



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 33
A281/17

Lord President
Lord Woolman
Lord Doherty

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion by

CLUB LOS CLAVELES AND OTHERS

Pursuers and Respondents

against

FIRST NATIONAL TRUSTEE COMPANY LTD

Defenders and Reclaimers

Pursuers and Respondents: RG Anderson; BTO Solicitors LLP
Defenders and Reclaimers: O'Brien; Turcan Connell

16 June 2020

Introduction

[1] In this reclaiming motion (appeal), the defenders seek the recall of an interlocutor of the Lord Ordinary, dated 30 September 2019. The Lord Ordinary sustained in part both parties' pleas to the relevancy and specification and determined that certain averments (and

curiously two conclusions) should be excluded from probation. He refused the defenders' motion to dismiss the action and allowed a proof before answer.

[2] In general terms, the action concerns the efforts of a time share organisation to terminate the appointment of the trustee of the property which is held on behalf of the time share holders. The Lord Ordinary rejected the pursuers' case, in so far as it related to the second and third conclusions for count, reckoning and payment. The pursuers do not seek to revisit that part of the decision. The remaining conclusions are: (first) for declarator that the defenders' appointment as trustee terminated on 1 December 2012; (fourth) for specific implement in terms of a Deed of Trust (*infra*) by ordaining the defenders (a) to execute a Deed of Retirement, Assumption and Conveyance which transfers the property, including shares in five companies, to a new trustee and (b) to deliver all lists of members to the pursuers; and (fifth) for a declarator that all copies of the Register of Members, or lists of members and their contact details, are "Property" in terms of the Deed. The defenders have declared a willingness to resign and transfer what might be said to constitute property, but only if they are provided with certain indemnities.

[3] Both parties produced draft Deeds of Retirement etc. The pursuers' version stated, *inter alia*, that:

"(4) The Committee on behalf of each and all of the members of the [pursuers] HEREBY DISCHARGES the [defenders] from the trusts of the Deed of Trust subject to the transfer of title to the Property to the New Trustee and the indemnities contained herein".

There are no indemnities in the pursuers' draft. The reference to them in clause (4) is a relic from an earlier draft prepared by the defenders.

[4] The defenders' draft contains a discharge but includes an indemnity of the defenders by the Founder Members, the pursuers and the new trustee:

“(10) ... against all claims actions proceedings charges (including ... charges to tax and breaches of Spanish and/or United Kingdom legislation ...) fees costs liabilities and expenses to which it may be entitled or which may result from or be incurred in connection with the performance by the [defenders of their] duties under the Deed of Trust and transfer of Property to the New Trustee and to keep the [defenders] fully indemnified against all losses, claims, demands, taxes, actions, damages, costs and expenses made or incurred in connection with the [pursuers] and/or in connection with the Property or in any other way in connection with the Deed of Trust ...”.

There was an additional requirement to secure a direct indemnity in similar terms from the new trustee.

Background

[5] The pursuers are an unincorporated association which was established by a constitution dated 5 April 1990 and amended in July 2014. The object of the pursuers is to secure for their members rights of occupation, on a time-share basis, of some 105 villas and apartments at the Los Claveles resort in Los Cristianos, Tenerife. The original time-share holders or their successors have real rights in the properties under the Spanish *Escritura* system. They amount to some 15% of the total. They are members of the Development Owners' Association (DOA) which controls the common parts to the resort and authorises relevant expenditure. Later time-share holders have no real rights. They are members of the pursuers but ownership of the properties which they occupy, ie 85%, vests in five limited companies who exercise that percentage of voting rights in the DOA.

[6] The pursuers' constitution provides that their business is to be managed by their committee, the members of which are named as pursuers in the instance. In terms of clause 11.5, the committee is given certain powers, including that:

“8. To bring... any proceedings or claims of any kind in relation to the affairs of the [pursuers] or the obligations of the Members hereunder or under the Deed of Trust [*infra*]...”.

The constitution requires that an independent trustee be appointed to hold certain property for the benefit of the pursuers' members. The property is defined (Deed of Trust (*infra*) clause 1(f)) as including the share capital of the five owning companies, "together with all other property (real or personal) which may from time to time be transferred to or otherwise vested in the Trustee to be held for the benefit of the Members of the [pursuers] ...".

[7] In relation to property, Schedule 1 (general terms and conditions) to the Deed of Trust states:

"7. All monies securities title deeds and documents belonging to or relating to the Property or this Trust shall be under the exclusive custody and control of the [defenders], any other person having all reasonable facilities for verification or inspection and the name of the [defenders] shall be placed first in the Register of all stock, shares, securities or property".

[8] In connection with the termination of the trust, the Deed provides:

"15.1 This Deed shall continue until (a) terminated ... by the [pursuers] giving not less than six months' notice in writing to the [defenders]; ...

15.2 Upon termination ... the [pursuers'] Members (or failing which the [pursuers]) shall pay to the [defenders] all remuneration then owing to the [defenders] ...and all expenses incurred by the [defenders] in conveying or assigning or otherwise disposing of the title to the Property in manner hereinafter provided. The [defenders] shall in the event of this Deed being terminated convey or assign the Property ... (at the expense of the [pursuers] ...) to any succeeding trustee or otherwise as the Committee of the [pursuers] in writing may direct.

Upon the termination or expiration of this Deed... or as soon thereafter as is reasonably practicable the [defenders] shall as directed by the Committee either:

- (a) Transfer the Property to the alternative trustee of this... trust... or
- (b) Retain the Property upon the terms of any new trust ...or
- (c) Sell the Apartments ...".

[9] The Deed of Trust was dated 5 April 1990. It was entered into by the "Founder Members" of the pursuers, who at that time were Wimpey Homes Holdings Limited and Time Ownership Los Claveles (Management) Limited and the Royal Bank of Scotland plc.

The defenders were substituted as the trustee by a Deed of Retirement and Appointment between the pursuers, the defenders and RBS dated 21 May 1991.

[10] The terms of the Trust Deed in relation to the provision of indemnities to the trustee are as follows:

“12. In connection with the Property and/or the Apartments the Founder Members on behalf of the [pursuers] and (as a separate covenant) for themselves covenant with the [defenders]:-

...

(c) to indemnify and keep fully and effectually indemnified the [defenders] from and against all actions claims demands losses damages costs and expenses made against or suffered or incurred by the [defenders] arising from any breach non-observance or non-performance of any of the agreements and/or covenants contained in this Trust Deed and/or the Constitution and/or the Management Agreement;...

13. The Founder Members on behalf of the [pursuers] and as a separate covenant for themselves the Founder Members hereby agree jointly and severally to indemnify and hold harmless the [defenders] against all claims actions proceedings charges...fees costs liabilities and expenses to which [they] may be entitled or which may result from or be incurred in connection with the performance by the [defenders] of [their] duties hereunder and the [defenders] shall be kept fully indemnified jointly and severally by the Founder Members and the [pursuers] against all losses claims demands taxes actions damages costs and expenses made or incurred in connection with the Property or the Owning Companies in connection with the sale of Membership Certificates...

...

22. If [the defenders retire] from the trusts hereof... such Trustee shall be released from all claims demands actions proceedings and accounts of any kind on the part of any beneficiary... interested under this Deed for or in respect of the Property or in the income thereof or the trusts of this Deed or any act or thing done or omitted in execution... of such trusts other than and except only actions –

(a) arising from any fraud or fraudulent breach of trust...

(b) to recover from [the defenders] trust property or the proceeds of trust property...”.

[11] In 2012, the pursuers decided to appoint a new trustee. A letter, dated 23 May 2012, was issued by the pursuers’ management company to the defenders stating the pursuers’ intention to terminate the defenders’ appointment with effect from 1 December 2012. The

pursuers proposed to appoint Hutchinson Trustees Ltd as the new trustee. The Deed of Retirement etc (*supra*) was drafted. That deed has never been executed. The pursuers maintain that the defenders' appointment was terminated as of 1 December 2012. They aver that they have called upon the defenders to transfer relevant property but the defenders have refused to do so. The pursuers maintain that their decision to appoint a new trustee has been frustrated by the defenders' refusal to sign the appropriate Deed. The defenders had continued to act as "*de facto* Trustee".

[12] The defenders make detailed averments about the validity of some of the interim appointments to, and decisions of, the pursuers' committee. These concern whether or not a retired member had been duly re-elected and whether others were ever appointed.

Although the relevance of such averments is unclear, it is on this basis that the defenders maintain that some of the committee members, who appear as pursuers, have no title to sue. The defenders have averments about a dispute between the pursuers and the management company, which had been referred to arbitration. This too concerned the validity of committee appointments and had been resolved, both at arbitration and in the Spanish courts, in the pursuers' favour. Nevertheless, the defenders maintained that they were "stuck in the middle". The averments about the arbitration and the court action have largely been excluded from probation and this is not challenged in the reclaiming motion.

[13] The defenders contend that they are entitled, in terms of the Deed of Trust, to certain indemnities from the pursuers and others. The original trustee had been granted such indemnities when they retired on 21 May 1991. The defenders state that, subject to the pursuers' title being established and the provision of the indemnities, they would be willing to execute a Deed of Retirement etc, in terms of the draft which they have lodged, in favour

of the pursuers' nominated trustee. They maintain that, in terms of clauses 12(c) and 13 of the Deed, they are entitled to such indemnities along with a discharge in terms of clause 22.

[14] A Register of Members had been kept by the management company, as the pursuers' administrators. They had given it to the defenders, who had requested it, according to the pursuers, in order to have a list of the beneficiaries of the Trust. Since their position as trustee had been terminated, the pursuers had sought the return of the register, which contained personal data of the members.

[15] The pursuers aver that the defenders require:

“to account for [their] compliance with data protection legislation; ...; and for copies of the Register of Members held and processed by the [defenders] which forms part of the “Property” held ... by the [defenders].”

They maintain that the defenders had frustrated their efforts to appoint a new trustee.

Lord Ordinary's Opinion

[16] Leaving aside the issue of count, reckoning and payment, the Lord Ordinary identified several discrete issues for determination. These included: (i) the effect of the May 2012 letter; (ii) the meaning of “Property” in the Deed of Trust; (iii) whether the defenders were entitled to indemnities in terms of their draft Deed of Retirement etc; and (iv) the pursuers' averments about the defenders' attempts to frustrate of the pursuers' actings.

[17] The Lord Ordinary held that the letter of May 2012 constituted a valid notice of termination. The defenders' appointment had ended. The trust continued pending the appointment of a successor. Such a situation did not preclude post termination action on the part of a trustee (Trusts (Scotland) Act 1921, s 20). The use of the term “trustee” in clause 15.2 was simply a reference to the party holding the appointment of trustee prior to any event arising under clause 15.1.

[18] The terms of clause 1(f) and clause 7 of Schedule 1 of the Deed of Trust were broad enough to encompass a right to the transfer of the content of the Register of Members, as being “all other property real or personal” in the context of “documents...relating to the Property or Trust”. This gave practical effect to clause 15.2. Accordingly, the conclusion relating to the Register and its supporting averments were respectively competent and relevant. The pursuers had title to sue for implement of the Deed in terms of clause 11.5.8 of the Constitution.

[19] There was no basis in the terms of clauses 12(c) or 13 of the Deed of Trust for the indemnities sought by the defenders. There was no reference to indemnification upon termination or retiral in the Deed. What was conferred by the Deed was a right to a release (ie a discharge). The defenders’ averments, including those relating to earlier indemnities, were irrelevant and fell to be excluded from probation. The question was to be determined only by reference to the terms of the Deed.

[20] The averments that the defenders required to execute the appropriate deed, and the defenders’ frustration of that process, were relevant. Further specification of the terms of the Deed had been provided.

Submissions

Defenders

[21] The defenders argued that the Lord Ordinary erred in failing to dismiss the action, in so far as it sought a declarator that the defenders’ appointment as trustee had been terminated, as irrelevant. In terms of clause 15.2, a notice under clause 15.1 did not necessarily terminate the trust, or even the trustee’s appointment. It could also lead to the trust continuing with a new trustee, or with the existing trustee continuing to hold the

property *qua* trustee. *Moness Country Club v First National Trustee Co* [2013] CSOH 188

concerned whether a clause, which was similar to clause 15, involved terminating the trust rather than the appointment of the trustee. It did not examine the status of the trustee. The letter of 23 May 2012 stated an intention to have the trust continue with a new trustee. That had not taken place. The defenders could not resign as trustee unless a new trustee simultaneously assumed office (Trusts (Scotland) Act 1921, s 3 proviso (1); Wilson & Duncan, *Trusts, Trustees and Executors*, (2nd ed), para 22-17; Gloag & Henderson, *The Law of Scotland* (14th ed), para 41.08). On the pursuers' own averments, no new trustee had assumed office. The pursuers' case was that the defenders remained obliged to take steps in terms of clause 15.2. That was not consistent with the defenders ceasing to be trustee. The conclusion for declarator that the defenders' appointment had been terminated was inconsistent with the other conclusions, particularly that for implement.

[22] The averments, about the defenders' frustration of the pursuers' wish to appoint a new trustee, were irrelevant. If the defenders had ceased to be the trustee, there was nothing they could do to prevent a new trustee being appointed. The pursuers' averments did not give fair notice of the basis upon which it was said that the defenders had prevented the appointment of a new trustee. In relation to implement, if the defenders had ceased to be trustee on 1 December 2012, they could not be called upon to execute a Deed "of retirement" *qua* trustee. The right conferred on the pursuers was limited to requiring the defenders to transfer the property to the pursuers' nominated trustee. Clause 15.2 did not require the defenders to execute a Deed of Retirement.

[23] The draft Deed of Retirement etc proposed by the pursuers did not include the requisite indemnities which were required by clauses 12 and 13. The practical need for such indemnities was reinforced by the possibility of a change in the Founder Members and the

existence of the ongoing disputes between the pursuers and the current Founder Members. There were issues concerning Spanish capital gains tax, because the concept of a trust was not recognised in Spanish law. The defenders could not be required to execute a Deed of Retirement which did not include the indemnities. It was accepted that the indemnities in the draft Deed were wider than those in clauses 12 and 13 and required to be given by more persons. The Lord Ordinary had been wrong to conclude that, in the absence of express reference to the provision of an indemnity in clause 22, the defenders were not entitled to such an indemnity. It was incorrect to maintain that it was the Founder Members who were to indemnify the defenders. It was accepted that there was no right of indemnity at common law, but here there was specific provision in the Deed. The pursuers' own draft Deed of Retirement etc included a discharge and made reference to indemnities. It would be odd if an outgoing trustee required to rely on the terms of the original Deed of Trust when that Deed was said to have been terminated. The defenders were seeking no more than what was normally done and had been done in 1991.

[24] The issues arising in relation to a declarator that the Register of Members constituted property overlapped with the conclusion for delivery of the Register. Property was defined in clause 1(f). For the Register to be regarded as property, it would have had to constitute "other property (real or personal)". The conclusion was not directed towards a physical copy, but the information contained within the Register. That information was not trust property. The only rights referred to by the pursuers were the rights of the individual data subjects over their data in terms of the General Data Protection Regulation (EU Reg 2016/679). Those were not rights which the pursuers were entitled to vindicate. They were personal to the individual data subjects (GDPR Art 79). The pursuers' approach failed to distinguish between trust property and a trustee's administrative records. Clause 7 of

Schedule 1 simply reinforced the view that the Register was part of the records relating to the trust. It had no bearing on the issue and just described what was to happen to the property. A former trustee was entitled to keep records relating to the trust and what he or she had done in his or her capacity as trustee. They needed a copy of the Register in order to know from whom the indemnities had been granted. There was no rule of law that, upon demitting office, a trustee had to provide records to his or her successor and to destroy all records held by him or her.

Pursuers

[25] The pursuers maintained that the highly technical grounds advanced by the defenders were without merit. The Lord Ordinary had distinguished between the internal relationships among trusters, trustees and beneficiaries on the one hand, and the formalities which may be required to give effect to a termination of an appointment.

[26] A trust was an amalgam of mandate and deposit (Gretton: *Trusts* in Reid and Zimmermann (eds) *A History of Private Law in Scotland* I, 480 at 488-489, 506). The modern dual patrimony concept explained the nature of a trustee's title (*Ted Jacob Engineering Group v RMJM* 2014 SC 579 at para [90]). Termination of the mandate of a sole trustee did not automatically result in the removal of the sole trustee from office, or inform third parties who were ignorant of the internal workings of the trust (see eg *Trusts (Scotland) Act 1961*, s 2).

[27] In terms of the Constitution, the May 2012 letter was, *ex facie*, a valid notice of termination of the defenders' appointment, but not the trust (*Moness Country Club v First National Trustee Co (supra)* at para [22]). While the letter terminated the defenders' mandate, they remained "clothed in the office of trustee" pending the appointment of a replacement.

The defenders remained in the office but their appointment was terminated. The pursuers required the defenders to execute the draft Deed of Retirement etc to allow a replacement to be appointed before the defenders could formally relinquish office. The defenders could only demit office on assuming an additional trustee or with leave of the court (Trusts (Scotland) Act 1921, s 3 proviso (1)). It was accepted that the defenders had not ceased to be a trustee on 1 December 2012 and that accordingly decree of declarator in terms of the first conclusion was not appropriate. Specific implement was the more important remedy.

[28] The defenders' records constituted property in terms of the definition in clause 1(f), and para 7 of Schedule 1. The pursuers were facing the very real practical difficulty of being deprived of their own Register. The natural and ordinary meaning of clause 15.1 was that property included such copies of the Register as the defenders may have maintained in the course of carrying out their duties. It was appropriate to construe property in a practical and realistic way, having regard to the context in which it occurs (*Sharp v Thomson* 1997 SC (HL) 66 at 76-77). Delivery of the books and records of a trust was a standard condition on the removal of a trustee because those records formed part of the assets of the trust. The defenders had no relevant averments of any entitlement to retain the records. Following termination, the defenders were no longer a data processor. The pursuers were the data controllers. The pursuers had the primary obligation to maintain a Register (Constitution, clause 1.6). The committee was authorised to bring proceedings on behalf of the Club. The remedies sought were consistent with the data protection framework. Each member had consented to the committee holding his or her personal data in terms of Article 6(1)(a) of the GDPR or Article 7(1)(a) of the Data Protection Directive 95/46/EC. Any processing by returning the data to the committee was necessary in terms of Article 6(1)(b) of the GDPR or Article 7(1)(b) of the Directive. Any processing constituted by the return of any copies of the

lists pursuant to an order of court would be legitimate in terms of Article 6(1)(c) and (f) of the GDPR and Article 7(1)(c) and (f) of the Directive.

[29] The defenders already held an indemnity from the Founder Members in terms of clauses 12(c) and 13. There was no right to a re-grant of that indemnity on termination of appointment. On the defenders' construction, the indemnities survived termination. If that was correct, there is no need for a re-grant. The power of termination in clause 15 was on the pursuers and not the Founder Members. It was not conditional on the grant of indemnities. The fact that the Founder Members granted the indemnities on behalf of the pursuers and themselves supported the conclusion that it is the Founder Members who are the principal obligants. The indemnity provided for in clause 13 related to expenses incurred "in connection with the sale of Membership Certificates by the Company." The defenders had not transferred any certificates. The express right conferred upon the defenders by the Deed on executing a Deed of Retirement was to a "release" (Clause 22); ie a discharge. There was no common law right to an indemnity; only to a discharge in respect of a trustee's intromissions (1921 Act, s 3(d); *Mackenzie's Exr v Thomson's Trs* 1965 SC 154).

[30] Any indemnity should come from the Founder Members, who were major businesses. The committee consisted of individual members of the pursuers. The pursuers were not a person. Their members were beneficiaries who were not parties to the Deed of Trust. The indemnities in clauses 12 and 13 were given by the Founder Members. The indemnity in the previous Deed of Retirement etc had been provided by the Founder Members. Any indemnities would have to reflect the terms of the Deed.

[31] As regards ongoing disputes, the letter of termination was issued in 2012. Subsequent disputes between the pursuers and the management company were irrelevant to the proper construction of the May 2012 letter and the formalities required to give effect to it.

Even if the court were to find that the defenders were entitled to the indemnities sought, that could be addressed by way of an adjustment of the proposed Deed of Retirement. It would not be in the interests of justice to dismiss the action as a whole.

Decision

[32] Wilson & Duncan: *Trusts, Trustees and Executors* (2nd ed) explains (at para 22-37) the rarity of the use of the Court's powers to remove a trustee as being partly because of the existence of the statutory facilities for resignation and assumption:

“which in the absence of quite unreasonable attitudes afford an easier and less unpleasant mode of resolving disagreements among trustees”.

The same might be said of situations, such as the present, in which there is a disagreement between the beneficiaries of the trust and a sole trustee. It is most unfortunate that the current dispute has proved incapable of simple resolution by the resignation of the defenders and the appointment of a new trustee. The court does not know why that may be, but protracted litigation in relation to events which stretch back to 2012 is an expensive solution.

[33] The court has not been asked by the pursuers to grant decree *de plano*. The reclaiming motion has focused upon whether the action should be dismissed in its entirety, principally on the grounds that the defenders' appointment has not terminated and they are not obliged to execute a Deed of Retirement etc in the form lodged by the pursuers. The court does not consider that, as a matter of law, dismissal is merited. It is also concerned that, in practical terms, dismissal will not assist the parties in achieving finality.

[34] A trust either exists or it does not. It may lapse, because of the death of a trustee or there may be a requirement for the court to appoint a trustee, if those originally selected

have declined office. For a trust to continue to operate, there must be a trustee who holds the trust's assets. For this reason, where a sole trustee wishes to resign, he cannot do so without assuming a new trustee (Trusts (Scotland) Act 1921, s 3 proviso (1)).

[35] A person either holds office as a trustee, or he does not. There is no such person as a "de facto trustee" or someone "clothed in the office of trustee" who is not a trustee. Clause 15 of the Deed of Trust is designed to meet a number of different situations. One is when the intention is to wind up the trust. A second is when there is to be a new trust created. Both of these events involve termination of the trust itself. The third situation is where the trust is to continue with a different trustee. This substitution envisages the continuation of the trust on the same terms. It may be because the clause is attempting to cover these different situations that it refers to the termination of the "Deed" rather than the trust itself. Seen in that context, the correct interpretation of the clause, in a situation such as the present, is that it is the trustee's appointment which is terminated rather than the trust itself. This was the analysis in respect of the similar clause in *Moness Country Club v First National Trustee Co* [2013] CSOH 188 (Lord Doherty at para [22]). The court agrees with the Lord Ordinary's reasoning in *Moness*. It follows, from the ability of the pursuers to terminate the "Deed" by notice, that they have in effect the power to remove the trustee by giving that notice.

[36] Returning to the three situations, in the first two, which involve the termination of the trust, the trustee has either to sell the property or to hold it on the new terms. In the former situation, the sale is executed by the trustee in that capacity. It is not a sale after his office has been terminated, although it may be concurrent with that event. In the third situation, there requires to be an assumption of a new trustee by the existing trustee before the latter's appointment is terminated. The only alternative to that occurring is to have the trustee removed and replaced by the court. For an assumption to occur there has to be a

trustee who is willing to undertake that role. It is not disputed that Hutchinson Trustees, who were the pursuers' selection, were unwilling to accept appointment. That being so, the defenders remained, and remain, in office until an alternative is found.

[37] The court is accordingly unable to agree with the Lord Ordinary that the effect of giving notice was to terminate the defenders' appointment on the expiry of the notice period. The letter of 23 May 2012 expressed the pursuers' intention to bring that appointment to an end, but that could not happen unless and until a new trustee was found and the defenders had executed the appropriate Deed to bring about the substitution. A declarator in the terms sought in the first conclusion is not therefore appropriate. That is not to say that dismissal of the action, in so far as relating to that conclusion, is the appropriate course. Rather, after the proof before answer, a declarator in not too dissimilar terms, which states that the defenders are obliged to resign and assume a nominated trustee once the latter has been identified, may be justified.

[38] The next question is the form of Deed of Retirement etc. It cannot be in exactly the same terms as that drafted by the pursuers, given its reference to Hutchinson Trustees, but it can, as will be explained, be in substantially the same format. The central question is whether the pursuers require to provide the defenders with indemnities of the nature set out in the defenders' draft deed. The answer to that is in the negative. The simple reason for that is the absence of such a requirement in the Deed itself. In addition, the Deed already contains indemnities in clauses 12 and 13. These have been provided by those described in the Deed for the benefit of the trustee in the circumstances stated. These indemnities will remain enforceable by the defenders, after any resignation, against the granters of the covenants. The Deed contains no obligation on the pursuers, as an unincorporated association, to provide additional indemnities on behalf of the time-share holders, even if

the committee had power to bind these individuals, or to procure new indemnities from others. In due course, the pursuers may well be entitled to a decree for implement in terms of the fourth conclusion on the basis of a suitably revised draft of the Deed which they have lodged. That Deed ought to include the discharge, to which the defenders are entitled, in terms of clause 22.

[39] The court is satisfied that the Register of Members, including their contact details, is part of the property of the pursuers as defined in clause 1(f) of the Deed of Trust. Clause 7 of Schedule 1 does not add to this equation. It is simply a statement that the trustee *pro tem* has the control and custody of documents relating to the trust property. In the event of the defenders ceasing to be the trustee, they must deliver the Register, along with all other records relating to the Trust, to the pursuers or the new trustee. That is not to say that the defenders cannot retain copies of some documents, if that has a legitimate purpose. However, their retention of details of the pursuers' members may contravene the Data Protection regime. The obligation to deliver records is unlikely to require the defenders to provide the pursuers with multiple identical copies of relevant records. However, duplicate records ought not to be retained unless there is a legitimate reason and retention does not contravene data protection requirements. In the event of such contravention, the defenders may be subject to the sanctions within that regime. Meantime, the court is unable to hold that the pursuers' averments about the defenders' obligation to transfer documents are clearly irrelevant.

[40] The court has taken a different approach from the Lord Ordinary in certain respects. Nevertheless, the Lord Ordinary was correct to decline to dismiss the action in its entirety. His subsidiary decisions on relevancy are sound. The court will accordingly refuse the reclaiming motion and adhere in substantial part to the interlocutor of 30 September 2019.

The exception is a technical one relating to the exclusion from probation of the second and third conclusions. That is not a competent remedy. The interlocutor should have dismissed the action in so far as relating to these conclusions.