trust Deed* 1932 SLT 244 ("*Dunn*"), in which the Lord Ordinary

declined to appoint a judicial factor to the estate of a deceased person where the purpose of that application was to seek transfer of the benefit of the deceased's policy of insurance to the pursuer. The principal deficiency the court identified was the absence of any claim establishing the deceased's liability to the pursuer and the improper use of the power to appoint a judicial factor to elide that omission. As the trustee defenders' senior counsel put it, the court in that case would not allow the presence of insurance to "overcome radical defects".

The pursuer's position

[30] In defending the competency of his action, the pursuer founds strongly on observations made in the recent case of *Forbes* v *Mclean* [2018] CSOH 88; 2018 SLT 877 ("*Forbes*"). In *Forbes* Lord Clark held that an action by a family member of a man who died as a result of alleged exposure to mesothelioma raised against the executor on the estate of a former partner in the partnership which employed the deceased was competent. In coming to that view, Lord Clark undertook a careful review of the authorities, including *The Assets Co Ltd* v *Falla's Trustee* (1894) 22 R 178 ("*Falla's Trustee*") and the later *Assets Company Ltd* cases. (Two cases brought by The Asset Company Limited against separate defenders were heard together on the merits, but advised separately: see *The Assets Company Ltd* v *Bain's Trustees* (1904) 6 F 692, advised by the First Division, and *The Assets Company Ltd* v *Phillips' Trustees* (1904) 6 F 754, advised by the Second Division. Those reports were preceded by the report on certain preliminary matters in those cases, advised by the Second Division: see *The Assets Company Ltd* v *Bain's Trustees* and *The Assets Company Ltd* v *Phillips' Trustees* (1904) 6 F 676.) Lord Clark relied in particular on *Falla's Trustee* and the first of the *The Assets Company Ltd* cases, and he regarded these authorities as conclusive of the competency of

raising an action against testamentary trustees (even if they had been discharged and the trust estate distributed), and he saw no reason why that tract of authority could not be extended to executors. The textbooks he was referred to, namely Wilson and Duncan, *Trusts, Trustees and Executors* at p 49 and the *Stair Memorial Encyclopaedia of Scots Law* (reissue) on "Trusts, Trustees and Judicial Factors" at paragraph 2.16, supported the competency of a creditor suing a trustee for the purpose of constituting a claim, notwithstanding the trustee's discharge by the beneficiaries. In passing, Lord Clark made the following observation (at paragraph 17), concluding with a rhetorical question:

> "The present case focuses on the discrete legal point as to the relevancy of the claim made against an executor, who avers that he has been discharged, for the purposes of constituting a claim against the estate of the deceased. That is the point of law at issue. There is, however, a wider practical and policy question, which was adverted briefly in submissions, the answer to which flows from the decision on the legal issue in dispute. It is this: where an employee claims to have suffered personal injury at the time of his employment and the employer was either a partner in a partnership or a sole trader, who has died, **can the former employee (or his family members if he is also now deceased) sue the executor of the former partner as a sole trader, perhaps long after the executor has ingathered and distributed the estate, as a means of seeking to cause the insurers under the employers' liability insurance policy to meet the claim?**". (Emphasis added.)

In *Forbes*, Lord Clark held that it was competent for such an individual to raise an action with a view to taking a decree to constitute a valid claim against the estate. Such an action was referred to as a decree *cognitionis causa tantum* in the older authorities Lord Clark canvassed (eg see Lord President Kinross in *The Assets Co Limited* v *Bain's Trustees* (1904) 6 F 692 at p 704 ("*Bain's Trustees*")). The pursuer founds strongly on the passage just quoted, and on Lord Clark's later answer (at paragraph 33 in *Forbes*) to his rhetorical question:

> "Although this was not the subject of submissions, the short point of principle might simply be that **where the right to claim on an insurance policy formed part of the estate when the executor was appointed**, and a **subsequent claim by a creditor of the estate would allow such an insurance claim to be made, the estate has not been the subject of a final distribution** and a case such as the present can be brought to assist in accessing the rights under the policy".

In reply, the trustee defenders submitted that the facts in *Forbes* are very different from the instant case and, in any event, that *Forbes* was wrongly decided and should not be followed. The presence of fraud was a significant factor in the cases Lord Clark analysed and any rule of law derived from those cases should be confined to cases involving fraud.

Consideration of the trustee defenders' competency challenge

[31] Dealing first with the case of *Dunn* relied on by the trustee defenders, in my view, *Dunn* is readily distinguishable from the present case. First, the *ratio* of the decision in *Dunn* was that what the pursuer contemplated in that case was not competently within the statutory power for appointment of a judicial factor. The pursuer here is not seeking the appointment of a judicial factor. Secondly, the purpose of the pursuer's action in this case, seeking to constitute a liability against the Trust estate, is to overcome the very deficiency identified by the court in *Dunn*, namely the absence of a claim in that case establishing the liability of the deceased. Furthermore, unlike the pursuer in *Dunn*, the pursuer in this case is not seeking the direct "transfer" to him of the benefit of any insurance policy.

[32] Turning to the case of *Forbes*, I am not persuaded that Lord Clark's decision is incorrect, as the trustee defenders submitted, or that his conclusion as to the competency of the kind of action contemplated, which he derived from the authorities he considered, should be confined to fraud. No rationale was offered for such a restricted reading, and which is not supported by a consideration of those authorities. It cannot be right that a discharge by beneficiaries can preclude a claim brought by a creditor of the estate with a view to constituting a claim against it: that was the rationale provided by the Lord President in *Bain's Trustees* in upholding the competency of the claim made in the case before him.

Separately, there is ample authority that a creditor may obtain a decree *cognitionis causa tantum*, being a decree against the estate (and not the person), made for the purpose of ascertaining the amount of a debt owed by the estate. Conventionally, such an action is declaratory. That is not what the pursuer seeks here, but the pursuer's action is sufficiently analogous in seeking a finding against the trustee defenders *qua* trustees for the purpose of ultimately having the benefit of any indemnity provided to them under any policy of insurance. The critical point is that the trustee defenders are sued solely in their capacities as trustees, and not as individuals, and as the last known trustees having right to intromit with any residual trust patrimony comprised of the contingent right of indemnity.

[33] I accept as competent in principle that, where an estate has not been the subject of a final distribution, it is competent for a third party creditor to bring a claim with a view to it being satisfied from the available (or new-found) estate. (One of the specialities of this case is that the asset relied on is a contingent right of indemnity.) The mechanics of how that may be done may be less than straightforward where the estate is or was in the hands of executors or trustees (as the case may be), as is illustrated by the *The Asset Company Ltd* cases and *Forbes*. There may be additional specialities where the claim sought to be constituted involves a trust as the debtor (cf Lord Drummond Young's comments on the proper form of indictment of trustees, in *Aitkenhead*, at paras [7] to [9]). Any mechanical or procedural questions arising can be addressed going forward.

[34] In this case, the pursuer contends that the Trust has not been subject to a final distribution and it is for this purpose that he relies on the insurance policy said to be in place and capable of responding, in the form of an indemnity of the trustees. I have determined that such an action is competent. In my view, the trustee defenders' challenge to the relevancy of the pursuer's case, based on a continuing trust patrimony, fails.

[35] At the end of paragraph 32 in *Forbes*, Lord Clark noted a number of matters that were uncertain (eg the question of how, when and in respect of whom any insurance claim might become an asset of the estate), which would have required proof. Many of those uncertainties are present in this case and, subject to the trustee defenders' remaining relevancy challenges, will also require proof. In addition, whether the trustees have been discharged or whether the Trust in this case has been subject to a final distribution are also matters which requires evidence. As noted, the pursuer calls on the trustee defenders to lodge any discharge or deed of winding up of the Trust. If there has been no winding up of the Trust, the circumstance I described above (in paragraph [15]) would not arise and the pursuer's case becomes a more straightforward one that would fall within the terms of the kind described in paragraph [14].

[36] Had I not upheld the relevancy and competency of the pursuer's action as, in effect, a constitutive one against the last known trustees, I would not have been prepared to dismiss it on this ground without evidence that the Trust has, in fact, been wound up. Although this was a matter touched on only lightly in submissions, whether the Trust has been wound up may be a significant issue, and which may not admit of an obvious answer. *Prima facie* the Trust was a charitable or public one, given its objects and purposes. That may give rise to an important distinction. The role of trustees of private trusts, or of executory or testamentary trustees on the estates of a deceased testator, is to ingather the estate and (after satisfaction of the liabilities) to distribute the estate to the beneficiaries in accordance with the testamentary provisions. Once the trust estate has been distributed and the testamentary purposes fulfilled, the trustees and executors are discharged. However, even in such a case, as is clear from *Falla's Trustee* and from the observations of Lord President Kinross in *The Assets Company Ltd* v *Bain's Trustees* (1904) 6 F 692 at p 704 to 705, such an action is

competent and the beneficiary's discharge of the trustees or executors cannot be to the prejudice to a claim of a third party creditor. The pursuer in this case is such a third party creditor. The difficulty, however, is that the winding up of a public or charitable trust generally requires different and more formal procedures usually involving the court. So, for example, if the objects of the Trust have failed (following the closure of the School and the Abbey), the trust estate could be transferred to a different trust pursuing similar purposes under a *cy près* scheme. Absent that, or some formal court oversight, it would not have been open to the last trustees of the Trust simply to realise the assets of the trust – which remain impressed with the trust purposes- and apply these for purposes outwith those of the Trust. It is by reason of these potential issues that, even had I been with the trustee defenders on the competency issue they raise, I would not have been prepared to uphold such a challenge without a proof of the critical fact on which the competency challenge is founded, that is, whether the Trust has in fact been wound up.

The insurance issue

The pursuer's averments

[37] The pursuer does not seek to hold the trustee defenders personally liable. He calls them only in their capacity as trustees of the Trust. He explained, under reference to *Forbes*, that the purpose in so doing was to constitute a claim against the last known trustees with a view to triggering the insurer's obligation to indemnify them. The pursuer avers the steps he took, prior to the raising of this action, to contact the Royal Sun Alliance (whom he was given to understand were the insurers), and he placed various calls on it and on the trustee defenders in relation to the terms of any policy of insurance. In relation to the policy of insurance, the pursuer avers:

> "The trustees of said Trust took out insurance in relation to the running of the Abbey and the school. There is a policy of insurance in force in relation to the events that form the subject matter of the present proceedings. Said policy was issued by Royal and Sun Alliance. Said policy **remains in force in relation to the events that form the subject matter of the present proceedings. Said policy forms part of the trust's property. The first and second defenders are entitled to claim, and seek indemnity, under said policy in relation to their liability as trustees arising from the subject matter of the present proceedings**. In these circumstances, the trust estate has not been subject to a final distribution." (Emphasis added.)

The pursuer also calls upon the trustee defenders to aver what steps they have taken to investigate the pursuer's claim or to trace contemporaneous witnesses. They are also called upon to lodge in process all papers relating to the Abbey and the School, as well as the deed winding up the Trust.

The trustee defenders' challenge to the relevancy and competency of the pursuer's reliance on any insurance that was or is available to the trustee defenders or the Serving Trustees

[38] The trustee defenders' position is that the insurance is neither an asset of the Trust nor for the benefit of the pursuer. Moreover, they submitted that if there were any insurance policy, it was *res inter alios acta*. It was not competent for a third party to attempt to proceed directly against the insurance company, which appeared to the trustee defenders to be the pursuer's stated intention. The trustee defenders also criticise the pursuer's averments for want of adequate specification. The trustee defenders' final challenge was that, even if the pursuer could competently engage any obligation of indemnification on the part of the insurers, whether there was any obligation to indemnify necessarily turned on the particular policy wording, as was evident from the case of *Burnett* v *International Insurance Company of Hanover Trust Deed* [2021] UKSC 12; 2021 SLT 623 ("*Burnett*"). The trustee defenders' senior counsel was not clear why any insurance the Serving Trustees may have had (or may have), would be of any relevance to the trustee defenders.

The pursuer's reply on the insurance issue and the constitutive nature of his action

[39] In reply to the specification point, the pursuer's Senior Counsel, Mr Mackenzie QC, explained that the pursuer's averments were based on the information the trustee defenders' agents had themselves provided in pre-litigation correspondence. He also explained that, as at the date of the debate, there was an outstanding specification for the recovery of documents, which included the terms of the insurance cover. The pursuer's position was that, if there were any force in the trustee defenders' criticism of a lack of specification, the court should afford him an opportunity to amend. In relation to *res inter alia actos*, the pursuer was not seeking to enforce the insurance policy directly.

Consideration of the insurance issue: does the pursuer have relevant and sufficiently specific averments?

[40] On the question of the availability or scope of any insurance, in my view those are matters that cannot be determined without proof. The availability of insurance is not generally a threshold or legal requirement for a competent or relevant action of personal injury, and the absence of cover as between the insurer and the trustees, is not a valid reason to bar a claim by a third party against the trustee, if that claim is otherwise well-founded. In this case, however, the pursuer relies on the existence of an insurance policy whose terms are habile to respond to the pursuer's claim against the trustees, and therefore as constituting a contingent right of indemnity in favour of the trustees (and hence an asset of the trust patrimony), in order to bring himself within the tract of authority (considered above) permitting a constitutive action against an executor or trustee of a wound up estate on the basis that the estate formerly under their control has not been the subject of a final

distribution. I have already rejected the trustee defenders' competency challenge and indicated that, even had I been with the trustee defenders on this issue, proof would still be required to establish whether the Trust has in fact been wound up.

[41] In relation to the trustee defenders' reference to *Burnett*, it is of course correct that the terms of any insurance will necessarily determine whether any particular claim is covered. The trustee defender's principal criticism is their challenge to the pursuer's specification of the insurance policy. The pursuer is necessarily a stranger to any liability insurance that may exist and may yet respond. By contrast, the trustee defenders potentially have the benefit of that cover as the insured. I bear those features in mind when assessing the trustee defenders' criticisms of the adequacy of the pursuer's averments or their assertions of any prejudice flowing from a lack of specification. There is also the important consideration that there is an outstanding specification of documents. The trustee defenders do not aver that there is no such policy. The tenor of the information their agents provided to the pursuer's agents, and which formed the basis of the pursuer's averments (quoted above), would strongly suggest otherwise. I am not persuaded that the pursuer's averments are so lacking in specification as to be irrelevant or prejudicial to the trustee defenders. Had I considered otherwise, I would have acceded to the pursuer's request to allow him to consider an amendment. On balance, if I hold other elements of the pursuer's case to be relevant, the existence and scope of the insurance policy may be one of the matters to be determined at any proof or, more likely, at a preliminary proof.

[42] I should briefly address the proper characterisation of any claim under the insurance policy. In my view, the trustee defenders' prospective claim under the insurance policy is properly characterised as a contingent liability, as that concept is understood in Scots law, namely, as "an obligation whose enforceability is dependent on the occurrence of a future

event that may or may not occur": *per* Lord Drummond Young in *Liquidators of the Ben Line Steamers Ltd, Noter* [2010] CSOH 174, 2011 SLT 535 ("*Ben Line Steamers*") at paragraph 24. (The facts of that case are instructive as to just how contingent a contingent obligation may be.) For present purposes, it suffices to note that Lord Drummond Young referred to an insurance policy as the classic example of a contingent obligation (*ibid*, at paragraph 25) and he held that it was sufficient for there to be a subsisting contingent liability, if there were "some sort of obligation, normally either contractual or statutory" (*ibid* at paragraph 25). (In that case, Lord Drummond Young rejected the noter's argument that the claim of the pension fund trustees was not in existence prior to the winding up of the company, notwithstanding that their claim depended on two amendments to the trust deed which post-dated the commencement of the company's liquidation. He held it was a relevant contingent liability, and so habile to found the pension trustees' claim in the company's liquidation.) In this case, the contractual obligation is that embodied in the indemnity insurance on which the pursuer relies (and whose averments I have held to be relevant) and "the future event that may or may not occur" is the claim by the pursuer against a trustee insured under the insurance. In other words, a relevant contingent obligation incumbent on the insurers (and a correlative right of indemnification in favour of the trustees) subsisted at the date of any (presumed) winding up of the Trust and which, for the reasons already explained, may competently found the kind of constitutive action the pursuer wishes to establish against the trustee defenders.

[43] In relation to the other ground of challenge, I am persuaded that the maxim *res inter alios acta* has no application in this case, for the simple reason that the pursuer is not making a direct claim against the insurers. The pursuer is seeking to establish the vicarious liability of the Serving Trustees for the alleged abuse by several of the lay teachers at the School, and

to call the last known trustees in these proceedings as the vehicle for satisfying any claim, if established after proof, with a view to triggering their right to be indemnified against such claims under any insurance policy.

[44] That gives rise to the personal and vicarious liability issues, to which I next turn.

The question of the trustee defenders' personal liability and their reliance on section 3 of the 1921 Act and on the limited liability provision in the Trust Deed

[45] Before turning to the vicarious liability issue, I should address the incidental question of any personal or primary liability on the part of the trustees. As noted above, the trustee defenders rely on section 3 of the 1921 Act and on the limited liability provision in the Trust Deed as protecting them from the pursuer's claim, whether advanced against them directly or via any vicarious liability on their part for the Serving Trustees. On this matter, I accept as well-founded the submission of the pursuer's senior counsel that those provisions exclude the trustee defenders' personal liability, and that they cannot exclude a liability arising as a matter of law. Accordingly, those provisions have no application in a case where, as here, the pursuer expressly does not sue the trustee defenders in their personal capacities. This does not deprive section 3 or the limited liability provision of effect; those provisions may be the natural counterbalance to the presumption that when trustees contract, they do so in a personal capacity. (While the trustee defenders relied on that presumption, as I understood it, in relation to the Serving Trustees' conduct, whether or not they acted in their personal capacities in respect of the running of the School or the employment of teachers is necessarily a matter for proof.) The trustee defenders' reading of these provisions, if upheld, would lead to a remarkable result. Given that, generally, a claim against a trust is made by calling all of the trustees in office (see *Aitkenhead*, *ibid*), the logic of

the trustee defenders' submission would mean that, if there were any change in the composition of the body of trustees, an action would founder (if it necessarily had to be advanced against the specific individual trustees). The same difficulty would arise in respect of any contract entered into by the trustees *qua* trustees. Strictly, there is no legal person in the form of a trust to be bound by the acts of the trustees, acting as individual trustees or corporately, but there is no doubt that any liability established, eg in contract or delict, would be met from the trust estate they administer. Although made in relation to a finding of expenses (rather than of contractual or delictual liability), Lord President Dunedin's observation in *Merilees* v *Leckie's Trustees* 1908 SC 576 at 579, that "a finding for expenses against the trustees would carry liability against the trust-estate", is apposite.

[46] As noted, the trustee defenders found on the proposition that, in the absence of express stipulation to the contrary, trustees are personally liable to parties with whom they transact (A Mackenzie Stuart, *The Law of Trusts* (1932), p358). If they were, then no question of vicarious liability could arise. As I have indicated, this is not a matter that can be determined at debate and the question of whether the Serving Trustees were acting in a personal capacity would be an ancillary matter for any proof.

The vicarious liability issue

The pursuer's factual averments

[47] The pursuer makes detailed averments of the circumstances in which he was physically abused, thereafter groomed and then regularly sexually abused by the third defender. He avers that he reported the abuse to the then headmaster, Father Davidson, but he was told not to worry. Nothing was done. The pursuer also makes detailed averments about the places where the abuse was said to have occurred (in the dormitory and in areas

where the third defender arranged to be alone with the pursuer). The pursuer also avers that others reported abuse at the School at the time to the same headmaster:

> "There were other allegations made against the third defender, and other monks at Fort Augustus Abbey, of sexually abusing pupils at the school. In particular, another pupil was sexually assaulted by the third defender in 1976. That other pupil told his parents of the abuse when he returned home for the summer holidays that year. That pupil's parents met with Father Davidson around September 1976 to discuss the third defender's abuse of their son. Around that time the third defender returned to Australia."

Notwithstanding the third defender's departure, Mr Owen then began to subject the pursuer to abuse, as well as another pupil (whom he names in the pleadings). This included the pursuer being taken off campus to an isolated cottage Mr Owen owned. This abuse continued after the pursuer left the School, when Mr Owen would prevail upon him to stay with him at a hotel in Inverness.

The pursuer's averments of fault

[48] The pursuer's principal averments of fault are as follows:

> "The pursuer's claim is based on common law. The sexual and physical abuse by the third defender, the sexual abuse by Mr Owen, and the physical abuse by Mr McDonald, all constituted assaults and intentional delictual wrongs. **The first and second defenders are vicariously liable for the sexual and physical abuse perpetrated by monks and lay teaching staff, including the third defender and Mr Owen, while the pursuer was a pupil at Fort Augustus. The perpetrators were the employees of the trustees. They were appointed by the trustees. They were put in a position of control over the pursuer by the trustees.** The abuse by Mr Owen after the pursuer had left Fort Augustus was a continuation of the abuse that commenced while and because Mr Owen was a teacher at the school. The conduct of Mr Owen after the pursuer left the school is indivisible from that which occurred while the pursuer was a pupil at the school. **The first and second defenders are vicariously liable for Mr Owen's abuse of the pursuer after he left the school.** But for the earlier abuse, Mr Owen would not have been in a position to continue it." (Emphasis added.)

I did not understand the trustee defenders to take issue *per se* with these averments of duty. Their challenge is to the basis on which the pursuer purports to direct a case against the Serving Trustees or against them, based on vicarious liability. The pursuer's averments of primary duty directed against the Serving Trustees are in the following terms:

> "*Separatim* the trustees, and their employee, Father Davidson (for whose acts and omissions they are responsible), had a duty to take reasonable care for the health and safety of pupils at the school and to avoid causing them unnecessary injury. They had a duty to take steps to minimise the risk of pupils at the school suffering abuse. They had a duty to devise, implement and enforce a system of supervision to ensure that monks and teachers at the school were not able to spend time alone with pupils at the school in circumstances where abuse could occur. They had a duty to put procedures in place whereby pupils and others at the school could report concerns about inappropriate behaviour. They had a duty to properly investigate any such concerns. In each and all of these duties the trustees and Father Davidson failed and by their failure caused loss to the pursuer. They failed to take any steps to minimise the risk of pupils at the school suffering abuse. They failed to put any procedures in place whereby pupils and others at the school could report concerns about inappropriate behaviour. They did not take reasonable care to ensure that staff employed at Fort Augustus were properly supervised when they worked with children. They did not properly respond to allegations of sexual abuse by the third defender that had been made by the pursuer and others, namely, the parents of the other pupil hereinbefore condescended upon. They failed to take steps to properly investigate the extent of abuse at the school after the allegations against the third defender were made and whether any procedures to prevent or minimise the risk of staff abusing pupils were effective. Any reasonable and prudent persons involved in running a boarding school would have taken such steps, because such steps were obvious, in particular, after allegations of sexual abuse of pupils had been made."

The pursuer's averments of vicarious liability and the trustee defenders' calls

[49] The pursuer's averments of vicarious liability of the trustees are as follows:

> "The trustees were involved in the running of the school. They **exercised control over the running of the school**. **They had power under the trust deed to enter into any contract or agreement, or to do any other act relative or incidental to or necessary for the performance or attainment of any purpose and object of the trust, including the running of the school.** They **appointed the head master** of the school. The trustees **employed teachers at the school**. The school was a fee-paying school. It was run as a business."

[50] The defenders make the following calls on the pursuer to aver and vouch:

> "(i) the basis upon which it is asserted that the trustees of the St Benedict's Abbey Trust exercised control over the running of the school;
>
> (ii) the basis upon which the said trustees appointed the headmaster of the school;
>
> (iii) the basis upon which trustees employed teachers at the school."

The trustee defenders' challenges to the relevancy of the pursuer's averments of vicarious liability

[51] The trustee defenders submit that the pursuer's averments of vicarious liability are also irrelevant and lacking in specification. They note the observations of Lord Phillips of Worth Matravers in *Various Claimants* v *Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1 ("*Catholic Child Welfare Society*") (at paragraph 19) that "[t]he law of vicarious liability is on the move". They trace how far it has moved under reference to two recent cases of the UK Supreme Court in *Various Claimants* v *Wm Morrison Supermarkets plc* [2020] UKSC 12, [2020] 2 WLR 941 ("*Wm Morrison Supermarkets plc*") and *Various Claimants* v *Barclays Bank plc* [2020] UKSC 13, [2020] 2 WLR 960 ("*Barclays Bank plc*"). The trustee defenders found on the following observations of Baroness Hale of Richmond in (paragraph 1 of) *Barclays Bank plc*:

> "Two elements have to be shown before one person can be made vicariously liable for the torts committed by another. The first is a relationship between the two persons which makes it proper for the law to make the one pay for the fault of the other. Historically, and leaving aside relationships such as agency and partnership, that was limited to the relationship between employer and employee, but that has now been somewhat broadened. That is the subject matter of this case. The second is the connection between that relationship and the tortfeasor's wrongdoing. Historically, the tort had to be committed in the course or within the scope of the tortfeasor's employment, but that too has now been somewhat broadened. That is the subject matter of the *Wm Morrison* case."

Subsequent cases apply the two-stage test descried in this passage.

[52] The trustee defenders submit that there has never been any relationship between the pursuer and the trustee defenders, who cannot be liable for the acts and omissions of the third defender, or of the lay teachers. They submit that, in any event, even assuming that

the trustee defenders are liable for the acts and omissions of their predecessor trustees, and that the predecessor trustees employed the third defender, Mr Owens and Father Davidson *qua* trustees (but about which they submit the pursuer does not give fair notice), the pursuer does not give fair notice of a sufficiently close connection between the Serving Trustees and the third defender, Mr Owens and Father Davidson to found vicarious liability. Reference was made to *Wm Morrison Supermarkets plc* at paragraphs 24, 25, 31, 35 and 36 and *BXB* v *Watch Tower and Bible Tract Society of Pennsylvania and another* [2021] EWCA Civ 356, [2021] 4 WLR 42 ("*BXB*"), though not to any particular passage in the latter case.

The pursuer's reply

[53] The pursuer accepts that there never has been any relationship between the pursuer and the trustee defenders in their personal capacity. But he submits it is incorrect with regard to the trustee defenders *qua* trustees. As the pursuer submits is clear from his pleadings (especially article 2 of condescendence), he offers to prove amongst other things that:

1) The Serving Trustees had powers, duties and responsibilities in respect of the management of the Abbey and the School;

2) They were involved in the running of the School and they exercised control over the running of the School;

3) They appointed the headmaster of the School; and

4) They employed teachers at the School.

The pursuer submits that these averments are capable of meeting the test for vicarious liability set out in *The Catholic Child Welfare Society and* others, and more recently in

Wm Morrison Supermarkets and *Barclays Bank plc* [2020] 2 WLR 960. Whether the test is actually met will of course be a matter for the court after hearing evidence.

Consideration of the vicarious liability issue

[54] In this case, the pursuer relies on two different sets of relationships in which he wishes to hold one party "responsible" (putting that in the most general sense) for another.

1) The first of those relationships is as between the trustee defenders and the predecessor trustees, particularly the Serving Trustees. The pursuer's case is that the trustee defenders may be accountable as the last known surviving trustees for the liabilities incurred by their predecessors by a combination of (i) the trust patrimony analysis and (ii) the obligation of the trustee defenders *qua* trustees to meet any liability incurred by the predecessor trustees out of any trust estate available to them (including a right to be indemnified under any insurance policy). While the trustee defenders treat that as a question of vicarious liability, it respectfully seems to me that the better analysis is that this is a liability arising from the trustee defenders' status *as trustees* and is more in the nature of a representative liability incurred by that status, not a vicarious one judged in relation to the alleged abusers; and
2) The second relationship, of the liability of the Serving Trustees for the acts and omissions of the headmaster and of the pursuer's alleged abusers, is properly one involving vicarious liability, in the sense discussed in the several Supreme Court cases referred to.

The parties did not refer the court to any cases involving attribution of vicarious liability to trustees, or any Scottish case in which the *dicta* in the recent Supreme Court cases on vicarious liability have been applied. It is not surprising, therefore, that in submissions there was at times some conflation of these different relationships, which is why I have endeavoured to distinguish them. In my view, the vicarious liability issue only properly arises in the second scenario. To the extent that the pursuer may have relied on the concept of vicarious liability in the first type of relationship, this would, in my view be erroneous in law. However, I understood the pursuer's senior counsel to rely on the kind of representative liability to which the first relationship gives rise. As he submitted, the trustee defenders' liability "arises *ex officio*". I accept that submission as well-founded in law.

[55] In considering the vicarious liability issue and the trustee defenders' challenge to the relevancy of the pursuer's case, I have had regard to the recent cases in the Supreme Court. As is clear from the passage the trustee defenders cited from *Barclays Bank*, the attribution of vicarious liability is approached in two stages: stage 1 examines the relationship between the two persons which make it proper for the law to make one liable for the fault of the other ("the tortfeasor"). Conventionally, an employer will be vicariously liable for the acts of his or her employee (assuming stage 2 is also met), whereas generally no vicarious liability of an employer will arise for the tortious acts of an independent contractor. In expanding the scope of relationships that may fall within stage 1, the courts have looked for a relationship "sufficiently akin to employment" (the approach used, for example, in *E's* case [2013] QB 722 to hold the trust (in place of a bishop) liable for alleged abuse of a priest). Stage 2 focuses on the connection between that relationship and the tortfeasor's wrongdoing. Classically, that has been approached by asking whether the tortfeasor's conduct was within the scope of his or her employment.

[56] While the trustee defenders rely on the passage from *Barclays Bank plc* (quoted above), that case concerned whether the defendant Barclays Bank was vicariously liable for a GP who undertook medical assessments and examinations of employees or prospective employees of Barclays Bank and whom the various claimants alleged sexually assaulted them during such examinations. It was not a case of vicarious liability arising in the paradigmatic case of employer and employee: the issue was whether the circumstances were such that the GP was within the "somewhat broadened" scope of the employer-employee relationship for the purposes of stage 1. (The Supreme Court held that the GP did not fall within the ambit of such a relationship and Barclays Bank was, accordingly, not vicariously liable for his assaults.)

[57] On the same day that the Supreme Court issued *Barclays Bank* it also issued *William Morrison Supermarkets plc*. Lord Reed PSC, giving the judgment of the Court in the latter, summarised the formulation of the stage 2 test (at the beginning of paragraph 23) and observed:

> "As Lord Philips noted in *Catholic Child Welfare Society* [2013] 2 AC 1, paras 83 and 85, the close connection test has been applied differently in cases concerned with the sexual abuse of children, which cannot be regarded as something done by the employee while acting in the ordinary course of his employment. **Instead**, the courts have emphasised the importance of criteria that are **particularly relevant to that form of wrongdoing, such as the employer's conferral of authority on the employee over the victims,** which he abused." (Emphasis added.)

A little further on in that case (at paragraph 36), Lord Reed emphasised the difference between the stage 2 test in its application to sexual abuse cases, where "**a more tailored version** of the close connection text is applied" (emphasis added).

[58] That more tailored test was applied by Chamberlain J in *BXB* (reported at first instance: [2020] EWHC 156 (QBD), [2020] 4 WLR 42) and affirmed on appeal earlier this year by the English Court of Appeal [2021] EWCA Civ 356; [2021] 4 WLR 42). That case

concerned the rape of an adult victim (who was a member of a congregation of Jehovah's Witnesses) by an elder of that church. After proof, Chamberlain J found that both stages for vicarious liability were met. The Court of Appeal upheld that decision, describing his analysis of the role of elder within the Jehovah's witnesses' organisation as "searching" and his findings "compelling". In doing so, it referred to and applied Lord Reed's observations in *Wm Morrison Supermarket plc* (see paragraphs 83 and 92, *per* Nicola Davies and Males LJ, respectively) of the tailored test to be applied in sexual abuse cases. As Nicola Davies LJ stated (at paragraph 84), "[c]ontained within the tailored test in cases of sexual abuse is the **concept of conferral of authority** upon the tortfeasor by the defendant" (emphasis added). Nicola Davies LJ regarded the rationale underpinning that tailored test to be the same, whether the victim was a child or an adult, because the issue "is the connection between the abuse and the relationship between the tortfeasor and the defendant. It is not the particular characteristics of the victim".

[59] In my view, the pursuer has pled a sufficient case of vicarious liability of the Serving Trustees for the alleged assaults by the third defender and the lay teachers to go to inquiry. The trustee defenders' submission that the pursuer fails to aver a "close connection" fails to take into account the more tailored test (as explained by Lord Reed in *Wm Morrison Supermarkets Ltd Plc*) to be applied in this kind of case. The pursuer's averments about the Serving Trustees' appointment of the headmaster and of the lay teachers is sufficient to instruct a case that, in so doing, they "conferred authority" on those individuals with the consequence that, if those individuals abused their position, the Serving Trustees might be held vicariously liable for their actions. The appointment of teachers and, above them a headmaster, is almost self-evidently the conferral of authority on those individuals, understood in the context of a boarding school run in the 1970s by a religious order

belonging to a church which valued hierarchy as a hallmark of authority. In any event, in his averments the pursuer describes being a boarder, the arrangement for sleeping in dorms and the fairly regimented life of the School. This included the lay teachers' powers to favour boys (eg by being made an altar boy or being added to the "social list" enabling those listed to enjoy the privilege of teas in the third defender's offices) or arbitrarily to punish them. The latter included canings, humiliating punishments in front of the other pupils and beatings. These features the pursuer describes are capable of reinforcing the authority conferred on the teachers to control these aspects of their pupils' lives. Applying the more tailored test described by Lord Reed, which is the correct test to be applied in a case such as this, I hold that the pursuer's averments of vicarious liability on the part of the Serving Trustees for the lay teachers and the headmaster are sufficiently specific and relevant to go to proof.

The limitation issues

Preliminary observations

[60] In addressing this matter I bear in mind the observations of Lady Carmichael in *B* v *Sailors' Society* [2021] CSOH 62 ("*B* v *Sailors' Society*") (at paras [209]ff), that the effect of the amendment to the 1973 Act to introduce section 17D (part of a suite of provisions to accommodate claims for historic sex abuse) was to effect a significant change in the law and that the policy considerations that arose under section 19A of the 1973 Act fall away. Those observations are undoubtedly correct. The parties recognised this and shortly before the debate they deleted averments which reflected the limitation provisions prior to their amendment and they removed the cases decided under the unamended provisions of the 1973 Act from the bundles of authorities. I also gratefully adopt the analysis of features of

the new limitation provisions undertaken by Chamberlain J in *JXJ* (at paragraph 101), read subject to the refinements Lady Carmichael made to that analysis (at para [240] of *B* v *Sailors' Society*). Those refinements were, in short, to place little reliance on the cases under section 19A as offering any assistance on the issue of whether a fair trial is possible or on the formulation of the nature of prejudice in the pre-amendment case law. I do note that the judgements in *JXJ*, *BXB* and *B* v *Sailors' Society* all followed an evidential hearing.

The trustee defenders' submissions

[61] The trustee defenders aver that the pursuer's case is time-barred. They invoke both section 17D(2) and 17D(3) of the 1973 Act and contend, as free-standing lines of defence, that it is not possible for a fair hearing to take place (for the purposes of section 17D(2)) or that, having regard to all of the relevant circumstances; and in any event, the court should be satisfied that the defender is prejudiced and that prejudice is such that the pursuer's action should not proceed (on the application of both elements of subsection 17D(3)).

[62] The trustee defenders rely on a variety of factors, namely: that, due to the passage of time, records have been lost or destroyed (more than 40 years having passed since the pursuer left the School), the closure of the School and the Community decades ago, and the winding up of the Trust. They aver that they have been unable to find contemporaneous records relating to the running of the School. Such contemporaneous documentation recovered is ambiguous. Their researches have been exhausted. Even if more documentation were recovered, this could only represent part of the total picture. Moreover, potentially material witnesses have died. The memories of any surviving witnesses are likely materially to have deteriorated. By the time the first defender was a trustee, which was only for a year (from late 1999 to late 2000), the School had been closed

and the Trust was being wound up. The second defender, who was a medical doctor before he was a monk, avers that likewise he was not a trustee at the material time or when the Trust was wound up and that he ceased to have any involvement in the affairs of the Trust after it was wound up in 2010 or 2011. All of those accused, apart from the third defender, are dead. The trustee defenders cannot investigate the pursuer's claim; they cannot prepare for proof. They cannot speak to the dead to see what the arrangements were. They are radically compromised. The Serving Trustees might say that they were not involved and that this was dealt with by the Board of Governors. Senior counsel accepted that a balance had to be struck but this should still result in dismissal against the trustee defenders. The pursuer has an alternative remedy in the form of an action against the third defender. In any event, they cannot get a fair hearing. The trustee defenders also made extensive calls upon the pursuer *inter alia* about the chronology of the allegations, the dates on which he sought advice or otherwise claimed compensation.

The pursuer's position

[63] The pursuer avers the name of Scottish agents who had formerly acted for the trustees and the Community at Fort Augustus. He also avers that when the School and Abbey closed records relating to the School, the Trust and the Community were transferred to the Scottish Catholic Archives, to the English Congregation in Bath and the Scottish solicitors in Edinburgh. In any event, the pursuer resists the trustee defenders' motion for dismissal at this stage contending, under reference to *Transco Plc* v *HMA* 2005 1 JC 44, that a very high degree of certainty (an "inevitability") much be reached if a court is to determine in advance that a proof or trial will breach fair trial rights under Article 6 of the ECHR.

Consideration of the limitation issues

[64] I prefer the pursuer's submission on the limitation issues. It is enough to say at this stage that I am not persuaded that the court could conclude on the basis of submissions at debate, that any proof in this case will necessarily or (to apply the formulation in *Transco*) 'inevitably' breach the trustee defenders' right to a fair trial, or that the trustees have discharged the onus they bear on this issue. It is not possible at this stage to come to any concluded view on these matters. As noted above, there is an outstanding specification. There appear to be repositories of papers which exist but which appear not to have been examined. Furthermore, in this case, there was a very recent indictment and conviction of the third defender. It may be that those cited as witnesses in the criminal proceedings, or who contributed to the TV programme of 2013 mentioned in the pursuer's pleadings, might be identified and (if willing) be precognosed. There may as yet be unexhausted avenues of enquiry.

[65] Even if the trustee defenders' plea under section 17D(2) were not upheld after a preliminary proof, for the reasons explained by Lady Carmichael in *B* v *Sailors'* Society, the court remains under an obligation throughout the determination of the case to ensure that the trustee defenders' fair trial rights are respected. That continuing obligation can be seen as further militating against making a determination for the purposes of section 17D(2) of the 1973 Act at debate or in advance of any preliminary proof.

[66] Given the balancing exercise inherent in the assessment of whether the trustee defenders are prejudiced, and whether any prejudice is such that the pursuer's action should not proceed (for the purposes of Section 17D(3)), it is also not possible to form a concluded view on this second limitation issue in the absence of evidence. As noted above, the upholding of the defendant's or defenders' limitation defences under section 17D of the 1973

Act in *JXJ*, *BXB* and *B* v *Sailors' Society* followed a full evidential hearing (in *JXJ* and *BXB*) or a preliminary proof (in *B* v *Sailors' Society*). I did not understand the trustee defenders to resist some form of evidential hearing, if the pursuer's case were otherwise relevant. Accordingly, in relation to the limitation issues, those cannot be resolved without an evidential hearing and the trustee defenders' relative pleas-in-law are reserved.

Decision and further procedure

Decision

[67] I have held that the trustee defenders' relevancy challenges are ill-founded and that critical matters affecting some of the legal foundations of the pursuer's case require proof (eg the questions of whether the trustee defenders have been discharged or whether the Trust has been wound up).

Further procedure

[68] As noted above, the pursuer moved for proof. However, I note that *B* v *Sailors' Society* followed a preliminary proof. I was also referred to the decision of the Sheriff Appeal Court ("the SAC") in *M v DG's Executor* [2021] SAC (Civ) 3, 2021 SLT (Sh Ct) 87 ("*M* v *DG's Exectutor*"), in which the SAC recalled the sheriff's allowance of a proof and ordered a proof before answer. While it is likely to be expedient for limitation issues to be resolved at a preliminary proof, rather than held over (as the sheriff in *M* v *DG's Executor* sought to do), I am not persuaded that it is correct that the issue of a fair hearing "cannot be held over until the end of a proof" (*per* the SAC in *M v DG's Exectutor* at para 15). Insofar as a defender invokes section 17D(3), it respectfully seems to me that, having regard to the statutory language, that kind of limitation issue must be determined *in limine*. However, for

the reasons set out in Lady Carmichael's opinion in *B* v *Sailors' Society*, whether or not a defender's fair trial rights (for purposes of section 17D(2)) are respected may remain a live issue throughout a proof. (Of course, a proof would not follow if a court were able to conclude in advance that fair trial rights would necessarily be breached by any trial.) In this case, it is likely that a preliminary proof is the appropriate next step. It may also be appropriate to include in a preliminary proof critical issues of fact, including the issue of whether trustees were acting in a personal capacity, whether the Trust was wound up and, possibly, the mechanics of how an action such as this might proceed against trustees (a matter on which the court was not addressed). However, as parties made no submissions on these matters, it is right that I allow parties an opportunity to address the court on the scope of the preliminary proof to follow.

[69] I reserve all question of expenses meantime. It remains for me to thank Counsel for well-presented and careful submissions on certain novel points which may be of some practical importance.