SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2021] SC GLW 9

GLW-CA26-20

JUDGMENT OF SHERIFF JOHN N McCORMICK

in the cause

BILLY GRAHAM EVANGELISTIC ASSOCIATION

Pursuer

against

SCOTTISH EVENT CAMPUS LIMITED

Defender

Pursuer: A O'Neill QC, D Welsh, Advocate; Balfour + Manson LLP
Defender: Dean of Faculty (R Dunlop QC), J MacGregor QC; CMS LLP

Glasgow, 16 February 2021

The sheriff, having resumed consideration of the cause, Repels pleas-in-law 1, 2, 3 and 4 for the pursuer; Sustains in part plea-in-law 1 for the defender and Dismisses crave 2; Excludes from probation the following pursuer's averments (a) condescendence 4; (b) condescendence 11, and (c) in condescendence 17, on lines 20 to 23: "The actions of the defender have caused injury to the feelings of the pursuer's staff, members and associates. Therefore," and "a sum for the injured feelings of the pursuer, and, as a representative religious group, its members and its associates as well as"; and to that extent sustains the defender's second plea in-law; *quoad ultra*, before further answer, allows parties a proof of their respective averments on a date to be hereafter assigned;

reserves the expenses occasioned by the preparation for and attendance at the debate until further order of court; ordains parties to discuss and, if possible, agree expenses, failing which to provide the commercial clerk at Glasgow with a list of suitable dates within the next 28 days for a hearing on expenses to be assigned thereafter; ordains parties to discuss and agree the likely duration of a proof before answer and to provide a list of unsuitable dates to the commercial clerk at Glasgow, also within 28 days.

NOTE

[1] This case proceeded to debate by WebEx on 21 December 2020. Prior to the debate parties had lodged and exchanged written submissions and supplementary submissions. At the debate the pursuer was represented by Mr Aidan O'Neill QC and David Welsh, Advocate. The defender was represented by the Dean of Faculty and John MacGregor QC.

[2] I incorporate the written submissions (rather than summarising them) within this decision in deference to the quality and breadth of those submissions.

[3] The pursuer is a company limited by guarantee and is a registered charity. It avers that in terms of hire agreement booking form dated 31 July 2019 the pursuer hired premises at SEC Hydro Arena from 0800 hours on 30 May 2020 to 0200 hours on 31 May 2020 for an event to be known as the "Franklin Graham Event".

[4] It is also averred that on 29 January 2020 the chief executive of Glasgow City Council wrote to the defender as follows:

> "I write regarding the SEC's proposed hosting of an event featuring Franklin Graham.
>
> On behalf of the council, as the majority shareholder of SEC Ltd, I have to ask you to cancel this booking for the following reasons.

> Firstly, as you may be aware, there is potential for Mr Graham to make homophobic and islamophobic comments during his public speaking engagements. Among other concerns, this could raise issues for the council in terms of its duty under the Equality Act 2010 to eliminate discrimination, harassment, and victimisation and to foster good relations between different groups.
>
> Secondly, I have a concern for the city's reputation. Glasgow is well known as a city which is friendly to all people, but particularly including people from the LGBTQ and Muslim communities. I do not want to send a message to those communities that the council is prepared to welcome any person who has the potential to make such comments."

[5] On the same date (29 January 2020) the defender wrote to the pursuer in the following terms referring to the hire agreement:

> "Regrettably, the Board of Scottish Event Campus Limited ("SEC") have determined that the Hire Agreement is hereby terminated with immediate effect under clause 5.1.2 of SEC's Terms of Business. This is by reference to your material breach of the Hire Agreement pursuant to clause 8.1.6 of SEC's Terms of Business, which sets out your obligations not to act, or not to omit to act, in any way reasonably likely to bring SEC into disrepute.
>
> This is on the basis of the recent adverse publicity surrounding your tour, which we have reviewed with our partners and stakeholders, and who are of the view that this brings both SEC and potentially, Glasgow, as a city, into disrepute. This is not capable of remedy."

[6] The letter from the defender to the pursuer referred to an alleged "material breach of the Hire Agreement" on the part of the pursuer.

[7] The pursuer did not accept that it was in breach of contract. On the contrary, the pursuer interpreted the letter as an anticipatory breach of contract on the part of the defender.

[8] The pursuer raised this commercial action at Glasgow Sheriff Court to ordain the defender in terms of crave 1, (i) to permit the pursuer to use the venue and the related facilities and (ii) to perform the core services and box office services; and (iii) to

otherwise perform its contractual obligations as defined and contained in the contract between the pursuer and the defender dated on or around 31 July 2019.

[9] Alternatively, in terms of crave 2, the pursuer seeks damages in the sum of £200,000 plus interest.

[10] Crave 3 seeks to find and declare that the defender has discriminated against the pursuer on the basis of a protected characteristic for the purposes of the Equality Act 2010.

[11] Crave 4 is for payment of the sum of £200,000 with interest in terms of section 119 of the Equality Act 2010.

[12] After this court action was raised, the defender's solicitors wrote to the pursuer's solicitors on 27 March 2020 saying that, assuming that the contract was valid and subsisting (a premise which the defender did not accept) the defender invoked clauses 11.1 and 11.2 of the hire agreement to contend that "the current COVID-19 situation" is a "*force majeure* event" as defined in the contract and that, on behalf of the defender, "We hereby notify your client in terms of clause 11.2 that, assuming the contract remains valid, our clients hereby cancel the event hire agreement".

[13] The debate raised a number of issues including the effect of the letter dated 29 January 2020 purporting to terminate the hire agreement; the decision by the pursuer not to accept the anticipatory breach of contract on the part of the defender; the effect of the letter dated 27 March 2020 from the defender's solicitors to the pursuer's solicitors purporting to cancel (rather than suspend) the event hire agreement coupled with the interpretation of clauses 11.1 and 11.2 ("*force majeure* event") of event hire agreement.

[14] The case also raises whether the common law of frustration of contract applies as a consequence of the COVID-19 pandemic (and the change of use of the venue into a temporary hospital facility).

[15] At debate the defender conceded that the pursuer's case under the Equality Act 2010 is relevant. The pursuer sought decree of declarator *de plano.* Finally, the parties disputed the remedies available under section 119. There is a dearth of authority on this issue.

[16] It was agreed that senior counsel for the pursuer would speak first. I detail his written submissions and the supplementary submissions. Thereafter I reproduce the submissions and supplementary submissions lodged on behalf of the defender.

Pursuer's written submissions

Introduction

P1 These written submissions are prepared in accordance with this court's interlocutor of 1 September 2020 and in anticipation of the diet of debate that has been fixed for Monday 21 December 2020 at 11am.

Motions

P2 The pursuer moves the court:

(i) to repel the defender's pleas-in-law; and

(ii) to sustain the pursuer's first, second, third and fifth pleas-in-law and either the pursuer's sixth or seventh plea-in-law, grant decree *de plano* in terms of the third and fourth craves and thereafter to appoint the cause to a proof restricted to the issues of contractual damages.

Breach of Contract

P3. The parties are not in dispute that the pursuer and the defender contracted with one another (Article/Answer 3). That Contract is incorporated into the pleadings and the court can see for itself what was agreed therein.

P4. It is also not in dispute that the defender was aware of Franklin Graham's Association with the pursuer and that the defender nonetheless freely and willingly entered into the Contract (Article/Answer 7).

P5. It is also not in dispute that the defender presented the pursuer with the Termination Letter on 29 January 2020 (Article/Answer 7). The Termination Letter is also incorporated into the pleadings.

P6. It is the pursuer's pled case that the Termination Letter marks an anticipatory breach of contract by the defender. There is an anticipatory breach when a party unequivocally indicates that it intends not to perform the contract: *Forslind* v *Bechely-Crundall* 1922 SC (HL) 173 per Viscount Finlay at 190. That is a matter that needs to be considered objectively.

P7. The defender's Termination Letter must be viewed only in the context in which it was sent and any attempt at formulating *ex post facto* reasoning – such as the now-professed G4S report – is irrelevant to the determination of whether the Termination Letter constituted an anticipatory breach. The basis of the Termination Letter – as is clear on its face – is that the defender stated that the pursuer's presence at its venue would bring it (and Glasgow as a city) into disrepute. That is the sole basis of termination. There was no suggestion of security concerns at that time. There was no suggestion that the pursuer should be prevented from hosting the Event so as to

avoid Islamophobia or homophobia. A further excuse was subsequently given in relation to a mistaken assumption that the Event would be "private" although no explanation is given of what is meant by that not on what basis the mistake was made. Those attempts at rationalising the Termination Letter came only after the raising of these proceedings and, insofar as concerning the court's attempt to contextualise the Termination Letter, they are entirely irrelevant. They should accordingly be excised from Answer 10 of the defender's pleadings.

P8. If the pursuer is correct that the Termination Letter represented an anticipatory breach, it follows that it was open to the pursuer either (i) to accept the repudiation and claim damages, or (ii) to insist on performance of the Contract: *Fercometal SARL* v *Mediterranean Shipping Co SA* 1989 AC 788 per Lord Ackner at 805. The pursuer initially sought to have the Contract performed albeit with reasonable adjustments in light of the issues caused with the dates. In the absence of such performance, the pursuer is entitled to contractual damages as a result of the defender's anticipatory breach.

P9. What is clear from the defender's pleadings at Answer 10 is that the true reason for the anticipatory breach was that the defender came under pressure from Glasgow City Council and sponsors (among others) to refuse to permit the pursuer to host the Event because of certain comments attributed to Franklin Graham, made in the expression of his faith, with which Glasgow City Council did not agree.

P10. There is no basis or foundation for any suggestion that there was any intention at the Event for any comment to be made in relation to either Islam or homosexuality. Indeed, Franklin Graham issued a public statement on 27 January 2020 to the effect that he had no intention of bringing hateful speech to the UK and, addressing

directly the LGBTQ+ community, noting that they would be made welcome at the Event. This message, of course, does not concur with the sentiments that the defenders wish to attribute to the pursuer so it was seemingly entirely ignored by them.

P11. On no reasonable view can it be said that the defender did anything other than unequivocally state that it had no intention of fulfilling its contractual obligations. The question then becomes how that anticipatory breach is dealt with by this court.

P12. It is at this stage that the defender says that its breach should be treated with impunity because, subsequent to its breach, the COVID-19 pandemic happened and, on the defender's hypothesis, it was absolved of any wrongdoing prior to that point. That line of argument is wholly irrelevant.

P13. It would be one thing if the pursuer were seeking to claim damages for an ongoing income stream interrupted by the defender. In such circumstances, the pursuer accepts that subsequent post-breach events may have been relevant. Here, however, as is entirely clear to the defender from the schedule of loss that has been lodged in this action, the pursuer's losses were caused by the defender as soon as it took the position that it would refuse to permit the Event to go ahead come what may. The fact that it was (and remains) unwilling to reconsider alternative dates for the Event is clear and unchallenged evidence that the defender's true problem with the pursuer arises as a result of the religious views of Franklin Graham, which it has sought to categorise by wrenching selected comments made in the past whilst conveniently ignoring contrary comments also made by Franklin Graham. For that reason, all of the preparatory and front-loaded expense incurred in holding the Event was wasted and represents the loss suffered by the pursuer as a result of the defender having

unilaterally opted to resile from the Contract. It is not future losses for which the pursuer is seeking to claim damages; it is already-incurred expenditure that was wasted as a result of, and immediately at the time of, the defender's anticipatory breach. The pursuer is entitled to prove those losses in this court.

P14. The defender's arguments anent *force majeure* and frustration might well hold water if it had not by that time already indicated its clear intention that it would not in any event be performing the Contract. The Contract was concluded on 31 July 2019. The defender issued the Termination Letter on 29 January 2020. The pursuer sought to exercise its right to require the defender to perform its obligations under the Contract but, in the absence of the defender doing so, it is entitled to contractual damages caused by the breach. The defender's argument is akin to a doctor wrongfully removing a patient's spleen arguing that he should escape liability for solatium because the patient subsequently suffers an injury which would have necessitated the removal of the spleen to save the patient's life. The two are unrelated and the latter does not excuse the former.

P15. Had the defender agreed to reschedule the Event and then that rescheduled Event had been prevented as a result of the COVID-19 pandemic, the defender may have been able to plead that the rescheduled obligations had been frustrated. However, the clear and inescapable truth in this case is that the defender refused and continues to refuse to permit the pursuer to make use of its venue because of the opinion the defender holds about certain views of Franklin Graham. Such refusal is unlawful for the reasons set out below in relation to the Equality Act 2010.

P16. What is clear from the defender's pleadings is that, rather than its decision to issue the Termination Letter having been reached as a result of any security concern, it was

reached as a result of pressure placed on it by Glasgow City Council. The defender pleads that Glasgow City Council asked it to cancel the event on 29 January 2020. That is the very same day that the Termination Letter was issued. There was, therefore, on the defender's own pleadings no independent or objective determination of the defender's obligations under the Contract. Indeed, the defender pleads that the defender's Chief Executive posed the question to the defender's board about "whether the Event should be allowed to proceed". There was, on the defender's own pleadings, no consideration of what the defender was obliged to do under the Contract. There was a decision taken to get out of the obligations under the Contract by any means to avoid upsetting Glasgow City Council and to deal with the consequences of doing so thereafter. This action represents those consequences.

P17. But for the actions on the part of the defender to refuse to fulfil its obligations as a result of the view it has formed about the religious views of Franklin Graham in order to please Glasgow City Council, it is clear that the Event would have been able to go ahead albeit on a different date. However, the defender refuses to countenance that as a suggestion (no doubt because it would cause concern at Glasgow City Council), instead seeking to rely on shoehorned arguments about *force majeure* and frustration. The losses suffered by the pursuer are, therefore, caused by the actions of the defender and not by any subsequent pandemic.

P18. The defender's arguments anent frustration and *force majeure* should be struck from the defender's pleadings. The defender pleads no relevant defence to the breach of contract. This court can accordingly sustain the pursuer's third plea-in-law and restrict probation to the *quantum* of contractual damages.

Ancillary points anent irrelevant pleadings

P19. The defender's averments about its mistaken belief that the Event would be "private" rather than public are wholly lacking in specification. It is entirely unclear what, if any, relevance this is said to have on the objective determination by this court of whether there has been an anticipatory breach by the defender. It is trite law to state that a unilateral error by one party to a contract which was not caused by a misrepresentation by the other party is insufficient to permit that party to resile from its obligations. The defender's averments in relation to this matter are entirely irrelevant and should be excised from the defender's pleadings to avoid irrelevant matters being sent unnecessarily to proof, thereby wasting this court's time.

P20. Following on that matter, the defender's averments relating to and incorporating the G4S Security Assessment are irrelevant. The report does not provide a foundation on which the defender can reasonably claim to have acted when issuing the Termination Letter. It was not available at that time, its provenance is wholly unclear from the defender's pleadings and, in any event, it concludes that reputational damage was "possible" which falls entirely short of "likely", "probable" or "certain". The report is irrelevant to the dispute before the court and references to it will cause only additional court time and expense to be wasted. The averments should be excised from the defender's pleadings.

Equality Act 2010 claim

P21. The defender fails to plead a relevant defence to the pursuer's Equality Act claim. It is clear from the defender's own pleadings that the reason for the Termination Letter being sent was because it bowed to pressure from Glasgow City Council who

objected to some of the views previously espoused by Franklin Graham. It was intended that at the Event, Franklin Graham would deliver religious addresses based around familiar and mainstream Christian themes. It was not his intention to speak to this audience about Islam. He was going to talk about Christianity. It was not his intention to speak to this audience about the issue of homosexuality, nor about the legalisation of same-sex marriage, whether in the USA or the UK. The defender thereby chose to deny its service to the pursuer on the basis of a protected characteristic. It is important to understand the genesis of the protections now included within the Equality Act 2010.

The constitutional principle of religious tolerance in the UK

P22. The constitutional principle of religious toleration has formed part of the fundamental constitutional framework in England and Wales and in Scotland since the constitutional changes in these kingdoms associated with and consequent upon the overthrow of the Catholic Monarch James II and VII (following the birth of a Catholic male heir to him), and his replacement by his Protestant elder daughter Mary and her Protestant husband (and his nephew), the Dutch Stadtholder, William of Orange who were enthroned under the "Glorious Revolution" settlement of 1688/1689 as the joint monarchs William III and Mary II of England, and William II and Mary II, King and Queen of Scots: see *R (Miller)* v *Secretary of State* [2017] UKSC 5 [2018] 2 AC 61 at paragraphs 40, 41. The Toleration Act 1688 was passed by the English Parliament at this time as "part of the emphatic testimony borne to the determination of the nation to reap the full fruit of the Revolution Settlement and to

secure against judges, as well as against the Sovereign, the liberties of the realm": *Scott* v *Scott* [1913] AC 417 per Lord Shaw of Dunfermline at 475.

P23. The precise terms of this Toleration Act 1688 were relatively limited: *Bowman* v *National Secular Society* [1917] AC 406 per Lord Parker of Waddington at 448. It allowed Protestant Trinitarian dissenters from the Anglican settlement (Nonconformists) - subject only to their avowal of certain oaths of political allegiance - to set up their own places of worship and to maintain their own teachers and preachers, provided that these places of worship were in principle open to the public, rather than held behind closed doors: see *Gallagher* v *Church of Jesus Christ of Latter-Day Saints* [2008] UKHL 56 [2008] 1 WLR 1852 per Lord Scott of Foscote at paragraph 44. Yet the broader constitutional impact of the Act was of immense significance in that it introduced the principle of religious pluralism within the post-1689 State and signalled the illegitimacy of the State's attempts at enforcing uniformity in the practice of religion in requiring universal membership of and subscription to one State-approved and supported church in the Church of England: see *R* v *Registrar General, Ex p Segerdal* [1970] 2 QB 697 Lord Denning noted at 740E-F.

P24. Although the provisions of the Toleration Act 1688 were not immediately replicated in Scotland by the Scottish Parliament in the immediate aftermath of the 1707 Anglo-Scottish Parliamentary Union, the principle of religious toleration had infiltrated even into Scotland: see *James Greenshields* v *Lord Provost of Edinburgh* (1710) Colles 427, 1 ER 356 (UKHL) leading to the Toleration (Scotland) Act 1711 which allowed persons of the Episcopalian persuasion in Scotland to assemble for divine worship. Certainly by the latter half of the eighteenth century the courts in England could affirm in that an individual's exercise of his religion,

according to his sentiments and persuasion, was under the protection of the law and constitution of the United Kingdom. And this constitutional protection of "religious nonconformity" was understood to extend so far as requiring the dismantling (and forbidding the re-imposition) of any legal barriers or obstacles against those (Protestant) religious dissenters from majoritarian State-supported Anglican or Presbyterian orthodoxies from being appointed to, holding and maintaining their appointment to any public office in the United Kingdom: *Harrison* v *Evans* (1767) 3 Brown PC 465.

P25. The principle of religious toleration, the right to public worship (and the removal of "religious tests" and requirements for oaths which had the intent and effect of barring religious dissenters from the established church from access to and the exercise of public office in the UK), was gradually extended in the course of the later eighteenth and early nineteenth century: first to Unitarians under The Unitarian Relief Act 1813 (see *Bowman* v *National Secular Society* [1917] AC 406 per Lord Parker of Waddington at 449); then to Catholics by the Roman Catholic Charities Act 1832 (*Bourne* v *Keane* [1919] AC 815 per Lord Buckmaster at page 867); and then to Jews by the Religious Disabilities Act 1846 (see *Keren Kayemeth le Jisroel Limited* v *Commissioners for Inland Revenue* [1931] 2 KB 465 per Slesser LJ at 494).

P26. It is clear that the principle of religious toleration and the protection and preservation of religious pluralism is a constitutional principle with far deeper historical roots than the subsequent constitutional principles of equality of treatment regardless of sex, (which began to develop only in the first half of the twentieth century) or equality of treatment regardless of race (which is very much a development of the second half of the twentieth century). It is only at the very end of

twentieth century that the law seeks to outlaw disability discrimination and we have to wait until the twenty-first century before the principle of equal treatment begins to be extended to encompass sexual orientation and age as specifically protected grounds against unlawful discrimination.

P27. The point about the historical *excursus* on the principle of religious toleration and the preservation of religious pluralism is that what this shows is that this principle has had time to become embedded within, and apply across, the full corpus of the common law. As Lord Mansfield confirmed in his judgment in *Harrison* v *Evans*, the constitutional principle of religious toleration is *not* to be understood as being confined by and within the specific words used in any particular statute (whether the Toleration Act 1689 or the Human Rights Act 1998 or the Equality Act 2010) in which that constitutional principle is currently expressed.[1] Instead, as a constitutional principle which expresses one of the undoubted fundamental liberties of the post-1689 realm - namely respect for the free exercise of religion - the concept of religious pluralism and toleration imbues, among other things, legal principles concerning the interpretation of (and consequences of, and remedies for, breach of) statutes and of contracts: cf *Cherry and others* v *Advocate General for Scotland/Miller* v *Prime Minister* [2019] UKSC 41, 2020 SC (UKSC) 1 at paragraph 40.

The Equality Act 2010

P28. Part 3 of the EA 2010 prohibits discrimination in respect of defined protected characteristics in the provision of services and separately in the exercise of public

functions. The protected characteristics for these purposes include religion and belief: section 10 EA 2010.

P29. Under Part 3, any (public or private, corporate or natural) body which is "concerned with the provision of a service to the public":

a. must not discriminate against a person requiring the service by not providing the person with the service: section 29(1) EA 2010; and

b. must not, in providing the service, discriminate against a person by terminating the provision of the service to that person: section 29(2)(b) EA 2010.

[1]On the significance of this speech of Lord Mansfield for the UK constitution, *Bourne* v *Keane* [1919] AC 815 per Lord Buckmaster at pages 866-867: "Lord Mansfield's speech in *Harrison* v *Evans* (1767) 3 Brown PC 465 is certainly worthy of a more important place in the law reports than that hitherto assigned. … Its importance lies in its strong declaration of the liberty accorded to every man for freedom of religious opinion in this country, except so far as such right has from time to time been limited and invaded by Acts of Parliament. The Toleration Act 1688 had then been passed [in England], and in dealing with its effect upon Dissenters, Lord Mansfield said:

> "Dissenters, within the description of the Toleration Act 1688, are restored to a legal consideration and capacity; and one hundred consequences will from thence follow, which are not mentioned in the Act. For instance, previous to the Toleration Act, it was unlawful to devise any legacy for the support of dissenting congregations or for the benefit of dissenting ministers; for the law knew no such assemblies, and no such persons; and such a device was absolutely void, being left to what the law called superstitious purposes. But will it be said in any Court in England, that such advice is not a good and valid one now? And yet there is nothing said of this in the Toleration Act.'"

P30. The discrimination prohibited by section 29 EA includes direct discrimination and indirect discrimination.

P31. The Equality Act 2010 confers rights against discrimination on "persons". It is clear that this includes both natural and legal persons: *EAD Solicitors* v *Abrams* [2016] ICR 380 per Langstaff J at §§ 25-26. It is therefore perfectly competent for the pursuer to have brought a claim under the Equality Act 2010. Any suggestion to the contrary by the defender is simply incorrect.

P32. There is no material difference between the scope of the religious and other beliefs which are protected under the EA 2010 from those protected under Article 9 ECHR: *Harron* v *Chief Constable of Dorset Police* [2016] IRLR 481 at per Langstaff J at § 33. In any event, this court is under an obligation to interpret and apply the provisions of the Equality Act 2010 in the circumstances of this case in a Convention-compatible manner: *Ghaidan* v *Godin-Mendoza* [2004] 2 AC 557 per Lord Rodger of Earlsferry at §§ 106-7; *Lee* v *Ashers Baking Co Ltd* [2018] UKSC 49 [2018] 3 WLR 1294 per Baroness Hale at § 56. The suggestion by the defender that reference to the ECHR is somehow prevented in the circumstances of this case is, therefore, simply wrong.

P33. Any religious belief which is genuinely held and which meets certain modest minimum requirements attracts the protection of Article 9 ECHR and of the Equality Act 2010. It is not for the court to embark on any inquiry, theological or otherwise, into the "validity" of the belief or the extent to which other professed followers of the same religion share the belief: *R (Amicus)* v *Secretary of State for Trade and Industry* [2007] ICR 1176 per Richards J at §§ 36-39. Religion-based beliefs are protected however supposedly irrational, apparently inconsistent or otherwise

surprising they might seem to others: *R (Williamson)* v *Secretary of State for Education* [2005] 2 AC 246 at § 22.

P34. As with Article 9 ECHR, it is clear the protection against discrimination on grounds of "religion and belief" under the EA 2010 protects not only the holding of religious beliefs but also manifestations of those beliefs. Manifestations of a belief includes conduct which is "intimately linked to the religion or belief": *Eweida* v *United Kingdom* (2013) 57 EHRR 8 at § 82. The European Court of Human Rights has held that the freedom to manifest one's religion individually or collectively in public or in private, since it may take various forms such as the teaching, practice and performance of rites, includes also the right to attempt to convince other persons, for example by means of preaching: *Perry* v *Latvia* [2007] ECtHR 30273/03 (Third Section, 8 November 2007) § 52.

Direct Discrimination

P35. Section 13 EA 2010 defines direct discrimination as follows: "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.".

P36. It follows from the underlined text that section 13 EA 2010 prohibits associative discrimination, where a person is treated less favourably because of their connection to or association with another person who has a protected characteristic: *EAD Solicitors* v *Abrams* [2016] ICR 380 per Langstaff J' at §§ 11, 14-6.

P37. A service provider, such as the defender, is therefore prohibited from denying or withdrawing access to their premises or refusing to provide such services associated with the hire of these premises (which it otherwise provides to the public) to the

pursuer because of the venue management's apparent policy objection to the religious beliefs and positions understood to be held and professed by those with whom the pursuer is

Associated - notably, in this case, Franklin Graham: *Saini* v *All Saints Haque Centre* [2009] 1 CMLR 38, EAT per Lady Smith at §§ 28-29.

P38. Given that the Equality Act 2010 protects both the holding and the manifestation of religious belief, it follows that direct discrimination occurs wherever a person suffers a detriment because of religious belief or because of conduct which manifests a religious belief. Further (other than in the specific cases expressly prescribed by statute) direct discrimination *cannot* be justified.

Indirect Discrimination

P39. Section 19 EA 2010 defines indirect discrimination as follows:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

P40. Section 19 EA 2010 should also be understood to prohibit associative discrimination, in this context meaning a situation where owing to a provision, criterion or practice a person suffers a disadvantage related to their association with a group which faces a particular disadvantage as a result of the provision, criterion or practice. In this respect the decision of the Court of Justice in Case C-83/14*CHEZ Razpredelenie Bulgaria AD* [2016] 1 CMLR 14 (also in the context of goods and services discrimination, albeit on grounds of race) is instructive, particularly at §56 of the Court's decision and at §106 of Advocate General Kokott's opinion.

The defender's position in its pleadings

P41. Section 136 of the Equality Act 2010 requires this court to apply a modified burden of proof at any eventual evidential hearing. However, for the purposes of this hearing, it is clear from the parties' respective pleadings that the espoused views of Franklin Graham formed the basis of the defender's decision to issue the Termination Letter. There is no reasonable explanation in the defender's pleadings.

P42. That being the case, the defender is then required to satisfy this court that, on the balance of probabilities, it was not materially influenced by a protected characteristic. The defender offers to prove no such explanation and, accordingly, pleads no relevant defence to the pursuer's Equality Act claim.

P43. It cannot seriously be disputed that section 29 of the Equality Act 2010 applies in the circumstances of the present case such as to require the defender not to discriminate when offering or refusing their services or premises. Section 29 plainly required the defender not to discriminate when making its decision on bookings or terminations.

P44. The first branch of section 13 of the Equality Act 2010 is plainly met: a decision unilaterally to terminate the pursuer's booking constituted detrimental and less favourable treatment of the pursuer. The Termination Letter deprived the pursuer of the opportunity (which it had acquired and paid for in good faith) to hold its event in its chosen venue. The key question is as to the other branch of section 13. The Court must ask whether, in taking the decision to issue the Termination Letter, the defender was influenced in more than a trivial way by:

(a) The religious beliefs of the pursuer and/or of Franklin Graham (with whom the pursuer is manifestly associated). Those beliefs are genuinely held by the pursuer and by Franklin Graham. They relate to profound aspects of Christian theology, ranging from belief in an obligation to proclaim the message of Jesus Christ to a conviction that sexual activity is something only to be expressed by opposite sex partners in a monogamous marriage; or

(b) The manifestations of the religious beliefs by the pursuer and/or Franklin Graham. In particular, Franklin Graham has preached and spoken publicly about his religious beliefs in accordance with this religious obligation and duty to proclaim the Gospel and bring the Good News of Jesus Christ to all.

P45. On a plain reading of the pleadings in this case, it is evident that the defender was materially influenced by its understanding of the beliefs of the pursuer and Franklin Graham and their desire and intent to manifest those beliefs. The complaints that the defender's own pleadings narrate as leading to the Termination Letter relate exclusively to the religious beliefs of Franklin Graham.

P46. Aspects of the religious beliefs of the pursuer and of Franklin Graham may now perhaps be regarded in some sections of UK society as controversial. Some members of society strongly oppose them and, indeed, it may be that not all who call themselves Christians adhere to them. Yet those beliefs remain genuinely-held and legitimate Christian beliefs, founded in Christian scripture and still proclaimed within individual Christian churches and preached by Christian Ministers including those of the evangelical wing of the Church of England.

P47. Neither the common law nor the Equality Act 2010 as interpreted in line with the Human Rights Act 1998 guarantees any right not to be confronted with opinions that are opposed to one's own convictions. To the contrary, freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of everyone. It is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

P48. The importance which the ECtHR attaches to these principles appears from its decision in *Annen* v *Germany* 2015] ECHR 3690/10 (Fifth Section, 26 November 2015). The applicant was an anti-abortion campaigner who handed out leaflets next to an abortion clinic naming and giving the addresses of doctors who performed abortions at the clinic. The leaflets appeared to draw an analogy with the Holocaust and identified a website named "www.babycaust.de". Despite the personal and somewhat extreme nature of Mr Annen's expression, the ECtHR found that an

injunction preventing him from disseminating the leaflets violated his Article 10 rights. In *Bayev* v *Russia* (2018) 66 EHRR 0, the ECtHR found that the convictions of three gay activists for demonstrating outside schools in favour of gay rights violated their Article 10 ECHR rights. In finding that the interference was not justified the ECtHR emphasised that the applicants' messages had not been inaccurate, sexually explicit or aggressive and that nothing the applicants did diminished the rights of parents to enlighten and advise their children in line with their own religious or philosophical convictions §82).

P49. The High Court of England and Wales very recently summarised the position as regards the domestic law on freedom of expression (which cannot reasonably be said to differ between Scotland and England & Wales): *R (Miller)* v *College of Policing* [2020] HRLR 10 at §§ 1-6. Freedom of expression is not restricted to matters that are uncontroversial or inoffensive. There is no protected right on the part of any individual not to be offended. There will always be, in a pluralist society, strongly held beliefs that cannot be reconciled with one another. That does not mean that one or the other of those views should be prevented from being expressed.

P50. The defender has discriminated against the pursuer on the basis of a protected characteristic and it pleads no relevant defence to the contrary. The whole of the defender's pled case in relation to the Equality Act 2010 is irrelevant and should be excised from the pleadings. This court can accordingly sustain the pursuer's fifth plea-in-law. That being the case, the question then becomes one of determining the appropriate remedy under the Equality Act 2010.

Remedies

P51. The principle of religious toleration and the preservation of religious pluralism are constitutional principles of law which are enforceable by the courts in the same way as other legal principles. In giving them effect, the courts have the responsibility of upholding the values and principles of the UK constitution and making them effective. The courts cannot shirk that responsibility merely on the ground that (the expression of) the religious views in question are considered by some to be political or problematic or controversial.

P52. The available remedies must be (made to be) effective, proportionate and dissuasive (in the sense of having of a real deterrent effect such as to guarantee real and effective judicial protection against continued or repeated breach of this fundamental constitutional principle). It is insufficient for the court to grant nothing more than a theoretical or token remedy: *R (UNISON)* v *Lord Chancellor* [2020] AC 869 per Lord Reed at §§71, 75-76. Where a person, such as the pursuer, has been afforded a right under the law and a party, such as the defender, breaches that right, the law must provide to the pursuer a remedy that makes the right effective in practice: *Lothian Health Board* v *HMRC* 2020 SC 351 per Lord Drummond Young at §§19 and 39.

P53. There is a positive obligation on the courts to *develop* the law in order to identify a fitting remedy: *Environment Secretary* v *Meier* [2010] PTSR 321 per Lady Hale at §25.

P54. Section 119 of the Equality Act 2010 provides, in relation to the available remedies, as follows:

(1) This section applies if the county court or the sheriff finds that there has been a contravention of a provision referred to in section 114(1).

…

(3) The sheriff has power to make any order which could be made by the Court of Session—

a. in proceedings for reparation;

b. on a petition for judicial review.

(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

(5) Subsection (6) applies if the county court or sheriff—

a. finds that a contravention of a provision referred to in section 114(1) is established by virtue of section 19 [indirect discrimination], but

b. is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the claimant or pursuer.

(6) The county court or sheriff must *not* make an award of damages unless it first considers whether to make any other disposal.

(7) The county court or sheriff must not grant a remedy other than an award of damages or the making of a declaration unless satisfied that no criminal matter would be prejudiced by doing so.

P55. In respect of identifying an appropriate remedy, this court accordingly has a very wide discretion to grant a remedy that it finds to be effective in the circumstances of the case to properly remedy the defender's breach.

P56. The pursuer has included a crave for a form of order *ad factum praestandum* which would require the defender to permit the pursuer to hold the Event at its venue once such events are able to be held there again. The defender decries this as requiring them to do the impossible. However, if this court were of the view that such an

order would be the best way of giving effect to the demands of justice, to achieve a just and equitable result, to do what is reasonable and fair, or as an expedient to escape from injustice, it is an order that the Equality Act 2010 permits this court to grant to the pursuer. An order *ad factum praestandum* is a perfectly competent remedy available to the Court of Session in judicial review proceedings and, therefore, it is available to this court under the Equality Act 2010 as set out above. Such an order does not require the court to form the view that the original Contract remains active.

P57. Failing such an order, the pursuer is entitled to an award of damages.

P58. The damages sought in the present case - whether under reference to the common law or under reference to Section 119(4) EA 2010 - are, like the pecuniary remedies available for breach of other fundamental common law constitutional rights, essentially vindicatory in character: cf *Attorney-General of Trinidad and Tobago* v *Ramanoop* [2005] UKPC 15 [2006] 1 AC 328, per Lord Nicholls at §§ 18-19; *R (Lumba)* v *Home Secretary* [2012] 1 AC 245.

P59. Thus, in addition to compensating the pursuer's *losses*, the award of vindicatory damages sought also seeks to vindicate the fundamental common law constitutional rights associated with the free exercise of religion which have been infringed by the defender's action in cancelling the pursuer's booking of its venue.

Conclusion

P60. The pursuer belongs to and represents a religious group the religiously based views of which are entitled to the law's protection within a democratic society properly governed by the rule of law. The rights which the pursuer enjoys under domestic

law mean that the defender's treatment of the pursuer was unlawful, both as a matter of common law and under and in terms of equalities legislation.

P61. The law cannot endorse an outcome whereby a mainstream Christian religious gathering cannot proceed because some members of the community, however vehemently, disagree with religiously based beliefs to which they take objection. Such objectors in a democratic society undoubtedly have a right to freedom of expression and of assembly to protest against other's religious views. What they don't have is a right to silence them or to stop religious assemblies from proceeding and from making welcome all who would come and hear the Good News preached at the Event.

P62. On the basis of the submissions contained herein and in light of the pleadings presented to the court, this court can and should:

a. Find that the defender has no relevant defence to the breach of contract claim so the court needs only hear evidence on the *quantum* of the contractual damages that the defender should pay to the pursuer;

b. Find that the defender has no relevant defence to the Equality Act 2010 claim on the basis of the defender having discriminated against the pursuer on the basis of a protected characteristic; and

c. Thereafter grant an effective remedy to the pursuer to compensate the pursuer for the actions of the defender either by way of a mandatory order such as that first craved or, alternatively, vindicatory damages, separate from the contractual damages.

Pursuer's supplementary written submissions

P63. The pursuer adheres to all of the arguments contained in its written submissions.

P64. The defender seems to want to argue simultaneously that the Contract was both terminated and continuing, depending on which argument it seeks to rely at any given time. The whole of the "Claim in Contract" section is premised on the contract not having been terminated. It is stated by the defender twice in paragraph 9 that its position is that the contract was terminated. Yet then at paragraph 25 onwards, the contract has, on the defender's hypothesis, not been terminated.

P65. The court can determine for itself what weight to lend to any and all such contradictory positions. What is clear however is that the defender's purported cancellation of the pursuer's booking in January was unequivocally a material breach of contract which in principle gave rise to a co-relative right on the part of the pursuer to be awarded damages as quantified and ascertained from that date of cancellation: *Edinburgh Grain Ltd* v *Marshall Food Group Ltd*, 1999 SLT 15. And as a matter of Scots law it is also clear that these contractual damages may include an award of damages in respect of inconvenience thereby occasioned the pursuer: *Mack* v *Glasgow City Council*, 2006 SC 543.

P66. What should be borne in mind, rather than metaphysical speculations as to whether or how a contact which has been breached, continues in "existence", is that the doctrines on which the defender seeks to rely in its defence are equitable considerations (rather than hard and fast rules) which were developed by the courts for the protection of the innocent party (in this case the pursuer) who has been the victim of the guilty party's (the defenders') breach of contract. Thus in *Heyman* v *Darwins Lt* [1942] AC 356 where Lord Porter said at page 399:

> "To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that on acceptance of the renunciation of a contract the contract is rescinded is incorrect. In such a case the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded."

P67. So, on Lord Porter's analysis, even an acceptance by the innocent party of material breach is not an end to the contract, at least in terms of remedies open to the innocent party such as damages or an order for potential future performance.

P68. And in *Geys* v *Société Générale* [2012] UKSC 63 [2013] 1 AC 523 Lord Hope observes as follows in relation to the issue of the requirement of acceptance of a repudiation of contact (at para 19):

> "19 The essential difference between the two theories may be said to be that under the automatic theory the decision as to whether the contract is at an end is made beyond the control of the innocent party in all circumstances, whereas under the elective theory it is for the innocent party to judge whether it is in his interests to keep the contract alive. Manifest justice favours preferring the interests of the innocent party to those of the wrongdoer. If there exists a good reason and an opportunity for the innocent party to affirm the contract, he should be allowed to do so."

P69. But the continuance of the contract for the purposes of determining and establishing the innocent party's remedies, does *not* give the guilty party in breach of contract an option to continue to pick and choose among contractual terms to its benefit - for example to claim to rely on *force majeure* to release him from his obligation and retrospectively purge its breach.

P70. Of course, as the decision of the Court of Appeal in *Classic Maritime Inc* v *Limbungan Makmur SDN BHD* [2019] EWCA Civ 1002 [2019] Bus LR 2854 makes clear, subsequent events might well mean that the quantum of contractual damages insofar

as based on losses related to future trading are limited. But future events subsequent to the breach of contract cannot be relied upon to deprive the innocent party, the pursuer, of any remedy at all in respect of the defender's breach of contract, (as the defender claims in the present case). If that analysis were accurate it would allow the defender to profit from their own undoubted and completed wrong-doing (in unequivocally indicating their unwillingness to perform the parties' contract and purporting to cancel the pursuer's booking with it and thereby committing a material breach of contract from the date of this decision). Such an approach would run wholly contrary to the equitable consideration which underpins the court's analysis of effective remedies being made available to innocent parties in response to a breach of contract.

P71. Finally the defender purports to rely on the equitable doctrine of frustration of contract (if it is unable to rely on its contract *force majeure* provisions). But again the doctrine of frustration is an equitable doctrine which seeks to do justice to and for the parties and is not a hard legal rule of which a guilty party in breach of contract can use to avoid or limit the liabilities that would otherwise flow from their wrongful act. This is clear from the survey of the case law on frustration contained in *Canary Wharf (BP4) T1 Ltd* v *European Medicines Agency* [2019] EWHC 335 (Ch) [2019] LTR 14 Marcus Smith J at paragraphs 21-24.

P72. In any event, as is set out in the principal submissions for the pursuer, the court need not concern itself with *force majeure* or frustration. The pursuer's losses were already crystallised by that point in time because of the discriminatory actions of the defender in refusing to provide its services to the pursuer. Any *novus actus* which occurred after the defender had made it clear that the Event would not be proceeding

at any time or on any date is an *ex post facto* irrelevance to the issues before this court. To that extent, paragraphs 5 to 24 are irrelevant.

P73. Paragraphs 25 to 31 are already adequately dealt with in the pursuer's principal submissions.

P74. At paragraphs 32 to 41, the defender embarks on a rather weakly argued criticism of the pursuer's pleadings. These being commercial proceedings, it is incumbent on the defender to have raised these issues at a pre-substantive hearing stage and, if it required more detailed pleading on a point, to have sought an order from this court ordaining such pleading to be included. It did not do so.

P75. In any event, the pursuer's pleadings give full adequate and fair notice of its arguments to the defender. The pursuer does not seek to have issues of quantum resolved at this hearing and, therefore, if the defender requires additional specification as to quantum in advance of any evidential hearing, it is welcome to seek an order to that effect from the court.

P76. The points sought to be made about the extent of discrimination law and the effect of the European Convention on Human Rights via the Human Rights Act 1998 are incorrect for the reasons set out in the principal submissions.

P77. The pursuer notes the irony of the defender moving from a request that the pursuer's action be dismissed on the basis of a pleadings point to a suggestion that the pursuer seeking decree *de plano* ought to be viewed as an unlawful trial by pleading. This, like the position anent the termination of the contract, appears to be a shape-shifting position, depending on which argument suits the defender at any given time. If there is no relevant answer to the Equality Act 2010 claim, as the pursuer contends,

there is no purpose to an evidential hearing on that matter and the court should not waste court time ordering such a hearing.

P78. The order *ad factum praestandum* is adequately explained in the principal submissions as is the basis on which the claim for contractual *et separatim* statutory vindicatory damages proceeds.

P79. The pursuer's case is relevant. The defender's case is irrelevant. The pursuer adheres to its motion set out at section 2 of its principal submissions and invites the court to make the orders there sought.

Defender's written submissions

Introduction

D1. The defender wishes to insist upon its first, second, third, fourth, eighth and ninth pleas-in-law for the following reasons.

D2. The defender's principal motion is for the Court to sustain its first and fourth pleas-in-law and to dismiss the action.

D3. If the Court is not minded to do so, the defender invites the Court to exclude certain averments from probation and to fix a proof before answer.

D4. The Defender shall address the following issues:

(i) The pursuer's claim in contract law;

(ii) The pursuer's claim in terms of the Equality Act 2010; and

(iii) The orders sought by the pursuer.

The Pursuer's Claim in Contract

D5. The pursuer and the defender entered into a contract. In terms of the contract, the defender was to make available the SSE Hydro Arena for the period from 8am on 30 May 2020 until 2am on 31 May 2020 (Article 3) in return for payment of the sum set out in the contract.

D6. The Pursuer correctly accepts in its pleadings that "… because of the restrictions imposed under reference to the response to the COVID-19 pandemic, the Event could not have taken place as envisaged…" (Article 5).

D7. Notwithstanding this concession, the pursuer's pleaded case is predicated on there being a valid and subsisting contract between the pursuer and the defender. It is clear as a matter of law that there is no valid and subsisting contract. Even if the contract was still in place as at the date the action commenced (which the defender denies) the contract was clearly terminated under the *force majeure* provisions, which failing it was frustrated as a result of the COVID-19 pandemic.

D8. The pursuer's case proceeds upon the hypothesis that there is a valid and subsisting contract which contains a contractual obligation requiring the defender to make the SSE Hydro Arena available to the pursuer for a new event on an unspecified future date. These averments are irrelevant. There is clearly no subsisting contract between the parties and no such contractual obligation exists.

The Terms of the Contract

D9. There is a dispute between the parties as to whether or not the defender validly terminated the contract on 29 January 2020. There is no need for the Court to resolve this dispute. It is clear that even if the contract was not validly terminated on

29 January 2020 (which the defender disputes) it was validly terminated on 27 March 2020 when the defender invoked the *force majeure* provisions in the contract, failing which it ended by operation of frustration.

D10. COVID-19 is a "*force majeure event*" for the purposes of the contract.

D11. The term *"force majeure event"* is defined in clause 1.1 of the contract as:

> "…a ny act outside the reasonable control of either party including without limitation … chemical, biological … contamination; the acts of any public authority or imposition of any embargo, sanction or similar action … and other difficulties including failures of suppliers…"

D12. Clause 11 of the contract provides that:

> "11.1 If any Force Majeure event occurs and if SEC is or reasonably anticipates that it will be prevented or hindered from fulfilling the substance of its obligations under the Event Hire Agreement, then SEC shall forthwith notify the Company and the Company shall be entitled at any time thereafter, so long as such cause still subsists at the relevant time, to cancel the Event Hire Agreement by notice in writing (including by e-mail followed within 24 hours by a hand delivered or postal notice) to SEC at any time within 14 days of the commencement of the Hire Period.
>
> 11. If, although SEC considers itself able to fulfil the substance of its obligations hereunder, SEC is or reasonably anticipates that SEC will be prevented or hindered from fulfilling a particular part or parts of such obligations, then SEC shall be entitled by notice in writing to the Company to cancel or suspend the Event Hire Agreement as to such part or parts of such obligations provided that, in the event of a cancellation or suspension of a particular part or parts of SEC's obligations which, to a material and substantial extent, shall prejudice the holding of the Event, the Company may, by notice in writing to SEC given not later than 7 days after receipt of such notice from SEC (and in the case of a suspension given while such suspension lasts) elect to cancel the Event Hire Agreement as if paragraph 11.1 applied."

D13. The pursuer accepts that on 27 March 2020, the defender's agents wrote to the pursuer's agents (the "March Letter") (Article 4).

D14. In the March Letter, the defender's agents stated that, if the contract was still valid and subsisting as at the date the present proceedings were commenced (which the

defender disputes), the terms of clause 11 of the contract would remain in full force and effect. The defender could fulfil the substance of its obligations but it would be hindered in permitting the event to be hosted due to the social distancing measures that were imposed by the Scottish Government. In terms of clause 11.2 of the contract, the defender provided notice in writing that it required to cancel the contract in its entirety. The defender was entitled to do so because there was no realistic prospect of an event of the sort envisaged in the contract taking place in Glasgow in May 2020.

D15. The Pursuer accepts that "… because of the restrictions imposed under reference to the response to the COVID-19 pandemic, the Event could not have taken place as envisaged …" (Article 5).

D16. In these circumstances, the contract is at an end. There is no basis upon which the pursuer can seek to compel the defender to make the SSE Hydro Arena available on an alternative date to that set out in the contract.

D17. As the event could never have taken place due to COVID-19, there is no basis for any damages to be paid by the defender to the pursuer based upon the purported cancellation of the event.

Frustration at Common Law

D18. If the contract survived the termination on 29 January 2020 and also the defender's invocation of the *force majeure* clause, the contract was in any event frustrated at common law as a result of the COVID-19 pandemic.

D19. The law on frustration was summarised by Lord Radcliffe in *Davis Contractors Ltd* v *Fareham UDC* 1956 AC 696 in the following terms:

> *"… frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because* ***the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.*** *Non haec in foedera veni. It was not this that I promised to do."*
> [at p729. Emphasis added by the defender]

D20. Similar observations were made by Lord Brandon in *Paal Wilson & Co A/S* v *Partenreederei Hannah Blumenthal (The Hannah Blumental)* 1983 1 AC 854:

> "The first essential factor is that there must be some outside event or extraneous change of situation, not foreseen or provided for by the parties at the time of contracting, which either makes it impossible for the contract to be performed at all, or at least renders its performance something radically different from what the parties contemplated when they entered into it. The second essential factor is that the outside event or extraneous change of situation concerned, and the consequences of either in relation to the performance of the contract, must have occurred without either the fault or the default of either party to the contract." [at p909]

D21. The COVID-19 pandemic is an external event that relieved the parties of their obligation to perform their contractual obligations. It became physically impossible to perform the contract due to supervening events, namely the Scottish Government guidance on social distancing and the re-purposing of the Scottish Events Campus as a temporary medical facility. The pursuer accepts that the event could not have taken place due to the COVID-19 pandemic.

D22. Both parties were relieved of further performance of the obligations they had undertaken in terms of the contract. The pursuer's contention that there is a valid and subsisting contract is clearly wrong. The law is correctly described by Proffessor McBryde (*Contract*, 2nd edn, 21-44) as follows:

> "Frustration ends parties' rights and obligations to future performance under the contract. This happens automatically without any act of the parties. The contract is not merely suspended. Notice of an election to treat the contract as perished is not necessary. Frustration does not depend, as does rescission or repudiation of a contract, on the choice of a contracting party. Even if the

> parties continue with the contract there could be frustration. Rights and obligations under the contract are ended for the future …"

D23. There is no basis for the Court to seek to compel the defender to enter into a new contract with the pursuer to make the SSE Hydro Arena available to the pursuer for a new event on an unspecified future date.

D24. The action should be dismissed in its entirety, which failing all of the averments concerning breach of contract should be excluded from probation

The Pursuer's Position

D25. The pursuer's pleadings and rule 22 note seek to meet these fundamental problems by arguing there has been a "repudiatory breach"/"anticipatory breach". The pursuer avers that:

> "… the defender's now purported attempt to rely on COVID-19 related issues as if these can ex post facto provide a justification for or defence against its earlier wrongful repudiation is inept and wrong in law" (Article 4)

D26. The pursuer's pleadings show a basic, and fundamental, misunderstanding of the law. Even if the Court accepted the pursuer's analysis that there was an anticipatory or repudiatory breach, in order to succeed in a case of that nature, the pursuer would need to prove that this anticipatory or repudiatory breach was accepted by it. It fails to do so.

D27. The pursuer's arguments ignore the basic fact that:

> "Anticipatory breach by one party gives the other party, or parties, an option. The option is either (1) to accept the repudiation and claim damages for breach of contract, or (2) to ignore or reject the repudiation and insist on performance of the contract."
> (McBryde, *The Law of Contract in Scotland*, para 20-32)

D28. The pursuer did not accept the claimed repudiatory breach. It maintained that the contract remained valid and subsisting. It insisted on performance. It raised the current proceedings to seek to compel the defender to make the venue available on the date stipulated in the contract.

D29. To accept an anticipatory breach, a party requires to intimate to the other party to the contract that it accepts the contract is at an end (McBryde, *The Law of Contract in Scotland*, paragraph 20-33). As Asquith LJ observed *in Howard* v *Pickford Tool Co Inc* [1951] KB 417 (at p421):

> "An unaccepted repudiation is a thing writ in water and of no value to anybody; it confers no legal rights of any sort or kind."

D30. The pursuer's pleadings proceed on the basis that the contract is valid and subsisting. It could not seek an order for specific implement if it did not adopt this position. The reality is that the litigation, which sought to enforce the contract, was overtaken by events. The COVID-19 pandemic resulted in the frustrating events set out above. After the litigation was commenced, the defender's agents sent the March Letter. It was expressly sent on the hypothesis that the contract may still be valid and subsisting as the pursuer contended it was. Even if the March letter had not been sent, the same result would eventuate given the common law of frustration. Frustration arises by operation of law and not on the election of any party.

D31. In these circumstances, the entire case in contract, and the averments regarding "repudiatory breach"/"anticipatory breach" are irrelevant. For such a case to be made out, the pursuer would need to offer to prove that faced with the anticipatory breach/repudiatory breach, it elected to accept the repudiation and claim damages **before** the COVID-19 pandemic. In the absence of such averments, the pursuer's

pleadings are fundamentally irrelevant and the case based in contract should be dismissed.

The Pursuer's Claim based on the Equality Act 2010

D32. If the contract was validly terminated as a result of either the March Letter or the common law of frustration, as is clearly the case for the reasons set out above, the case predicated on the Equality Act 2010 is irrelevant.

D33. Even if the Court is not convinced by this argument, it is respectfully submitted that the case based on the Equality Act 2010 is entirely lacking in essential specification and should be dismissed.

D34. As a private limited company, the pursuer does not possess protected characteristics in terms of the Equality Act 2010. Moreover, the pursuer is not entitled to seek damages for others in a representative capacity.

D35. The pursuer avers that the "… defender has discriminated – and in its refusal to reschedule the Event continues to discriminate – against the pursuer because of a protected characteristic …" (Article 12)

D36. These averments are entirely lacking in essential specification.

D37. The pursuer fails to provide any specification of when it contends that the pursuer contacted the defender to seek to arrange a new event. There are no relevant averments of any legal basis to "re-schedule" the event. The pursuer fails to aver the name of the defender's employee that it contacted. It fails to state how contact was made. It does not aver what was said by the defender's employee when contact was made. Furthermore, the pursuer does not offer to prove that the SSE Hydro Arena is

staging events and is treating others in a different, or more favourable way. In these circumstances, the averments should not be admitted to probation.

D38. The pursuer makes a series of averments in relation to the European Convention on Human Rights in Article 13. These are irrelevant as the pursuer does not offer to prove that the defender is a public authority.

The pursuer's contention that decree de plano should be granted

D39. In its rule 22 note, the pursuer contends that the Court should pronounce decree *de plano* and fix a hearing on the remedy to be provided. The defender respectfully submits that the pursuer's pleadings are irrelevant and the action should be dismissed. However, if the Court is not prepared to dismiss the action, there would be no basis for the Court to grant the order sought by the pursuer without hearing evidence. The Inner House has repeatedly stated that disputed issues of fact, and associated judgments, cannot be determined on the basis of "trial by pleading". That is precisely what the pursuer invites the Court to do in this case.

D40. In *Heather Capital Ltd (In Liquidation)* v *Levy & McCrae* 2017 SLT 376, Lord Glennie observed that:

> "[100] …**parties have indulged in a process akin to trial by pleading …** The process resembles one of cross examination and response, a process for which pleadings are quite unfitted … [T]he Lord Ordinary is invited to form a view that what was done was insufficient or that the reasons given for not doing it are inadequate. **Such an invitation should, in my view, be resisted save in the most obvious case. The judgments which the court is being asked to make are essentially value judgments, assessments of the reasonableness or otherwise of a party's conduct. Such judgments should seldom if ever be made on the basis of the pleadings without hearing evidence. It may seem obvious, on paper, that something ought to have been done or that a line of enquiry ought to have been pursued; but when evidence is led it might seem less obvious, or there might be good reasons for not taking that course.** It is not the function of pleadings to set out every

> reason why each relevant individual took or did not take any particular step. **In many cases issues of credibility and reliability might arise, the evidence may be far more nuanced than it is possible to convey on paper, explanations may be given more fully and persuasively than can come over in the pleadings, and some of the criticisms may, in light of all the evidence, be seen to be informed by hindsight.** I should emphasise that I make these observations without reference to any of the particular points decided in the particular cases with which we are here concerned. But it does seem to me that the cases with which we are concerned illustrate **the danger of the court being drawn into deciding cases on detailed averments of fact when it would be more appropriate that all the evidence be heard before any decision is made."**
> (Emphasis added by the petitioners)

D41. The pursuer offers to prove that:

> "At no time since the conclusion of the contract, did the pursuer act in a way which might properly be said to be reasonably likely to bring the defender into disrepute or in any other way in breach of any of its obligations under the Contract" (Article 10 of condescendence)

D42. This is disputed by the defender. Detailed averments are set out as to why the defender took the decision to terminate. It offers to prove that the actions of the pursuer would bring it into disrepute if the Event had taken place. These matters cannot be resolved without evidence.

D43. The pursuer offers to prove that the defender "operates a policy of discrimination" and that its board "… set out to find a reason to cancel the Event …" (Article 10). These averments of fact are all denied by the defender. In Answer 10, the defender offers to prove that it "… does not discriminate against any group or individual …" It sets out detailed averments as to why it was legitimate to terminate the Contract. It offers to prove that:

> "The defender accordingly determined that the staging of the event would bring the defender into disrepute and terminated the Contract on that basis. It did not terminate the event as a result of the religious views of the pursuer or Mr Franklin Graham."

D44. The Court could not resolve these issues at debate without indulging, contrary to the guidance provided by the Inner House, in "trial by pleading". The defender submits that evidence would require to be heard in order to allow the Court to determine the disputed issues of fact before a decision on whether the defender breached any term of the Equality Act 2010, when terminating the Contract, could properly be made.

The Orders Craved

Specific Implement

D45. The pursuer seeks an order for specific implement to ordain the defender to comply with its contractual obligations. There is no basis for any such order to be granted. The contract was clearly validly terminated and is at an end.

D46. Moreover, the only obligation that ever existed between the pursuer and the defender was for the SSE Hydro Arena to be made available from 8am on 30 May 2020 until 2am on 31 May 2020 (Article 3). That date has passed. There is no basis for the Court to compel the defender to enter into a new contractual obligation to host a different event on a different date.

D47. In Article 17, the pursuer makes a series of averments in relation to the law of specific implement. These averments are irrelevant and there is no basis for any such order to be granted. These averments should be excluded from probation.

D48. It is clear that a decree of specific implement cannot be granted if performance is impossible (*Bell Bros (HP) Ltd* v *Reynolds* 1945 SC 213 at 216). The pursuer accepts that the event could not have taken place on the date stated in the contract due to COVID-19. It does not aver that the pandemic is at an end. It does not aver that an

event such as the event envisaged by the contract could lawfully take place. In these circumstances, the pursuer seeks to compel the impossible.

D49. Moreover, the crave for specific implement is clearly not precise enough to be granted by the Court. As Lord President Cooper observed in *Munro* v *Liquidator of Balnagown Estates Co Ltd* 1949 SC 49 at p55:

> "It is impossible for us with propriety to pronounce any decree ad factum praestandum which is not absolutely precise in every particular, both as to time and as to place, and we are not yet in a position to give such particularity to any order in this case."

D50. The order craved could not competently be granted by the Court.

The Damages Craved

D51. The pursuer accepts that "… because of the restrictions imposed under reference to the response to the COVID-19 pandemic, the Event could not have taken place as envisaged …" (Article 5).

D52. However, the pursuer also avers that it has "incurred significant wasted expense as a result of having contracted with third parties …" and that "but for the defender's breach of contract, the pursuer would not have incurred such losses" (Article 11).

The pursuer avers that "preparatory expenses" have been incurred.

No adequate specification is provided as to the losses that are claimed. In these circumstances, the averments should not be admitted to probation.

D53. The pursuer also avers that certain losses incurred would otherwise have been "insured". No averments are made of any insurance policy or its terms. No averments are made of the alleged losses that would otherwise have been covered by

the purported insurance policy. In these circumstances, the averments should not be admitted to probation.

D54. The pursuer craves for payment of £200,000 as a result of the cancellation of the event. It seeks payment of a further £200,000 in terms of the Equality Act 2010.

D55. Any damages claim is limited to the "Charges" as defined in clause 3.1 of the Contract. These are £50,000.

D56. Clause 10.5 of the Terms and Conditions provides that:

> "Subject to paragraph 10.4, the aggregate liability of SEC to the Company in respect of any breach of the Event Hire Agreement, any breach of duty or any claim in delict/tort or other ground of action arising out of the matters contemplated under the Event Hire Agreement:
>
> 10.5.1 in respect of any matter which is an insured risk under and covered by the policy of insurance to be effected and maintained by SEC pursuant to paragraph 10.1 above, shall be limited to the aggregate amount recoverable under such policy of insurance plus any excess payable; and
>
> 10.5.2 in respect of any other actions, claims, loss, damages, costs or injury incurred directly as a result of any breach of the Event Hire Agreement or other act, omission or negligence by SEC under the Event Hire Agreement shall be limited to the amount of the Charges or the actual loss incurred, whichever is lower."

Clause 10.7 of the Terms and Conditions provides that:

> "Subject to paragraph 10.4, neither party shall be liable to the other for any indirect or consequential loss (including loss of profits) which may be suffered as a result of such act, omission or negligence."

D57. In these circumstances, the claim for damages is also irrelevant.

D58. The schedule of alleged damage incurred is also lacking in essential specification. It does not provide specific specification of the sums craved. The schedule is significantly less than the total craved. It is also noteworthy that the sum craved is in pounds whereas the schedule providing the purported breakdown is not. The sums

inserted are in dollars with no averments being made of the specific dollar currency or the claimed conversion rate to pounds.

Conclusion

D59. The defender submits that the case should be dismissed which failing the irrelevant pleadings identified above should be excluded from probation.

Defender's supplementary written submissions

Introduction

D60. The defender has addressed the issues that it seeks to debate in its written submission. This supplementary written submission is produced in compliance with the interlocutor dated 1 September 2020.

The Claim in Contract

D61. The pursuer's written submission does not address the fundamental problems with its case. In particular, the pursuer fails to acknowledge that it does not offer to prove that any repudiatory breach was accepted by it before the contract was frustrated as a result of COVID-19. That is fatal to the claim in contract for the reasons set out in the Defender's written submissions.

D62. The pursuer's written submissions also ignore the obvious problem of causation. But for the alleged breach of contract, the event could not have taken place. Therefore, any purported breach of contract by the defender has not caused the pursuer any loss.

The Claim in terms of the Equality Act 2010 ("EA 2010")

D63. The defender maintains its position that the pursuer fails to set forward a relevant and specific claim in terms of the EA 2010. The case predicated on the original contract having purportedly been unlawfully terminated by the defender in breach of the EA 2010 must fail as a matter of causation. The pursuer raised the present action and maintained that the contract was valid and subsisting. It is clear that the defender could not perform the contract due to COVID-19. Therefore, even if there had been a breach of the EA 2010, which is denied, it can have caused no loss to the pursuer as the event could not have taken place.

D64. The only potential claim that remains is the vague assertion by the pursuer in the pleadings that there has been some further, unspecified, breach of the EA 2010 by the defender in not agreeing to a new contract for an unspecified event, on an unspecified date on unspecified terms. This case is lacking in essential specification. The defender has no fair notice as to when the pursuer contends this further act was committed or indeed who committed it. The defender has made it plain to the pursuer that it is entirely open to the discussing a potential new contract with the pursuer. However, that would need a new commercial negotiation. The pursuer would need to set out the nature of the event. It would need to propose a date. A risk assessment would need to be conducted by the defender. The defender would need to consider the commercial terms on which it would make the venue available. The pursuer erroneously assumes that it has a right to insist on a future event on historic terms and conditions.

D65. The defender accepts that a service provider cannot discriminate on religious grounds. It offers to prove that it did not do so. The pursuer's written submission in

relation to the EA 2010 proceeds on the misapprehension that the Court should make a judgment on why the original event was terminated and on the subsequent actions of the defender without hearing evidence. As the defender has explained in its written submissions, there is no basis for the Court to do so.

D66. The defender maintains that a relevant and specific case has not been set out by the pursuer. However, if the Court disagrees with that submission, the defender maintains that the Court could not sustain any of the pursuer's pleas-in-law in relation to the claims made in terms of the EA 2010 without hearing evidence.

D67. In answer 12, and at paragraph 34 of its written submissions, the defender maintains that the pursuer does not possess protected characteristics in terms of the Equality Act 2010 ("EA 2010"). That will ultimately be an issue for the Court to determine at a proof, if the pursuer has put forward a relevant and specific case. However, the defender does not maintain that a company can never possess such protected characteristics (*EAD Solicitors* v *Abrams* [2016] ICR 380). Everything will depend on the facts and circumstances of the particular case.

Conclusion

D68. The defender invites the Court to dismiss the case, which failing, to exclude certain averments from probation and to fix a proof before answer on the issues of liability, causation and quantum.

Decision

[17] By hire agreement dated 31 July 2019 the parties entered into a contract whereby the pursuer agreed to hire from the defender the SEC Hydro Arena between 0800 hours on

30 May 2020 to 0200 hours on 31 May 2020. The contract was between the Scottish Event Campus Limited and the Billy Graham Evangelistic Association with, in terms of the contract, the event entitled "Franklin Graham Event". The SEC were to provide 12,306 audience places.

[18] Initially I will deal with the contractual issues by following the chronology of events. This is because the decisions taken by the parties determine (sometimes preclude) the remedy.

[19] If the letter from the defender to the pursuer dated 29 January 2020 constitutes an anticipatory breach of contract that provides the innocent party with an option, namely, to accept the anticipated breach and seek damages or to insist upon performance.

[20] In this regard I refer to the opinion of Lord Sumption JSC in *Geys* v *Société Générale, London Branch* [2013] 1 AC 523 at paragraph 113 where he opines:

> "The general rule is that the repudiation of a contract does not necessarily bring the contract to an end. The innocent party has a right to choose either (i) to accept the repudiation, thus bringing the primary obligations in the contract to an end but leaving him with a right to enforce the secondary obligation to pay damages for the loss of the bargain; or (ii) to treat the contract as subsisting and claim any sums falling due under it as and when they fall due, together with any damages for the repudiating party's failure to perform as and when performance should have occurred."

Within the same paragraph Lord Sumption goes on to recall that:

> "The concept was memorably expressed by Asquith LJ in *Howard* v *Pickford Tool Co Ltd* [1951] 1 KB 417, 421, when he described an unaccepted repudiation as 'a thing writ in water'."

[21] Here the pursuer chose not to accept the anticipatory breach of contract but to insist upon performance. On the above analysis, that was its right. The pursuer raised these proceedings seeking an order to use the venue and related facilities in accordance with the

contract. The pursuer has never accepted the anticipatory breach of contract. Accordingly the contract subsisted.

[22] Thereafter the pandemic struck. By letter dated 27 March 2020 solicitors for the defender cancelled the event hire agreement by referring to clauses 11.1 and 11.2 of the hire agreement.

[23] Clause 11.1 of the hire agreement reads as follows:

> "If any Force Majeure event occurs and if SEC is or reasonably anticipates that it will be prevented or hindered from fulfilling the substance of its obligations under the Event Hire Agreement, then SEC shall forthwith notify the Company and the Company shall be entitled at any time thereafter, so long as such cause still subsists at the relevant time, to cancel the Event Hire Agreement by notice in writing (including by e-mail followed within 24 hours by a hand delivered or postal notice) to SEC at any time within 14 days of the commencement of the Hire Period."

[24] Senior counsel for the pursuer observed that clause 11.1 entitled the pursuer to cancel the event hire agreement, something which it did not do.

[25] On behalf of the defender, the Dean founded upon clause 11.2 which reads as follows:

> "If, although SEC considers itself able to fulfil the substance of its obligations hereunder, SEC is or reasonably anticipates that SEC will be prevented or hindered from fulfilling a particular part or parts of such obligations, then SEC shall be entitled by notice in writing to the Company to cancel or suspend the Event Hire Agreement as to such part or parts of such obligations provided that, in the event of a cancellation or suspension of a particular part or parts of SEC's obligations which, to a material and substantial extent, shall prejudice the holding of the Event, the Company may, by notice in writing to SEC given not later than 7 days after receipt of such notice from SEC (and, in the case of a suspension given while such suspension lasts) elect to cancel the Event Hire Agreement as if paragraph 11.1 applied."

[26] The Dean contended that in light of the COVID pandemic the defender was entitled to cancel the event on the basis of clause 11.2. Senior counsel for the pursuer invited me to interpret clause 11.2 as not meaning that the defender was entitled to cancel the event but

rather that the defender should have suspended a particular part or parts of its obligations, for example, by postponing the event.

[27] Having considered the submissions in relation to the interpretation of this clause and on giving the clause 11.2 its plain meaning, the defender was entitled either to cancel or to suspend part of the event hire agreement.

[28] The first line refers to the SEC considering "itself able to fulfil the substance of its obligations". The clause also provides that the "SEC shall be entitled by notice in writing to the Company to cancel or suspend the Event Hire Agreement as to such part or parts of such obligations …" (my emphasis).

[29] Mr O'Neill QC accepted that the law of frustration of contract does not apply where the parties themselves had provided for such a situation (*Paal Wilson & Co A/S* v *Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* 1983 1 AC 854). I agree with that proposition. The contract provided for a situation such as arose here.

[30] Clause 11.2 affords to the defender a discretion whereby, although the SEC "itself" may be able to fulfil the substance of its obligations (if the SEC is prevented or hindered from fulfilling a particular part or parts of such obligations) then the SEC shall be entitled to cancel "or" suspend the event hire agreement. In other words, the defender had discretion either to proceed with the agreement as best it could or to cancel the agreement. Therefore, while I agree with the pursuer that the event might have been, for example, postponed rather than cancelled, I do not accept that that option lies with the pursuer. In terms of clause 11.2 the option rests firmly at the discretion of the defender. On the other hand, if the defender had proposed postponing the event and that variation had prejudiced the pursuer, the pursuer might then have elected to cancel the event hire agreement (within seven days in terms of clause 11.2). The point here is neatly summarised in *Paal Wilson & Co A/S* v

Partenreederei Hannah Blumenthal (The Hannah Blumenthal) 1983 1 AC 854 where Lord Brandon opines at page 909F:

> "The first essential factor is that there must be some outside event or extraneous change of situation, not foreseen or provided for by the parties at the time of contracting, which either makes it impossible for the contract to be performed at all, or at least renders its performance something radically different from what the parties contemplated when they entered into it. The second essential factor is that the outside event or extraneous change of situation concerned, and the consequences of either in relation to the performance of the contract, must have occurred without either the fault or the default of either party to the contract." (my emphasis)

[31] Here the parties' contract made provision for a *force majeure* event. While it is true that the defender had the option to reschedule the event, the defender was not obliged to do so. In my opinion, the defender was entitled to exercise the option to cancel the event.

[32] In abstract, where a *force majeure* event occurs the common law of frustration of contract intervenes unless the contract provides for such an event. Here the contract includes a *force majeure* clause. Therefore the common law of frustration of contract does not apply. Both the hirer and the venue had a right to cancel. Alternatively the venue might have suggested a suspension of the contract (which it did not do) which the hirer would have had seven days to reject. These provisions make plain reading. They are pragmatic and they (standing that they have to provide for unforeseen *force majeure* events such as fire, flood, war or, in this case, a pandemic) make commercial common sense. They are unexceptional.

[33] To conclude on the contractual relationship between the parties, the pursuer treated the letter dated 29 January 2020 as an anticipatory breach of contract on the part of the defender. The pursuer chose to insist upon performance (rather than accept the breach and seek damages). This decision therefore kept the contract alive. COVID intervened. The defender then exercised its option to cancel the (still subsisting) contract. That decision was

within its discretion in terms of clause 11.2. In my opinion therefore, the pursuer's case founded on an anticipatory breach of contract is irrelevant.

[34] In concluding that this aspect of the pursuer's case is irrelevant, I am mindful of the words of Lord Normand in *Jamieson* v *Jamieson,* 1952 SC (HL) 44 at page 50:

> "The true position is that an action will not be dismissed as irrelevant unless it must necessarily fail even if all the pursuer's averments are proved. The onus is on the defender who moves to have the action dismissed, and there is no onus on the pursuer to show that if he proves his averments he is bound to succeed."

The Equality Act 2010

[35] I turn now to deal with the Equality Act 2010. In terms of the 2010 Act, protected characteristics are stated in section 4 to include religion or belief as defined in section 10. At debate the Dean accepted that the pursuer's averments anent a breach of the Equality Act 2010 were relevant. In its written submissions the pursuer sought decree of declarator *de plano* on the basis that there was no relevant defence to this aspect of the pursuer's claim. I can deal with this submission in concise terms by reference to the pleadings. The defender's case includes, in Answer 10, averments that there was potential for public order issues with the event and:

> "That was because it was to be a public, unticketed event, rather than a private event. There was the potential for protestors to get inside the venue in addition to protesting outside the venue."

and, within the same answer,

> "The board members concluded that there was a risk to public safety as the event was open to the public. There was a risk of protest, counter protests and violence."

The defender also avers within Answer 10 that:

> "The defender accordingly determined that the staging of the event would bring the defender into disrepute and terminated the Contract on that basis. It

> did not terminate the event as a result of the religious views of the pursuer or Mr Franklin Graham."

Further also within Answer 10 the defender avers that:

> "It does not discriminate against any group or individual when deciding on whether to accept a booking. It was irrelevant to the defender that the pursuer was seeking to express religious views. The reason the Contract was terminated was due to the risk to the defender's reputation arising from the risk of violent protests at a public event, when, at the time of the Contract being concluded, the defender had understood that the Event would be a private event."

[36] Here the parties dispute many of the facts and, importantly, the true basis and motivation for cancelling the event. The pursuer's averments are substantial and relevant. The defender's averments are also detailed and, in my opinion, relevant. The pursuer submits that decree of declarator should be granted effectively on the basis that, as pled, the pursuer's case is the more compelling. I express no opinion on that analysis. A court may grant decree against a defender at debate where (a) no defence is stated (skeletal defences), (b) where the defender's averments are irrelevant in law, (c) where the defences are so lacking in specification that they should not be admitted to probation (rare, but it does occur) and (d) of consent. None of these apply here. The pursuer invites me to allow a proof restricted to the appropriate remedy. That requires me to assess the factual merits of competing averments. By doing so I would be falling into error. In my opinion the defender's pleadings are not irrelevant or so lacking in specification that the pursuer is bound to succeed. I will not grant decree of declarator. I will now discuss the remedies available.

[37] At debate the Dean sought to curtail the remedies available to a successful pursuer in a case such as this. His contention was broadly threefold.

[38] Firstly, he argued that the court should not order performance of the contract on another date. As I understood his argument, he contended that, as 30 May 2020 had passed,

the order sought in terms of crave 1 could not be granted because that crave referred to the contract. If performance was impossible then declarator of an order *ad factum praestandum* should not be granted. I was referred to the case of *Bell Bros (HP) Limited* v *Reynolds* 1945 SC 213 where Lord President Normand said at page 216 that:

> "It is inconceivable, however, that the Court should grant a decree *ad factum praestandum* in the knowledge that performance is impossible…"

[39] The Dean outlined various examples of what he said was the impossibility of performance in a situation such as this. For example, if the court were to fix a date, would that be without regard to the parties? If the court were to assign a date, the venue might be pre-booked.

[40] I have to say that, without evidence, I could not reach a view as to the true difficulty that might arise in rescheduling an event. I say this because it is likely to have arisen on occasion that an event has had to be cancelled or rescheduled because, for example, the artist or the performer is ill or otherwise unavailable. Furthermore, I do not know, for example, whether the defender does not accept bookings beyond a certain date in advance. If so, the court could order performance on a date beyond that cut-off secure in the knowledge that the venue would not be pre-booked. The court should not pre-judge such matters on ex-parte statements.

[41] Secondly, the Dean criticised the pursuer's averments in condescendence 17 that: "The actions of the defender have caused injury to the feelings of the pursuer's staff, members and associates. Therefore, such damages, in accordance with section 119(4) should include a sum for the injured feelings of the pursuer, and, as a representative religious group, its members and its associates as well as a sum for patrimonial loss as set out in the pursuer's schedule." He argued that a company limited by guarantee, such as the pursuer,

does not have "feelings" and it is questionable whether the pursuer can legitimately claim damages for the supposed hurt feelings of staff, members and associates. I deal with these submissions below.

[42] Thirdly, the Dean invited me not to allow the matter to proceed further on the basis that an award of damages might be a token exercise and that that would be disproportionate. Again, without hearing the facts, I have difficulty accepting that proposition.

[43] I say this because a declarator that a defender has discriminated against a pursuer on the basis of a protected characteristic for the purposes of the Equality Act 2010, may be an important matter to a pursuer.

[44] Here it is averred that pressure was brought to bear on the defender by its principal shareholder, Glasgow City Council. The pursuer refers to the letter sent by Glasgow City Council to the defender on the same day (29 January 2020) as the defender cancelled the booking. It is also averred that the defender subsequently sought to justify its decision on differing grounds.

[45] The pursuer avers that the event was a forum for the proclamation of the Christian gospel in accordance with mainstream evangelical Christian teaching. For example, in condescendence 10 the pursuer avers:

> "The fact that the defender now avers that it does host a range of faith-based events to which it takes no objection – the defender offers as an example the annual conference of Jehovah's Witnesses – shows precisely that the defender does operate a policy of discrimination against groups or individuals in that only those with views or religious positions which the defender deems to be 'acceptable' will be permitted to hire its premises. In any event, in the present case the defender has traduced and misrepresented the intent and purpose of the Event. It was an event of Christian religious evangelisation, manifesting and expressing religious belief by a religious organisation. The event was (and was always intended to be) a forum for the proclamation of the Christian Gospel in accordance with mainstream evangelical Christian teaching. It was to

> be open to everyone and entry was free of charge. It was never intended to be a platform for politically controversial views or otherwise be a politically contentious event. It was to be a sign of, and a stimulus for, a Christian religious awakening within Glasgow and a return to the Gospel and Gospel values in the whole central belt region. It was never going to be used for facilitating the conveying of any, or anyone's Islamophobic and/or homophobic views." (sic)

[46] The Dean contended that the pursuer should re-book rather than litigate. He suggested that there would then be three possible outcomes. First, that the venue was already booked. Second, that the booking would be taken or, thirdly, a refusal to book. Only on a refusal to accept a booking would the pursuer have a potential claim against the defender under the Equality Act 2010.

[47] In my opinion this is too simplistic an analysis. Indeed, such a course would be inconsistent with the terms of section 119 as discussed below. It would involve the pursuer forgoing its existing claim which, it is conceded, is relevant in law. Furthermore, here the pursuer avers that the defender has refused "to discuss or seek to agree an alternative date for the event. Instead the defender has produced any number of new and ever-changing reasons as to why it will not allow the event to take place…" (Condescendence 10). If parties can reach an accommodation I would encourage them to do so. However, for the purposes of the debate and the Dean's submission, I have no power to dismiss a claim timeously raised, actively pursued, relevant in law and where there is a statutory remedy.

[48] The pursuer seeks to prove that the defender breached a protected characteristic in that the defender purported to cancel the event without legitimate reason and again (on this occasion, using the pandemic as a cover) chose to cancel rather than reschedule the event. If those averments, on balance of probabilities, can be proved, it seems to me that the court should be reluctant to limit the potential remedies available without first hearing evidence on the merits of the available options.

[49] On a more general note, if a breach of a protected characteristic under the Equality Act 2010 were established, the event as scheduled here was not a minor or a fringe event. The contract provided over twelve thousand audience places and the hire cost was substantial. I do not know whether other reservations of the venue during the pandemic have been, or will be, rescheduled. As such, the court should be slow to exclude remedies legislated for by parliament without first hearing evidence on the options available and their feasibility.

[50] Even if I am wrong, a pursuer might legitimately seek a determination (with all that that might imply) and token damages as a vindication of its rights. Accordingly, standing the concession (properly made) that the case under the Equality Act 2010 is relevant, I will allow the averments anent both the appropriate remedy and damages to proceed to proof.

[51] I now turn to deal with the issue of damages within the framework of the 2010 Act. I agree with the defender's contention that a company cannot claim compensation for hurt feelings under section 119(4) of the Equality Act 2010. A company does not have feelings to hurt. In basic terms the loss (hurt) to a company is reflected in its accounts.

[52] In addition, I am not persuaded that the pursuer is entitled to recover compensation for the alleged hurt feelings of third parties. The pursuer refers to *R (UNISON)* v *Lord Chancellor* [2020] AC 869 (where a trade union sought to judicially review the imposition of fees under the Employment Appeal Tribunal Fees Order 2013, SI2013/1893) but that is not analogous to the remedies sought here.

[53] The pursuer also refers to the opinion of Lord Drummond Young in *Lothian Health Board* v *HMRC* 2020 SC 351 (one of a number of cases involving the quantification of historical overpaid value added tax) where, at paragraph 19, he comments:

> "As a matter of elementary common sense, it is obvious that if the law accords a right to any person that person should have a remedy that can make that right effective in practice."

I agree with that sentiment. However the pursuer in that case had operated forty four laboratories and was seeking recovery of tax on its own behalf.

[54] Senior counsel for the pursuer invited me to develop the remedies available with reference to the observations of Lady Hale in *Environment Secretary* v *Meier* [2010] PTSR 321 at paragraph 25 where she comments:

> "The underlying principle is *ubi ius, ibi remedium*: where there is a right, there should be a remedy to fit the right. The fact that 'this has never been done before' is no deterrent to the principled development of the remedy to fit the right, provided that there is proper procedural protection for those against whom the remedy may be granted. So the questions are: what is the right to be protected?"

Here, however, the pursuer seeks damages on behalf of an unspecified number of unnamed individuals who are not parties to these proceedings. Furthermore, damages are compensatory, not penal, in nature. That being so, it is unclear why the pursuer should be enriched by damages properly due to a third party. If parliament had intended that result, no doubt a provision to that effect would have been included in the legislation. Accordingly, the averments in condescendence 17 anent compensation for the alleged hurt feelings of the pursuer itself and those of third parties are irrelevant and will be excluded from probation.

[55] Moving on, Section 119(6) directs that the court "must not make an award of damages unless it first considers whether to make any other disposal". Damages are a secondary or fall back disposal. The legislation currently provides the court with powers to remedy injustice before damages are to be considered.

[56] Here it is averred that the event was to be open to members of the public. A remedy other that one of damages might well be the more compelling where a pursuer is a religious organisation (or a similar organisation, such as a trade union) where discrimination against it also affects its members or the public at large.

[57] This interpretation would do justice to the range of remedies explicitly provided to the court in terms of the legislation where damages might not truly reflect the discrimination complained of. In saying this I accept that in many cases damages might be the preferred or only practical remedy.

[58] Finally, before leaving the issue of damages, I would observe that, in terms of section 119(4) an award of damages "may include" compensation for injured feelings. An award of damages is not restricted to injured feelings.

[59] In summary the pursuer's averments anent a breach of the Equality Act 2010 are relevant as are the defender's answers. The pursuer is entitled to pursue the remedy sought, namely, a rescheduling of the event under the 2010 Act, failing which damages. Whether it can establish a breach of the 2010 Act and the practicality and appropriateness of the remedy sought (failing which damages) will depend on the evidence.

[60] I conclude by addressing the remaining submissions of both parties. The pursuer invited me to excise the averments in Answer 10, line 71, relating to a G4S Report dated 11 March 2020 as this had post-dated the letter of 29 January 2020. I accept that this has no relevance to the decision taken by the defender on 29 January 2020. However, I could not say at this stage that the report is not relevant to the subsequent decision on 27 March 2020 to cancel, rather than to postpone, the event. I will allow the averments to remain.

[61] On the other hand, the defender criticised the specification (precision) within crave 1 standing the fact that the date for the event has passed. However, it is clear what the

pursuer craves (rescheduling - not a different event, on a different date, as is suggested in the defender's written submissions) albeit that the precise wording needed to give effect to a decision of the court, might require refinement after proof. The Dean also criticised the specification within the schedule of loss. The criticism of the schedule, while not without foundation, does not in my opinion render the schedule so lacking in specification as to be irrelevant. I will allow the quantification of the pursuer's losses to proceed to proof.

[62] In terms of my interlocutor I have deleted certain averments from probation. I have been circumspect in deleting averments. This is because many of the averments by both parties relating to the breach of contract case also form the narrative for the case under the Equality Act 2010.

[63] I was not addressed in relation to expenses. I anticipate that expenses will follow success. Accordingly, if parties can agree, they should advise my clerk within 28 days failing which I shall assign a hearing (or, if parties would prefer, written submissions). In relation to future procedure, parties should agree the duration of the proof before answer and provide my clerk with a list of unsuitable dates, also within 28 days.