OUTER HOUSE, COURT OF SESSION

[2022] CSOH 8

PD379/20 & PD380/20

OPINION OF LORD WEIR

In the cause

B

Pursuer

against

THE CONGREGATION OF THE SISTERS OF NAZARETH

Defender

and

W

Pursuer

against

THE CONGREGATION OF THE SISTERS OF NAZARETH

Defender

Pursuer: Hofford QC, Cowan; Digby Brown LLP
Defender: Brodie QC, Rolfe, Clyde & Co (Scotland) LLP

14 January 2022

Introduction

[1] In these two cases the pursuers allege that they suffered physical and emotional abuse at a Home operated by the defender ("the Home") while living there between 8 July

and 12 August, both 1974. The defender was responsible for running the Home, which has since closed. Both cases called before me for a preliminary proof on the defender's contention that the actions ought not to be allowed to proceed in terms of section 17D(2), which failing 17D(3), of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). Put broadly the defender submits that, by reason of the passage of time, a fair hearing cannot take place. Alternatively, the defender submits that it would be substantially prejudiced were the action allowed to proceed and that, having regard to the pursuer's interest in each of the two cases proceeding, the prejudice is such that neither should proceed.

[2] There being no dispute between the parties that the onus was on the defender to satisfy the court that the conditions in both section 17D(2) and 17D(3) (relating to "substantial prejudice") were satisfied, the defender led at the proof. No oral evidence was led and parties made submissions on the basis of affidavits and statements of various witnesses and other documents lodged in process. What follows is my decision on the application of both of those provisions to the circumstances of the two cases.

The statutory provisions

[3] Sections 17A, 17B and 17D of the 1973 Act provide as follows:

> **"17A Actions in respect of personal injuries resulting from childhood abuse**
> (1) The time limit in section 17 does not apply to an action of damages if –
> (a) the damages claimed consist of damages in respect of personal injuries,
> (b) the person who sustained the injuries was a child on the date the act or omission to which the injuries were attributable occurred or, where the act or omission was a continuing one, the date the act or omission began,
> (c) the act or omission to which the injuries were attributable constitutes abuse of the person who sustained the injuries, and
> (d) the action is brought by the person who sustained the injuries.

(1) In this section –
'abuse' includes sexual abuse, physical abuse, emotional abuse and abuse which takes the form of neglect,
'child' means an individual under the age of 18.

17B Childhood abuse actions; previously accrued rights of action

Section 17A has effect as regards a right of action accruing before the commencement of section 17A.

17D Childhood abuse actions: circumstances in which an action may not proceed

(1) The court may not allow an action which is brought by virtue of section 17A(1) to proceed if either of subsections (2) or (3) apply.
(2) This subsection applies where the defender satisfies the court that it is not possible for a fair hearing to take place.
(3) This subsection applies where –
(a) the defender satisfies the court that, as a result of the operation of section 17B…the defender would be substantially prejudiced were the action to proceed, and
(b) having regard to the pursuer's interest in the action proceeding, the court is satisfied that the prejudice is such that the action should not proceed."

Allegations on record

[4] B's allegations of abusive practices by staff at the Home, and grounds of fault, are expressed in the pleadings in the following terms:

"During the period of her residence in the Home the pursuer was subjected to abusive practices perpetrated by Sisters who had responsibility for the care of the children who resided in the Home. Those practices were both physically and emotionally abusive. Children who were bed-wetters were punished and humiliated. The pursuer wet the bed every night. Sisters punished her for wetting the bed. She was made to stand naked against the wall, or to sit naked on her bed. She was then struck with a large wooden ruler. When she had wet the bed, the pursuer would try to hide her bed sheets under her bed. Sisters would pull the sheets from under the bed, and rub the urine-soaked sheets onto the pursuer's face and head. The pursuer would try to avoid falling asleep so as not to wet her bed. She also tried to steal an additional bed sheet so that she could change the wet sheet for a dry one. She was found out and physically beaten.

The pursuer was subjected to other abusive and degrading practices perpetrated by the Sisters who had responsibility for the care of the children who resided in the Home. Children in the Home, including the pursuer, were subjected to force-

feeding. If the pursuer did not eat the meals provided to her, Sisters would attempt to force-feed her. She also had food put in her ears. The food provided to the children was often inedible. Children in the Home, including the pursuer, were struck with or without implements in an excess of punishment. The pursuer was physically beaten by Sisters for not making her bed to the standard demanded by them. The pursuer was prevented from having contact with her brothers. If she was caught trying to have contact with her brothers, she would be physically chastised. On one occasion, she was beaten for climbing a tree whilst wearing a skirt. She was beaten with a stick on her legs and arms. Her legs and arms were bruised.

One of the Sisters who abused the pursuer was Sister X, also known as ABC. In or about 2000, Sister X was convicted of four charges of having assaulted children…The fourth charge related to her time at the Home. The pursuer was also abused by a Sister whose name she recalls as Sister M. During the course of these proceedings, the defenders have produced evidence to the effect that there was no Sister M working in the Home at the material time. They have also provided information regarding the Sisters who worked in the Home in 1974. Those Sisters included a Sister MMM. According to the information provided by the defenders, Sister MMM's duties included helping with children's groups. Believed and averred that Sister MMM is the Sister who the pursuer wrongly recalls as being named Sister M…

The pursuer's claim is based upon the defender's fault at common law. The defender is vicariously liable for the acts and omissions of the Sisters working at the Home."

[5] W's allegations of abusive practices by staff at the Home, and grounds of fault, are expressed in the pleadings in the following terms:

"During the period of his residence in the Home, the pursuer was subjected to abusive practices perpetrated by the Sisters who had responsibility for the care of the children who resided in the Home. Those practices were both physically and emotionally abusive. The Sisters who perpetrated the abusive practices included Sister X, also known as ABC. Children who were bed-wetters were punished and humiliated. The pursuer wet the bed almost every night. Sisters punished him for wetting the bed. He would be humiliated in front of other children. He would be forced to sit with a urine-soaked bedsheet over his head. He would either be naked or would be wearing his wet pyjamas. He would then be required to take a cold bath. In addition, the pursuer was physically chastised for wetting the bed. He was struck with a wooden ruler on the back of the legs or hands. If the children did not eat their meals provided to them, Sisters would take food off their plates and stuff it in their ears. The pursuer had food stuffed in his ears. He also had food rubbed in his hair.

The pursuer was subjected to other incidents of abusive and degrading treatment by Sister X. On one occasion, during the night, the pursuer heard his sister screaming.

> He got out of bed to check on her. He was caught out of his bed by Sister X. He was physically beaten by Sister X. On another occasion, the children in the Home were taken on a trip to Burntisland. It was a hot, sunny day. The pursuer suffered bad sunburn. His legs blistered. The next day, Sister X struck the pursuer on the back of his legs, bursting his blisters. On another occasion, the pursuer was caught holding a cigarette which had just been passed by another child. Sister X caught him and stubbed out the cigarette on the pursuer's nose…
>
> In about 2000, Sister X was convicted of four charges of having assaulted children…The fourth charge related to her time at the Home…
>
> The pursuer's claim is based upon the defender's fault at common law. The defender is vicariously liable for the Sisters working in the Home."

Losses claimed

[6] The sum sued for in B's action is £750,000. She avers that as a result of the abuse to which she was subjected at the Home she developed, and continues to suffer symptoms of, Post-Traumatic Stress Disorder and Recurrent Depressive Disorder. The pursuer claims for (i) *solatium*; (ii) past and future loss of earnings; (iii) past and future loss of employability; (iv) loss of pension rights, and (v) the costs of cognitive behavioural therapy and psychiatric treatment.

[7] The sum sued for in W's action is also £750,000. He avers that, as a result of the abuse to which he was subjected at the Home, and from childhood onwards, he suffered from Post-Traumatic Stress Disorder. As a result of media reporting of alleged abuse at the defender's Homes about ten years ago, the pursuer developed a Recurrent Depressive Disorder, and he was currently suffering from a Severe Depressive Disorder. He too claimed for (i) *solatium*; (ii) past and future loss of earnings; (iii) past and future loss of employability; (iv) loss of pension rights, and (v) the costs of cognitive behavioural therapy and psychiatric treatment.

Available evidence

Joint minute

[8] A significant quantity of evidence was the subject of agreement by joint minute between the parties. Accordingly, it was not disputed that the pursuers were admitted to the Home on 8 July 1974 while their mother was in hospital, and discharged into the care of their father on or about 13 August 1974. The defender's surviving records disclosed that twelve sisters were present at the Home in 1974. Eight of those sisters were now deceased. Four sisters listed as being present at the Home as at 31 December 1974 were still alive. They included Sister X and Sister MMM. Sister X, also known as Sister ABC, was convicted at Aberdeen Sheriff Court on 19 September 2000 of four charges of cruel and unnatural treatment. The remaining two sisters were not directly implicated in the pleadings as having been responsible for any of the abuse alleged by the pursuers.

[9] Various records pertaining to both pursuers, and lodged within the core bundle of documents, were agreed between the parties as true and accurate copies of their respective originals, all entries therein being treated as equivalent to the evidence of their authors. The documents concerned comprised (i) GP records; (ii) social work records; (iii) records held by Police Scotland; (iv) counselling and psychological services records; (v) records of the Criminal Injuries Compensation Authority; (vi) DWP records relating to W, and (vii) legal letters intimating claims for damages, each dated 18 February 2019.

[10] The joint minute also recorded that the Scottish Child Abuse Inquiry ("the SCAI") investigated allegations of abuse and assaults of children at institutions run by the defender, including the Home, during the period between 1933 and 1984. The evidential hearings took place between about 24 April 2018 and 23 July 2018. Former residents of the Home provided statements to the SCAI and gave evidence. By 2018 at least 44 civil actions had been raised

against the defender in relation to alleged abuse at the Home. A copy of the Findings of the SCAI relative to the provision of residential care by the defender, and a transcript of evidence from day 75 were also produced and agreed to be true and accurate copies of the their originals.

[11] Finally, parties agreed that two expert reports by Professor Gillian Mezey, Consultant Psychiatrist, dated 22 January 2021 and 8 March 2021, and relating to (respectively) B and W were true and accurate copies of the originals and that, when the witness narrated what the pursuers had said to her, that should be taken as a true and accurate account of what she understood the pursuers to have said.

Witness evidence

Karen Firmin-Cooper

[12] Ms Firmin-Cooper is the defender's archive and legal manager. She provided an affidavit to the court, dated 3 September 2021, detailing the steps taken by her to locate in the defender's archive any documents relating to the pursuers, and to identify any other documents relating to the Home covering the period when the pursuers were living there.

[13] Ms Firmin-Cooper explained that the defender established its Generalate archive in 1994. The Home was closed to children in 1984. Although it has remained open for the provision of care to the elderly all of the surviving records of the Home are kept in the Generalate archive. The archive contained only nine records relating to the Home, of which the only potentially relevant items appeared to be (i) a Children's Register, Girls and Boys covering 1931-1982; (ii) a Children's Admission and Discharges Register covering 1969-1980, and (iii) a Discharge Receipt Book covering 1965-1975.

[14] Ms Firmin-Cooper was able to confirm, from the Children's Register, that the pursuers were admitted to the Home in 8 July 1974, on the recommendation of Edinburgh Social Work Department, while their mother was in hospital. They left the Home on 12 August 1974. The Admissions and Discharges Register recorded the same details, albeit without specifying a leaving date. The Discharge Receipt Book evidenced entries for the pursuers dated 13 August 1974 together with receipts which appeared to have been signed by what appeared to be the pursuers' father. Those were the only records the witness was able to locate in the archive specifically relating to the pursuers.

[15] Ms Firmin-Cooper identified other types of records which were kept for the defender's homes. These included (i) address books; (ii) books containing inventories of possessions, (iii) baptism records; (iv) log books of day to day events; (v) medical books recording visits by doctors; (vi) punishment books; (vii) visitors' books; and (viii) staff and volunteer records. There were no such records relating to the Home. Ms Firmin-Cooper was, however, able to trace a minute for a meeting of the defender's Northern Regional Council on 24 July 1974 which related to the Home and concerned an insurance claim for fire damage and a record of visitations to the Home by or on behalf of the Superior General in 1972 and 1974.

[16] Although there were no personnel files for individual Sisters, Ms Firmin-Cooper stated that local houses would have kept lists of Sisters' names, the nature of their tasks and duties. The defender maintained a Sister's Employment Register from which Ms Firmin-Cooper was able to ascertain that there were twelve Sisters who were likely to have been present in the Home in 1974. Of those, only four were still alive. The names of the individual Sisters, and the dates of death of those who had passed away were listed in an appendix to the witness's affidavit.

[17] Ms Firmin-Cooper confirmed that, in as much as B alleged to have been abused by a Sister M in 1974 she could find no record of anyone working at the Home with that name. She did trace a record of a Sister MR but that individual never worked at the Home and had, in any event, died in 2001.

Mrs Eileen McElhinney – formerly Sister Eileen Pirrett

[18] Mrs Eileen McElhinney's evidence was provided by way of a signed witness statement dated 10 September 2021 in which she explained that she had entered the defender's Order in February 1967, at the age of 17. She remained in the Order until she left in May 1975. She worked at the Home between 1972 and 1975. Thereafter, she trained as a social worker, in which career she worked until retirement in 2012. Mrs McElhinney had not previously been involved in any requests for information or evidence about the Home, and had not been in touch with anyone from the Home since she left in 1975.

[19] Mrs McElhinney provided a description of the layout of the Home and its accommodation arrangements. Three groups of children were housed in the main building. She was in charge of one of those groups. It comprised 27 children, both boys and girls, ranging in age from 3 to 14 years.

[20] The other two groups in the main building were under the charge of Sister Cormac (now known as Sister Mary Bridget Broderick) and Sister Julia (the documentary evidence as to Sisters serving at the Home in 1973 record a Sister Mary Julia McMahon as present in 1973 but not in 1974). Sister X was in charge of a group that was resident in a separate building called Hollycot. The witness had little to do with Sister X because Hollycot was a separate building from the main house. She described being assisted at meal times by lay staff.

[21] Mrs McElhinney had no recollection of the pursuers. She did, however, remember taking a group of children from the Home on holiday to Dunbar in 1974, and produced photographs of what she believed to have been that holiday. That she was in charge of a group of children from the Home on holiday in Dunbar was supported by reference to the social work records relating to the pursuers and discussed below. These record the pursuers as having been there between 20 July 1974 and 10 August 1974.

[22] Dealing with the pursuers' allegations, the procedure in Mrs McElhinney's group was that if a child wet the bed they would shower and put their sheets in the washing machine. Sometimes children would take cold showers if the boiler had not come on, but children were not forced to do so. Mrs McElhinney was unable to comment on the procedure adopted by Sisters in the other groups. Mrs McElhinney stated that she had never hit a child, and did not recall having seen any child being hit. She did not see any stick or ruler being used, nor did she witness any act which she would have considered to be abusive.

Sister Mary Bridget Broderick – formerly Sister Mary Cormac

[23] Sister Mary Bridget Broderick's evidence was also provided by way of a signed witness statement dated 8 September 2021. She was born on 11 May 1942, and joined the defender's Order on 20 February 1962. She resided at the Home between 1973 and 1975. From there she had served in a number of places in both Ireland and then California, and most recently as a Mother Superior in Dublin. Her work had been in childcare and nursing.

[24] Sister Broderick explained that the children were divided into five groups in the Home. Her recollection was that children of one family would be kept together within a group. Three of the groups were housed in the main building and the other two groups

occupied Hollycot. Each group was looked after by a different Sister. Sister X's group was located in Hollycot. Sister Broderick's group was in the main house. Children from the main house did not go into Hollycot, and children in Hollycot did not go into the main house. The groups were kept separate. The Sisters looked after their individual groups. Sister Broderick did not get involved in other groups. For example, she would generally only see Sister Eileen when attending prayer. Lay staff would assist in getting the children out of bed, washed and dressed. They also assisted with mealtimes and homework. Each group was pretty much autonomous, with its own allocation of rooms. Sister Broderick's group had a separate dining room. The sleeping accommodation was divided by wooden partitions, and children were allocated by family group. It was her practice to have families seated together at the dining table, and she understood Sister Cormac to do the same.

[25] Dealing with the pursuers' allegations, Sister Broderick could not comment on how bedwetting was dealt with in groups other than her own. Some children did have problems with bedwetting. It was always in the morning when this was identified, and the child most nearly concerned would be showered or occasionally bathed. It might be Sister Broderick or a lay member of staff who attended to this. Children were never made to wash their sheets or stand with dirty sheets. No child would be punished and she did not witness punishment being administered to any child for bedwetting. Sister Broderick could recall no disciplinary procedures, or any punishment book. She did not come to hear of anything which she would have described as physical or emotional abuse on the part of either Sisters or lay staff. She did not force feed any of the children, saw no force feeding taking place, and received no complaint from any child that it had occurred.

[26] Sister Broderick had no recollection of the pursuers. She did not witness any acts of the kind alleged by them.

MM – formerly Sister MMM

[27] Mrs MMM provided a signed statement dated 21 September 2021. She thought she must have been at the Home in 1974. She was there for only a year, possibly less. She had been sent to assist one of the Sisters with her group of children and became responsible for the group when that Sister had taken ill. She remained responsible for the group until the Sister recovered. There were also lay staff to assist. Mrs MMM's group of children was resident in the main building. It was a mixed group. Mrs MMM remembered that there was a building separate from the main house although she could not recall its name. On the matter of the pursuers' allegations, Mrs MMM had no concerns over how the children were treated. She has no recollection of the pursuers. She did not hit any child, nor did she use any form of corporal punishment. She was shocked by the allegations, never having previously been the subject of any allegations of any sort, and would have reported any such conduct to the Mother Superior.

Sister X – also known as Sister ABC

[28] No statement was available for Sister X. I was advised that the defender's agent had attempted to obtain a statement addressing the allegations made in both of the actions. He had been advised by her legal representatives in Belfast that her health had deteriorated in recent months and that there were concerns over her capacity to give evidence. The defender's agent had not been able to obtain an independent assessment of Sister X's capacity to do so, whether in person or by affidavit.

Anne Dawson, lay member of staff from the mid-1970s until circa. 2010

[29] Ms Dawson provided a signed statement dated 9 September 2021. She believed that she started working at the Home in the in the mid-1970s. She could not recall if she had been present between July and August 1974. It is therefore unknown if Ms Dawson was on the staff at the time of the pursuers' residence at the Home.

[30] Ms Dawson came to work at the Home as a "housemother" in Sister X's group in Hollycot. There was another group in Hollycot, for which another Sister had responsibility. Initially she worked between 4pm and 8pm, but her hours quickly became from 1pm until 9pm. Her main duties involved caring for the children, and helping them with their homework. The children ranged in age from babies up to children of 16 to 17. She estimated that there were perhaps 12 children of all different ages in Sister X's group. Ms Dawson recalled occasions when the children were taken to Dunbar on holiday. However, she had no recollection of the pursuers, either generally or as part of Sister X's group.

[31] Turning to the specifics of the pursuers' allegations, Ms Dawson stated that she did not work in the mornings and had no knowledge of how any issues of bedwetting were handled. There was never anything serious in terms of discipline that the witness observed. A child might be sent to bed early, but that would be deserved. She did not witness any child being either physically abused or force fed. If a child refused to eat they would be encouraged to do so, but if the child still refused its plate would be taken away.

Margaret Dempsey McLafferty

[32] Mrs McLafferty provided a signed affidavit to the court dated 3 September 2021. She began working at the Home as a lay member of staff in 1974 or 1975. It is therefore unknown if she was on the staff at the time of the pursuers' residence in the Home.

[33] Mrs McLafferty was a resident employee who lived in the Home. She described the children as being divided into five separate individual groups. Three groups resided in the main building and two groups resided in Hollycot. There was one Sister in charge of each group, and the groups were quite separate from each other. The Home employed a number of lay staff, both residential and non-residential. Mrs McLafferty only ever worked at Hollycot with Sister X's group. There were, according to the witness, no other nuns in Sister X's group. Since Mrs McLafferty was a resident member of staff, she would assist the children of the group when they rose in the morning, had their meals and went to bed. Mrs McClafferty had no recollection of the pursuers.

[34] Turning to the specifics of the pursuers' allegations, if any bedwetting occurred the children would be helped to make the beds if they could not do so themselves. If they were wet, the children got a bath in the morning. Mrs McLafferty never disciplined a child, nor did she observe any child being punished for bedwetting. She saw no lay members of staff administer any form of corporal punishment. The witness stated that the nuns could smack the children, but only with their hands. This happened very occasionally and she had seen the odd hit, such as a smack, on the back of a hand or bottom by Sister X but nothing which the witness would have characterised as child abuse. Mrs McLafferty never saw any children being beaten or hit with implements. Nor did she see them being subjected to force feeding.

Affidavits of Graeme Watson and Duncan Batchelor

[35] In addition to the evidence given by way of affidavit or signed statement summarised above, I was furnished with affidavits and supplementary affidavits from those solicitors who had been charged over the course of time with investigating historical abuse allegations against the defender, including those advanced by the present pursuers.

[36] Mr Batchelor's principal affidavit provided helpful information about the clearly considerable efforts to which his team of solicitors and paralegals had gone to identify relevant witnesses who may have been on the staff of the Home in 1974 and to ascertain their whereabouts. His affidavit also described the steps taken to locate relevant records for each pursuer, and the cautious policy adopted in relation to approaching individuals who may have been resident in the Home at the time. Beyond those whose evidence has already been summarised, Mr Batchelor's affidavit identified a total of nine further individuals as potentially having been present at the Home at the same time as the pursuers but who were now either deceased or untraceable. A further witness, now in poor health, had made contact with the defender's agents through her daughter. She had apparently worked in Hollycot but had no recollection of the pursuers. A further named individual was traced by the defender's agents but was established not to have been present at the relevant time. Finally two partially named individuals had been identified as authors of relevant entries for the pursuers in the social work records which had been recovered. However, it had not been possible to identify and trace those individuals.

[37] Mr Watson's principal affidavit covered his knowledge and recollection of previous investigations into litigation raised against the defender which were subsequently, and in large part, abandoned following the case of *AS* v *Poor Sisters of Nazareth* 2008 SC (HL) 146. Mr Watson also recorded having had access to material arising from the investigations

undertaken in defence of the criminal prosecution of Sister X, and spoke to his involvement in representing the defender in the SCAI. In the latter respect, the information which Mr Watson was able to impart was necessarily circumscribed. What he was able to relate from his involvement in the SCAI was his understanding, consistent with other evidence recorded above, that the children at the home were divided into five different groups. Three were in the main house and two were in Hollycot. Sister X was in charge of one of the Hollycot groups. The evidence was generally to the effect that Sisters of the defender did not tend to become involved in each other's groups; indeed, the layout of the Home was such that there was a physical separation between groups based in the main house and Hollycot respectively.

[38] Having been made aware that a further statement in relation to the instant proceedings had not been taken from Sister X, Mr Watson provided further information in a supplementary affidavit dated 1 October 2021. He advised that he had not spoken to Sister X about either of the pursuers. He had, however, spoken to her by telephone in June 2018 about the generality of allegations of abuse made against her. Sister X had then stated that she had not abused any child. She was also clear that her denial of responsibility extended both to the children whom she had been convicted of abusing and other children who had been in her care.

Social work involvement – Rosamund Wass-O'Donnell, formerly Sister Rosamund Wass

[39] Ms Wass-O'Donnell provided a signed affidavit to the court dated 6 September 2021. Until 1999 she was a member of the Order of the Helpers of the Holy Souls. She worked for the Order in a social work capacity. She had no connection with the Home but did have some involvement with the pursuers' family (although she had no recollection of W).

[40] Ms Wass-O'Donnell's main involvement was with the pursuers' mother whom she described as having worries and concerns. She was not managing both the house and the family. She stated that she had a reasonably close relationship with B, who was a young child at the time, but had no recollection of speaking to B about her time at the Home. Nor did Ms Wass-O'Donnell have any recollection of B complaining to her about the treatment she received there. Ms Wass-O'Donnell did recall that B was a resident of Canaan Lodge.

[41] There were two entries in the social work records to which Ms Wass-O'Donnell referred specifically in her affidavit, in relation to which she appeared to be the author. The first entry, dated 15 July 1977, stated:

> "Interviewed [B] [and another] and both appeared to be more ready to go into care. B fancied [the Home]…B would also like to stay at Thomas of Aquins if possible"

[42] A further entry, for 3 August 1977, comprised a letter she wrote, the recipient of which was unclear. It contained a passage in the following terms:

> "I have approached [the Home] in connection with B – they feel it is impossible to say what their position is at present as they are on holiday with the children. Possibly in 2 -3 weeks they might have a vacancy there, but nothing at present or certain."

[43] Ms Wass-O'Donnell had no recollection of the events giving rise to these entries but had no reason to doubt that they accurately recorded what she was told, or what had happened, at the time.

Social work records

[44] Social work records, relating to both pursuers, of the former Edinburgh Corporation and City of Edinburgh District Council were lodged in each action. In his written submissions senior counsel for the defender identified, and quoted from, a number of specific entries covering the period of the pursuers' residence at the Home, including the

two entries discussed in Ms Wass-O'Donnell's evidence. I find it unnecessary to rehearse those entries, the terms of which were not disputed. It is sufficient to notice that (i) there are no recorded entries evidencing any upset on the part of the pursuers about their treatment within the Home; (ii) the records indicate that the pursuers were in the charge of Sister Eileen (which would appear to locate them in the main house rather than Hollycot); (iii) there is evidence that the pursuers spent a significant period of their residence at the Home on holiday in Dunbar, and (iv) B appeared to be favourably disposed towards a return to the Home in 1977 when her admission to care was again an issue.

Reports by Professor Mezey

[45] I have studied the reports by Professor Mezey. She interviewed B in January 2021 and W in February 2021. Having taken a detailed history from both of the pursuers (to which senior counsel for the defender referred in his submissions), and considered other relevant records, Professor Mezey concluded that neither pursuer was suffering from, or had ever met the criteria for, PTSD, and that any alleged abuse at the Home had not disadvantaged their education or career opportunities to date. In doing so, Professor Mezey was apparently in disagreement with another expert, Professor Green, whose reports were not lodged on behalf of the pursuers, and to which my attention was not drawn (although I did find a copy of a report by Professor Green within W's medical records).

Other records relating to the pursuers

[46] I have already recorded that parties agreed the provenance of a number of other records relating to both pursuers. Aside from certain observations about the consistency between the pursuers' case on record and certain isolated entries in those records, to which I

will return in addressing the defender's submissions, these records (very extensive as they were) did not illuminate the issues which I require to address. In particular, senior counsel was correct to observe that the pursuers' GP records contain no contemporaneous entries either supporting or negating the allegations on record.

B

[47] B gave evidence to the court in the form of an affidavit dated 7 September 2021. She is the sister of W, and was born in Edinburgh. B's affidavit described the circumstances in which she was taken into the care of the local authority. She was removed from her biological home and placed in the Home at the age of 11.

[48] B could not recollect all of the Sisters involved in her day to day care but Sister X was one of the Sisters who was in charge of her. B recalled another Sister whom she thought was named Sister Marguerite. Having become aware that no one of that name worked at the Home at the relevant time, she was given to understand that a Sister MMM did so in 1974. She thought it was possible that they were the same individuals. B stated that all of the nuns involved in her care treated her in the same way. In that respect she described how she was punished for wetting the bed, battered for not making her bed to the correct standard, force fed meals if she did not eat them, and how food was inserted in her ears. She described an episode in which she had given her visiting father a pea to eat which was so hard that he had been moved to tears. B also stated that she was battered black and blue if she attempted to see her siblings, who were housed in a separate dormitory, and when she had climbed a tree wearing a skirt.

[49] In a statement to the police dated 25 August 2018, B indicated that she was around six years old when she was admitted to the Home (which would have been 1969). She was

unable to remember how long she had stayed there. In the statement B refers to being struck with a ruler for trying to get to her brothers when that was not permitted. She appeared initially unclear about whether the abuse was perpetrated by the same, or more than one, Sister, but later said that the names Sister X and Sister Marguerite kept coming to mind. There is no account in B's statement of soiled sheets being rubbed on her face and head. B told a counsellor in December 2018 that she had reported to the police that she had been physically and mentally abused in a children's home from about the age of approximately 8 to 11. In her application for criminal injuries compensation in November 2018, B stated that the abuse occurred between 1 January 1969 and 1 January 1971. She was unable to recall the names of, or put faces to, the Sisters responsible for abusing her when speaking to Professor Mezey in January 2021, and she made no mention in her account of soiled sheets being placed over her or rubbed on her face and head.

W

[50] W also gave evidence in the form of an affidavit dated 7 September 2021. Having confirmed the circumstances in which he and his siblings were taken into care, W stated that he was sent to the Home in 1974. He explained that there were two or three nuns who looked after the dormitory to which he was allocated, of which Sister X was one. He was unable to recall the names of the other two nuns.

[51] W described being subjected to a cruel regime involving physical beatings which went well beyond reasonable chastisement, and being hit by a ruler. Sister X was the main individual responsible, although the other two nuns were involved as well. W described how he too was punished for wetting the bed. The punishments included being made to sit naked with a wet sheet over his head, or wearing wet pyjamas, being made to take a cold

bath and daily beatings. W described a trip to Burntisland during which his legs became sunburnt. He stated that Sister X had taken pleasure in smacking his sunburnt legs to burst the blisters. On another occasion related by him, W described being passed a lit cigarette by another resident. As he did so Sister X took the cigarette from him and stubbed it out on his nose. None of the other nuns intervened. W also described how food would be stuffed in his ears by all of the nuns responsible for his care, and how on a different occasion he was beaten black and blue for leaving his dormitory during the night to check on his sister.

[52] There is lodged within the core bundle a statement given by W to the police on 26 April 2018. In it, the pursuer is recorded as having told the police that he was present in the Home for about one year when he was about eight years old. This would have been sometime between 1969 and 1972. He made reference to physical abuse, including being beaten for attempting an escape. W was unable to name to the police the Sisters responsible for physically abusing him specifically. That said, in a supplementary statement to the police on 8 February 2019, the pursuer named Sister X (who looked after him and his brother in what he described as "the boys section") as a perpetrator of the abuse. In February 2021 W told Professor Mezey that the abuse to which he was subjected had been carried out mainly by two nuns. One of them was called Sister X and he was unable to remember the name of the other Sister. In an application for criminal injuries compensation in October 2018 W advised that the relevant abuse occurred between 6 October 1965 and 4 October 1967.

Submissions for the defender

[53] The defender submitted that consideration of a plea under section 17D of the 1973 Act required the court to determine the nature and scope of the evidence in existence

and the extent to which that evidence allowed the defender to investigate, defend and forensically challenge the allegations advanced in a meaningful way. In addressing both statutory tests under section 17D(2) and 17D(3) of the 1973, it was legitimate for the court to consider the overall credibility and reliability of those allegations.

[54] Consideration of the evidence available disclosed that it was very limited. Only four of the twelve Sisters present in the Home at the material time were alive. They included Sister X who had not provided a statement. The other three Sisters did not remember either pursuer, denied having been responsible for any of the alleged abusive conduct and did not witness any of the alleged acts averred. In these circumstances, it was submitted, there was no basis to enable the defender to investigate the allegations, and no basis upon which to subject the pursuers' allegations to cross-examination.

[55] The defender also submitted that the available documentary evidence was very limited and, aside of some social work records dating from the material time, shed no light on any of the pursuers' allegations. The social work records disclosed entries indicating that the pursuers were in fact well settled in the Home, but the authors of those entries were unknown and therefore unavailable.

[56] Turning to what the pursuers aver about those purportedly responsible for the abusive conduct alleged, senior counsel observed in relation to the case of B that only Sister X had been named in the pleadings as "one of the Sisters who abused the pursuer". In addition, the pursuer now believed and averred that another sister who abused her was Sister MMM (whose name she had previously recalled erroneously). In the case of W, Sister X was the only named individual alleged to have been responsible for the abuse of him. Otherwise the pursuers' allegations rested on allegations against unspecified sisters. That placed the defender in an unfair position, or at least substantially prejudiced, in

attempting to investigate and defend claims where no notice had been given as to who may have been responsible for the acts in question. In not being able to speak to identified individuals alleged to have been responsible for abuse, the defender faced many of the difficulties which arose in *B v Sailor's Society* 2021 SLT 1070. The two claims advanced in that case foundered on the absence, through death, of alleged perpetrators of the abuse. The defender in the instant cases was arguably in a worse position because allegations were persisted in against unspecified individuals.

[57] It was further submitted that the cogency of the pursuers' accounts of abuse was a relevant consideration in the court's assessment of both whether a fair hearing was possible and whether the defender would suffer substantial prejudice (such as to outweigh the interest of the pursuers) if the actions were permitted to proceed (*JXJ* v *Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWCA 1914, paragraphs 38-39; *B v Sailor's Society*, paragraphs [242]-[243]). Senior counsel referred to inconsistencies between the allegations on record and other available evidence, including evidence of what the pursuers themselves had previously stated. Such was the deleterious effect of the passage of so long a period of time. He drew particular attention to a material discrepancy between the pursuers' position that they had spent the whole of their time at the Home while there was a body of evidence to the effect that the pursuers were on holiday in Dunbar between 20 July and 10 August 1974 (being, on their own averments, a substantial part of the pursuers' whole time spent in the care of the defender).

[58] There were other factors in play which were relevant to any assessment of the possibility of a fair hearing, or the issue of substantial prejudice. Those factors were again a reflection of the deleterious effect on the quality of evidence (and, therefore, the quality of justice) of the passage of time. That deleterious effect had been recognised by the courts,

which senior counsel illustrated by reference to such authorities as *B* v *Murray (No.2)* 2005 SLT 982, paragraphs 20-42; *M* v *O'Neill* 2006 SLT 823; *SF* v *Quarriers* 2016 SCLR 111 – all cases concerning section 19A – and also *HM Advocate* v *ARK (No.2)* 2013 SCCR 549. Thus, both claims depended on the pursuers being able to establish the occurrence of wrongful acts by named individuals for whom the defender was vicariously liable. That required both identification, with precision, of the acts which are now said to have occurred, and determination that those acts were unlawful according to the social norms of the time, recognition requiring to be given to the fact that in neither case was there any allegation of sexual misconduct (*B* v *Murray (No.2).*; Walker: Law of Delict (1981), p.497). Evidencing the relevant social norms presented difficulty both to the defender and to the court. Moreover, complex issues of causation would likely arise from the fact that the pursuers presented with a number of personal and family difficulties at the material time, as evidenced by the social work records lodged in process.

[59] Lack of witnesses and contemporary documentation, lack of specification in the pleadings, lack of cogency in each of the pursuer's accounts, difficulty in establishing what constituted wrongful conduct in 1974, and complex issues of causation, all militated against the possibility of a fair hearing. The defender was unable to mount a meaningful defence, it could not question unspecified abusers, or develop lines of defence in respect of allegations against named individuals.

[60] Those same factors were relevant to the court's consideration of section 17D(3) of the 1973 Act. They should be seen in the context of a material change in the law wrought by the decision in *Lister v Hesley Hall Ltd* [2002] 1 AC 215. Vicarious liability would not have arisen in the circumstances averred back in 1974. Moreover, the effect of the enactment of

section 17D was that the defender had in the intervening period lost the protection of the *triennium*.

[61] In all the circumstances, even if the court were persuaded that a fair hearing was possible in each action, the defender would be substantially prejudiced if they were permitted to proceed. Moreover, the interests of the pursuers were not such as to outweigh that prejudice. The allegations were, in relative terms, at the lesser end of the spectrum of claims for childhood abuse. On any view of what is known of the circumstances the pursuers were not resident at the Home for long. Any damages, if quantifiable, would likely be relatively modest. In any event B had submitted a claim for criminal injuries compensation, and both appeared to be eligible for compensation under the Redress Scheme for Survivors of Child Abuse (the provisions for which came into effect while this case was at *avizandum*).

[62] In summary, the defender submitted that, in light of the passage of time, the nature and scope of the available evidence, and issues as to the credibility and reliability of the pursuers' evidence, it was not possible for a fair hearing to take place. Separately, in light of the same factors, together with changes in the law since the time of the alleged abuse, the defender would be substantially prejudiced were the actions to proceed, and that even after consideration of the pursuers' interest in the actions proceeding they should not be permitted to do so.

[63] Finally, the defender maintained an objection to the admissibility of evidence contained in the pursuers' fourth inventory of productions concerning (i) the defender's submissions to the SCAI, (ii) the findings of the SCAI, and (iii) the conviction of Sister X in other criminal proceedings. His submission was to the effect that (i) evidence of wrongdoing which was not the subject of the instant proceedings was irrelevant (*A* v *B*

(1895) 22R 402; *Inglis* v *National Bank of Scotland Ltd* 1909 SC 1038; *Oswald* v *Fairs* 1911 SC 257), and (ii) a decision of a criminal court relating to circumstances different from those under consideration was also irrelevant (*Calyon* v *Michailaidas* [2009] UKPC34).

Submissions for the pursuers

[64] In reply the pursuers submitted that section 17D(2) and (3) of the 1973 Act imposed on the defender the onus of establishing that a fair hearing was impossible *et separatim* that it would be substantially prejudiced if the actions were to proceed, and that the prejudice was such that the actions should not be permitted to do so. In the application of both section 17D(2) and (3) the defender had failed to discharge that onus, and the motions for dismissal should be refused.

[65] Senior counsel disputed that these were cases in which the alleged perpetrators were dead or *incapax* and unable to give instructions or offer a defence to the allegations. In that respect they stood in contrast to the circumstances disclosed in the cases of *JXJ* and *B* v *Sailor's Society*, in which the determinative factor affecting the possibility of a fair hearing and the balance of prejudice was the death of the alleged wrongdoers. While recognising that both actions were taken in respect of the actings of staff members at the Home more generally, there was nonetheless a focus on Sister X (in both actions) and Sister MMM in B's case. Sister M was alive and of sound mind. She had provided a statement in the past in which she denied any wrongdoing (or having witnesses any wrongdoing). She could be called to give evidence.

[66] Moreover, Sister X was well known to the defender. She had been convicted in about 2000 of four charges relating to cruelty and unnatural treatment, of which one charge related to the Home. Sister X had provided a statement to the SCAI in June 2018 and had

subsequently given oral evidence. There was nothing to suggest that she was not alive and well or able to provide the defender with information and give evidence at proof. The defender must have been aware, from at least 2000, that the actings of Sister X were likely to give rise to civil litigation. The defender had taken no steps to obtain or preserve her evidence in any meaningful way in the intervening period. It was still open to the defender to do so but it had offered no medical or psychiatric report to explain why she had not provided an affidavit for the purposes of the preliminary proof or been cited to give evidence.

[67] Further, the conviction of Sister X, and her witness statement to the SCAI, reflected a consistency between the allegations of the pursuers in the instant cases and what was found to have been going on in homes run by the defender at the time. While senior counsel recognised that the submissions and findings of the SCAI could not provide corroboration for a course of criminal conduct of which the pursuers' allegations formed part, the cogency of the pursuers' allegations – which had been directly challenged by the defender – was enhanced by their consistency with those findings and submissions. Even if Sister X's evidence had been unavailable it was submitted that a fair hearing would still be possible (*Raggett* v *Society of Jesus Trust 1929 for Roman Catholic Purposes* [2009] EWCA 909 (QB)).

[68] Senior counsel submitted that the lack of contemporary records was largely irrelevant. The issue of liability was likely to be decided on the credibility and reliability of the witnesses' evidence rather than any recovered documents. The defender had not identified any particular class of records the absence of which was said to be fatal to the possibility of a fair hearing, or resulted in substantial prejudice. Besides, it was unrealistic to think that any absent records would have charted a history of abuse. In particular, it was implausible to think that any punishment book maintained for the Home would have

chronicled examples of excessive chastisement. That having been said, the defender did have available to it GP records, social work records for the pursuers, police records and of course the statements and affidavits taken for the preliminary proof with which to work. In summary, any lack of documentation was not such as to meet the statutory tests for refusing to allow the actions to proceed.

[69] Senior counsel made detailed reference to the submissions and findings from the SCAI. I do not propose to rehearse that material, which has been placed in the public domain. The conclusion he ultimately sought to draw from this material was that it confirmed that the type of abuse alleged by the pursuers did occur at the time when they were resident at the Home. (As I understood it, senior counsel accepted that the findings of the SCAI did not assist in proof of the pursuers' allegations, but he submitted that they did have a "reasonably direct bearing" on them (*Strathmore Group Ltd* v *Credit Lyonnais* 1994 SLT 1023), in the sense of providing a context for, and consistency with, the pleadings and the contents of the pursuers' affidavits).

[70] Turning to how the court should approach the evidence at the preliminary proof, the senior counsel submitted that the pursuer's averments should not be assumed to be true save where admitted. The court was not being asked to adjudicate on whether the allegations were true or false at this stage. Rather it was for the court to draw from the evidence presented such fair and reasonable provisional inferences that it could to enable it to make an assessment as to whether or not (i) a fair trial was impossible, and (ii) if not impossible, whether the defender would be substantially prejudiced if the cases were permitted to proceed (cf. *Stubbings* v *Webb* [1992] 1 QB 197, pp.202H-203A; *B* v *Sailor's Society*, paragraphs [194]-[199]). The court was not assessing credibility and reliability at this stage. The allegations had not yet been properly tested by cross-examination of the

individual pursuers. Nevertheless, unless there were significant and obvious inconsistencies between the pursuers' affidavits and other evidence, which cannot be explained, then that was the material from which the court must draw its inferences.

[71] As to the utility of cases such as *B* v *Murray (No.2)*, *M v O'Neill*, and *SF* v *Quarriers*, which were concerned with the application, to particular circumstances, of section 19A of the 1973 Act, senior counsel submitted that the tests to be applied under section 17D were different. Previously, the onus was on a pursuer to justify proceeding against a defender outwith the statutory time limit. Section 19A dealt with the possibility of "significant prejudice" if an action were allowed to proceed. If the defender could show that there was a real possibility of significant prejudice then the decision would generally have been in the defender's favour. The bar was now set much higher. In terms of section 17D(2) the defender had to establish that a fair hearing was impossible. The starting point was that claims were now to be heard in all but the most exceptional circumstances. Whilst there may be elements of the section 19A case law which might assist with the question of whether a fair hearing was possible, the existence of different tests rendered the section 19A jurisprudence largely irrelevant (*A* v *XY Ltd* 2021 SLT 399, paragraph 40).

[72] In all the circumstances senior counsel submitted that the defender had failed to establish that a fair hearing in the two cases would be impossible. That meant that the second stage of the statutory test, under section 17D(3), was triggered. In that respect senior counsel recognised that the provisions of the 2017 Act, together with developments in the law of vicarious liability since 1974, might operate to the prejudice of the defender. Senior counsel did not, however, concede that this could be characterised as substantial prejudice. In any event, in assessing the balance of prejudice required by section 17D(3)(b), the pursuers' interests in seeing their actions proceed clearly far outweighed any prejudice

suffered by the defender. Both pursuers maintained that the consequences of the abuse had been enduring, affecting their personal lives and their emotional and financial wellbeing. They also had a desire to see justice served, and the actions provided their only means of achieving that.

[73] It was accepted that the court had a continuing obligation, both at common law and under Article 6 ECHR, to secure that any subsequent hearing was fair. At this stage, however, both actions should be permitted to proceed.

Analysis and decision

Law

[74] Parties were in agreement that, in enacting sections 17A-D of the 1973 Act, by their introduction by section 1 of the Limitation (Childhood Abuse) (Scotland) Act 2017, Parliament had departed from (as senior counsel for the defender expressed it) a policy determination that claims advanced after the expiry of the *triennium* will not be allowed to proceed, unless a pursuer persuades the court to exercise its discretion otherwise, to a policy determination that child abuse claims can proceed at any time, subject to a defender persuading the court that a claim should not be permitted to proceed under section 17D(2) or (3). The extent and significance of that policy change is evident from how Lord Drummond Young summarised the situation which confronted the pursuers who, in *B* v *Murray (No.2)*, sought to invoke the section 19A discretion to enable their otherwise time barred claims to proceed:

> "…[138]…If the discretion under section 19A is not exercised in their favour, they will lose any right to compensation. If the discretion is exercised, the defenders will lose their right to rely on the defence of limitation. In my opinion these elements should be balanced in the manner suggested by McHugh J in *Brisbane Regional Health Authority* v *Taylor*…The limitation period is the norm enacted by the legislature; the

> discretion under a provision such as section 19A is an exception to the norm. Consequently the onus is on the pursuers, who seek to invoke the exception, to satisfy the court that special circumstances exist. If they fail to do so, they must lose their legal rights; that merely gives effect to the legislative policy…"

[75] The new starting point is that persons subjected to childhood abuse, who seek to bring claims, should not be prevented from doing so just by the passage of time (cf. the policy memorandum accompanying the draft Bill which ultimately became the 2017 Act, quoted in *A* v *XY Ltd*, at paragraph [34]). The policy intent has been inverted.

[76] Accordingly, section 17D(2) provides that an action will not be allowed to proceed where the defender satisfies the court that it is impossible for a fair hearing to take place. If the defender fails to discharge that onus, it may still invoke section 17D(3) in terms of which an action will not be allowed to proceed where the court is satisfied that the defender would be substantially prejudiced if it were to do so, and that having regard to the pursuer's interest in the action proceeding, the court is also satisfied that the prejudice is such that the action should not proceed.

[77] For the avoidance of doubt, there are two branches to section 17D(3). The first concerns the establishment of substantial prejudice. The second occasions the need for the court to undertake a balancing of the parties' interests. I agree with Lord Woolman that there is no onus in respect of the second branch (*A* v *XY Ltd,* paragraph [39]. If the conditions for the operation of neither section 17D(2) nor section 17D(3) arise then an action will be permitted to proceed no matter how "historic" the underlying circumstances.

[78] My attention was drawn to three recent decisions which considered the scope and effect of section 17D of the 1973 Act, namely *JXJ* v *The Province of Great Britain of the Institute of the Christian Schools*, *B* v *Sailor's Society* and *A* v *XY Limited*. *JXJ* concerned a claim which was raised in England but fell to be determined according to the principles of Scots law. The

claim comprised three elements of which the first was concerned with a member of staff of a school operated by a monastic order who had been convicted of sexually assaulting the complainer. The defendant admitted that the assaults to which that conviction related took place. The second element of the claim concerned an assertion by the claimant of vicarious liability for the acts and omissions of the headmaster in exposing the claimant to the risk of abuse and failing to protect him from it (which the defendant denied). The final element of the claim concerned further allegations of assault by named individuals within the order, including the headmaster, the occurrence of which was denied by the defendant.

Chamberlain J, assisted by the expert opinion of Scottish senior counsel, determined that the new limitation provisions in the 1973 Act should be applied in the following way:

> "(a) In cases to which s.17A of the 1973 Act applies, the disapplication of the triennium means that there is no time bar to be disapplied, no presumption that stale actions should not be brought and no onus on a claimant to demonstrate a good reason for delay in raising an action.
>
> (b) A defender who relies on s.17D(2) bears the burden of showing that 'it is not possible for a fair hearing to take place'.
>
> (c) In assessing whether that test is met, the cases interpreting s.19A will be relevant to the extent that the reasoning in those cases turned on whether it was possible for the defender to have a fair hearing. It is therefore likely to be helpful and instructive to compare the facts of the case with those in *M* v *O'Neill*, *SF* v *Quarriers* and *K* v *Marist Brothers*, in each of which the judge decided (among other things) that it was not possible for a fair hearing to take place.
>
> (d) However, caution must be exercised in reasoning by analogy from other case law which turns on the application of the 'real possibility of significant prejudice' test enunciated by Lord Drummond Young in *B* v *Murray (No. 2)* and approved by Lord Hope in *AS* v *Poor Sisters of Nazareth*. The Scottish Parliament was aware of that test and chose not to adopt it for the purposes of s.17D(2).
>
> (e) In a case where the right of action accrued before the coming into force of the new provisions, s.17D(3) applies if the court is satisfied of two things: first, that as a result of the retrospective operation of s.17A, the defender can show that he 'would be substantially prejudiced' if the action were to proceed; second, that this prejudice outweighs the pursuer's interest in the action proceeding.

(f) The test required by the first limb of s.17D(3) is more stringent than that in *B* v *Murray (No.2)* and *AS* v *Poor Sisters of Nazareth* in two respects. First, it requires the defender to show that he *would be* substantially prejudiced, not just a 'real possibility' of that. Secondly, the prejudice has to be 'substantial', rather than merely 'significant'.

(g) The second limb of s.17D(3) reflects the Scottish Parliament's view that there may be cases where the defender *would* suffer substantial prejudice, but the pursuer's interest is such that the action should proceed anyway. This means that it will no longer be appropriate to focus on prejudice to the defender as a factor likely to be determinative in most cases.

(h) In assessing the extent of the pursuer's interest, the seriousness of the abuse which the pursuer claims to have suffered and the claimed effects of that abuse will certainly be relevant. Read in context, however, the reference to the pursuer's 'interest' does not seem to me require consideration of his or her reasons for delay. A review of the legislative history shows that one of the aims of the new provisions was to relieve pursuers of the need to establish good reason for delay by disapplying the triennium. Against that background, it would in my judgment be wrong to read s.17D(3)(b) as re-importing a requirement to justify delay as part of the balancing exercise required in any case where a defender can show that substantial prejudice would be caused."

[79] It was a matter of agreement in *JXJ* that the application of the tests in sections 17D(2) and 17D(3) might yield different results across the three elements of the claim. Chamberlain J, having made preliminary findings on the reliability and cogency of the claimant's evidence, allowed the first element of the claim to proceed. However, for the reasons set out at paragraphs [111]-[114] of his judgment, he refused to allow the second and third elements to proceed on the basis that it would not be possible for a fair hearing to take place. It is clear that the court regarded as significant the fact that the alleged wrongdoers were now deceased.

[80] In *B* v *Sailor's Society* the pursuers alleged that they were subjected to physical, sexual and psychological abuse at a children's home in which they were resident between, respectively, 1968 and 1970 and 1972 and 1982. Lady Carmichael heard a preliminary proof on the defender's argument that the actions should be dismissed in terms of section 17D(2),

which failing (3) of the 1973 Act. The proof involved no oral evidence and otherwise proceeded on the basis of affidavits and statements lodged by the parties, and other documents lodged by them. A number of factors, very similar to those advanced by the defender in the present case, were advanced in support of the proposition that the actions should not be permitted to proceed. Of these, the only (but determinative) factor in each case was held to be the fact that the alleged wrongdoers were dead. Accordingly, neither action was permitted to proceed.

[81] In *A* v *XY Ltd*, a case involving a single incident of alleged historic child abuse, the defender did not argue that a fair hearing was impossible. Accordingly, the case was only concerned with the application of section 17D(3). Lord Woolman decided, after debate, that the defender had established that it would be substantially prejudiced if the action were allowed to proceed. He did so because of the "sea change" in the legal position which resulted in the defender now being exposed to a potentially significant financial liability which did not exist for many years after the incident alleged by the pursuer. However, he also decided that the balancing exercise required by section 17D(3) fell firmly in favour of the action proceeding. In relation to the application of section 17D(3) the court said this (at paragraph [38]:

> "[Section 17D(3)] contains a number of open textured terms. It does not define "substantially prejudiced" or "the pursuer's interest in the action proceeding". In my view this is deliberate. The Scottish Parliament intended that the court should apply the two stage test in a broad manner."

[82] In my opinion the same approach falls to be taken in relation to the application of section 17D(2). There is nothing complicated in the language adopted. It was not suggested by either party that the terms "not possible" and "fair hearing" should attract a meaning any different to that which the words would ordinarily convey. Whether a fair hearing is

impossible, or whether there is substantial prejudice to the defender, will depend on all of the circumstances of the case.

[83] In the course of her opinion in *B* v *Sailor's Society* Lady Carmichael endorsed (at paragraph [240]) – almost entirely – Chamberlain J's summary in *JXJ* of the relevant law, as set out above. In relation to paragraph (c) of his analysis, however, she doubted the value of comparing the facts of a case like *M* v *O'Neill* given that there the statutory context was not one which involved a consideration of the impossibility of a fair hearing. In relation to paragraph (d) her Ladyship considered that the law now imposed a different test from that articulated in *B* v *Murray (No. 2)*; section 19A cases provided no useful guidance in relation to what constituted "substantial prejudice".

[84] In the discussion before me the parties were at odds over the relevance of cases decided under section 19A to the matters under consideration. The discussion had a somewhat theoretical flavour to it and tended to blur the distinction between the two statutory tests in section 17D. Senior counsel for the defender did, however, rely on *B* v *Murray (No.2)* as an example of the court determining that the simple passage of time was by itself sufficient to make it inequitable to allow an action to proceed where a major decline in the quality of justice was inevitable (p.1013K-L). I agree with Chamberlain J that caution must be exercised in reasoning by analogy from a case which turned on a "real possibility of significant prejudice" test. However, it does not follow that what Lord Drummond Young had to say about the effects of the passage of time might not have at least some interest or resonance in what must be a factual assessment as to whether, in the instant cases, a fair hearing is impossible. After all, his Lordship's conclusion (at paragraph [116]) was to the effect that sufficient time had elapsed, without regard to any specific prejudice to the defenders, to make it inequitable to allow the pursuers' actions to proceed.

[85] Senior counsel for the defender also relied on *SF* v *Quarriers* and *K* v *Marist Brothers* as examples of situations where, in deciding whether it would be equitable for actions to proceed, the court regarded, as a significant factor, the death of the alleged wrongdoer. As long as it is recognised that in neither case was the court required to resolve whether a fair hearing was possible for the purposes of section 19A, I did not see anything controversial in having regard to what was said, in either case, about the significance to a fair hearing generally of an absent wrongdoer. Nor, it would seem, did Lady Carmichael, in *B* v *Sailor's Society*, (see paragraphs [224]-[226], [242]), and I share her caution about proceeding on the basis that the cogency of a pursuer's case can be such that the absence of evidence from someone whose conduct is central to a case could not affect its outcome.

[86] In the final analysis, however, as Lord Woolman succinctly observed in *A* v *XY*, each case is intensely fact specific, and must ultimately be decided on its own individual circumstances. That is how I have approached the decision in these cases.

Decision

[87] I therefore turn now to consider the application of section 17D to the circumstances of the two actions before me, and the motion of the defender that neither should be permitted to proceed on the basis that a fair hearing is impossible, which failing that the defender would be substantially prejudiced and that taking into account the interests of the pursuers in their actions proceeding, that prejudice remains such that neither should do so.

[88] In doing so, and since I respectfully agree with it, I have taken the same approach to the assessment of the evidence at the preliminary proof as that of Lady Carmichael in *B* v *Sailor's Society* (at paragraphs [194]-[197]). Accordingly, I have not considered it appropriate to reach a concluded view on the credibility and reliability of the allegations made in the

pleadings and the pursuers' respective affidavits (to which it was agreed I was entitled to have regard). I have taken into account the terms of all of the other statements and affidavits referred to above, and relevant entries in the productions agreed in the joint minute, all with a view to determining whether the defender has established that, in terms of the tests set out in section 17D of the 1973 Act, the actions should not be permitted to proceed.

[89] Finally, to the extent that the basic cogency of the pursuers' allegations has been put in issue by the defender, I have taken into account, where the context justifies it, the proceedings of the SCAI, as disclosed in the pursuers' fourth inventory of productions. I have, however, done so on the basis that senior counsel for the pursuer did not ultimately seek to argue that the findings of the SCAI directly assisted in proof of the pursuers' particular allegations. I would only add that it did not seem to me that the findings could be said to have a reasonably direct bearing on the conduct of Sisters of the defender whose identities were unspecified and unknown, but whose behaviour was the subject of criticism (cf. *Strathmore Group Ltd* v *Credit Lyonnais*, p.1032E-H).

[90] Since the arguments were in large measure common to both actions I can take them together. The principal factors relied on by the defender in arguing both the impossibility of a fair hearing and substantial prejudice were (i) lack of cogency in each of the pursuers' accounts; (ii) difficulty in establishing what constituted wrongful conduct in 1974; (iii) complex issues of causation; (iv) lack of contemporary documentation; (v) lack of availability of witnesses, and (vi) inadequate specification in the pleadings. It will be apparent that the issues raised bear striking similarities to those relied upon by the defender in *B* v *Sailor's Society*, and equally convenient if I address each issue in turn.

Lack of cogency

[91] Senior counsel for the defender emphasised a number of respects in which he submitted that the pursuers had each given inconsistent accounts of the abuse which they alleged. I have already recorded his submission that there was a material discrepancy between the pursuers' position that they spent the whole of their time at the Home when, in the social work records in particular (supported by the statement of Mrs McElhinney), there was a body of evidence to the effect that, for three of the five weeks they were in the defender's care in 1974, the pursuers were not in the Home at all but were on holiday in Dunbar. Senior counsel for the defender also drew attention to discrepancies which he submitted existed between the pursuers' averments on record and statements they had given on other occasions. Those statements are identified in paragraphs [49] and [52] above.

[92] I accept that, on a preliminary assessment of the available evidence, such inconsistencies exist. I also conclude that, beyond their own accounts of having been abused and similarities in the nature of the abuse to which it is assumed they will speak, there is little if anything by way of support for the pursuers' allegations within the voluminous documents lodged for the preliminary proof. No evidence was available from any other former residents of the Home (although the difficulty and sensitivity in recovering such evidence should be acknowledged). The pursuers' evidence amounted to the contents of their own affidavits and their consistency *inter se*, their supposed consistency with the accounts given to the police in 2018 (which is disputed), and the background findings of the SCAI to the effect that there was an established course of degrading, humiliating and cruel punishment within homes operated by the defender.

[93] I did not understand the defender to go so far as to suggest that either account was inherently unlikely or implausible (as was the suggestion in at least one of the cases in *B* v

Sailor's Society – see paragraph [249]). In that respect I consider that it is open to me to have regard generally to the context provided by the SCAI findings in relation to the provision of residential care for children by the defender in Scotland, and also the fact of Sister X's conviction in September 2000 on charges relating to cruel and unnatural treatment.

[94] In my opinion, the existence of apparent inconsistencies in the evidence does not of itself militate against the possibility of a fair hearing in these cases. There would seem to be no reason to think that the contents of the social work records, within which there appears to be no independent support for the allegations, would not be capable of agreement as the equivalent of the evidence of their authors, as was done for the purposes of the preliminary proof. Other evidence relied on by the defender for its supposed inconsistency with the pursuers' allegations (such as the accounts given by the pursuers to police officers and to Professor Mezey) would seem to be capable of being led without difficulty. Such inconsistencies would also be capable of being raised in cross-examination, and would no doubt be the subject of comment in submissions at the conclusion of any proof.

[95] In short, I do not consider that the defender's criticism of lack of cogency in the pursuers' allegations renders a fair hearing impossible. Lack of cogency may have greater potential traction were it necessary to consider whether or not the defender would be substantially prejudiced by having to answer the claims so many years after the events said to underpin them occurred - a matter to which I will return.

Wrongful conduct in 1974

[96] No allegation is made of sexual abuse by either pursuer. The allegations on record are restricted to physical abuse. The defender submitted that a factor which militated against the possibility of a fair hearing (or, for that matter, occasioned substantial prejudice)

was the difficulty in establishing what constituted wrongful physical conduct, as opposed to reasonable physical chastisement, in 1974 (cf. *B* v *Murray (No.2)*, paragraph [22]; *SF* v *Quarriers*, paragraph 163). The defender's averments on the matter, in both actions, are restricted to the following:

> "…[T]he intervening period has also seen significant changes in social attitudes and mores. Changes in social attitudes between the time of the alleged abuse and now mean that it would be difficult to reconstruct the social attitudes prevailing at the material time, which would lead to a serious decline in the quality of justice…"

[97] The onus is on the defender to prove that such changes in social attitudes would have a material effect on the court's ability to adjudicate on the wrongfulness of the historical conduct alleged. I have read with particular interest what Lord Drummond Young had to say, in *B* v *Murray (No.2)*, about the proper understanding and assessment of events that occurred at a time when social attitudes were different from that which now prevail. I accept that it may be a difficult exercise for the court to assess the propriety of what happened against standards that previously prevailed. However, no evidence was led in support of the suggestion that the particular conduct alleged in either case, if proved, would have constituted anything resembling reasonable chastisement at the time when it was supposed to have taken place. The findings of the SCAI, although not clearly not directed towards the circumstances of the instant cases, lend little or no support for such a suggestion.

[98] Moreover, from my consideration of the SCAI material, it does not appear that the Inquiry encountered any particular difficulty in resolving what may or may not have been wrongful conduct over the period of time with which the present allegations are concerned. Ultimately, it does not appear to me to have been a matter of significant dispute. Likewise, with its experience of directing juries on how to approach reasonable chastisement in a

historical context (cf. *B* v *Sailor's Society*, paragraph [263]), I do not consider the issue raised to be one which would preclude the possibility of a fair hearing.

[99] Accordingly, I reject the submission that any difficulty in establishing what went beyond acceptable corporal punishment in 1974 precludes fair hearing in either case.

Complex issues of causation

[100] I have already highlighted, by reference to the pleadings in both actions, the various heads of loss advanced by the pursuers. The fact that the conduct in each case is alleged to have occurred over a period of time measurable in weeks – perhaps not even very many weeks - against a background in which, as the social work records reveal, the pursuers' childhood was one disrupted by domestic difficulty and admission to care, might suggest that proof of the component losses in both cases will be a tall order. The defender has, however, been able to investigate this aspect of the case. I had the advantage of sight of detailed reports by Professor Mezey, a consultant forensic psychiatrist instructed on behalf of the defender, in relation to both pursuers. Broadly put, the reports dispute on a reasoned basis the central claims of both pursuers that they have suffered and continue to suffer from symptoms of Post-Traumatic Stress Disorder and a Recurrent Depressive Disorder, with consequential patrimonial loss and ongoing disadvantage on the labour market. I was not specifically referred to, or invited to draw, any inferences favourable to either of them, from the reports said to have been prepared on behalf of either pursuer by Professor Green. They are referred to in Professor Mezey's reports. For present purposes it is sufficient to observe that proof of causation would likely present considerable challenges for the pursuers. But they are not challenges I consider that the defender has been, or is, incapable of meeting.

Missing documents

[101] The evidence indicates that the defender holds no documentary evidence relating to the pursuers other than those relating to the dates of their admission and discharge. Ms Firmin-Cooper described how records were now held by the Generalate archive, which was established in 1994 and to which all surviving records of the defender's Homes were sent. Ms Firmin-Cooper clearly traced very few records for the Home. She did, however, discuss the some of the kinds of documents that might have existed. They would appear potentially to have included lists of Sisters' names, the nature of their tasks and their duties.

[102] The pursuers submitted that any lack of records was largely irrelevant. Such records were unlikely to chart a history of physical abuse. In any event any lack of documentary evidence was a consequence of the inadequate steps taken by the defender to secure evidence at an earlier stage. For example, the defender had been put on notice for some time that vicarious liability for the actings of Sister X was a likely outcome of her criminal conviction in 2000. The letters of claim in 2019 and the findings of the SCAI would have lent emphasis to that position.

[103] It was not entirely clear to me what investigations senior counsel for the pursuers had in mind in making that submission, towards whom such investigations should have been directed, and to what effect. After all, the pursuers' claims were only intimated in 2019, many years after the Home ceased to operate as a children's home in 1984, and long after Sister X's conviction. I do not feel able to criticise the defender for failing to take earlier and more proactive steps to recover documents relative to the organisational structure of the Home in or around 1974. Senior counsel for the defender acknowledged that what might have been contained in those documents from the Home which no longer existed (if they ever existed) was to a degree a matter of speculation. However, in my view, it is reasonable

to conclude that the passage of such a long period of time has deprived the defender of the ability to source a potentially more compendious administrative archive relating to the organisation and operation of the Home which may have contained material relevant to the plausibility of the pursuers' claims that they were subjected to physical abuse by multiple Sisters (including those they have been unable to identify). The inability to do so is a potentially significant factor especially in view of the limited evidence which does exist to the effect that groups of children were under the charge of a Sister and based in either the main house or Hollycot, and that children from the main house did not go into Hollycot (and vice versa).

Lack of availability of witnesses/inadequate specification

[104] The averred circumstances in both cases distinguish them from those which arose in *JXJ* and *B* v *Sailor's Society*. In *JXJ* the summary of his evidence (paragraphs [40]-[50]) discloses that the claimant was able to, and did, identify by name the various brothers within the defender's Order who were alleged to have subjected him sexual and other assaults while in their care, including those who were now deceased. In *B* v *Sailor's Society* the alleged abusers were named but were now deceased. I note in passing that, in *B* v *Murray (No.2)*, the alleged abusers were named and some were still alive. My attention was not specifically drawn to any case where the claim included allegations against un-named individuals.

[105] In B's case the pursuer avers, in statement 4.2 of the amended record, that she was subjected to abusive practices "perpetrated by the Sisters who had responsibility for the care of the children". What follows in statements 4.2 and 4.3 is a series of allegations of physical abuse which is said to have been perpetrated by "Sisters" generally. In statement 4.4 the

pursuer alleges that Sister X was one of the Sisters involved. She also avers that a Sister, whom she recalled as "Sister Marguerite", is believed to be Sister MMM, and that that individual was also responsible for perpetrating abuse.

[106] In W's case the pursuer also avers, in statement 4.2 of the amended record, that he was subjected to abusive practices "perpetrated by the Sisters who had responsibility for the care of the children". He also avers that the Sisters who perpetrated the abusive practices included Sister X. In statement 4.3 the pursuer then particularises three incidents for which Sister X was responsible.

[107] It is, however, clear from the pleadings in both actions, and the pursuers' affidavits, that the factual foundation for each claim is not intended to be restricted to the actings of named individuals. Indeed senior counsel for the pursuers made it clear in his submissions that the cases *were* taken in respect of the actings of the Sisters more generally, and that the pursuers did seek to visit on the defender vicarious liability for the conduct of those un-named Sisters. In contrast to the situation which arose in *JXJ* I did not understand it to be suggested by either party that the tests in sections 17D(2) and 17D(3) might yield different results across different elements of each claim. Or, to put it another way, it was not suggested that application of either test could be confined to claims made against the Sisters named on record. This is perhaps unsurprising. The attempt by senior counsel for the defender during submissions to hive off averments which were capable of being tied to individual alleged abusers quickly foundered. In W's action only three incidents were specifically identified as having been the responsibility of Sister X.

[108] Parties are agreed that, of the twelve Sisters recorded as having been present at the Home in 1974, eight of them are now deceased. Of the remaining four Sisters (or former Sisters) two are not implicated in the pleadings as having been responsible for any abusive

conduct towards the pursuers. That agreement would seem to have been the direct product of the investigations undertaken by the defender's agents to which reference was made in Mr Batchelor's affidavit evidence. I again see no reason to criticise the thoroughness of that aspect of the defender's investigations. It would seem to follow that, in support of their significant claims for loss and damage, the pursuers are looking to maintain, and ultimately prove, allegations of physical and emotional abuse against un-named Sisters who are either deceased or who are no longer traceable.

Conclusion

[109] In the foregoing circumstances, in respect of allegations made against unspecified Sisters in both actions, I consider that the defender is faced with many of the same difficulties as arose in *JXB* and *B* v *Sailor's Society.* The situation is very different from that which arose in *Raggett* v *Society of Jesus Trust,* where there was documentary evidence to link a deceased wrongdoer to the conduct alleged. There is no means of identifying the alleged abusers from the pleadings. That precludes the defender from obtaining from such unidentified individuals responses to the allegations on record. It cannot explore with such individuals the essential credibility and reliability of the allegations. It cannot explore with the alleged abusers whether they were in a position within the Home to commit the kind of abuse alleged by these particular pursuers. It cannot even investigate with those individuals the veracity of the allegations made against the two individuals who have been named. In short, the defender cannot assert that the alleged abuse of these particular pursuers by un-named individuals did not occur nor can it fully develop a full defence to the claims which are made.

[110] A further complicating factor is that the pursuers assert that the defender is vicariously responsible for "the acts and omissions of the Sisters working at the Home". The alleged conduct being non-sexual in character it may not be overly difficult to envisage circumstances in which vicarious liability would be held to arise. It is, however, difficult to so do in circumstances where the individuals are not identified at all.

[111] I do not consider that the difficulties I have outlined are elided by the fact that two individuals, across the two actions, have been identified. The situation may have been different if the actions were directed towards only those individuals (or, in the case of W, Sister X alone). But the claims are not so restricted. It is the totality of the abuse to which they were allegedly subjected that forms the basis for the pursuers' claimed loss and damage. As matters have been pled, it is not possible to anticipate in advance how much responsibility it is intended to visit on Sisters generally as opposed to the individuals named, and one can readily foresee unfairness arising from any attempt at the proof to ascribe fault only to those whose identities have been averred, or indeed only to those whose identities have not been specified, when that is not the basis upon which liability against the defender is asserted.

[112] In this connection it is also necessary to observe that, as regards the implication by B of Sister MMM in the alleged abuse, the "believed and averred" averment on which it depends seems to me to be predicated on the thinnest of evidential bases. Having eventually been traced by the defender, Sister MMM's affidavit recorded her shock at being so implicated, never having previously been the subject of any allegations of any sort. The naming of her on record appears to proceed only on the basis that she has a Christian name which sounds like (but is not the same as) a name recollected by the pursuer.

[113] The absence of evidence from persons said to have committed abuse but who have not been identified on record is fundamental to both cases and, in my view, precludes the possibility of a fair hearing in either of them. Matters are then compounded by the inability of the defender now to source archive material relating to the pursuers' residency at the Home beyond the admission and discharge records. Whether or not documents once existed evidencing, for example, the location of Sisters and allocation of children within the Home, must necessarily be a matter of some conjecture after the passage of such a long period of time. It does, however, seem reasonable to conclude that a residential establishment like the Home would have maintained more detailed administrative records then the very limited material sourced by Ms Firmin-Cooper, and I did not understand her affidavit evidence, about what she had been able to source, to circumscribe what might have been available nearer the time. Indeed, she referred to the potential existence, in local houses, of lists of Sisters' names, and information about their tasks and duties.

[114] In these circumstances I consider that the defender has discharged the onus incumbent on it in terms of section 17D(2) of the 1973 Act. Accordingly, the issue of substantial prejudice, and the associated balancing of parties' interests, does not strictly arise.

[115] That said, if I had not been so satisfied, then I would have had little difficulty in concluding that the defender would be substantially prejudiced if the actions were permitted to proceed. That prejudice arises from the operation of the new limitation provisions in the 1973 Act which exposes the defender to a potential liability which would not otherwise have arisen. The sums sued for are significant and proceed on averments of significant psychological harm. The claims, which have already occasioned expense, will be costly to defend. The passage of time has resulted in potential witnesses (including the

majority of the Sisters thought to have been present at the Home in 1974) passing away and excluded consideration of contemporary documentary material whose potential relevance to the allegations cannot therefore be established.

[116] Undertaking the balancing exercise, on this hypothetical basis, has an artificial flavour to it. But, in approaching it, I would have regarded as significant (i) the relatively brief (and potentially very brief) period of each pursuer's residence at the Home; (ii) the nature, in that context, of the allegations made, and (iii) the reasoned concerns raised, in her reports, by Professor Mezey about the extent to which the claimed loss and damage could, in the circumstances averred by both pursuers, properly be attributable to the conduct alleged within the timeframe concerned. For completeness I heard a submission, principally in relation to the balancing exercise under section 17D(3), to the effect that the pursuers each had alternative means by which to secure financial compensation. Indeed, as I understand the position, the redress scheme touched on earlier is now available for that purpose. Whether the existence of such alternative routes to compensation can in any sense outweigh the pursuers' interest in securing justice is open to question. Access to justice through the courts is a precious commodity and I would not readily have acknowledged the existence of such alternatives as a factor standing in the way of the actions proceeding if the conditions for them doing so otherwise existed.

Disposal

[117] In the result, however, since the defender has succeeded in establishing that a fair hearing is not possible, I must dismiss both actions. All questions of expenses are reserved.