SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2025] SC EDIN 60

EDI-A449/24

JUDGMENT OF SHERIFF KOMOROWSKI

in the cause

CLUB LOS CLAVELES

First pursuer

ALBERT FLETCHER (Club Chairman); CAROL ANN PARKINSON (Club President); NORMA ANN BURSTON, TERRENCE WILLIAM SMITH, and WALTER McKINNON FARQUHAR

Second to Sixth Pursuer

against

HUTCHINSON TRUSTEES LIMITED

Defender

Act: R McIllvride KC (BTO solicitors LLP)
Alt: F Whyte, Advocate (Blackadders LLP)

EDINBURGH 20 August 2025

The sheriff, following proof-before-answer, having resumed consideration of the cause, repels parties' preliminary pleas (the pursuer's fourth and the defender's first pleas-in-law) for want of insistence, thereafter,

Finds the following facts admitted or proved:

1. The first pursuer, Club Los Claveles, is an unincorporated association with its main office at Calle Andorra, 2, Los Cristianos, Arona, CP38650, Santa Cruz de Tenerife, Spain.

2. The Club membership consists of those with time shares in the Los Claveles resort in Tenerife, that is to say those who have a recurring entitlement to the use of accommodation and connected facilities in the resort for a stipulated period of every year.

3. The real right to that accommodation is held by five limited companies incorporated under Scots law. The shares in these five companies are held exclusively by the trustee for the benefit of the Club membership.

4. The current trustee is the defender, Hutchinson Trustees Ltd, a company incorporated under English law with number 03195365, with its registered office at 5 Priory Court, Tuscam Way, Camberley, Surrey, GU15 3YX.

5. The defender took up appointment as trustee in 2022 after its predecessor as trustee was compelled to demit office as trustee by court order.

6. The second and third pursuers are respectively Club Chairman and President, and the fourth to sixth pursuers are a majority of the Club's committee responsible for management of the Club. These individual pursuers represent the Club for the purposes of this litigation; they pursue this action both as individuals and on behalf of the Club.

7. Certain differences have arisen between the individual pursuers and Hutchinson Trustees Ltd over the trustee's decisions regarding the five companies. These individual pursuers believe the replacement of Hutchinson Trustees Ltd with a different trustee to be in the best interests of the Club.

8. On 11 October 2023, the Club Chairman, Albert Fletcher, with Walter Farquhar (the second and sixth pursuers, respectively), represented the Club in a video call with Veranne Wilkinson (Managing Director) and Chris Allan (Director), representing Hutchinson Trustees Ltd.

9. No agenda was circulated for that meeting. No arrangements were made to record the proceedings of the meeting in any manner or to confirm the outcome of the meeting for all participants.

10. At the video call, it was agreed that Hutchinson Trustees Ltd ought to cease its role as trustee.

11. At the video call:

a. An expectation was stated that BTO solicitors would replace the defender as trustee.

b. No agreement was arrived at limiting who could or ought to replace Hutchinson Trustees Ltd.

c. No agreement was arrived at, nor condition stipulated, as to Hutchinson Trustees Ltd having the right to determine who ought to replace it.

Finds-in-fact-and-law:

12. What was said at the video call on behalf of the Hutchinson Trustees Ltd, objectively construed, did not convey an agreement to be legally bound to cease to be trustee.

Finds-in-law:

13. There was no contract entered into on 11 October 2023 between the Club and Hutchinson Trustees Ltd for the latter to cease its trusteeship.

THEREFORE repels the pursuer's first-to-third pleas-in-law, sustains the defender's second plea-in-law and absolves it from the first-to-sixth craves; reserves meantime all questions of

expenses so far as not already dealt with; ordains any party seeking an award of expenses to enrol a motion within 14 days of this judgment.

NOTE:

[1] In this action, the leadership of a club consisting of timeshare holders in Los Claveles, a resort in Tenerife, Spain, seeks specific implement of a contract said to have been entered into between that club and the trustee for the club members, Hutchinson Trustees Ltd. The agreement is said to have been concluded during a video conference call on 11 October 2023.

[2] The trustee denies any legally enforceable agreement was entered into.

The hearing

[3] I heard evidence on 12 and 13 May 2025, with submissions, written and oral, delivered on 14 May.

[4] I heard evidence from all four participants in the video-call. I heard evidence from Walter Farquhar, a Club committee member, and Albert Fletcher, the Club chairman, for the pursuers. I then heard evidence from Veranne Wilkinson, the managing director of Hutchinson Trustees Ltd, followed by Christopher Allen, a director, for the defender. Each witness's evidence-in-chief was principally provided by means of written statements.

[5] Notwithstanding counsel for the defender's criticisms of the pursuer's witnesses, I found each witness to be credible.

The factual background

[6] I agree with counsel for the defender that: "There is a considerable factual background … Some of that may be relevant to the core issues the court [is] asked to determine though … much of it is not" (defender's written submissions, paragraph 5).

Matters important to the parties; but unimportant to the proceedings

[7] Differences in opinion as to who should manage the Los Claveles resort and how this should be done appear to be significant and of long standing. The Club leadership pursuing this action consider that a particular multinational hospitality business has designs over the resort so as to commercially exploit it in a manner that would be detrimental to its amenity for Club members. The Club leadership perceive a dispute about voting rights in an association of apartment owners at the Los Claveles resort to be crucial to the business's machinations. Whether the Club leadership are right to be concerned about this business, or what effects there might be on Los Claveles as a pleasant place to sojourn, are not relevant to the issue I am to determine.

[8] The defender avers on record that the status of the Club and its leadership is in a state of "confusion". The defender unsuccessfully moved to sist the proceedings on the basis that: a rival committee had been elected by the Club members displacing the committee members who are pursuers in these proceedings; and, the rival committee did not wish to continue these proceedings.

[9] I surmise that the long-standing differences of opinion I have alluded to have found some expression in manoeuvres within the Club itself. But I have heard no evidence on such intra-Club matters; objections to such evidence having been sustained at the hearing unopposed. The fractious history of this Club is such that the precedent for sustaining those

objections arises from its own experience with a previous trustee: *Club Los Claveles* v *First National Trustee Co Ltd* [2022] CSIH 35, 2022 SC 251. The defender perhaps might harbour an interest in the ordinary sense in such developments but has no legal title to enquire into them, they are *res inter alios acta* and not relevant to what I have to decide. Accordingly, when I refer to the Club leadership, I mean the persons claiming to be President, Chairman and committee members of the Club as set out in the instance of the initial writ for these proceedings.

[10] Despite the quantity of ink spilt and paper consumed in this case setting out the history of the Los Claveles resort, the developments and differences arising in the running of the resort and the alleged machinations of the particular hospitality business, I do not think I need say anything about this beyond some brief notes about the ownership association for the resort to explain why there was any discussion about the defender ceasing to be trustee.

The maintenance of Los Claveles resort facilities is directed by an Association

[11] The Club members own timeshares in around 85% of the accommodation in the Los Claveles resort. A Development Owner's Association is responsible for maintenance and management of the common parts and facilities of the Los Claveles resort, that is, those parts used by club members or by those staying at the remaining 15% of the accommodation. Thus, participating in the decision-making of the Association is significant for decision-making as to how the resort as a whole is managed.

Five Companies hold title to the Club members' accommodation

[12] The accommodation for which club members hold timeshares is all owned between five companies. The entire shares of these five companies are held by the trustee for the

benefit of the club members. The trustee's duties are limited to preserving the five companies' ownership of the accommodation, and thus in preventing the accommodation being alienated or encumbered. The trustee does not have any role or responsibility in managing the accommodation.

The Five Companies lost the right to vote in the Association

[13] The five companies had once been allowed to vote as members of the Development Owner's Association. But that changed so that instead, the individual members of the club were given a vote. In the opinion of the Club leadership, this prejudiced the interests of the club membership as a whole.

[14] I surmise that the importance of the change was as follows. It meant that the Club leadership could no longer procure a bloc vote, representing 85% of the accommodation, to be cast in accordance with their views. Instead, members might vote in different ways if indeed they voted at all. It prevented the Club leadership presenting or imposing a united front in respect of the majority of the accommodation-ownership.

The Club wanted to sue; the Trustee did not

[15] The Club leadership wanted to raise legal proceedings challenging this alteration to Association voting. But this required the co-operation of the trustee. As it was the five companies' voting rights that had been lost, the five companies had to raise proceedings, or at least grant a power of attorney to others, such as the Club leadership, so that they could pursue litigation in the names of those companies. Unless the five companies' shareholder, the trustee, brought this about then no litigation could proceed.

[16] But the trustee was unwilling to cause the five companies to do this. The trustee was concerned that litigation by the five companies, or on their behalf, would put the accommodation owned by the companies at risk. Some legal encumbrance might be placed on that accommodation; I surmise as security for litigation expenses. The trustee considered its first duty was to preserve the ownership of the accommodation, certain and unqualified.

Either Club or trustee could walk away, with a clean-break, on the requisite notice

[17] The Deed of Trust dated 13 August 2023 between the Club and Hutchinson Trustees Ltd, provides that the deed can be "terminated" from its first anniversary onwards provided that no less than six months' notice was given in writing (clause 15.1). Termination of the deed ought to be understood as termination of the appointment of trustee (*Club Los Claveles* v *First National Trustee Co Ltd,* [2020] CSIH 33, 2020 SC 504, paragraph 35). In that event the trustee was to convey the trust property to a successor or otherwise as the Club's committee directed (clause 15.2). Upon the trustee retiring, the trustee was to be released from all claims, *&c.*, except for fraud or to recover trust property or proceeds from such property (clause 22).

The video call of 11 October 2023

[18] All are agreed that the differences of view about the proposed litigation led to the video-call of 11 October 2023. But they disagree as to what was precisely said, what was meant, and the effect in law of what was said, at that video call.

Documents contemporary to or not long after the video-call

[19] It is trite that contemporary documents, that is, what those involved recorded at the time or shortly after the events in question, are often more reliable as evidence than what the authors of those documents might testify to in court some months or years later (*eg. Gestmin SGPS (SA)* v *Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) [2020] 1 CLC 428, Leggatt J at paragraph 22).

[20] No agenda was circulated before the video call, nor was any record of the discussion in the form of minutes or otherwise shared after with all of those in attendance. But there were some e-mails sent out the same day and in the few weeks following that set out the understanding of those who participated.

[21] I have set out only correspondence either recording what was said in the video-call or reciting what was agreed there, even if only fleetingly. I have omitted correspondence that did not in any way make any such reference, including that solely concerned with identifying a suitable replacement trustee. In that context it should be noted that whilst it was initially thought that BTO solicitors could serve as a replacement, that proved not to be possible, and various other possibilities were contemplated, including a specially incorporated company called Club Los Claveles Trustee Company Limited. I consider discussion as to the replacement, when done without reference to what was agreed at the video-call, to be neutral in import given that it is both consistent with the Club requiring the defender's approval but also with the Club taking advantage of the defender's advice.

11 October 2023 – Mr Farquhar's e-mail to the Club Committee

[22] In the evening following the video call, Mr Farquhar sent an e-mail to his fellow Club Committee members in these terms:

> "**Subject:** Brief Notes of the Zoom Call with Veranne & Chris of Hutchinson Trustees, 11/10/23
>
> …Veranne [Wilkinson] and Chris [Allen] reiterated their full support for the Club but stated that the Hutchinson board was not willing to put the company [the trustee] and all of their clients at risk over Los Claveles, and that their Insurer was not supportive of them taking legal action. … . Veranne and Chris had explored every possible avenue to find a solution but had come to the conclusion that an amicable agreement should be reached to allow the Club to seek an alternative trustee. Albert [Fletcher] concurred with this and said he would approach BTO Solicitors to take over the trusteeship … in order to defend the voting rights of the [accommodation] owning companies.
>
> …"

[23] It is significant, in my view, that there is no reference to the defender having a role in approving the substitute trustee or any agreement as to the necessary attributes of a trustee.

[24] I place considerable significance on this e-mail. Mr Farquhar was writing only hours after the discussion, in reasonably detailed, dispassionate and even-handed terms, to others in the Club leadership rather than an external audience.

16 October 2023 – Ms. Wilkinson's e-mail to Mr Allen

[25] Ms Wilkinson e-mailed her fellow director Mr Allen five days later what she had "jotted down … to summarise" what was said in the video-call. Under the title "Legal action by the OCs [the five companies]", she recited the Club leadership's wish to raise proceedings and the trustee's opposition to this, and continued:

> "the Club will have to part company with HUT [the defender] reluctantly. The process of appointing a new Trustee (preferably a legal firm) was discussed. It was agreed that this would be done by mutual consent between the Club and HUT. AF [Mr Farquhar] to contact BTO re. trusteeship."

[26] The terms of this e-mail are far from clear. The reference to mutual consent is ambiguous, as it is not clear whether the consent relates simply to an acceptance that there will be a new trustee or extends beyond that, such as to the identity of the replacement. I

think the more natural reading is that the consent is to the defender being replaced by a new trustee, and nothing more. The "mutual consent" more naturally refers back to the Club parting company with the defender. If the "process" was to proceed by mutual consent, that would concern the manner of giving effect to the appointment of a replacement rather than the identity of the replacement, which is the outcome of the process. If it was resolved between parties that the defender could approve who or what its successor would be, I would expect that to be unambiguously stated. There would instead be a reference to the selection of a trustee, rather than the process for appointing one. Ms Wilkinson's note only of a preference as to the attributes of the new trustee falls far short of the defender understanding it to have some right of approval.

26 October 2023 – Mr Fletcher's e-mail to Messrs. Fletcher and Farquhar

[27] Mr Fletcher, in an e-mail addressed to Ms Wilkinson and Mr Allen sent on 26 October 2023, stated that at an annual general meeting of 22 October 2023:

> "The meeting supported unanimously the view that the contract with Hutchinson [the appointment of the defender as trustee] should be terminated by joint agreement and that the Committee should take up your offer of assisting the transfer to another trustee."

[28] The unqualified reference to agreement to termination, and a contrasting reference to assistance with the transfer to another trustee, implies that the Club leadership did not understand the identity or attributes to be a condition of the agreement.

30 October 2023 – Mr Allen's e-mail to Messrs. Fletcher and Farquhar

[29] In an e-mail addressed by Mr Allen to Messrs. Fletcher and Farquhar, he said "we duly note the termination by mutual agreement, and we will discuss further with …

[Mr Farquhar …] in regards the next steps.". He then asked whether they had received advice regarding the successor trustee.

[30] I consider it of some note that the termination is what is said to be the subject of mutual agreement. Who or what would replace the defender as trustee is clearly of interest to the defender, but not said in that e-mail to be a part of what was mutually agreed.

30 November 2023 – Ms. Wilkinson's e-mail to Mr Fletcher

[31] Ms Wilkinson e-mailed Mr Fletcher, recalling that certain next steps discussed at an earlier video call, and "highlighted the main sections", which included that:

> "- Official termination notification from the Club is issued to Trustee … providing details of when the decision was made (with reference to the … Committee powers to do so), confirming that the notice period has been waived by joint agreement and providing details of Successor Trustee"

[32] Later on in the e-mail, Ms Wilkinson asked whether legal advice had been received by the Club leadership confirming the independence of the proposed trustee as required by the Club's constitution, and for a copy of any such advice, as well as details as to the "legal (or other professional) independent representation for the new Trustee."

[33] This latter comment would seem to reflect the belief of the trustee's directors that the trustee had some right or duty to assess the suitability its successor. But the only reference to "joint agreement" was as to the period of notice being waived; it was not said this was subject to any conditions imposed by the current trustee as to arrangements for the new trustee. Whatever right or duty the trustee had to approve of its successor, it was not said by Ms Wilkinson to originate from what was agreed on the video-call.

2 December 2023 – Mr Fletcher's letter to Ms Wilkinson

[34] By letter dated 2 December 2023 sent by e-mail, Mr Fletcher stated to Ms Wilkinson that:

> "I write to confirm that at the meeting held with you on 11 October 2023 it was jointly agreed that the 'Agreement' between yourselves and the Club Committee (on behalf of the Club) should be terminated without any notice period. You may regard the 2 December 2023, the date of this letter, as the official termination date.
>
> …
>
> You have been given details as to the transfer. The New Trustee is 'Club Los Claveles Trustee Company Limited'"

Subsequent correspondence

[35] On 6 December 2023, Ms Wilkinson stated in an e-mail to Mr Fletcher that the defender did not consider the proposals for a new trustee to be suitable, with a description of the attributes it considered necessary for such a trustee. The import of that e-mail was that the defender would not consent to termination of its appointment as trustee without notice.

[36] There continued to be further correspondence between the Club leadership and those acting for them, on the one hand, and the trustee, on the other, as to a successor, as well as certain other matters. But I do not consider that correspondence, occurring once clear differences had arisen about the implications of what was said at the meeting of 11 October 2023, to be of material evidential value. With every set of words exchanged and every week that passed, those communications represent less what was said and understood at the October meeting, and more the articulation of opposing standpoints or unsuccessful steps of conciliation. In particular, I do not consider the defender's charging of a fee for work some months later for bringing its role as trustee to an end, and the reduction of that

fee at the Club's request, to be evidentially significant. That need not show anything more than that both parties anticipated that the defender's role as trustee would be coming to an end. Inquiry with witnesses on the later correspondence and matters such as the fee resulted in additional disputes that added to the main controversy more than it helped to resolve it.

The testimony of the witnesses

[37] Before describing the written and oral testimony of the witnesses, I should note certain features of their written statements. The principal statement for each witness devoted a significant section to a *tour d'horizon* of certain aspects of Club and resort affairs, and developments after the video-call of 11 October 2023, with only fairly brief discussion of what was said at the meeting itself.

The Club leadership's testimony

[38] Written statements by Mr Farquhar and Mr Fletcher, the Club Chairman, are consistent with what was said in Mr Farquhar's contemporary e-mail, albeit the forensic impact of those statements was somewhat destroyed by the material terms of those statements being almost identical.

[39] In the following extract from their statements, I have underlined text in Mr Farquhar's statement but not in Mr Fletcher's statement, put in **bold** text in Mr Fletcher's statement but not in Mr Farquhar's, with wording in plain text common to both:

> "On 11 October 2023, Albert Fletcher **Walter Farquhar** and I had a Zoom call with Veranne Wilkinson and Chris Allen of Hutchinson. Veranne is the Managing Director of Hutchinson and Chris is a director **in relation to various matters pertaining to Los Claveles**. During that call, Chris said to us that they **(being Hutchinson)** realised that the only way they were going to sort out the voting right

> issue was if Hutchinson took legal action …. Veranne and Chris confirmed on the call that having taken legal advice, they were not prepared to litigate due to the risk involved and various insurance issues. However, Chris also said that he realised that legal action would be the only way to look after the best interests of the Club and that accordingly, Hutchinson was willing to transfer the trusteeship to a company or individual of the Committee's choosing. Albert agreed to that proposal on behalf of the Committee. **The termination was agreed during the call.**"

[40] This feature of the statements was understandably the object of much questioning by counsel for the defender. Mr Farquhar testified that he had composed the language in his statement from notes he took at the meeting. I think it plausible he would have taken notes anticipating informing others about the meeting as he did by e-mail sent later that day. By contrast, Mr Fletcher, after some hesitation, said he understood that a lawyer (he referred to counsel but that is obviously wrong) had a hand in composing his statement.

[41] It seems likely that Mr Farquhar's statement was worked on first, and that it was based on his account put in his own words, and that a solicitor composed a statement for Mr Fletcher to review based in part on what had been composed with or by Mr Farquhar. I say that because of: (i) Mr Farquhar's oral testimony; (ii) unlike Mr Fletcher it is known that Mr Farquhar committed his thoughts on the meeting to an e-mail that same evening; and, (iii) some of the wording particular to Mr Fletcher's statement has the character of additions added to enhance clarity, rather than redundant phrases deleted for brevity.

[42] If, as I surmise, one witness's evidence has been used, in places, as the draft text for another's statement, that has resulted in effect in their evidence being co-ordinated. It is unacceptable that the statements of these different witnesses have come to be aligned in this manner. Much greater care ought to have been exercised by the solicitors for the pursuers in working with the witnesses on the terms of their statements. But I do not consider it likely that either of the witnesses have colluded or that one has deliberately copied the statement of the other. Nor, should I say, do I detect any mendacity by solicitors for the pursuers.

Otherwise, the language in the witness's statements would not have so transparently a common origin. This seems rather to be an instance of gross carelessness rather than conspiracy.

[43] There was nothing in the oral evidence of these witnesses that was inconsistent or materially added to or detracted from their statements. Both said that the agreement that the trustee would resign was not subject to any conditions. That is consistent with the absence of any clear reference to conditions in the e-mails sent between attendees that I have already discussed.

The trustee's directors' testimony

[44] In Ms Wilkinson's statement, it was said that:

> "We discussed the process of appointment of a replacement trustee in broad terms and agreed that his would be done by mutual consent. Mr Fletcher said he would contact BTO about their taking over the trusteeship."

I note once again the ambiguity in Ms Wilkinson's statement, as with her e-mail of 16 October 2023, as to what was mutually being consented to.

[45] In examination-in-chief, Ms Wilkinson set out her understanding of the pursuers' case, that the defender agreed to transfer the trusteeship to anyone of their choosing without the defender's input. She then said the pursuer's case was just something that would not happen and had not happened in the history of trustee companies, which had fiduciary duties which extended to ensuring a successor would meet its fiduciary duties. I understood her position to be that it was implausible that the defender would knowingly agree to this. But her evidence in written and oral form seemed to stop short of asserting that any explicit comment was made at the meeting to the effect that the Club did not have a free choice, or a choice subject to the defender's approval.

[46] In cross-examination, Ms Wilkinson testified that it was said at the video-call that a legal firm would be ideal as a suitable replacement as trustee. She could not recall the details of what was said on this point beyond that. She accepted the proposition, as far as she could recall, that it was said the best way forward was for the defender to resign as trustee, with her probably or possibly saying that the best replacement would be a law firm. She did not recall Mr Allen using particular words referring to the trustee potentially being an individual or a company; she thought she would have put any such reference in her notes of the meeting.

[47] Mr Allen's written statement said of the meeting: "On the call we agreed to resign on the basis it was mutual. … We had said we would allow the transfer to go ahead but that had to be with a suitable replacement." (paragraph 23). He referred also to discussion about setting up a limited liability partnership to act as trustee, or approaching BTO solicitors (paragraph 24). In cross-examination, he was asked if he told Messrs. Fletcher and Farquhar that they could choose a new trustee, which could be a new individual or company. Mr Allen said he could not recall exactly what was said. When asked in various ways whether the defender considered it had the right to approve or vet a proposed new trustee, Mr Allen demurred from that language. He said "right" would not be the correct term, he would not use the word "vet" either; it was rather that the trustee "had to feel comfortable" with the replacement proposed.

Assessment

[48] My conclusions on what was said at the meeting derive primarily from the documents I have set out earlier. The additional value of the testimony, written and oral, is limited. To the extent there is any real variance between what the witnesses said in these

proceedings, and what I infer from consideration of their correspondence, I place much more significance on what was said (and not said) in writing in the days and weeks immediately following the meeting.

[49] I am not satisfied that the pursuers have proven that Mr Allen made some comment to the effect that the Club could chose a company or individual as a trustee. Nothing explicitly to this effect was set out in Mr Farquhar's e-mail to his colleagues in the Club leadership on the day of the meeting. The first mention of this appears in the troublingly similar paragraphs in Mr Farquhar's and Mr Fletcher's statements written for the proof.

[50] On the other hand, I do not accept Mr Allen's written testimony that the change in trustee was subject to the qualification that there "had to be … a suitable replacement". I accept there was discussion as to whom a suitable replacement might be. I do not accept that the defender's assessment of suitability was said at the meeting to be a *sine qua non* of the defender resigning. Nothing like this featured explicitly as a condition or qualification to the agreement as described in the correspondence in the first few weeks after the meeting. As I have said, nothing like that was referred to by Mr Farquhar to his committee colleagues in the e-mail sent in the evening after the video call. No more than a preference was noted in Ms Wilkinson as to the replacement in her e-mail a few days later to Mr Allen. The diffidence of Mr Allen in court in referring to a "right" to "vet" fits more readily with this never being an explicit aspect of what was agreed on 11 October 2023.

[51] It was anticipated that BTO solicitors could be the successor trustee. It might be there was a preference expressed at the meeting by one or both parties that a law firm take on the role of trustee, or something with similar standing. There was nothing more than that.

[52] The consensus at the video-call was that the defender's role as trustee should end. Given that either party could bring about an end to that appointment on the requisite notice, the consensus must have been that that the defender's role as trustee should be brought to an end *before the required notice expired*. Otherwise, there was no need to reach a common view; either party could simply impose their will by serving notice. That is also consistent with the explicit terms of what was said by Ms Wilkinson on 30 November and Mr Fletcher on 2 December 2023.

[53] But the termination was not immediate. It was *to terminate the appointment as trustee* (future tense), it was not that *the appointment is terminated* (present tense). The agreement to terminate did not in itself terminate the trusteeship. The Club leadership could not have intended this where no replacement trustee had been decided upon still less consented to appointment. The behaviour of *both* parties subsequently in conducting discussions about a replacement is consistent with this.

[54] To some extent, bringing about the end of the trust appointment as soon as feasible would bring advantages to both parties. The perils and disadvantages to a trustee of continuing its duties where significant differences have arisen between it and the representatives of the beneficiaries are obvious. A right not to be locked into an acrimonious trusteeship till August 2024 would be something of real value to the defender. But this was understood by the Club leadership as, essentially, a concession by the Trustee to waive its period of notice. The option of bringing an end to the trustee appointment immediately was understood by the Club leadership as a benefit to them, which they could take or leave. That is consistent with the Club leadership seeking approval for this step by the membership at an annual general meeting. I do not know that it occurred to anyone, in the Club leadership or on the trustee's board, whether conversely the trustee could insist on

immediate resignation. If someone had raised the question during the video-call, I think the only answer anyone would have given (whether they spoke for Club or trustee) is that the defender could not properly insist on resigning, at least not until the Club leadership had a reasonable opportunity to secure a replacement trustee.

What was agreed was not, viewed objectively, intended to be legally binding

[55] I proceed on the basis, as counsel for the pursuer submitted, that:

> "whether parties have concluded a contract and, if so, what they have agreed, falls to be determined objectively on the basis of what they have said and done rather than be reference to their subjective intentions" (pursuer's written submissions, paragraph 9(i)).

[56] I note that the agreement in this case has been reached in what is for the defender a commercial setting, between parties performing legal duties to pursue or protect the private law interests of others. In that context, *ceteris paribus*, it is more likely to entail an intent to create legal obligations than one entered in, for example, a social setting. Examination of the particular facts, though, is essential rather than the application of some presumption or heuristic (see *Dawson International plc* v *Coats Paton plc* 1993 SLT 80, Lord Prosser at 95K/L).

The agreement was an option for the Club only; not the defender

[57] The Club leadership considered that they ought not to proceed with ending the defender's role as trustee without the approval of the membership. Contrary to the submission of counsel for the defender, that is not, in my view, inconsistent with a binding agreement having been reached. It is consistent with the Club having been given an option to bring an end to the defender's role without notice, which they could take or leave.

[58] Counsel for the pursuer sought to address the Club's leadership having sought the members' approval in a different way. He submitted instead that the Club leadership was mistaken in considering that they could unilaterally resile from the agreement of 11 October 2023 if, for instance, the membership had disapproved of removing the defender as trustee. But, counsel submitted, the leadership's subjective misunderstanding could not affect the objective meaning of what had been agreed.

[59] I do not consider, though, that this is the objective meaning of what was said. A disinterested but well-informed bystander at the meeting of 11 October 2023, cognisant of all background matters that were common knowledge between the Club leadership and the trustee's directors, would not derive this meaning from what was said. I do not think that the objective meaning was that both the pursuers and the defender were being given an option to, more or less, bring about an immediate end to the defender's role as trustee. That could have put the pursuers in immense difficulty – were the defender to insist on urgently resigning – if they could not immediately identify an able, willing and appropriate successor. They might have been driven to appoint the first volunteer who could be found to preserve the legal and practical continuation of the trust or beg the defender to remain in office for some time. Part of the relevant context was the discussion at the very same meeting indicating that a successor trustee had yet to be settled on. A legally binding agreement to shorten the notice period is plausible; to dispense with it altogether leaving the Club at the mercy of the defender is not.

[60] I do not accept counsel for the defender's submission that part of the relevant background was that the trustee would require to be satisfied, as part of its duties as such, that it was appropriate for it to resign and that its replacement would be fit and proper for that role. The trust deed contains an explicit right for the defender to quit on the requisite

notice. There is no qualification upon that right of there being a suitable replacement. References in the deed to the Committee selecting a replacement trustee prevent any such term being implied. Of course, the defender could be removed by the Club unilaterally as trustee from the anniversary of the deed onwards on 6 months' notice without the defender having any ability to influence what might replace it. I do not consider the trustee would have had an implied duty not to agree to waiver of notice where the replacement was not suitable; that could only delay rather than avoid an inappropriate trustee being appointed. In any event, the trustee is absolved in the deed upon its retiral of all claims apart from fraud or appropriation of property. The defender had no well-founded fear of legal consequences from the choice of what might replace it.

[61] There is, therefore, nothing implausible or in defiance of commercial sense in the defender agreeing to its appointment as trustee being terminated without notice. That directors of the defender evidently consider it incumbent upon them to satisfy themselves as to succession arrangements — even if, as Ms Wilkinson said in correspondence and in her testimony, that this was some form of industry standard — is irrelevant as there is no legal foundation for this. This understanding was not one shared by the pursuers; it is not one that could reasonably be imputed to the pursuers, as it was at odds with what the trust deed provided for.

Lack of formality

[62] Counsel for the defender submitted that that the defender's directors at the video-call only:

> "expressed a willingness to resign, subject to someone suitable taking on its duties as trustee, that was a statement of future intention and perhaps even a mutual

> understanding of the future course of events" (Counsel for defender's written submission, paragraph 24).

[63] I consider that comes close to the correct answer. I would hold rather that the objective meaning of what was said on the defender's behalf at the video-call was that the directors expressed an unqualified willingness for the defender to resign, that this expression of willingness was a statement of future intention, and together with the Club constituted a mutual understanding of the future course of events. The defender's directors' subjective intention was not to enter a legally binding undertaking to resign, without notice, upon being called upon to do so. Crucially, that was not the objective meaning of what they said; a disinterested but appropriately informed bystander would not have taken them to mean that.

[64] There was simply a complete lack of any formality for an agreement of such significance as would be expected, if that agreement was to be legally binding.

[65] It would be remarkable that such an agreement would be made orally, if it was intended to be legally binding. Serious and substantial undertakings can be entered into by a spoken exchange of words. But *ceteris paribus*, an agreement by spoken word is less likely to be intended to create legal obligations than one in writing. When such oral contracts occur there is often a formal context leading up to an occasion where such an exchange is to be expected, with steps shortly after to confirm what is agreed. For example, many a valuable agreement settling litigation has been reached between two counsel whilst pacing together up and down Parliament Hall. But that does not arise out of nowhere, it follows the formal recording of parties' different positions in the written pleadings, it occurs in propitious circumstances such as the imminence of the proof, and the agreement is

invariably confirmed immediately after in some way, such as by a statement in court or correspondence between parties.

[66] In this case there was no agenda for the video call. There was no written proposal in advance of the video-call that the defender resign immediately as trustee or, more realistically, resign immediately when called upon to do so. There was no pressing need to make a legally-binding decision that day on the matter. There was no formal record of the meeting. There was no exchange of writing shortly after the meeting to confirm what had been said. No one had seen fit to make any arrangements to record the proceedings in any way or for confirmation of the outcome.

[67] The absence of any significant formality to what is supposed to be a contract is astonishing given its effect on relations characterised by formalities and solemnities, documentary and legal. The agreement concerned the termination of a relationship brought about by a detailed deed of trust, with a Club governed by a written constitution, concerning the ownership of companies set up to hold the registered title of land. That a legally binding agreement on such a matter would be reached, even if the Club and the resort had been running harmoniously, on an exchange of spoken words alone is implausible. It is especially unlikely that the trustee's directors would be content to give such a legally enforceable undertaking, and the Club's leadership would be content to accept it, except in writing, given the significant long-standing differences that have arisen with the Club and the resort. In this respect, I think it of some significance that the defender took up its role as trustee only when the previous trustee was compelled in litigation to relinquish that position. This is the quintessential set of circumstance where one would insist on any legally-binding agreement to be constituted in writing or at the very least for arrangements to be made for that agreement to be confirmed in writing shortly thereafter.

Lack of interest for the defender

[68] I also consider it to be of some significance that on my construction of what the agreement consisted of, the defender had nothing to gain from legally binding and obliging itself to quit the trusteeship upon being called upon to do so. On my analysis, there was no obligation assumed by the Club to the trustee on 11 October 2023. Nor can I conceive of any benefit the defender would derive from making a commitment to the Club to end the defender's role as trustee if and when the Club chose without notice. Of course, a person can enter into a gratuitous contract. But in assessing objectively whether the parties intended to be legally bound, it is of some significance that one of the parties would seemingly have nothing to gain from it.

Conclusion

[69] Accordingly, I hold that what was said by the parties during the video-call, objectively considered, did not signify an intention to be legally bound.

Matters outwith the scope of this litigation

[70] It was not the pursuers' pleaded case, and I was not asked in submissions to determine, whether an agreement or undertaking by the defender to resign as trustee was constituted by conduct or correspondence since 11 October 2023. Such later matters were relied on only as evidence as to what was said or meant during the video-call.

[71] Similarly, it was not part of the pursuer's case, nor was I asked to determine, whether the letter of 2 December 2023, albeit stated to be immediately effective, could constitute the giving of notice such that, upon the anniversary of the deed of trust (that being more than

6 months away), the defender's role as trustee would come to an end. It is perhaps an irony that if notification of termination upon the requisite notice had been given, either at the video-call or in the letter of 2 December 2023, the Club could have removed the defender unconditionally and unilaterally from its role as trustee on 13 August 2024, before proof in this action took place. It is perhaps a further irony that, on my analysis, the defender has nothing to fear in terms of legal liability from what might replace it as trustee and had no reason to withhold its consent to removal.