



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 25

CA99/20
CA100/20
CA101/20

OPINION OF LADY WOLFFE

In the causae

KEVIN BROWN

Pursuer

against

THE SHORE PORTERS' SOCIETY OF ABERDEEN & OTHERS

Defender

--

ALAN DAVIDSON

Pursuer

against

THE SHORE PORTERS' SOCIETY OF ABERDEEN & OTHERS

Defender

--

SEAN SIMPSON

Pursuer

against

THE SHORE PORTERS' SOCIETY OF ABERDEEN & OTHERS

Defender

Pursuer in Mr Brown's action: MacColl QC, Cowan; Brodies LLP
Pursuer in Mr Davidson's action: MacColl QC, Cowan; Blackadders LLP
Pursuer in Mr Simpson's action: MacColl QC, Cowan; Burness Paull LLP
Defenders in each action: O'Brien QC; Ledingham Chalmers LLP

10 March 2021**Introduction***The Shore Porters' Society of Aberdeen*

[1] The first defenders in each of these actions is The Shore Porters' Society of Aberdeen ("the Society"), which has existed for many centuries. Parties were agreed that it is an unincorporated association and, as such, it has no separate legal personality. The other four defenders are, respectively, the Deacon, Depute Master, Box Master and Key Bearer of the Society (positions recognised by the Rules of the Society, as after-noted, and collectively referred to as the Committee ("the Committee")) and they are called, essentially, as the representatives of the Society. For convenience, in this Opinion I shall simply refer to "the Society" rather than to all of the defenders. The Society's constitution is set out in the Rules and Regulations of the Shore Porters' Society of Aberdeen adopted in 1896 ("the Rules"). While there have been amendments to the Rules, none of these was said to be material to the subject matter of the disputes between the parties.

The Society's Working and Property Departments

[2] The Society has two parts, one now known as the "Working Department" (referred to in the Rules as the "van and horse department") and the Property Department. The Working Department carries on a removal business and members engaged in those activities are known as "the working members" of the Society. In practice, the working members encompasses new entrants, who are effectively probationary members for their first 3 years. The Society's office-bearers, comprising the Committee of the Society, are drawn exclusively from the working members. It was a matter of agreement between the parties (rather than express provision of the Rules) that the profits of the Working Department are divided among the working members as if they were in partnership.

[3] The Property Department of the Society is treated as the owner of investment properties belonging to the Society and it also carries on a business providing storage facilities. The revenue of the Property Department is used to pay certain benefits conferred by the Rules (as after-noted), but it is principally used to pay the annuities of those members who become superannuated members ("superannuated member"). The pursuer in each action was a superannuated member at the time they raised their respective actions.

The disputes between the parties

[4] From about 2015 a dispute has arisen between the superannuated members of the Society and the working members. The essence of that dispute is as follows:

- (i) Whether certain revenue (said by the Society to be due to the Property Department (eg rental income from the properties or storage fees paid by customers)) has been wrongly retained by or attributed to the Working Department, and

(ii) Whether certain expenses attributable to the Working Department (as the Society contends) have been wrongly allocated to the Property Department.

On the Society's analysis the effect of either of these misallocations was to overstate the profits of the Working Department and to understate the revenue of the Property Department.

The Society's Action

[5] The Society has raised a separate action against five members of the Society, including the pursuers of these actions, seeking repayment of the sums said to have been overpaid to the working members ("the Society's Action"). Furthermore, on the basis that these misallocations constitute breaches of the Rules, the Society resolved to expel a number of superannuated members, including the pursuers in these actions.

These actions

[6] The Society's Action prompted these actions. The pursuer in each of these actions obtained an *interim* interdict against his expulsion. The pursuers in these actions also seek declarators that the Society has no power under the Rules to expel them.

The issue at debate

[7] The Society challenged the relevancy of the pursuers' actions on a number of grounds. After sundry procedure, two debates were fixed: the first in the Society's Action, which was immediately followed by the debate in these actions. While there were five issues identified as suitable for debate in these actions, at the outset of the debate parties

were agreed that three of these issues were not insisted upon. The remaining matters were as follows:

- 1) Whether the power of expulsion in rule 16 of the Society's Rules applies only to working members; and
- 2) Whether there is any requirement that expulsion should be proportionate, in addition to the requirement for grounds of expulsion to exist.

However, Mr MacColl QC, who appeared on behalf of the pursuers, sought leave in the course of his reply to lodge a minute of amendment to address the criticisms encompassed within issue (2). Accordingly, the debate was, and this Opinion is, confined to issue (1).

The Rules

[8] The preamble to the Rules is as follows:

"Whereas it has been unanimously agreed by the whole members of the Society that the Rules and Regulations at present in existence be rescinded and repealed, and that the Society be reconstructed **for the charitable and benevolent purpose of raising and establishing a fund for the relief and support** of its aged members and the widows and orphan children of deceased members: Therefore, it is enacted that all former Rules and Regulations for the government of the Society shall be, and the same are hereby repealed, annulled and made void, and that the following shall constitute the Rules and Regulations of the said Shore Porters' Society of Aberdeen:-" (Emphasis added.)

[9] The relevant rules are 2, 16 and 18. For ease of reference, I have altered the layout of, and inserted sub-paragraphs into, rules 2 and 16. The layout of the other rules are as they appear in the printed text of the Rules.

"2.- **The aims and objects of the Society shall be to conserve and perpetuate a fund** by means of entrance fees, subscription, fines levies, donations, plank mails, rents of properties, interest, dividends, or otherwise, **for insuring**

- (i) a sum of money to be paid on the death of a member as Funeral Allowance;
- (ii) a sum of money to be paid on the death of a member's wife;

- (iii) a sum of money to be paid at the death of a deceased member's widow, or for defraying the expenses of the burial of such widow;
- (iv) for the payment of a sum of money to each member as Sick Allowance during sickness, which allowance, however, shall cease on superannuation, as is hereinafter provided;
- (v) for the payment of Superannuated Allowances to members who have served 21 years, and who have thereby become entitled to the benefits of the Society;
- (vi) for the payment of annuities to widows and orphan children of deceased members; and
- (vii) for granting assistance to widows and orphan children of deceased members in distressed circumstances, if found necessary." (Emphasis added.)

[...]

"16.- In order as much as possible to preserve the character of the Society, and to prevent any evil report or disgrace being put upon it by the improper conduct of any of its members, it is hereby expressly provided and declared that,

- (i) should any of its members be convicted of any crime or flagrant immorality, or
- (ii) should he be intoxicated during business hours, or
- (iii) should he desert his business of a Porter, or
- (iv) should he appropriate any sum or sums collected by him belonging to the Society, or
- (v) retain the Society's funds for the period of one week after a demand shall have been made upon him by the Society or its officers, or
- (vi) should he in any way attempt to subvert or injure the business or the Society, or
- (vii) become directly or indirectly involved in any business in direct competition with the Society, or
- (viii) should he become bankrupt, or
- (ix) refuse to conform himself to the Rules and Regulations prescribed by the Society from time to time,

he shall in each and all of these cases, on the vote of two-thirds of the members present at any meeting duly called for the purpose, be liable to be expelled from the Society,

and in the event of such expulsion, he shall forfeit all benefit and interest in the property and funds of the Society."

[...]

"18.- Any member of the Society who has served for a period of twenty-one years without having done any act whereby his interests in the Society's funds may be forfeited as aforesaid, shall be entitled to payment of his share of the van and horse department of the Society...He shall also be entitled to receive from the Society as

superannuated allowance such sum as may from time to time be sanctioned by the Society to be paid to superannuated members...”

[10] As reference was made to some of the other rules, I set these out below.

“1.- The said Society shall be called the Shore Porters’ Society of Aberdeen, and shall consist of an unlimited number of members. The Society shall carry on its business at 12, Virginia Street, Aberdeen, which shall be deemed to be the office of the Society, and when any change is made thereon, notice of the same shall be advertised in the daily newspapers circulating in the County of Aberdeen.

[...]

3.- The Society shall be governed by a Committee, which shall consist of a Deacon, Boxmaster, Depute Master, Key Bearer, a Master for the Body, and an Officer, who shall be elected from the working members of the Society annually at a General Meeting convened on or about the 11th day of November. The Deacon, Boxmaster, and Key Bearer shall be the only authorised members to sign cheques on behalf of the Society, and no money shall be withdrawn from the Bank without their signatures.

4.- The said Committee shall direct the way and manner and the securities upon which the funds of the Society shall be laid out, as well as the application of the funds, and shall have power to purchase heritable or moveable property for the Society, or to sell the heritable or moveable property of the Society-subject nevertheless to the review and control of the Society-and five of the members of said Committee at least shall at all times be necessary to concur in any act of such Committee, and all acts and orders of such Committee under the powers delegated to them shall have the like force and effect as the acts and orders of such Society at any general meeting thereof-the Deacon, or in his absence, the Boxmaster being always of the number. It is also hereby provided and declared that no member shall be elected Deacon of the Society until he has been three years a member thereof, and after having served one year as Deacon he shall be Boxmaster for the following year.

5.- All monies, goods, and chattels, stocks, annuities, rights of property, title-deeds, and other transferable securities and effects whatsoever, belonging to the Society, shall be vested in the Deacon, Boxmaster, and Keybearer of the Society for the time being and their successors in office as Deacon, Boxmaster, and Keybearer of said Society, for the use and benefit of the members of the Society and none others; and from and after the death or retirement of any Deacon, Boxmaster, or Keybearer, shall vest in the succeeding Deacon, Boxmaster, and Keybearer for the same purposes as he or they had therein, and subject to the same trust without any assignment whatsoever.

[...]

9.- The Revenue of the Stock and Funds and annual contributions, save as aftermentioned, shall be appropriated and applied as follows, viz. :-After paying the accounts and necessary expenses of management, and providing for depreciation on the Society's properties, and other benefits hereinafter provided, the sum remaining shall be divisible by the whole number of members who have served twenty-one years, whether working or retired from the same, and also widows and orphan children *per stirpes* on the roll, and the quotient obtained shall be the sum which shall be payable to the said superannuated members, widows, and orphans of deceased member *per stirpes* and none others. The said sum shall be paid to the foresaid recipients quarterly or so as the Society may determine. The sum remaining over after paying the said superannuated members, widows, and orphans, shall be added to the funds. But it is also hereby expressed and declared that no member shall receive any superannuation from the funds of the Society so long as he remains a working member of the same after having served twenty-one years; but superannuated members shall always have a vote in the affairs of the Society's properties and funds at any summoned meeting anent the same. And it shall always be in the power of the Society to augment or restrict the foresaid annuities, according to the state of the funds, at any summoned meeting of the whole members called for the purpose of considering and resolving anent same.

10.- The Society shall also elect Factors, who shall look after and let to the best advantage the Society's properties, and collect the rents of the same; but the Deacon shall be the factor for the bonded warehouse properties during his period of office. Said factors, after paying the accounts for repairs or alterations on the properties, and the necessary expenses of management, or other exigencies, shall hand over the balance to the Boxmaster to be put into the bank according to the directions of the members of the Society. The Factors, Widows' Paymaster, &c., shall be elected at the General Meeting on or about the 11th November yearly.

11.- A General Meeting of the Society shall be held on or about the last day of December each year, when the Boxmaster, Widows' Paymaster, Plank Master, and Factors, shall lay their books and balance-sheets before the Society or its Committee for examination, and if any error appears in the books, vouchers, or balance-sheets not satisfactory to the Committee or the Society, and the factor or member producing the same be absent from the meeting, the Master for the Body shall call another meeting and have the matter explained and put right. The books, vouchers, and balance-sheets after being examined and found correct shall be handed over on the following day to the Society's Law Agent, who has been or may hereafter be appointed Auditor of the Society's affairs to be audited.

[...]

14.- Any candidate for admission as a member of the Society shall not be under the age of twenty-one or above the age of twenty-six years, and any person desiring to become a member of the Society shall give an attestation of his moral character, certified by two or more of his former employers, shall produce a certificate of the entry of his birth, and a certificate from a regular Medical Practitioner that he is free

from all external and internal disease, and, if approved of by the Society, he shall be admitted as a member on payment of such sum or sums as may be sanctioned at any summoned meeting of the Society called for considering and resolving anent the same.

[...]

18.- Any member of the Society who has served for a period of twenty-one years without having done any act whereby his interests in the Society's funds may be forfeited as aforesaid, shall be entitled to payment of his share of the van and horse department of the Society, which share shall be ascertained by valuers, and in the event of their differing in opinion, by an oversman, all chosen from among the members of the Society...He shall also be entitled to receive from the Society as superannuated allowance such sum as my from time to time be sanctioned by the Society to be paid to the superannuated members and the widows and orphan children of deceased members."

Parties' submissions

The Society's submissions challenging the relevancy of these actions

[11] Mr O'Brien QC, who appeared on behalf of the Society, contended that the pursuers' construction that rule 16 applies only to the working members of the Society was wrong and should be rejected. He developed his submissions, as follows:

- 1) The pursuers' submission was simply not a possible meaning of rule 16.

Mr O'Brien emphasised that rule 16 expressly applies to "any of [the Society's] members". In his submission, the Rules distinguish between members who are still working, and those who have completed 21 years' service and become "superannuated": see rules 2 and 9. There is no doubt that such individuals are still "members". Rule 9 states in terms that "superannuated members shall always have a vote in the affairs of the Society's properties and funds".

References to superannuated members also appear in rules 18, 19 and 24.

Accordingly, the words "any of [the Society's] members" in rule 16 must

encompass superannuated members. In his submission, those words could not sensibly bear any other meaning.

- 2) If rule 16 was intended to be limited to working members, it would have said so. The Rules do distinguish between the two categories of members when they wish to do so. That is most obvious in rule 9. However, rule 3 (in its original form) also limited membership of the Committee to “working members of the Society”, and other provisions make reference specifically to “superannuated members”.
- 3) The pursuers’ submission that the listed grounds of expulsion are only relevant to working members was simply wrong. Although some grounds of expulsion relate to working members (eg ground (iii)), others are relevant to all types of member: eg retaining the Society’s funds in the face of a demand for repayment (ground (v)), attempting to subvert or injure its business (ground (vi)), becoming involved in the business of a competitor (ground (vii)) or becoming bankrupt (ground (viii)). Superannuated members can vote at the Society’s meetings and review its internal accounts: see eg rule 9 (“superannuated members shall always have a vote in the affairs of the Society’s property and funds”), rule 13 (“the vote of the majority of the members of the Society present at any meeting ... shall decide all questions”), and rule 11 (requiring office bearers to “lay their books and balance-sheets before the Society or its Committee for examination”). Further, the Society’s Property Department carries on business separately from the activities of the Working Department (see eg rule 10). In his submission, it was entirely logical to bar members from involvement in a competing business.
- 4) In any event, the grounds of expulsion relied on in relation to the pursuers in these cases concerned things done while the pursuers were still working

members. Thus, the pursuers are not merely saying that it is impossible for a retired member to *commit* an expellable act. Rather, they claim that a working member who is liable to expulsion can acquire immunity by clinging on until his retirement date. There was, Mr O'Brien submitted, no logic to that. It has no basis in the language of rule 16, and it would have bizarre and arbitrary practical consequences. It would reward a member who successfully concealed his expellable conduct until it was too late to expel him. It would mean that if serious conduct were committed, or came to light, shortly before a member's retirement date, then the Society might have to move swiftly and on incomplete information to deal with it while it still could. That would be in nobody's interests - not even those of the affected member.

Accordingly, the pursuers' interpretation of rule 16 is wrong. Superannuated members can be expelled under rule 16. The pursuer's averments to the contrary were irrelevant.

The pursuers' submissions in reply to the Society's challenge

[12] Mr MacColl referred to rules 16 and 18.

- 1) In relation to rule 16, he submitted that standing its terms, the power of expulsion contained therein plainly relates to working members (rather than retired (ie superannuated) members). This, he submitted, was clearly demonstrated by the restrictions on intoxication during business hours and desertion of business (in ground (ii)), which can only relate to those working for the Society. Similarly, there is no proper basis to construe the need for restrictions on competition to apply to retired members - there is no express non-compete provision in the Rules which is to apply after a person ceases to be a

working member. Similarly, the other activities of an individual once they have retired, whether they lead to conviction of a crime, bankruptcy (*per* grounds (i) or (viii)) or the like offer no basis to justify the expulsion of a retired (as opposed to a working) member.

- 2) In his submission, this construction of rule 16 was also consistent with the provisions of rule 18 which clearly envisages that the issue of any expulsion is to be dealt with prior to the member's retirement (and prior to the member becoming entitled to the annuity). In terms of rule 18, the pursuer is entitled to payment of the superannuated allowance (otherwise known as an annuity) which the first defender, from time to time, agrees to pay to its retired members. Further, he is entitled to payment until his death.
- 3) Mr MacColl noted that in its answer 7, the Society referred to rules 9, 16, 20 and 21. However, none of those rules provide the Society with the power to withhold payment of annuities from individual retired members. Rule 9 provides the Society with the power to restrict annuities. However, that power could only be exercised with regard to the retired members as a whole. Rule 20 provides for the possibility of the Society's funds being applied for purposes and uses other than those provided for in the Rules, and rule 21 provides for alteration of the Rules. However, neither Rule provides the Society with the power to deprive the pursuers of the entitlement acquired by them in terms of rule 18.

In the circumstances, the defenders have not pled a relevant defence to each pursuer's conclusion for declarator in terms of conclusion 3, and decree should be pronounced as concluded for. On the basis that rule 16 does not permit the expulsion of retired members,

there is no relevant defence pled to the pursuer's first conclusion, and decree should be pronounced in terms thereof.

Discussion

The Rules

Preliminary observations on the approach to interpretation of the Rules

[13] Parties were agreed that, generally, the rules of an unincorporated association regulate the liability of members *inter se* as a matter of contract and, if it provides for liability, then that should have effect. They were also agreed that the normal principles of contractual interpretation apply to the interpretation of the Society's Rules and, accordingly, they were agreed that the Court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean.

[14] It respectfully seems to me that the agreed approach urged by the parties on the Court is not entirely apposite when applied to the Rules. It may be problematic, to say the least, for a Court in 2021 to apprehend "all the background knowledge which would have been available to the parties" at the time the Rules were promulgated 125 years ago. And, while the conventional analysis of the rules of an unincorporated association is that they form a multilateral contract among its members, none of the current members of the Society were parties to the "contract" formed upon the promulgation and acceptance of the Rules in 1896. When I raised this with Senior Counsel in the course of the debate, I understood them to eschew any doctrine of originalism and, indeed, they observed that the pleadings are silent as to what any specific relevant factual background might have been. The parties'

common position was that the Court could resolve the issue debated by reference to the Rules alone and without the need for evidence.

[15] In my view, it is important to bear in mind that the Society is in the nature of a mutual benevolent association. It is not an overtly, or at least an exclusively, commercial enterprise. In that context it is not surprising that the Rules are largely concerned with the governance of the Society and the circumstances in which its members might be eligible for certain benefits. In practise, the Rules are read and applied by laymen, not lawyers. Some of the language is more open-textured, than technical. An example of this are the references in the Rules to what might now be termed issues of personal probity and which reflect the morality and *mores* of the late Victorian age when the Rules were promulgated. At points, too, the Rules preserve a degree of discretion not typically found in a contract with clearly stipulated mutual rights and obligations entered into between commercial parties at arms-length or with adverse interests.

[16] Finally, while I was not addressed on the objects of the Society, as defined in the Rules, in my view it is important to bear these in mind when construing the Rules, or applying a purposive construction to them. I turn to consider the objects of the Society.

The objects of the Society

[17] The preamble to the Rules states that the Society was to be reconstructed

“for the charitable and benevolent purpose of raising and establishing a fund for the relief and support of its aged members and the widows and orphan children of deceased members:” (Emphasis added.)

This is reflected in rule 2, which states that “the aims and objects of the Society shall be to conserve and perpetuate a fund...”. Before turning to the specific purposes enumerated in rule 2, it should also be noted that the in terms of rule 20, it was declared that

“20.- The Society shall never be dissolved, and **no part** of the funds of the Society shall on any pretence **be applied to any other purpose than** the payment of the necessary expenses of management and others as herein provided, and **the benevolent and charitable uses for which the Society is formed**, without the consent of the whole members, both working and superannuated.” (Emphasis added.)

In terms of rule 20, it was envisaged that the Society will persist in perpetuity and that application of the funds for the Society’s “charitable and benevolent uses” was entrenched, requiring a two-thirds majority of the whole members to apply the funds for other purposes.

[18] Returning to rule 2, it specified the purposes for which the funds could be expended.

I have altered the layout and inserted sub-paragraphs for ease of reference:

“2.- The aims and objects of the Society shall be to conserve and perpetuate a fund by means of entrance fees, subscription, fines levies, donations, plank mails, rents of properties, interest, dividends, or otherwise, **for insuring**

- (i) a sum of money to be paid on the death of a member as Funeral Allowance;
- (ii) a sum of money to be paid on the death of a member’s wife;
- (iii) a sum of money to be paid at the death of a deceased member’s widow, or for defraying the expenses of the burial of such widow;
- (iv) for the payment of a sum of money to each member as Sick Allowance during sickness, which allowance, however, shall cease on superannuation, as is hereinafter provided;
- (v) for the payment of Superannuated Allowances to members who have served 21 years, and who have thereby become entitled to the benefits of the Society;
- (vi) for the payment of annuities to widows and orphan children of deceased members; and
- (vii) for granting assistance to widows and orphan children of deceased members in distressed circumstances, if found necessary.” (Emphasis added.)

It is apparent from the words highlighted in the preamble, and the terms of rules 2 and 20 that, at least from 1896, the Society was a voluntary society which proposed to establish a fund with certain benevolent objects (“relief and support”) for a defined class of beneficiaries (“aged members and the widows and orphans of deceased members”) who would qualify for the benefits specified in rule 2.

[19] This is reflected in the subject-matter of the Rules. They are not concerned with the activities of the Working Department. There is only one reference to the “van and horse department” (now, the Working Department) in rule 18, which provides for the payment to a member of his share of that department upon becoming a superannuated member. It is also notable that, apart from the payment upon retirement of a retiring member of his share of the working capital of the Working Department, and which was treated as akin to the payment to a retiring partner of his share in the partnership (and which is to be ascertained by valuers), there is no provision of the Rules governing the business of the Working Department or the application or division of the profits generated by it. Apart from their eligibility to certain benefits, to the extent that there is reference to the working members, generally it is to define their terms of entry to the Society and the circumstances in which their entrance money might fall to be repaid (rules 15 and 17), their role in the conduct of its formal affairs (if elected as one of the office-bearers), and their responsibility for the maintenance and administration of the funds of the Society.

[20] Another feature to note from the Rules is that, apart from their ability to attend and vote at certain meetings of the Society (rules 9, 20 and 21), the superannuated members play no active role in the Society. They are essentially the passive recipients of the benefits provided in terms of the Rules. This is reflected in the other references to superannuated members in the Rules and which are essentially to define the circumstances in which they (or their dependants) may become eligible for benefits payable out of the Funds of the Society.

The use of “member”, “superannuated member”, “working member” and “whole members”

[21] Given the focus of parties’ submission on the phrase “any members” in ground 16 (i) of the Rules, it is necessary to consider whether there is any consistency in the meaning and usage of the terms “members”, “working members” and “superannuated members”.

[22] There is no definition of “members” or “working members” in the Rules. The only express definition, of a “superannuated member”, is contained at the end of rule 19: “a member shall not be deemed to be a superannuated member until he has actually retired from work, after having served twenty-one years”. In addressing the issue debated, which was focused principally on the phrase “should any of its members” where it precedes the grounds in rule 16, it may assist to consider whether the word “member” is used consistently in the Rules.

[23] It is indeed correct, as Mr O’Brien submitted, that the Rules distinguish between the classes of working members and superannuated members. But that does not mean that every reference to “the members” or to “any member” has a constant or consistent meaning. While parties made no submissions on this, it should be noted that the Rules also refer to the “whole members” of the Society for certain significant events: see the preamble, rule 9 (at which a meeting of the “whole members” might consider the augmentation or restriction of annuities), and rules 20 and 21 (consent of two-thirds of “the whole members” required to depart from the Society’s principal objects or to alter the Rules). The reference to “the whole members” is at least suggestive that the use of “member” or “members” in the Rules, without any qualifying descriptor means “working members” because, when the Rules mean the whole members, meaning the working members and the superannuated members, they say so. If correct, this would assist the pursuers’ construction of rule 16.

[24] Before turning to rule 16, it may be useful to consider where “member” is used elsewhere in the Rules without any qualifying adjective of “superannuated” or “working” and what, from the context, it is intended to mean. In many instances, the use of “members” without a qualifying adjective is capable of encompassing working members and superannuated members. The following rules illustrate this:

- 1) Rule 2: This is the provision that defines the several benevolent objects of the Society. Benefits (i) to (iii) are to meet the vicissitudes of life (death of “a member” or wife of “a member”, or death of the widow of a “deceased member”). The reference to “member” used in these parts of rule 2 is unqualified, but there is nothing in the Rules to support a restricted reading, that is, one that confines these benefits to working members. Benefits (iv) and (v) are likewise payable “to members”, albeit they are mutually exclusive to those payable to superannuated members: “Sick Allowance” (payable to “each member...during sickness”) is not available to a superannuated member and the “Superannuation Allowance” is payable only to “members who have served 21 years”. Benefit (vi) governs the payment of annuities to widows and orphan children of “deceased members”, and benefit (vii) enables discretionary payments (“if found necessary”) to assist widows and orphans of “deceased members” in distressed circumstances; but in either case these payments are without distinction as to whether the deceased member leaving a widow and orphan children was a working member or superannuated member at the time of his death.
- 2) Rule 19: This rule limits the scope of certain benefits. It excludes “any member” from receiving a superannuated allowance, even if he has served for 21 years, for

so long as he remains a working member. (In that context, “any member” necessarily means a “working member”.) However, rule 19 also provides for the forfeiture of a “deceased member’s” widow’s annuity, if she remarried. In that context, the reference to a “deceased member” encompasses both a working member and retired member. Rule 19 also excludes any claim by a widow who married a “superannuated member” (who then subsequently dies). There would be no need for a specific exclusion of a widow’s claim in those circumstances, if the benefit conferred in rule 2 (vi) (“payment of annuities to widows... of deceased **members**”), was construed as applying only to working members.

- 3) Rules 5 and 6: These rules govern the vesting of the Society’s funds and property in specified members of the Committee “for the use and benefit of the members” (rule 5), and the maintenance of the Minute Book of the Society, which shall be “patent to every member” (rule 6). Having regard to the preamble and rule 2, the use of “members” in rules 5 and 6 invites a broad construction encompassing both superannuated and working members. Indeed, the reference in rule 5 to the whole assets of the Society being applied “for the use and benefit of the members”, this necessarily encompasses the superannuated members, as they are the beneficiaries of the principal benefit conferred under the Rules in the form of the annuities.
- 4) Rules 9, 11 and 13: Given the express provision already noted in rules 9, 20 and 21 for specified types of decisions to be made by “the whole members” at a meeting convened for those purposes, the construction of “members” attending the kinds of meetings provided for in rules 10 and 13 as being confined to the working members is an available interpretation, although Counsel’s submissions

presumed that the reference to members in these rules encompassed working and superannuated members.

- 5) Rule 20: This provides that “every present member of the Society, and all members to be hereafter admitted” subscribe the Rules and abide by them.

In the rules just noted, “member” or “members” encompasses both working and superannuated members of the Society. This would favour the Society’s construction.

[25] However, there are other instances in the Rules where the use of the word “member” can only mean a “working member”. Generally, these are where the Rules are referring to the duties of one or more members of the Committee (for which, as noted above, only working members are eligible) or where, by context, the use of “members” can only be referable to the working members, because of the subject-matter of the rule. Rules that illustrate this include the rule dealing with admission of new members (rule 14), their payment of entry money (rule 15), and the return of their entry money in the event of their departure during their first 3 years of membership of the Society (and which of course could only be as a working member).

[26] Furthermore, there is at least one instance in the Rules (in rule 8) where “member” is used to mean “working member”, at one point, and to mean *all* of the members, working and superannuated, at another point. Rule 8 governs the duties of the Boxmaster. It contains a provision requiring security for his intromission, in the following terms:

“The **member** appointed Boxmaster shall be obliged to find security for his intromissions and faithful management, if found necessary or insisted upon by two-thirds of the **members** present at his election.” (Emphasis added.)

The first reference to “member” necessarily means the working member. This is because only working members are eligible for one of these positions in the Society (see rule 3) and so, in that context, it would be otiose to say “working member”. However, the second

usage, “the members”, means the working and superannuated members. This follows from the fact that those present “at his election” are those attending the annual General Meeting (provided for in rule 3) at which these elections take place, and which is attended by both retired and working members (reading rules 3, 12 and 13 together (the only meetings bearing to have a restricted attendance, are the “private” meetings of the Deacon, Boxmaster or Committee)).

[27] The foregoing analysis discloses that, unlike many modern commercial deeds, the Rules do not contain defined terms which are used consistently to signify what they mean. In short, all that can be concluded from the foregoing review is that the reference to “member” or “members” in the Rules has no fixed meaning. In the Rules, “member” may extend to superannuated members, or it may not. There is no single or settled meaning for the word “member”. Rather, the content of “member” is dictated by the context in which it is used. Another example of inconsistent usage in the Rules is in respect of the use of the word “funds”, which appears both in lower case and in capital letters, but without any discernible reason for the different treatment or whether this was intended to signify a different meaning.

Rule 16

[28] Turning to rule 16, the reference to the voting “of the members present” at the end of the rule was assumed by parties to encompass both working members and the superannuated members, without differentiation. However, that does not mean that the use of “members” at the beginning of the clause is to be similarly construed. As noted above, the use of “member” in two different senses in the same Rule is not without precedent.

[29] In relation to the different grounds of expulsion (enumerated at para [9], above), Mr MacColl submitted that some of these patently referred only to working members (eg being “intoxicated during business hours”) and that the Society could not have it both ways (ie that some of the grounds of expulsion applied to working members and some to all members). In my view, this is too pat a submission. Neither common-sense nor syntax dictates that all grounds of expulsion must apply to both classes of members.

[30] Turning to the grounds for expulsion in rule 16, in relation to grounds (ii) to (v), it is patent by their nature that these grounds are only applicable to the working members. The grounds in rule 16 (vi) and (vii) are more amenable to being applied to working members but are, if viewed in isolation, potentially sufficiently broadly expressed to extend to superannuated members. The same may be said of the grounds in rule 19 (i) and (viii), concerning personal probity, and the catch-all in ground (ix). The critical question is: Were those grounds intended to apply to the superannuated members?

[31] I have come to the conclusion that the grounds in rule 16 do not extend to the conduct of superannuated members, and that therefore the power of expulsion is not exercisable in relation to such conduct. I come to this conclusion by construing rule 16 within the Rules as a whole; that is, having regard to the substance, function and location of rule 16 among the Rules; and not just by a consideration of whether the language of any particular ground was on its own habile to extend to a superannuated member.

[32] Looking first at the overall structure of the Rules, rule 18 deals with the benefits conferred on the superannuated member. Up to this point in the Rules, and leaving aside rule 16 for the moment, any reference specifically to “superannuated members” is limited to rule 9. The two references in rule 9 are: (i) to the order of priority for payment of the various benefits (sickness, funeral, superannuated or otherwise) and (ii) to the inclusion of

the total number of superannuated members as part of the aggregate figure for the divider in the calculation of the quotient or share to be paid.

[33] I return to a feature of the Rules noted earlier: upon retiring, the superannuated member ceases to have any responsibility or to have any active or public-facing role under the Rules. Once superannuated, apart from voting in any meeting they choose to attend, the superannuated members are the passive recipients of the Superannuation Allowance once those are appropriated and calculated under the Rules.

[34] That is the context for rule 16, which refers at the outset to the “improper **conduct**” giving rise to the risk of expulsion on the enumerated grounds (emphasis added). As just noted, the superannuated members have no role or responsibility under the Rules. No purposive construction of the Rules, nor any other reason, was advanced as to why these grounds should extend to superannuated members who hold no representative or managerial role within the Society and who, once they become superannuated members, essentially fall from public view in respect of their association with or conduct in relation to the Society.

[35] In his submissions, Mr MacColl invoked rule 18, and I turn next to consider that rule.

Rule 18

[36] The construction of the grounds of expulsion in rule 16, as being confined to working members, is also consistent with the language of rule 18, which provides:

“Any member of the Society who has served for a period of twenty-one years without having done any act whereby his interests in the Society’s funds may be forfeited as aforesaid, shall be entitled to payment of his share [of the Working Department]...He shall also be entitled to receive from the Society as superannuated allowance such sum as may from time to time be sanctioned by the Society to be paid to the superannuated members....”

The opening words are to be noted: “Any member of the Society” (which, parenthetically, I note can only mean the working members) “who have served for a period of twenty-one years **without having done any act whereby his interests in the Society’s funds may be forfeited as aforesaid**”. The conditional tense of “without having done” instructs a retrospective perspective: the conduct considered is that of his conduct *while* a working member. On this analysis, the critical matter is the time-frame of the potentially offending conduct (ie as a working member). It matters not, therefore, that, when viewed in isolation, the language of some of the grounds in rule 16 might be capable of extension to superannuated members.

[37] Furthermore, it should also be noted that the word “whereby”, which immediately follows “without having done any act” in rule 18, introduces a causal link between the relevance of the necessarily past conduct of the working member reaching the threshold of retirement, and the entitlements with which rule 18 is principally concerned. This causal link is also foreshadowed by the terms of rule 2(5): “payment of the Superannuated Allowance to the members who have **thereby** become entitled to the benefits of the Society”.

[38] In my view, it is also important to note the structure of rule 18. It is principally concerned to define the core benefits which arise upon the retirement of a working member. The first entitlement (“shall be entitled ...”) is to be paid his share of the working capital of the Working Department. Parties were agreed that this was akin to the return to an outgoing partner of his share of the capital of the partnership. The second entitlement (“[h]e shall also be entitled...”) is to the Superannuation Allowance, sanctioned and paid by the Society from time to time. The language is clear: these entitlements arise at this stage, so long as two threshold criteria are satisfied, namely that the retiring member has

- (i) served 21 years (ie as a *working* member),
- (ii) “without having done any act whereby his interests in the Society’s funds may be forfeited”.

Having regard to the language and structure of rule 18, so long as the retiring member has not engaged in any conduct that infringes the grounds in rule 16, as a *working* member, then he becomes *prima facie* entitled to the benefits specified in rule 18.

[39] Finally, the fact that rule 16 precedes rule 18 reinforces the construction of rule 16 as being concerned with, but confined to, the conduct of *working* members, that is their conduct prior to their reaching the threshold of retirement. Putting it another way, the superannuated member has no role or responsibility under the Rules once he has attained that status. *Prima facie* the conduct of a superannuated member falls outside the scope of the potentially “improper” conduct which is the focus of rule 16.

[40] Collectively, these features of rule 18 reinforce the reading of rule 16 that the grounds for expulsion, however apparently broad they may be, apply only to the conduct of the members as working members of the Society.

[41] This conclusion is also consistent with the nature of the Society as a benevolent society, at least in respect of the application of the funds of the Property Department, and one of the features of the Rules already noted. Once a member becomes a superannuated member, he is the passive recipient of the benefits (once they are appropriated and calculated). There is no active conduct in relation to, or representative of, the Society which falls within the scope of the “improper conduct” towards which rule 16 is directed.

Conclusion on scope of the grounds for expulsion in rule 16

[42] For these reasons, I find that the grounds for expulsion in rule 16 are concerned with the conduct of the working members. A superannuated member is not susceptible to expulsion for his conduct as a superannuated member. However, this does not itself resolve the issue between the parties, at least as it was argued at debate. What remains to be considered is whether the power of expulsion, based on the conduct of a member while he was a working member, is exercisable once that member has become a superannuated member. I refer to this as “the procedural question”, which I address below.

The procedural question: Is the power of expulsion in rule 16 exercisable only in relation to working members?

Parties’ submissions

[43] Parties dealt lightly with the question of whether any power of expulsion was exercisable for conduct that was committed while a member was a working member, but which only came to light after (or was only able to be given effect after) the member concerned became a superannuated member. Mr MacColl’s submission was as follows:

- (i) to treat the procedural question as either determined by the scope of the grounds in rule 16; that is, since the rule 16 grounds could only apply to working members, only working members could be expelled; or
- (ii) to contend that expulsion was precluded by rule 18, which envisaged that any question of expulsion had to be dealt with before a member became a superannuated member.

Mr O’Brien’s submission was that in these cases all of the conduct arose while the pursuers were each working members and that the power of expulsion in rule 16 was exercisable

notwithstanding that they had each since become superannuated members. He submitted that on the pursuers' approach, it would become impossible to expel a superannuated member because he had achieved an "immunity" simply upon attaining the status of a superannuated member. There was no logic in that reading of the Rules and which would lead to bizarre or arbitrary practical consequences. It would, for example, reward a member who had successfully concealed his expellable conduct until he had retired. In the case of expellable conduct which came to light shortly before a member was due to retire, he submitted that the pursuers' approach would compel the Society to move quickly, and perhaps on incomplete information, in order to exercise the power of expulsion before the member concerned attained the status of being a superannuated member.

Determination of the procedural question

[44] On this issue, I prefer the submissions for the Society essentially for the reasons it advanced. To those I add the following observations. It is in my view significant that rule 16 itself contains no restriction as to when the power to expel may be exercised. Turning to Mr MacColl's reliance on rule 18, does it create the kind of immunity shield for a member once he attains the status of being a superannuated member, regardless of whether he engaged in expellable conduct which had not yet been discovered? In my view, it does not. In the first place, the two entitlements specified in rule 18 (described in para [38], above), are conditional on satisfaction of what I have described as the threshold criteria: that the member has served for a period of 21 years, and he has done so "without having done" any expellable act. That latter criterion, the "conduct criterion", contains no restriction as regards the point in time at which his conduct as a working member might be assessed. A working member who engaged in expellable conduct (eg embezzlement of the Society's

funds) would, viewing the matter objectively, never be able to satisfy the conduct criterion. There is nothing in the language of these parts of the Rules to justify a sharp distinction between the member whose expellable conduct was discovered before he became a superannuated member and one whose expellable conduct comes to light after he had become a superannuated member. The effect of Mr MacColl's interpretation would be to introduce a *de facto* time bar on, or limitation to, the power of expulsion. In my view, there is simply no warrant for reading in such a restriction to a conduct criterion stated in unqualified terms.

[45] There is a further reason why simply achieving the status of a superannuated member is not a bar to expulsion (provided the conduct was engaged in *qua* working member). In my view, the language of "shall be entitled" does not vest in the superannuated member an indefeasible right upon retirement *inter alia* to the superannuated allowance. This is because the member's entitlement is always dependent on a decision to appropriate sums of the Society for payment of this (and other benefits) and on each superannuated member's (or other beneficiaries') share being calculated in terms of rule 9. More fundamentally, the entitlements specified in rule 18 remain conditional on the satisfaction of the threshold criteria. On that analysis, it does not matter if the member's failure to satisfy the conduct criterion comes to light before or after the date on which the member becomes a superannuated member. It follows that if a ground of expulsion in rule 16 is established in respect of a working member's conduct, then the power of expulsion is exercisable in relation to him even if he has become a superannuated member before the Society resolves to exercise it.

By order

[46] Parties requested that the Court put the case out by order to discuss the terms of any interlocutor to give effect to the Court's ruling on the issue debated. At that point, too, parties should have finalised the amendment concerning the second issue, which has been held over. I shall reserve all questions of expenses meantime.