OUTER HOUSE, COURT OF SESSION

[2021] CSOH 37

CA98/20

OPINION OF LADY WOLFFE

In the cause

THE SHORE PORTERS' SOCIETY OF ABERDEEN AND OTHERS

Pursuers

against

(FIRST) KEVIN BROWN, (SECOND) STUART BURNETT, (THIRD) EUAN CUTHBERT, (FOURTH) ALAN DAVIDSON and (FIFTH) SEAN SIMPSON

Defenders

Pursuers: O'Brien QC; Ledingham Chalmers LLP
First Defender: MacColl QC, Cowan; Brodies LLP
Second Defender: Lindsay QC; DLA Piper Scotland LLP
Third Defender: MacColl, Cowan QC; Drummond Miller LLP
Fourth Defender: MacColl QC, Cowan; Blackadders LLP
Fifth Defender: MacColl QC, Cowan; Burness Paull LLP

13 April 2021

Background

The parties

The Shore Porters' Society of Aberdeen

[1] The first pursuer is The Shore Porters' Society of Aberdeen ("the Society"), which has existed for many centuries. Parties were agreed that it is an unincorporated association and, as such, it has no separate legal personality. The other three pursuers are, respectively, the Deacon, Depute Master and Box Master of the Society (positions recognised by rule 4 of the

Rules of the Society, as after-noted, and who, together with the position of Key Bearer, Master of the Body and an Officer, collectively constitute the Committee of the Society ("the Committee"). These individual pursuers are called as the representatives of the Society. For convenience, in this Opinion I shall simply refer to "the Society" rather than to all the pursuers. The Society's constitution is set out in the Rules and Regulations of the Shore Porters' Society of Aberdeen adopted in 1896 ("the Rules"). While there have been amendments to the Rules, none of these was said to be material to the subject-matter of the disputes between the parties.

The defenders

[2] The defenders are each members of the Society and, by the time of the debate, they had become superannuated members. Three of the defenders have raised separate actions to interdict their expulsion by the Society ("the members' actions"). The means by which members become superannuated members, and the benefits thereby accruing, are more fully described in my opinion in the action brought by three of the defenders in this action against the Society("the members action"), *Brown & Others* v *The Shore Porters' Society* ([2021] CSOH 25).

The Society's Working and Property Departments

The Working Department

[3] The Society has two parts, one now known as the "Working Department" (referred to in the Rules as the "van and horse department") and the Property Department. The Working Department carries on a removal business and members engaged in those activities are known as "the working members" of the Society. In practice, the working members

encompass new entrants, who are effectively probationary members for their first 3 years. The Society's office-bearers, comprising the Committee of the Society, are drawn exclusively from the working members. It was a matter of agreement (rather than express provision of the Rules) that it has long been the practice for the profits of the Working Department to be divided among the working members as if they were in partnership.

The Property Department

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

The dispute between the parties

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

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

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

On the Society's analysis, the effect of either of these "misallocations" (the term used in the Society's pleadings, and which I will adopt as shorthand) was to overstate the profits of the Working Department and to understate the revenue of the Property Department.

The Society's Action

Conclusions

[6] By this action the Society seeks repayment of the sums said to have been overpaid to the defenders, when they were working members of the Society and held one or more of the positions on the Society's Committee ("the Society's Action"). That is greatly to simplify, as the pursuer has two primary pecuniary conclusions, directed against all of the defenders, as individuals (first conclusion) and as trustees (second conclusion) on a joint and several basis (with seven specified sums sought), an alternative pecuniary conclusion against each defender individually (with a total of 27 specified sums sought), as well as two alternative conclusions for count, reckoning and payment (containing a total of 12 more specific calls for an accounting). As noted below, one of the defenders' grounds of challenge to the Society's Action is that there is no basis to impose a joint and several liability among the defenders.

Precis of factual basis of the Society's Action

[7] Central to the Society's Action is that over a number of years there were misallocations which had the effect either of increasing the profitability of the Working Department (by £579,561) or overstating the expenses of the Property Department (by c £117,000). The Society's case is predicated on establishing that there were "misallocations" of the kind described and which were said to breach the Rules and "the long established practice of the Society". The defenders challenged the Society's reliance on the Rules,

essentially on the basis that, although a number of rules were referenced in the Society's pleadings, there was in fact no averment of any breach of a specific rule. The defenders singled out for criticism the Society's reliance on a "long established practice", contained in the following averment (from Article 2.6 of Condescendence):

> "In accordance with these Rules **and the long established practice of the Society**, the Working Department carries on a removal business, funded by the capital contribution made by new members under rule 18. **The Rules do not expressly specify how the profits of the Working Department are to be applied**, **but by long established practice** any profits from that business are distributed among the working members on the same basis as if they were in partnership with one another. Any profits made from the Society's storage business are attributable to the Property Department and accrue for the benefit of the whole membership, i.e. both superannuated members who are presently receiving a superannuated allowance, and working members who may expect to do so in future upon completing 21 years' service in terms of the Rules. That is reflected in rule 10, which provides for the Society to manage its properties and collect rents, and for the proceeds from those activities to be paid to the Boxmaster as part of the Society's funds (to be distributed in accordance with rule 9). "(Emphasis added.)

As a consequence of these misallocations, the Society contends that collectively the defenders were overpaid by a significant amount (the aggregate sum of the first conclusion is c £516,000), and which resulted in underpayments in a like amount to the superannuated members, to their detriment. Following an investigation, the Society identified a number of practices which resulted in these misallocations (eg retaining storage revenue properly due to the Property Department from certain clients and the allocation of 100% of the wages of a handyman to the Property Department). I need not set these out in detail.

The legal bases for recovery founded on in the Society's Action

[8] The four grounds of liability the Society founds on are as follows:

1) Breach of trust: The Society avers that the sums overpaid to the defenders should have been attributed to the Property Department and applied "in accordance with the Rules". In particular, the Society avers:

"In terms of rule 5, those sums were held in trust for the generality of the Society's members. They were paid to the defenders in breach of trust. Accordingly, each of the defenders is liable to make good the loss to the trust fund in respect of those payments that were withdrawn during years when they held one of the three trustee positions." (Article 6.5 of Condescendence.)

2) Constructive trustees: this ground focused on the monies received by the defenders and for which the Society says they are accountable as constructive trustees:

"… in any year in which the defenders were members of the Society's committee, they owed fiduciary duties to its members in that capacity. The payments to the defenders were made and received in breach of those fiduciary duties. By rule 4, the members of the Committee were charged with the management of the Society's funds. They had control of its funds and activities analogous to the control exercised by the directors of a company. The Committee members did in fact exercise that control, and the Working Department charged a management fee to the Property Department to reflect that work. They were subject to fiduciary duties in respect of the Society's funds. Those duties included duties to exercise reasonable care that the funds were applied in accordance with the Society's rules. The defenders failed to exercise such care, as hereinbefore condescended upon. Having received such funds to which they were not entitled, they were under a duty to return them. They held any such funds in a constructive trust. Accordingly, each of the defenders is liable to make good the loss to the fund in respect of those payments that were withdrawn during years when they held a fiduciary position as aforesaid and in any event to account for the sums which they received personally." (Article 6.6 of Condescendence.)

3) Fault and negligence: the Society imputes liability against the defenders "[a]s members of the Committee, and in any event in terms of their roles as working members of the Society", and who, it contends, each owed a duty

> "to take reasonable care to see that the Society's funds **were applied in accordance** with its Rules. In any event it was an implied term of the Rules that they should exercise reasonable skill and care in discharging the duties which they had agreed to carry out for the

> Society. Those were duties owed by them to the generality of the members of the Society. To that end, it was **their duty to take reasonable care to ensure that costs and revenue were allocated properly** as between the Working Department and the Property Department. It was their duty to take reasonable care to ensure that the accounts which they signed and submitted to the wider Society each year were accurate. Having regard to the scale of misallocations described above, and the length of time over which they persisted, each of the defenders knew or ought to have known that there were repeated and significant misallocations that favoured the Working Department (and therefore themselves personally) at the expense of the Property Department. The defenders had personal responsibility for checking the invoices issued in respect of their work. The first and third defenders as office managers were personally involved in the general operation of the Aberdeen business. The second and fourth defenders were personally involved in the operation of the Rumsey & Sons business. Had each of the defenders not been at least negligent in discharging their duties, any inaccuracy of the accounts in favour of the Working Department would have been identified and corrected prior to any overpayments being drawn by the defenders." (Article 6.3 of Condescendence.) (Emphasis added.)

4) Unjustified enrichment: The Society's initial ground has, as a consequence of adjustment (reflected in bold font), become a fall-back ground of liability:

> "… each of the defenders has been unjustifiably enriched by receiving sums from the Society **to** which they were not in fact entitled. **Accordingly, insofar as those sums are not recoverable under one of the other causes of action referred to, they are recoverable on the basis of unjustified enrichment**". (Article 6.2 of Condescendence.)

While in its pleadings the Society had founded on this as a primary ground of liability, at the debate Mr O'Brien acknowledged that this ground would arise only if the contractual remedies failed (*per* Lord Hope of Craighead in *Dollar Land (Cumbernauld) Ltd* v *CIN Properties Ltd* 1998 SC (HL) 90 at 94E to F). On that footing, the defenders no longer challenged the Society's averments of this ground of liability.

[9] Furthermore, on the basis that these misallocations constitute breaches of the Rules, the Society resolved to expel a number of superannuated members, including three of the

defenders in this action. This prompted the members' actions, in which *interim* interdict against expulsion was granted and certain declarators and orders for payment were sought.

The issues at debate

[10] The defenders challenged the relevancy of the Society's actions on a number of grounds. After sundry procedure, two debates were fixed: the first in the Society's Action, which was immediately followed by the debate in the members' actions. Mr O'Brien QC represented the Society at the debate. Mr Lindsay QC represented the second defender. Mr MacColl QC represented the first, third, fourth and fifth defenders (whom I shall refer to collectively as "the other defenders"). While Mr Lindsay and Mr MacColl produced separate notes of argument, there was considerable overlap in their challenges to the Society's case. The defenders' over-arching position was that the Society's case was irrelevant for the following reasons:

1) Challenges to the grounds of liability: In respect of the principal grounds of liability, the Rules did not prescribe the allocation of monies as between the Working and the Property Departments. It was not enough to refer to a "practice", as the Society does in article 2.6 (see para [7], above) and assert that what the defenders did amounted to a "misallocation". A similar criticism was levelled at the Society's use of the word "properly" in its averment that the defenders had "a duty to take reasonable care to ensure that costs and revenue were allocated properly between the Working Department and the Property Department" (see para [8(3)] above). Accordingly, in the absence of averments of any breach of the Rules, there were no relevant averments of any breach of duty on the part of the

defenders, whether owed in delict or as a fiduciary. The Rules did not impose fiduciary duties on any member of the Committee. Nor were there relevant averments to impose any liability on the defenders either as individuals or as trustees, or as constructive trustees in respect of monies received ("the relevancy challenges to the grounds of liability);

2) The joint and several conclusions: Members of an association could not be vicariously liable for the acts of another member. The joint and several conclusions were therefore inept, as no relevant basis had been pled on which the defenders as a collective owed duties to the Society and in respect of which they might be held liable on a secondary basis for any breaches by one or more of the other defenders ("the joint and several liability issue"); and

3) Prescription: The defenders also contend that the majority of the claims the Society advances have prescribed by virtue of the short negative prescription, as provided for in the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). The Society's primary position is that some of the obligations on which it founds are imprescriptible (eg an obligation of a trustee to account) and in respect of other grounds, it relies on a section 11(2) of the 1973 Act, to justify going back to payments more than five years before the raising of these proceedings. The defenders contend that while an obligation of a trustee to produce an account is imprescriptible, any obligation of a trustee to make reparation for breach of trust, is only imprescriptible if it was fraudulent, which the Society does not aver. They also challenge the Society's reliance on section 11(2) as incapable of extending to any obligation to make repetition ("the section 11(2) issue"). Finally, the defenders attack the

Society's reliance on section 6(4) of the 1973 Act, to preclude the running of prescription on the basis that it was induced by the defenders' conduct from making a relevant claim and which it could not with reasonable diligence have discovered ("the section 6(2) issue"). I shall refer these issues collectively as "the prescription issues"; and

4) Other challenges: There were other challenges, for example, by the second defender to the alternative conclusions for count, reckoning and payment. This was on the footing that if any obligation to make payment or reparation had prescribed, there would be no utility to any accounting. Other challenges are noted in the discussion, below.

[11] Parties lodged notes of arguments and two volumes of authorities. The Society produced a supplementary note of argument and a supplementary bundle of authorities. Reference was also made to certain productions lodged, principally the Rules, as well as minutes of the Society from 2015. I have had regard to all of these materials and do not propose to narrate them, or the pleadings, in any detail.

The Rules

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

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

[13] Rule 2 defines the objects of the Society. For ease of reference, I have altered the layout of, and inserted sub-paragraphs into, rule 2. (The layout of the other rules are as they appear in the printed text of the Rules.)

> "2.- **The aims and objects of the Society shall be to conserve and perpetuate a fund** by means of entrance fees, subscription, fines levies, donations, plank mails, rents of properties, interest, dividends, or otherwise, **for insuring**
>
> (i) a sum of money to be paid on the death of a member as Funeral Allowance;
>
> (ii) a sum of money to be paid on the death of a member's wife;
>
> (iii) a sum of money to be paid at the death of a deceased member's widow, or for defraying the expenses of the burial of such widow;
>
> (iv) for the payment of a sum of money to each member as Sick Allowance during sickness, which allowance, however, shall cease on superannuation, as is hereinafter provided;
>
> (v) for the payment of Superannuated Allowances to members who have served 21 years, and who have thereby become entitled to the benefits of the Society;
>
> (vi) for the payment of annuities to widows and orphan children of deceased members; and
>
> (vii) for granting assistance to widows and orphan children of deceased members in distressed circumstances, if found necessary." (Emphasis added.)

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

> "1.- The said Society shall be called the Shore Porters' Society of Aberdeen, and shall consist of an unlimited number of members. The Society shall carry on its business at 12, Virginia Street, Aberdeen, which shall be deemed to be the office of the Society, and when any change is made thereon, notice of the same shall be advertised in the daily newspapers circulating in the County of Aberdeen.
>
> […]
>
> 3.- The Society shall be governed by a Committee, which shall consist of a Deacon, Boxmaster, Depute Master, Key Bearer, a Master for the Body, and an Officer, who shall be elected from the working members of the Society annually at a General Meeting convened on or about the 11th day of November. The Deacon,

Boxmaster, and Key Bearer shall be the only authorised members to sign cheques on behalf of the Society, and no money shall be withdrawn from the Bank without their signatures.

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

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

[…]

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

to the state of the funds, at any summoned meeting of the whole members called for the purpose of considering and resolving anent same.

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

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

Discussion

The liability at common law inter se members of an unincorporated association

[15] This is an action by an unincorporated association against five of its members, all of whom held on ore more of the positions on the Committee. The defenders challenge the several grounds of liability on which the Society founds. In considering the parties' submissions it may be helpful to note the position as regards any liability *inter se* members of an unincorporated association at common law arising by reason of their status as members of an association, and how that may be altered by the collective agreement of the members of an unincorporated association (eg as embodied in the association's rules or constitution). I note that in this case, no question of liability arises in respect of any third party: the claims are among the members of the Society.

The liability inter se the members of an unincorporated association arising from their status as members

[16] In the course of submissions, reference was made to legal concepts such as agency, vicarious liability and the obligations of fiduciaries. Inherent in these concepts is a legal relationship between two (or more) persons such that one may act for, or be accountable to, another (eg as between an agent and its principal, or as between a trustee and a beneficiary). Vicarious liability presupposes a tripartite relationship, namely, where a person (A) is responsible vicariously, for the conduct of another (B), to a third party (C). However, it is a truism that an unincorporated association has no separate legal personality. Accordingly, the application of concepts such as vicarious liability or agency may be less than straightforward or, indeed, inapt. So, for example, a member or officeholder of an unincorporated association cannot act on behalf of, or as an agent of, an incorporated association: the association has no separate legal personality and it therefore cannot be a principal (see *Cromarty Leasing Ltd* v *Turnbull* 1988 SLT (Sh Ct) 62 at 63J.) Furthermore, members of an unincorporated association are not vicariously liable for the acts and omissions of other members of the association, regardless of whether or not they are committee members (*per* Lord Marnoch in *Harrison* v *West of Scotland Kart Club* 2004 SC 615 at 622 to 623 ("*Harrison*"). This is on the analysis that each member is a principal, and vicarious liability does not arise among principals: see the Scottish Law Commission Discussion Paper on Unincorporated Associations (DP no. 140, December 2008) ("the SLC Discussion Paper") at end of para 3.7). Moreover, but subject to the rules of an unincorporated association, a member who accepts office as a committee member or office-bearer does not *thereby* incur a greater liability to other members of the association in that role (*Harrison, ibid*, and see *Milne* v *Duguid* 1999 SCLR 512 at 516 ("*Milne*")). This is

consistent with *Prole* v *Allen & Others* [1950] All ER 476 ("*Prole*"), in which the court dismissed the action of a member of an unincorporated association who had sustained injury falling down the unlit stairs insofar as directed against the committee members of the association. This is often expressed as the rule that, at common law, a member cannot sue the other members of an association in respect of liability said to arise *from their membership* of the association. For these reasons, actions framed on that basis by a member against other members or office-bearers seeking damages for negligence (eg as in *Harrison* or *Milne*) have been dismissed as irrelevant.

[17] Leaving aside any liability that might arise in respect of third parties, subject to the terms agreed among its members, an unincorporated association is the sum of all its members, each of whom is a principal in a common enterprise (*Harrison* at 622). The defenders advanced the legal proposition (which the Society did not accept) that a member of an association cannot sue the association because he is, along with the other members, equally responsible for its liabilities (see *Harrison* and *Milne*) and, therefore, an action by a member against the unincorporated association would be tantamount to suing himself. In my view, the defender's proposition requires some qualification. I accept that proposition as well founded, insofar as it applies to an action purporting to found on liability common to or against the *whole* members. It respectively seems to me that it is *that* circumstance which gives rise to the point of objection, of the pursuing member "attempting to sue himself, among others, as the primary obligant" (*per* Lord Marnoch in *Harrison* at para 25). However, the cases do recognise that liability may nonetheless arise between some of the members of an association (it is on this separate ground that the plaintiff in *Prole* succeeded).

Circumstances in which liability between some members, and arising other than from membership, capable of arising

[18] It was common ground that membership of an unincorporated association does not provide immunity from being sued by another member for liability which arises independently from membership of the unincorporated association. Liability may be established between one or more of the members of an association (ie other than by reason of being a member of an unincorporated association), so long as the rule in *Harrison* is not contravened. While the second defender submitted that a committee member of an unincorporated association owed no duties of care to other members of the Society when acting in that capacity, in my view that must be qualified. While it is correct that simply having the status of a committee member or office-bearer does not itself constitute a basis of liability (*per* Lord Marnoch in *Harrison*, and *Prole* (at p 477), cited on this point with approval by Lord Marnoch at para 28 in *Harrison*), if the rules of the association imposes duties breach of which may lead to liability, the rules should be given effect. In *Prole*, the plaintiff, who was a member of an unincorporated association, advanced two separate grounds for liability. The plaintiff's case against the members of the committee, based simply on their status, failed. However, the plaintiff established liability in negligence against another member who had been appointed "steward" and in which capacity the defendant was responsible for the premises being in a fit state for the use of its members. The Society founds on this part of the case as an example of liability being established as between individual members of an association. That form of liability was not advanced in, or considered by, the Court in *Harrison*. As I have them noted, the defenders did not contend that the second *ratio* in *Prole* was wrongly decided.

[19] The second defender referred to paragraph 7 of Lord Uist's decision in *Taylor v Quigley* [2017] Rep LR 37; [2016] CSOH 178 ("*Taylor*"). That passage, which refers to the Court of Appeal's decision in *Robertson v Ridley* [1991] 1 WLR 872 holding that at common law the officers or committee members of an association owed no liability to members at common law, falls within Lord Uist's summary of the various cases cited to him (at paras 3 to 11). Lord Uist referred to *Prole*, but only the first, unsuccessful ground. To the extent that he appears to extend the rule in *Harrison* so as to preclude the prospect of *any* liability arising between individual members of a club (at para 35, which the defenders did not found upon) and regardless of the terms of the association's rules), I respectfully disagree. In his discussion of the issues, Lord Uist did not refer to or analyse any of the cases Counsel cited to him. Critically, he does not note or take into account the ground on which the plaintiff in *Prole* succeeded and which, in my view, is also an available ground in Scots law.

[20] As noted in the foregoing discussion, the rules of an association are capable of modifying the common law position. I turn to consider the scope of the rules of an association to do so.

Liability arising by virtue of the rules of an unincorporated association

[21] It was common ground that the rules (or constitution) of an unincorporated association regulate the liability of members *inter se* as a matter of contract. The rules of an unincorporated association may provide for liabilities which would not arise at common law. Likewise, the existence and extent of any duties owed by officers-bearers or committee members of an unincorporated association to individual members by virtue of having assumed those positions will depend upon the rules of the association. If an association's rules provide for liability, then that should have effect. The normal principles of contractual

interpretation apply to the interpretation of the Society's Rules. I turn to consider the relevancy challenges to the grounds of liability.

The relevancy challenge to the grounds of liability

Does the Society have relevant averments for breach of trust or of fiduciary obligations?

[22] I have noted above (at para [10]) the bases of liability the Society founds on. While parties were agreed that the Rules constitute a contract among the Society's members, the Society does not found on breach of any particular rule as a breach contract *per se*. The defenders rely on this in their challenge to the relevancy of the Society's case based on breach of trust or breach of fiduciary obligations. The defenders' position may be summarised as follows:

1) The Rules do not regulate the distribution of the profits as between the Working Department and the Property Department. Therefore there can be no breach of the Rules arising from any "misallocation";

2) In any event, these rules did not create a trust or impose any fiduciary obligations on individual members of the Committee.

Accordingly, there are no relevant averments of any breach of the Rules, and hence there were no relevant averments of breach of trust or of any fiduciary duty.

[23] The Society's answer is, in fact, to rely on the "established practice" of allocation it avers (see para [7], above) and on rule 5 as constituting the specified office bearers as *ex officio* trustees holding all of the property of the Society in trust for the behoof of the Society's members.

[24] In considering parties' submissions, I note that the defenders did not contend that as a matter of law fiduciary duties owed by one member of an unincorporated association to

another member or members or that a trust could never arise. By implication, whether an officeholder of an unincorporated association might owe fiduciary obligations will depend on the particular rules of the association. The defenders' relevancy challenge was advanced on the narrower footing that the Rules did not create a trust or otherwise impose fiduciary obligations. Accordingly, this ground of challenge involves a consideration of the Rules and whether, properly construed, they impose fiduciary obligations on a member or officeholder in respect of the property of the Society. I turn to consider the Rules.

The Rules

[25] By contrast with the debate in the members' actions, in which the Rules were the subject of submissions by the parties, in this debate there was little reference to the Rules. I refer to, but do not here repeat, the observations I made in the members' action opinion as to the approach to interpretation of the Rules (see *Brown & Others* v T*he Shore Porter Society* [2021] CSOH 25 at paras [14] to [15]). However, having regard to the Society's reliance on fiduciary duties, it is appropriate to note certain features of the Rules potentially relevant to that ground of liability. As noted in the members' action opinion, the Society is in the nature of a mutual benevolent association. This is clear from the preamble to the Rules as well as rules 2 and 20, which I note below.

The objects of the Society

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

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

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

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

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

[27] Returning to rule 2, which is set out in paragraph [13] above, it specified the purposes for which the funds could be expended. It is apparent from the words highlighted in the preamble (see para [12], above), and the terms of rules 2 and 20 that, at least from 1896, the Society was a voluntary association which proposed to establish a fund with certain benevolent objects ("relief and support") of a defined class of beneficiaries ("aged members and the widows and orphans of deceased members") who would qualify for the benefits specified in rule 2.

[28] Further, in terms of rule 5 of the Rules, the property of the Society :

> "shall be **vested** in the Deacon, Boxmaster, and Keybearer of the Society **for the time being and their successors in office** as Deacon, Boxmaster, and Keybearer of said Society, **for the use and benefit of the members of the Society and none others**; and from and after the death or retirement of any Deacon, Boxmaster, or Keybearer, **shall vest in the succeeding** Deacon, Boxmaster, and Keybearer for the same purposes as he or they had therein, and **subject to the same trust** without any assignment whatsoever." (Emphasis added.)

The effect of rule 5 is, in my view, to constitute the members appointed as "Deacon", "Boxmaster" and "Keybearer" from time to time as the custodiers or trustees of the Society's

property. (I shall refer to the members holding these positions as "the trustee members of the Committee".) In my view, having regard to the rules just noted, the tripartite elements of a trust are present: there is a trust fund (here, the property of the Society) which is dedicated to certain purposes (principally set out in rule 2) for the benefit of a class of beneficiaries (broadly, the superannuated members) and vested in and administered by trustees (here, the trustee members of the Committee).

[29] Accordingly, as a matter of the interpretation of the Rules, I have no hesitation in holding that by virtue of rules 4 and 5, fiduciary obligations were imposed on the members holding the positions of Deacon, Keybearer and Boxmaster from time to time, in respect of their stewardship of the Society's property. This was framed as a positive obligation in rule 5 (the property of the Society was "**for the use of the members** of the Society and none other" (rule 5 (emphasis added)) and also as a negative obligation in rule 20

> ("… **no part** of the funds of the Society shall on any pretence **be applied to any other purpose than** the payment of the necessary expenses of management and others as herein provided, and **the benevolent and charitable uses for which the Society is formed** …" (emphasis added)).

In other words, in terms of the Rules, those officeholders held the Society's property (the trust property) *qua* trustees for the benefit of the Society's members, particularly its superannuated members (being the beneficiaries), and which fell to be applied for the trust purposes being more specifically defined in the rules (especially rules 1 and 2 of the Rules). Rule 4 confers ancillary powers on the trustee members of the Committee to deal with the property of the Society. Rule 9 directs the appropriation of funds and the order of priority in which sums appropriated are paid to different classes of beneficiaries. It follows that I reject the defenders' contention that the Rules do not give rise to a trust or fiduciary obligations.

[30] I reach this view upon a consideration of the Rules. The Society advanced a discrete argument that the role of the members of the Committee was analogous to the role of directors of a limited company. In the context of this case, I am not persuaded that drawing that analogy assists. There is a well-established *corpus* of case law defining the status of directors and the duties they owe to the company of which they are directors. This body of law is now incorporated as a statutory code in the Companies Act 2006. These authorities provide an ample basis for imposing fiduciary duties on company on directors as well as conferring on directors the capacity to act as agents of the company of which they are directors. While the defenders reject the analogy because (as they correctly point out), in the context of an unincorporated association there is no collective entity akin to a company, it respectfully seems to me that the Society is correct that the question of whether a fiduciary obligation arises is determined by the nature of the role assumed and any associated duties imposed. Nonetheless, in my view, the analogy is apt to mislead, as no fiduciary duties are imposed on members or officeholders of an association as a matter of common law. While the *corpus* of law on directors' fiduciary duties may afford general guidance on the kinds of duties that could arise, whether or not such duties do arise is determined principally upon an interpretation of the rules of the association rather than an extrapolation from the very different context of corporate actors.

Does the Society have relevant averments of breach of trust or fiduciary duties?

[31] Does the Society have relevant averments that the property of the Society was applied other than in accordance with the trust purposes? In my view the Society has sufficient and relevant averments to instruct a breach of trust or fiduciary duty on the part of the defenders as trustee members of the Committee. The defenders' attack on this ground of

liability was that, essentially, there was no provision in the Rules governing the allocation of the income or expenses of the Society, a matter which the Society accepts: see the second sentence in the opening passage of Article 2.6 of Condescendence (quoted at para [7] above).

[32] In relation to the defenders' challenge to the Society's reliance on a "long established practice", and their related submission that the Rules do not themselves prescribe any particular allocation of the funds of the Society, I am not persuaded that there is any force to this challenge. In my view, the defenders misapprehend the purpose and scope of the Rules. The Rules are principally concerned with the definition of the benevolent objects of the Society, the particular benefits that may be conferred and the circumstances in which those benefits would be payable to the beneficiaries. This is reflected in the subject-matter of the Rules quoted above.

[33] Self-evidently the Rules are not concerned with the management or *minutiae* of the Working Department. There is only one reference to the "van and horse department" (now, the Working Department) in rule 18, which provides for the repayment to a member of his share of that department upon becoming a superannuated member and which was treated as akin to the repayment to a retiring partner of his share in the capital of the partnership (and which is to be ascertained by valuators). It is notable that, apart from that reference, there is no provision of the Rules governing the business of the Working Department or the application or division of the profits generated by it. Apart from their eligibility to certain benefits, to the extent that there is reference to the working members, generally it is to define their terms of entry to the Society and the circumstances in which their entrance money might fall to be repaid (rules 15 and 17), their role in the conduct of its formal affairs (if elected as one of the office-bearers), and their responsibility in that capacity for the

maintenance and administration of the funds of the Society. All of this is ancillary to the core benevolent purposes of the Society articulated in the Rules.

[34] The Society's essential case is that the effect of certain intromissions by the defenders as trustee members of the Committee was to deplete or misdirect assets belonging to the Property Department, to the loss of the superannuated members or other beneficiaries. The Society details (in Article 5) a variety of ways in which there were misallocations of the income and expenses, to the detriment of the superannuated members. This level of detail is underpinned by the Society's fundamental point case, by reason of certain types of misallocations (which it is said the defenders were party to or of which they were cognisant), funds of the Society which should have been applied in accordance with its benevolent purposes and payable to the superannuated members were diverted to the working members. Other than to contend that the Rules do no themselves contain specific rules of allocations, the defenders never engaged with this central premise of the Society's case.

[35] In my view, the Society has sufficient averments that what it describes as "misallocations" are capable of instructing breaches of trust or fiduciary duties on the part of the defenders as trustee members of the Committee. As noted above, the central purpose of the Society, and which is the principal focus of the Rules, was the establishment of a benevolent fund for its members. The property of the Society was dedicated to that purpose. By virtue of rule 5, the property of the Society was vested in the trustee members of the Committee, and by virtue of rule 4 they, together with the rest of the Committee, were empowered to intromit with the Society's property as well as direct its application. Furthermore, rule 9 provided for the 'appropriation' of the Society's property, meaning the dedication of the sums appropriated to fulfil the benevolent purposes of the Society and

which are to be paid in the order of priority described in rule 9 to the classes of beneficiaries created in rule 2. The Society's averments are also sufficiently specific, at least for the purposes of a commercial action, as they are supported by the analysis of an expert report which details the means and amounts of what are said to be the different types of misallocations.

[36] The Society's case is bolstered by its reliance on what it avers was "a long established practice" that the income of the working department was distributed among the working members as if they were in partnership with one another, and that the income of the Property Department was to be treated as part of the funds falling within, and to be applied in accordance with, rule 10, and which fell to be applied in accordance with that rule. Accordingly, a "misallocation", being an allocation of expenses or income which departed from the long established practice, is in my view capable of giving rise to a breach of fiduciary duty. The focus of the defenders' attack is the Society's averments about this "practice", as it is not expressly provided for in the Rules and so, this argument runs, no breach of fiduciary duty could arise by departure from a practice not expressly derived from the Rules.

[37] In my view, there is no reason in principle to preclude the written rules of an unincorporated association from being augmented by a practice agreed to and complied with by the members over time, and such as to bind the members and to require the custodiers or trustees of the assets of the association to apply those assets in accordance with that established practice, so long as the practice is not inconsistent with the association's rules and so long as it is not inimical to the purposes of the association. In any event, in respect of the allocation of the income and expenses as between the Working and Property Department, the Society's averments of "the long established practice" are supported by

reference to rule 10, directing that certain classes of income were to be treated as the funds of the Property Department. In my view, the Society averred a relevant case under this head.

[38] For these reasons, the defenders' challenge to the relevancy of the Society's action, insofar as grounded on breach of trust or fiduciary duty, fails.

The Society's ground of liability based on constructive trust in respect of monies received in breach of trust

[39] For the purposes of this ground of liability, the Society advances the proposition that Scots law recognises that those who receive funds gratuitously or in knowledge of breach of trust may themselves become constructive trustees in respect of those funds. This was derived from the statement in Menzies on *Trustees* (at paragraph 1271):

> "[W]here funds affected with a trust come into the hand of another than the beneficiary, either gratuitously or with knowledge of a breach of the trust, the transferee is a constructive trustee".

Menzies treated this as an instances of a trust arising by operation of law (as a constructive trust does). The Society contends that such funds are impressed with a trust.

[40] For present purposes, it suffices that that passage was quoted with approval by both Lord President Hamilton and Lord Nimmo Smith in *Commonwealth Oil & Gas Co Ltd* v *Baxter* 2010 SC 156 (at paras 16 and 85, respectively). Further support for the Society's legal proposition, if it be needed, may be found in Wilson & Duncan, *Trusts, Trustees & Executors* (2nd edition), paragraphs 6-63 and 6-64, where it was observed that a constructive trust also arises where fiduciary property wrongly passes into the hands of the fiduciary himself. Averments of knowledge are not necessary to aver a relevant case: see *King's Trustees* v *King* [2020] CSOH 101, at paragraph 32. The defenders' principal challenge to this ground was that the no fiduciary obligations were capable of arising under the Rules or that they did not

prescribe the allocation of income and expenses in the manner the Society contended for. As I have found against them on those matters, it follows that I also reject their challenge to this ground of the Society's case. I also accept that the Society has sufficient averments to engage this proposition, namely that the defenders were aware of the misallocations or that the effect of the misallocations was to direct sums into their hands to which they were not entitled (ie gratuitously).

Does the Society have relevant averments of fault and negligence?

[41] I have set out the Society's averments on fault and negligence above (at para [8(3)]). These are framed as duties incumbent on the defenders "as members of the committee" to take reasonable care to see that the Society's funds were applied in accordance with the Rules. In my view, the Society has averred a relevant case of fault and negligence. This passage in the Society's pleadings is followed by detailed averments about a meeting of the members of the Working Department on 17 January 2015 at which all of the defenders were present. The minute of that meeting, which is quoted, records the second defender accusing the fifth defender of "blackmail", if the fifth defender disclosed to the superannuated members how income from a particular property was being directed to the Working Department (the implication being that this should have been directed to the Property Department). The Society avers that the second defender did not dispute that the arrangement involving the redirection of the income was a misallocation. There are further averments quoting the minute about a practice of taking weekly cash payments, which the Society notes that the second defender did not dispute, but is recorded as replying:

> "It is ridiculous to suggest that I am more complicit for accepting the money than the person who was offering it. That was the arrangement that was in place and it is unfair that we are now being 'dug out' for those payments".

The fifth defender is recorded as replying "I am just establishing that there was dishonesty". In light of these passages, the Society avers that:

> "All of the defenders were actually aware of some degree of accounting irregularity by 17 January 2015 at the very latest. All of the defenders were aware that improper cash payments had bene withdrawn. None of them drew it to the attention of the wider membership, or sought to have the accounts corrected, as they ought to have done. Instead they continued to sign accounts showing a position which they knew to be inaccurate, and to draw profits accordingly." (Article 6.4)

[42] The Society's case is that the property of the Society has should be applied in accordance with the Rule as augmented by the long established practice it avers, and that in various roles averred the defenders failed to ensure that the property of the Society was so applied. Mr O'Brien submitted that the Society's case for breach of trust (which is also grounded in the Rules) is *a fortiori* its case in negligence, and that they are capable of founding a case in negligence for failure in their duty to apply the funds of the Society in accordance with the Rules. I agree. In my view, essentially for the reasons already provided, the Rules are habile to instruct a case that the members of the Committee owed duties of care to ensure that the property of the Society was applied for the purposes described in the Rules.

[43] I reject the defenders' challenge to this ground of the Society' Action.

Unjustified enrichment

[44] As noted above, once the Society indicated that this ground of liability was relied on only as a fall-back and not as a primary ground, the defenders withdrew their relevancy challenge. Accordingly, subject to the prescription issue, these averments are sufficiently relevant and specific to go to proof.

The prescription issues

[45] The defenders contend that any claim open to the Society in respect of payments prior to 29 June 2015 (being a period more than five years preceding the commencement of the Society's Action) has been extinguished by prescription. As noted above, the prescription issues encompass a number of discrete arguments, namely:

1) Whether the Society has relevant averments that certain of the heads of claim advanced by it are imprescriptible;
2) Whether the Society's claim involves a "continuing act" within the meaning of section 11(2) of the 1973 Act; and
3) Whether the Society's averments in relation to section 6(4) of the 1973 Act are relevant.

The Society's case based on an imprescriptible obligation and the conclusions for an accounting

[46] The Society relies on two imprescriptible obligations of a trustee: the first is the obligation in paragraph (e)(i) of schedule 3 to the 1973 Act to produce accounts of his intromissions ("the trustee's obligation to account")y, and the second is the obligation in paragraph (e)(iii) of the same schedule to make forthcoming any trust property or proceeds of any such property in the possession of the trustee or to make good the value of any such property previously received by the trustee and appropriated to his use ("the trustee's obligation to make forthcoming"). These obligations are imprescriptible, as they are excluded from the short and long negative prescriptive periods by sections 7(2) and 8(2), and paragraph 2(h) of schedule 1 to the 1973 Act. The Society relies on these provisions for its case of breach of fiduciary duty as well as its case based on constructive trusts.

[47] The defenders' argument on this issue is driven by their contention that the Rules are incapable of giving rise to fiduciary obligations. I have found against the defenders on that

argument. I did not understand the defenders otherwise to contend that the trustee's obligations to account or to make forthcoming were not capable as a matter of law of extending to those whose fiduciary obligations arose other than under a formal deed of trust or otherwise arose as a matter of law (eg as a constructive trustee). Nonetheless, it is appropriate that I deal briefly with the definitional issue of whether the provisions of the 1973 Act are habile to include the circumstances and conduct the Society relies on.

[48] The definition of "trustee" in section 15(1) of the 1973 Act

> "includes any person holding property in a fiduciary capacity for another and, without prejudice to that generality, includes a trustee within the meaning of the Trusts (Scotland) Act 1921; and "trust' shall be construed accordingly".

Mr O'Brien submitted that this is a very broad definition. He also submitted that this was not confined to trusts constituted in writing (cf the definition of "trust" in section 2 of the Trusts (Scotland) Act 1921) but could extend to anyone holding property in a fiduciary capacity. I accept those submissions as a correct statement of the law. I also note that this accords with the views of the learned author of *Prescription and Limitation* (2nd ed) that the definition of "trust" in the 1973 Act is "capable of extending well beyond the law of trusts" and means that "the question of an obligation being imprescriptible can arise well outside the context of trusts proper": *per* Johnston, *Prescription and Limitation* (2nd edition) ("*Prescription and Limitation*"), paragraphs 3.23, 3.24. Dr Johnston cites the case of *Ross* v *Davy* 1996 SCLR 369, where it was accepted that a company director was in a fiduciary position in relation to the company's property, and was therefore a "trustee" for the purposes of prescription. I have found that the Rules impose fiduciary obligations. There is no reason in principle, and none advanced by the defenders (other than their submission that the terms of the Rules themselves do not give rise to fiduciary obligations), why the defenders should not be subject to be the obligations of a fiduciary to account for their

intromissions or to make forthcoming of any trust property which they have received in breach of trust.

In relation to the Society's case, that the defenders were constructive trustees in respect of sums received gratuitously or in knowledge of breach of trust, I did not understand the defenders to argue that this was outwith the provisions in paragraph 3(e) of schedule 3 of the 1973 Act. Their attack was limited to the proposition that, on the wording of the Rules and on the Society's case as pled, no constructive trust arose. I have already held that those who are subject to fiduciary duties other than under a formal trust deed come within the broad definition of "trustees" in the 1973 Act. There is no discernible reason or principle for excluding those who come under fiduciary obligations as constructive trustees by operation of law (rather than express deed) should be excluded from the broad definition of "trustee" in the 1973 Act. In my view, if the requisite elements of the definition in section 15 of the 1973 Act are satisfied – namely, that the defender is a "person holding property in a fiduciary capacity for another" – then, regardless of the means by which that fiduciary status was brought about (eg by formal trust deed, informal writings or by operation of law), the imprescriptible obligations of a trustee are potentially engaged in respect of that person. I have already noted that Scots law recognises that monies received in breach of trust are recoverable and that a person might become a constructive trustee in respect of funds she or he received, either gratuitously or with knowledge of breach of trust. In my view, the imprescriptible obligations of a trustee are in principle capable of extension to a constructive trustee. Accordingly, in respect of its reliance on certain imprescriptible obligations, in my view the Society has pled a relevant case.

The second defender's challenge to the remedy of an accounting

[49] It is here convenient to address the second defender's additional argument that the Society's remedy for count, reckoning and payment (which I shall refer to as "an accounting") should be refused as unnecessary, as the Society is (it is said) already in possession of all of the papers and that no class of documents is identified by its expert as missing. The second defender also noted that it is a cumbersome remedy and, if used in combination with other remedies, might be oppressive.

[50] Conventionally, an accounting is sought as an alternative remedy, as it is here. As is clear from the discussion in Chapter X of Menzies on *Trustees* (especially at paragraphs 950 to 985) there are specific rules and presumptions governing an accounting by a trustee, although I was not referred to these. Some of these rules may favour the person seeking the accounting (eg the presumption *in dubio* against the trustee who fails to keep proper accounts or who has destroyed records, the fact that the expense and initial onus falls on the person undertaking the accounting, the competency of a joint accounting against more than one trustee); other rules favour the person making the accounting (eg one the accounting is produced, the onus shifts to the person who wishes to challenge any entry). Indeed, one called to account might welcome this as the means to exonerate himself or to ascertain the amount of his actual liability. For aught yet seen, the parties might wish to have this remedy available. For these reasons, I am not persuaded that at an early stage, and prior to enquiry, the Court should withhold a remedy which is competent and supported by relevant averments simply on the ground of potential inexpediency. Given the flexibility and case management powers available to the Commercial Judge, the question of whether that remedy is appropriate is a matter that may be kept under review and considered anew at the point the Society may seek to avail itself of it.

[51] The other imprescriptible obligation the Society seeks to rely on is that of a trustee to make furthcoming trust property or its *surrogatum*. No submission was advanced regarding the scope of this remedy, whether it was capable of extension to fungibles such as money, or whether it might encompasses a form of tracing a nascent example of which may be found in *Jopp v Johnston's Trustees* (1904) 6 F 1028 (in which the solicitor was treated as the fiduciary in respect of his client and the proceeds of the client's bonds were excluded from the insolvent solicitor's sequestration). As this is an underdeveloped area of Scots law, I would have been reluctant to dismiss any challenge to the scope of the remedy at debate.

Does the Society's claim involve a "continuing act" within the meaning of section 11(2) of the 1973 Act?

[52] The Society accepts that most of the misallocations took place more than five years before it raised this action, with the effect that any claim founded on fault and negligence or on breach of fiduciary duties will, absent resort to other provisions in the 1973 Act, have been extinguished. In order to overcome this, the Society invokes section 11(2) of the 1973 Act, which provides as follows:-

> "Where as a result of a continuing act, neglect or default loss, injury or damage has occurred before the cessation of the act, neglect or default the loss, injury or damage shall be deemed for the purposes of subsection (1) above to have occurred on the date when the act, neglect or default ceased."

The Society accepts that it bears the burden of bringing itself within section 11(2).

[53] The defenders' first point is that section 11(2) only applies to obligations to make reparation, not repetition. It cannot therefore apply to the Society's case founded on unjustified enrichment, a point I understood Mr O'Brien to accept.

[54] The essence of the defenders' challenge to the Society's reliance on section 11(2) was that what the Society avers amounted to no more than individual completed acts. The

second defender submits that the Society's averments in respect of him relate to checking invoices and the signing of the annual accounts of the Working Department. These were completed acts when each individual invoice was checked or the set of accounts signed and are, he submitted, thus outwith section 11(2). The other defenders make essentially the same point, framed in a slightly different way. They contend that the Society avers no more than acts of a varied nature, relating to different items of revenue and expenditure, carried out by a number of different defenders occupying different roles. This amounted to no more than a series of discrete acts, with each being completed at the time that each allocation of revenue or expenditure was made.

[55] Before addressing these arguments, the Society's averments should be noted. The Society's principal averments are found in articles 4.1 to 4.3, which are as follows:

> **"4. Overstatement of Working Department profit**
>
> 4.1 Throughout the period 2009 to 2017, the Working Department's profit was consistently overstated, at the expense of the Property Department. That overstatement arose from a number of distinct matters, which are set out more fully in the following Articles of Condescendence. The total effect was that, during that period, the profits of the Working Department were overstated by £579,561. The defenders' averments in answer are denied except insofar as coinciding herewith.
>
> 4.2 Those overstated profits were shown in the Working Department's accounts as being credited in the first instance to each individual defender's current account. From time to time those sums were transferred from the current to the capital account before being drawn. The first to fourth defenders were each credited with an additional £118,884.35 in respect of the years 2009 to 2017 over and above the amount to which they were properly entitled. The fifth defender was credited with an additional £104,023.60 in respect of the years 2009 to 2015 over and above the amount to which he was properly entitled. Because he retired from the Working Department on 31 December 2015, he was not credited in respect of the subsequent overpayment. The defenders' averments in answer are denied except insofar as coinciding herewith.
>
> 4.3 Each of the defenders made drawings from their current or capital accounts which were based on those overstated profits. Reference is made to section 7

> below. The defenders' averments in answer are denied except insofar as coinciding herewith." (Emphasis added.)

[56] In Article 3.5 of Condescendence, the Society avers that every year the Working Department produced accounts, which were laid before and approved at meetings of the working members immediately before the Society's Annual General Meetings. In articles of Condescendence 5.3 to 5.18, the Society details the variety of ways in which it avers the misallocations were made. So, for example, in respect of the failure to allocate income from storage to the Property Department, it refers to 358 invoices identified between the years 2009 to 2017 (art 5.3) and it avers that the "practice" of this kind of misallocation was instituted by the fifth defender and followed from time to time by the first defender and latterly the third defender. A similar allegation is made in respect of a particular client (in art 5.4) for the period 2009 to 2015, which is coupled with the averment that all of the invoices had been checked by one or other of the second or fourth defenders, the implication being that they were aware of this form of misallocation; and in respect of other clients that there had been "consistent misallocation" (eg in arts 5.10, 5.13). In respect of the asserted misallocation of the entirety of the handyman's wages to the Property Department, the Society avers that for the years 2009 to 2017 100% of his wages were wrongly allocated to the Property Department, notwithstanding that prior to that period the "previous practice" had reflected an allocation of 25-75% to the Working Department.

[57] It should be noted that the 1973 Act does not define "a continuing act, neglect or default". In his *Prescription and Limitation* Dr Johnston gives as two examples of continuing acts "nuisances such as the emission of noxious substances, and economic delicts, such as breaches of competition law": see *Prescription and Limitation* at paragraph 4.64. Counsel noted that there is a dearth of authority on the meaning of "continuing act, neglect or

default" in section 11(2). In *Johnston* v *The Scottish Ministers* 2006 SCLR 5, the Court identified two steps to be considered under section 11(2), namely, identifying the act, neglect or default and then considering whether it is continuing (at para 17). That case concerned a challenge to a statutory instrument ("the instrument") on the grounds it was invalid because it was made in breach of EU law. The challenge was launched more than five years after the instrument had been enacted. The Court found that while the instrument clearly had continuing validity, the relevant act was the passing of the instrument at a specific point in time and so section 11(2) was not engaged.

[58] Mr O'Brien prayed in aid the use in employment law of time limits expressed by reference to the date of an "act extending over a period". He submitted that phrase has been construed to cover a series of discrete acts that could properly be viewed as amounting to a complaint of an ongoing situation or continuing state of affairs. See eg *Commissioner of Police for the Metropolis* v *Hendricks* [2002] EWCA Civ 1686, [2003] ICR 530 at [52]; *Lyfar* v *Brighton and Sussex University Hospitals Trust* [2006] EWCA Civ 1548 at [17]-[18]. I note that, in *Somerville* v *Scottish Ministers* (2008 SC(HL) 45 ("*Somerville*")at 66, para 52), in the very different context of the consideration of the time-bar in section 7(5) of the Human Rights Act 1998 (which required an action to be raised within one year of the date on which "the act complained of took place"), Lord Hope observed that whether acts complained of were continuing acts or were one-off acts with continuing consequences was not an easy matter to determine, at least to do so on the pleadings in that case.

[59] In considering the nature of the Society's case, it is in my view artificial to look at each misallocation in isolation and as unconnected to the others, which is the effect of the defenders' approach. This is too simplistic and fails to take into account the whole features of the Society's pleaded case. What the Society offers to prove are large numbers of

misallocations made over an extended period of time and which, it is said, were effected or condoned by one or more of the defenders. The Society avers a general course of conduct (summarised at Articles 4.1-4.3), and also avers examples of various practices persisting over periods of years (see Article 5). These are coupled with averments (in Article 6.3) of a continuing failure on the part of the defenders at the level of accounting and supervision and a continuing failure on the part of the defenders as committee members, and as working members generally, to take reasonable care to see that the Society's funds were applied in accordance with the Rules. The Society's submission is that, if those averments are proved, they constitute a continuing act. Its fall-back position is that even if its whole claim is not to be analysed as involving a continuing act or wrong for the purposes of prescription, that analysis should be applied to individual chapters within Article 5. Mr O'Brien submitted that those individual chapters involve courses of conduct followed in relation to particular clients or particular categories of work over a period of years. Such systemic issues are properly to be viewed as a "continuing act, neglect or default" within the meaning of section 11(2), just as the frequent emission of noxious vapours would be regarded as a continuing nuisance for that purpose.

[60] In my view, the Society has averred a relevant case for the purposes of section 11(2) of the 1973 Act. The 1973 Act does not define an "act". What the Society avers is a practice comprised of numerous similar steps repeated over an extended period of time which, collectively, had the effect of inflating the profits of the Working Department; that these misallocations flowed through to the accounts, approved by one or more of the defenders, and in reliance on which the defenders could (on the Society's case) draw more than they were entitled to, to the detriment of the superannuated members. On this approach, the making or approval of a misallocation, the subsequent reflection of that in the accounts, the

approval of the accounts, and the subsequent drawings by the defenders are all inextricably linked.

[61] The continuing character of the conduct the Society avers is reinforced by the repetition of the same kinds of misallocations time and again for an extended period of time. While this practice was comprised of individual misallocations, the sheer number of misallocations of a similar nature and repeated for an extended period of time, is capable of supporting an inference that this was a "continuing" act or state of affairs. Accordingly, on the Society's averments, the misallocations were not disparate, intermittent or unconnected acts. In other words, the "act" here founded on is a course of conduct or the institution of a practice with a view to inflating the profitability of the Working Department, whose constituent elements are the individual misallocations. In my view, those circumstances are capable of constituting a "continuing act" for the purposes of section 1192) of the 1973 Act. In any event, the section 11(2) issue is better determined in the light of the evidence, rather than on the pleadings, as it is ultimately a question of fact whether the individual allocations are so connected as to constitute a continuing act, as the Society avers, or whether they amount to no more than individual, unconnected and completed acts on which time has run (as the defenders contend).

[62] In my view, the defenders' submissions also fails to engage with two other features the Society founds on. The first is the Society's averments about the preparation and approval of the accounts by one or more of the defenders. On the Society's averments, the accounts of the Working Department were not disclosed to the superannuated members and they were approved immediately before the Society's AGM. In signing or approving those accounts, the defenders who did so are, at that point, representing (in accordance with standard accounting practice) that these give a fair and true view of the matters the accounts

record. Furthermore, the misallocations within the accounting period covered by those accounts are only given effect when they are reflected in, or become fixed by, those accounts. Secondly, the loss to the superannuated members is only sustained when the defenders drew out their (on the Society's hypothesis) inflated share of the profits of the Working Department, as reflected in those accounts from year to year. It is only at that point that the funds are removed from the control of the Society or that it may be said that the misallocated funds are demonstrably not being applied in accordance with the objects of the Society. On this analysis, the initial instance of allocating a particular expense to the Property Department which should have been borne by the Working Department (eg as with the weekly wages of the handyman) or of attributing income due to the Property Department to the Working Department (eg in an individual invoice for a storage client) is only the initiating step and which may not ultimately be given effect to until many months later. These features are collectively capable of instructing a case of a "continuing act" for the purposes of section 11(3). I reject the defenders' challenge to this part of the Society's case.

[63] Had I had any doubt on the matter, I would not have been inclined to delete the Society's averments on the section 11(2) issue without enquiry. As noted by Lord Hope in *Somerville*, the analysis of the nature of an "act" may be difficult to undertake with any confidence on the pleadings alone. For aught yet seen, the evidence may disclose that the defenders' drawings from the profits of the Working Department were in the nature of a running-account or that the misallocated funds were so intermingled with the sums legitimately due to the defenders that it is difficult to identify with any precisions when a misallocation was completed (and hence, difficult to identify when time began to run).

[64] There is a further deficiency in the defenders' argument. Their submission appeared to be directed only to the word "act" in section 11(2). However, the statutory provision also refers to a "continuing … default" and on which the Society relies. In applying those words, regard should be had to the nature of the legal obligation that is said to be engaged. On the Society's averments, the defenders were constituted by the Rules as trustees or fiduciaries charged with the duty to ensure that the property of the Property Department was to be applied for the objects of the Society and no other purpose. That is in the nature of a continuing duty and, indeed, at the point where the defenders are averred to be aware of payments in breach (or received by them as constructive trustees), they came under a duty to reverse those breaches of trust (or to disgorge the funds in respect of which they were constituted constructive trustees). While the Society makes averments about what transpired at a meeting in January 2015, it also has averments that one or more of the defenders was (or were) responsible for checking the individual invoices and, accordingly, in light of that knowledge, came under a duty to restore the misapplied trust funds. The failure to do so as a trustee, or indeed as a constructive trustee, may also, if proved, be capable of constituting a continuing default. The Society's averments are sufficient to instruct a case of a "continuing … default" relying on section 11(2) of the 1973 Act.

Does the Society have relevant averments in relation to section 6(4) of the 1973 Act?

[65] The Society relies on section 6(4) in the alternative, in relation to any claim that is subject to the five-year negative prescription (ie the grounds of liability in negligence and in unjustified enrichment). In light of my decision on the other prescription issues, this does not arise, but it is right that I express my view on the section 6(4) issue. Section 6(4)(a)(ii) of the 1973 Act provides that the five-year prescriptive period does not run during

"any period during which by reason of … error induced by words or conduct of the debtor or any person acting on his behalf, the creditor was induced to refrain from making a relevant claim in relation to the obligation", subject to a test of whether "the creditor could with reasonable diligence have discovered the … error".

[66] The defenders rely on the proviso to section 6(4) (a), which applies a test of whether "the creditor could with reasonable diligence have discovered the … error". "Reasonable diligence" means doing what an ordinary prudent person would do, having regard to all the circumstances: *Adams* v *Thorntons* 2005 1 SC 30, at paragraphs 23 to 24. The second defender advanced a further criticism. After noting that the sole factor the Society founds on in respect of the second defender related to his signing of the accounts, the second defender argues that the Society's case is irrelevant in the absence of averments that the accounts did not disclose the allocation of profits as between the Working and Property Departments or that the accounts incorrectly stated those allocations. From this, it is presumed that the accounts were accurate and correctly stated how profits had been allocated and that accounts which were not averred to contain incorrect figures or to conceal the true state of affairs cannot provide a basis for relying on section 6(4). The other defenders take a different tack: on the basis of the Society's averments that revenue had been wrongly allocated to the Working Department came to light at the Society's AGM on 28 March 2015 and that at a special general meeting on 5 May 2015 it was agreed that the possibility of similar errors should be investigated, the other defenders argue that it was clear that the Society was no longer relying on the accounts for a period more than more than five years before the raising of this action on 29 June 2020.

[67] Before addressing these submissions, I note the Society's averments based on section 6(4) are as follows:

"9.3 *Esto* section 11(2) does not apply to any extent (which is denied), the appropriate date for the purposes of the five-year prescriptive period would be the date on which any misallocation resulted in an overpayment being made (i.e., a payment from the Society in respect of profit which exceeded the amount that would have been payable on a correct apportionment of profit). However, in terms of section 6(4)(a) of the 1973 Act, the prescriptive period does not run during any period during which, by reason of error induced by words or conduct of the debtor or any person acting on his behalf, the pursuers were induced to refrain from making a relevant claim in relation to the obligation (subject to the error not being discoverable with reasonable diligence). That includes an error which prevents the creditor from being aware of his claim. **The members of the Society were unaware of the present claims because they relied on the accounts that were provided to them by the defenders as the working members**. **Those accounts reflected the apportionment which had wrongly been applied**, as described above. **The accounts induced (failing which, they contributed to inducing) the members' erroneous belief that revenue, expenditure and profit had been properly allocated as between the two Departments in the respects described above.** They had no reason to begin investigating the Society's affairs until around 2015. At the Society's annual general meeting on 28 March 2015, it came to light that revenue from a licence granted to a third party to occupy the Society's garage premises had been diverted to the Working Department for a number of years. It was agreed that that matter would be looked into further. The issue was discussed further at a special general meeting on 5 May 2015. At that meeting it was agreed unanimously that the revenue from the licence fee should be reallocated between the Property and Working Departments. At the same meeting, it was agreed that two of the retired members, Mr G Burnett and Mr Winton, should be allowed access to the Society's records and that they should check for any similar errors and report back to the Members. On 14 May 2015 Mr Winton attended at the Society's offices accompanied by another member whom he had asked to assist him, Mr Fraser. The fifth defender came through to see them and declined to provide the requested information. His behaviour was aggressive, and they left. Subsequently, however, certain information was provided to them, which enabled them to report to a special general meeting of the Society on 12 August 2015. At that stage, Mr Winton and Mr Burnett had identified issues regarding undercharging the licensee of the garage premises for utilities and a second-hand vehicle, certain excessive costs which appeared to have been expended on work at the Society's yard by a friend of the fifth defender, and a specific cash withdrawal which exceeded the value of the bill to which it purported to relate, and certain small items which had been misallocated. Investigations and discussed within the Society continued over the following months. The working members were unco-operative with those investigations. Copies of the minutes of those meetings are produced and held as repeated herein *brevitatis causa*. **The matters giving rise to the present claims did not come to the attention of the members of the Society until less than five years before the commencement of these proceedings.**

> **The summons in this action was served on the various defenders on 29 June 2020.**" (Emphasis added.)

[68] In relation to the inducement a creditor relies on for the purposes of section 6(4), it is sufficient for a pursuer to show that the error was induced by words or conduct by or on behalf of the defender. So, for example, a pursuer does not need to aver when the claim would otherwise have been made: see *BP Exploration Operating Co* v *Chevron Transport (Scotland)* 2002 SC (HL) 19, at paragraph 34 (*per* Lord Slynn) and at paragraph 103 (*per* Lord Millett).

[69] Mr O'Brien submits that the inducing conduct can be active or passive. It can include silence or inactivity when the debtor might have been expected to act. It need not be deliberate. It need not be the sole cause of the error. The question "is simply whether any conduct on the part of the [defenders], viewed objectively, induced or contributed to inducing some or all of the error": *Heather Capital Ltd* v *Levy & McRae* [2017] CSIH 19, 2017 SLT 376 ("*Heather Capital*") at paragraphs 63 to 64. I accept those submissions as correct, and I propose to apply the approach it describes.

[70] For this part of its case, the Society relies on the accounts. On the Society's averments in Article 9.3 (set out above), it was not aware of the claims that it now pursues until less than five years before service of the Summons. The Society avers as a cause the fact that the accounts were submitted to the wider Society by the defenders themselves. While the allocations were disclosed in the accounts, contrary to the second defender's reading of the Society's averments, the Society's case is that the *misallocations* were not patent on the face of the accounts and for that reason. The Society's position is that it was unaware of the kinds of misallocations which are the subject of its action (until within five

years if the raising of the Society's Action), notwithstanding approval and disclosure of the accounts.

[71] The relevance of the Society's averments of the discussion at the meeting in January 2015 as recorded in the minutes (and averred in Article 6.4) is to demonstrate that the defenders were aware by that date that the accounts contained misallocations, and were not disclosing that fact. In other words, the Society avers that its ignorance was induced by the defenders' conduct. That averment is not a bright line to support the conclusion that because members of the Society had discovered some misallocations by that point, this necessarily infers knowledge of *all* the misallocations, or the different means of misallocations, such as to displace the Society's reliance on section 6(4) of the 1973 Act. That averment is also capable of reinforcing the Society's conclusion that the defenders' were not properly discharging their duties of supervision.

[72] I am persuaded that the Society has a relevant case for reliance on section 6(4). In relation to the specific matters the defenders refer to, with the effect that the Society began to suspect that something was amiss (but I understand that those specific matters do not form part of the Society's case), in my view this does not instruct the requisite knowledge on the part of the Society that the misallocations founded on for the purpose of the Society's Action were discoverable with reasonable diligence at the point in time concerns were only first emerging about other types of misallocations. While the Society avers in Article 9.3 that steps were in fact taken to follow up on the points that had come to light, its case is that those investigations did not bring the present claims to light by the relevant time.

The defenders' challenge to joint and several liability

[73] In addition to the foregoing challenges, the defenders also challenge the Society's case insofar as it seeks to hold the defenders jointly and severally liable. As noted above, Conclusions 1, 2 4 and 5 are expressed on a joint and several basis. The second defender's contention is that, as members of an unincorporated association cannot by vicariously liable for each other (*per* Lord Marnoch in *Harrison* at para 25), joint and several conclusions are necessarily irrelevant as are the associated averments in Article 7.2 of Condescendence (which is a general averment of joint and several liability based on the foregoing grounds of liability, including in negligence and for breach of trust). The other defenders read the joint and several liability as confined to the Society's case based on negligence (in Articles 6.3 and 6.4), and that the Society's first plea in law should be confined to those claims. The other defenders challenge the relative averments instructing the Society's case on negligence as being insufficiently specific, as the Society simply refers to "the scale of the misallocations" and "the length of time over which they persisted" to establish constructive knowledge, and which the other defenders submit is insufficient to establish liability back to 2010 (the date of the first misallocation identified). Further, the other defenders argue that the averment of actual knowledge dates only from the Society's AGM of February 2015 and, given that the Society identified the issue with the accounts shortly thereafter, no basis is established for fixing the defenders' liability for any loss after that date.

[74] The Society's reply to the second defender's argument is that the joint and several liability is not advanced on the basis that the defenders were vicariously liable for each other's acts, but that they are called as liable for the same loss. In relation to the other defenders' argument as to the scope of the joint and several liability, the Society observes

that its averments are directed to joint and several liability for breach of fiduciary duty as well as negligence.

[75] In my view, the second defenders' challenge is misconceived. Fairly construed, the Society's case for joint and several liability is not based on vicarious liability, but is predicated on duties each defender is said individually and personally to owe to the Society and (it is said) the defenders ' individual breaches contributed to the same loss. Further, the Society seeks to hold the defenders jointly and severally liable in respect of both negligence and breach of fiduciary duty. (As noted above, trustees may be called jointly and severally in an action of accounting: see paragraph [50], above.) In advancing its case on these grounds of liability, the Society avers the individual involvement of the defenders in the management of the Society's affairs (as members of the Committee from time to time), and also in their supervision and preparation of the accounts of the Society. I have already held that the Society's averments are sufficiently specific and relevant for the purposes of its cases in negligence and breach of trust and fiduciary duties. The Society accepts that, if on the evidence one or more of the defenders was not personally in breach of trust, then he would be liable only for sums received and to which he was not entitled. This is also reflected in the Society's conclusions, some of which are framed on a joint and several basis, and some of which are directed at individual defenders. This reinforces the Society's approach that it seeks to impose joint and several liability on the basis that the defenders contributed to the same loss between one or more of the defenders, as a matter of principle. However, whether it establishes that each defender was in fact is liable, or that a distinction falls to be drawn between the London-based defenders and those responsible for the Society's Aberdeen-focused business, can only be determined on the evidence, not on the pleadings.

[76] In relation to the other defenders' second ground of challenge, in my view the Society has relevant averments. It make averments as to the function of the Committee and of specific office bearers (in Articles 2.72 to 2.8), and it avers that it was the defenders' duty to take reasonable care to see that the Society's funds were applied in accordance with the Rules (see Article 6.3).The Society's case is that this includes a "proper" allocation between the Working and Property Departments. (I have already repelled the defenders' criticisms of the Society's averments for their use of "properly", its reliance on a long established practice or that its case was not grounded in the Rules.) In respect of the Society's averments against the individual defenders, the Society takes care to distinguish between the conduct of the individual defenders (in Articles 5.3 to 5.4 of Condescendence) and to relate this to the individual defender's responsibility for various sections of the Society. So, for example, it distinguishes between those defenders who worked in and were responsible for the London branch of the Society and those performing a like role in the Aberdeen offices. Nonetheless, the Society avers systemic failures extending across multiple years and multiple aspects of the Society's activities. As Mr O'Brien pointed out in submissions, the case against the defenders in Article 6.3 rests not only on their acts and omissions at the stage of preparing the accounts but also on their responsibility for the correct allocation of revenue and costs at the stage of carrying out their work. I accept his submission as well founded that the Society has sufficient averments that the scale, duration and nature of the misallocations is such as to justify the inference that they could not have arisen if the defenders had properly discharged their duties of oversight and that this case is bolstered by its averments of the individual defenders' personal involvement in particular chapters of misallocation.

The second defender's reliance on the weaker alternative rule

[77] The second defender challenges the Society's averments relating to approval of certain invoices (in Articles 5.5 to 5.14) as falling foul of the weaker alternative rule, and therefore irrelevant. The weaker alternative rule was defined by Lord Stott in *Haigh & Ringrose Ltd* v *Barrhead Builders Ltd* 1981 SLT 157 at 157 in the following terms:

> "If legal liability arises only on proof that the fact is A and if all that a pursuer offers to prove is that it is either A or B his pleadings are irrelevant. The relevancy of the case is tested on the weaker alternative."

Mr Lindsay notes that, in the present case, the Society merely avers that the disputed invoices were "checked by one or other of the Second or Fourth Defender" (*per* Articles 5.5, 5.8, 5.10 and 5.13 of Condescendence). Further, given that the second defender is not vicariously liable for any acts or omissions on the part of the fourth defender (who, like the second defender, was based in the Society's London-based business (which traded under the name "Rumsey & Son" branch), Mr Lindsay submitted that in order to aver a potentially relevant case against his client it would be necessary for the Society to aver that the invoices were checked by the second defender. The Society has failed to do so; it simply averred that the invoices were checked by the second **or** fourth defender. Applying the weaker alternative, that amounted to no more than that the invoices were checked by the fourth defender and, as against the second defender, this was irrelevant as he is not vicariously liable for any acts or omissions on the part of the fourth defender.

[78] The Society's response is that this is to take these averments out of context. The proper context was the Society's averments about the practices adopted at the Rumsey & Son branch and in respect of which the Society avers that the second and fourth defenders "both managed the business of Rumsey & Son throughout the relevant period" (see Art 3.6).

The Society's case is that, in respect of each of the averments challenged complained of, actually concerns a course of conduct extending over a period of years. In each of the passages in its case, the Society avers that:

> "All invoices issued by Rumsey & Son were checked by one or other of the second or fourth defender. Accordingly, such consistent misallocation could not have happened without both of them being involved."

Thus, read fairly and as a whole, the Society's case is that the various invoices would have been checked by both of these defenders; and that while it is not possible to say which one of them checked any individual invoice, the practice was so consistent over so long a period that it could not have happened without them both being involved. For these reasons, this averment does not engage the weaker alternative rule.

[79] On this issue, I prefer the submissions of the Society and that it is correct for the reasons advanced. Its case is more fully averred than the averment the second defender criticises in isolation. I have already held that the Society has averred a relevant basis for liability arising from a failure to exercise oversight, arising from the defenders' being that members of the Committee from time to time and, separately, which arise by reason of the fiduciary obligations that arose. The second defender's reliance on the weaker alternative rule is also undermined, as it is predicated on reading the Society's averments as seeking to impose vicarious liability- a reading I have already rejected. This discrete argument advanced by the second defender (and which might, *mutatis mutandis* have been advanced by the fourth defender, but was not) is ill-founded.

Decision

[80] It follows from the foregoing that the defenders' relevancy and other challenges have failed and that the Society's case should now go to proof. Even had I not been able to

conclude that the Society's case under section 11(2) of the 1973 Act was relevant, given that the factual issues underpinning that issue are so integral to the merits, I would have remitted the whole of the case to proof rather than a preliminary proof on that issue (and which no party sought, as a fall-back). Accordingly, the defenders' respective pleas to the relevancy fall to be repelled. Meantime, I will reserve all question of expenses incurred in the preparation for and attendance at the debate.