



OUTER HOUSE, COURT OF SESSION

[2025] CSOH 79

P319/25

OPINION OF LORD BRAID

In the Note by

ALEXANDER LAMB

Noter

for

special powers

Petitioner: Colquhoun; Lindsays LLP

Respondent: Macleod; Shepherd and Wedderburn LLP

19 August 2025

Introduction

[1] The Old Waughton Discretionary Trust is a discretionary trust established by the late Ian James Wilson, who died on 1 April 2018, the principal asset of which is Old Waughton Farm, which Mr Wilson farmed and which was disposed to the trust by virtue of a legacy in his will. The trustees are Christine Wilson and Alexander Hodge (the respondent), who are, respectively, the widow and a friend of Mr Wilson. The beneficiaries of the trust are (i) Mrs Wilson, (ii) any other individual selected by the trustees, and (iii) any charitable or educational organisation selected by the trustees. No such selection has been made. Mr Wilson signed a letter of wishes, addressed to the trustees, setting out his desires for

their administration of the trust, in which he expressed the hope that the trustees would make the farm available to a young person interest in making a career in farming.

[2] The relationship between Mrs Wilson and the respondent has broken down irretrievably and, on 13 March 2019, on a petition presented to this court by Mrs Wilson, the noter was appointed as the judicial factor on the assets of the trust, being granted “the usual powers”. The court did not sequester the estate into the noter’s hands, and consequently Mrs Wilson and the respondent technically remain in office as trustees.

[3] The noter entered into administration of the trust. He now wishes to wind it up in favour of the sole discretionary beneficiary (namely, Mrs Wilson), being of the view that there is no sensible alternative course of action. He has identified a purchaser for the farm. He considers that the proposal accords with the purposes of the trust, and also (at least partially) with Mr Wilson’s hopes for the farm. The Accountant of Court has agreed with the proposal, and consequently the present note, seeking special powers to sell the farm and to authorise the noter to appoint that the whole trust fund shall be held absolutely for the benefit of Mrs Wilson, was presented to the court. Orders for service were sought on, *inter alia* the trustees - viz, Mrs Wilson and the respondent. Perhaps not surprisingly, Mrs Wilson has not lodged answers. The respondent, however, disagrees with the noter’s proposal and has lodged answers, in which he avers that the trust purpose remains capable of being fulfilled, that he remains willing to select a beneficiary and that he has identified a suitable person to be so selected. He further avers that the sole purpose of lodging answers is to provide information to be considered by the court in considering the note. The sole issue for determination at this stage is whether the respondent has title and interest to maintain that position. The case called before me for a debate on that issue.

Submissions

Noter

[4] Counsel for the noter submitted that the respondent lacked both title and interest to oppose the note, and that his answers should be repelled. If the respondent wished to have a say in the management of the trust, his remedy was to seek the recall of the noter's appointment. Underlying counsel's submission were two fundamental points. The first was that the trustees had been superseded by the appointment of a judicial factor, who had been appointed in their place to manage the trust estate. It was nothing to the point that the trust estate had not been sequestrated. *Shedden and others* 1867 5M 955, relied on by the respondent, did not address the fundamental question of who held the current responsibility for management of the trust. The appointment of the noter as judicial factor removed from the trustees their responsibility and title to make decisions regarding the trust. The noter had to answer only to the Accountant of the Court, and the court, and had no duty or need to account to the trustees for his actions and decisions. Second, to the extent that the trustees retained the power to do anything, they must act together: (the shortly-to-be-repealed) section 3(c) of the Trusts (Scotland) Act 1921, which provides that a provision that a majority of the trustees shall be a quorum. A single trustee did not have the power to litigate on behalf of the trust, nor to defend proceedings against the trust. Even if the trustees were jointly opposed to the note, the appropriate remedy would still be to petition for recall of the noter's appointment. As regards interest, the same points were equally relevant. Not only did the respondent have no personal interest in the outcome of the note, the only dispute was a managerial one over to whom the trust assets should be paid. The only person with an obvious interest in the outcome of the note was Mrs Wilson. The respondent did not oppose the winding up of the trust; he merely disputed to whom

the farm should be made over. That was an essentially managerial decision, in which the court should not become involved, and the answers raised a point of only academic interest. Although the noter accepted that he would ultimately have to persuade the court that his proposal was appropriate, that did not give licence to anyone who happened to have a view on the matter to appear and be heard.

Respondent

[5] Counsel for the respondent submitted that in relation to title, the noter's submissions failed to recognise that the trustees had not been removed, nor had the estate been sequestrated. Even if the estate had been sequestrated, the effect of that would simply have been to take the estate out of the trustees' hands, not to effect their removal: *Morris v Bain* (1858) 20 D 716, at 718, per the Lord President (Colonsay). There therefore remained a possibility that the factory could be recalled, in which event the administration of the estate would remain with the trustees: *Shedden and others*, above. The noter's appointment did not have the effect of negating the respondent's continuing title and interest: *Morison v Gowans* (1873) 1 R 116. It followed that the respondent, as a continuing trustee, had a title to oppose the petition. Although it was accepted that generally trustees required to act by unanimity, there was a distinction between an action framed against the trust estate and an action affecting the trustees. That distinction was exemplified by the situation where trustees were called upon to account for their intromissions, in which it would be fallacious to assert that an individual trustee could elide a duty to account by founding upon a lack of cooperation with the other trustee. It would be illogical to hold that an individual trustee continued to have certain duties, but to have no title for other purposes. Further, the judicial factor was himself a trustee, which meant that, coupled with the respondent's office as

trustee remaining extant, there were trustees who, by a majority, could administer the trust estate. Finally, any dispute as to the respondent's title was made good by the fact that the note had been intimated to him, for his interest, from which it may be presumed that the noter considered that he had a continuing title and interest.

[6] As regards interest, that arose on account of the respondent retaining an ongoing title as trustee. That he had no patrimonial interest was irrelevant. It was in any event appropriate that there be a contradictor: *cf Carmichael's Judicial Factor v Accountant of Court* 1971 SC 295.

Decision

[7] As Lord Dunedin put it in *D & J Nicol v Dundee Harbour Trustees* 1915 SC (HL) 7, at 12:

"By the law of Scotland a litigant, and in particular a pursuer, must always qualify title and interest. Though the phrase 'title to sue' has been a heading under which cases have been collected from at least the time of Morison's Dictionary and Brown's Synopsis, I am not aware that anyone of authority has risked a definition of what constitutes title to sue. I am not disposed to do so, but I think it may fairly be said that for a person to have such title he must be a party (using the word in its widest sense) to some legal relation which gives him some right which the person against whom he raises the action either infringes or denies"

[8] Although it is not clear what should be taken from Lord Dunedin's reference to a pursuer "in particular", (which perhaps suggests a laxer test in relation to defenders than pursuers), it is generally accepted that a defender, or a person seeking to enter process as an interested party must likewise have a title to do so: see, for example, *Court of Session Practice*, paragraph C [71]. That said, where a person is called as a defender, they have a right to lodge defences and to be heard on them: *McLauchlan v McLauchlan's Trustees* 1941 SLT 43,

Lord Robertson at 44 (without prejudice to the pursuer's entitlement to argue that the defender has no interest to maintain the proposed defence).

[9] As Lord Dunedin also put it in *Summerlee Iron Co Ltd v Lindsay* 1907 SC 1161, at 1165, title and interest, "although they are different, often very much run into each other", but interest generally connotes some benefit from asserting the right with which the action is concerned or from preventing its infringement; or, at least, that the action (or the defence to it) has some intelligible purpose to serve and that some legal right of the party will be prejudiced: *Agnew v Laughlan* 1948 SC 656, Lord Mackintosh at 659.

[10] Applying that to the present case, and considering first the respondent's title, the short answer to the noter's submission is that he remains in office as a trustee. Whether or not sequestration of the estate would have had the effect of removing the trustees (*Barry v Thorburn* (1847) 9 D 917, per Lord President (Boyle) at 919, suggests that it would; *Morris v Bain*, above, suggests otherwise), the fact of the matter is that the estate was not sequestrated, and there remains at least a possibility that the judicial factory could be recalled and the trust assets restored to the trustees. The noter, as factor, is himself a trustee for the purposes of the Trusts Acts (*Tennent's Judicial Factor v Tennent* 1954 SC 215, Lord President (Cooper) at 225), and, applying Lord Dunedin's *dictum*, in a wide sense the respondent is therefore party to some legal relationship with the noter in that they are both trustees on the same trust estate, albeit, for the time being at any rate, the powers of the respondent and Mrs Wilson have been superseded by those of the noter. As regards the need for unanimity, it does not follow from the fact that trustees must act by a majority (or, where there are only two, unanimously) in bringing or defending proceedings by or against a trust estate, that a single trustee does not have title to bring certain proceedings concerning the trust alone, (or indeed to be sued) without the involvement of the other trustees. The

most obvious example is, perhaps, a petition to appoint a judicial factor, as occurred in the present case, the noter having been appointed on the sole petition of Mrs Wilson. Another is that given by counsel for the defender, where one trustee is sued for an accounting. Counsel for the noter at first seemed to accept that another example might be a petition for recall of the judicial factory and removal of the noter as judicial factor, which he initially submitted was the remedy which the respondent ought to pursue, although when he thought through the implications of that argument, he appeared to depart from that position, submitting that a single trustee would have title to petition for recall only where he sought along with it the appointment of a third trustee to break the deadlock which had led to the factor's appointment in the first place.

[11] For all these reasons I hold that the respondent does have a title to oppose the petition. For what it is worth, I also observe, although I am conscious that we are here dealing with a note rather than a summons and that the respondent has not been called as a defender as such, that the schedule to the note sought service upon him "for any interest which he has therein", which makes it difficult for the noter now to assert that the respondent has no title (as distinct from interest) to lodge answers. The true question is whether he has any interest in maintaining his opposition, to which I now turn.

[12] As counsel for the noter recognised in his oral submission, there is no need for a trustee to demonstrate a personal patrimonial interest in order to have an interest to pursue, or defend, a claim relating to the trust. However, the answers must serve some intelligible purpose, be that the furtherance of the respondent's fiduciary duty to the trust or otherwise.

[13] In considering whether a party has an interest, it seems to me that there is a crossover between that issue, and that of relevancy, in that averments which do not demonstrate an interest may equally be held to be irrelevant. At times it was difficult to

discern whether the noter's argument was properly one about lack of interest or one about lack of relevancy. However, the noter's position is that he wishes to wind the trust up and make over the entire trust estate to the sole beneficiary (who also happens to be the other trustee), asserting that there is no sensible alternative. The accountant of court supports that position. The only person who holds a view opposed to that position who is in a position to act as contradictor is the respondent, who remains a trustee. He avers that Mr Wilson's letter of wishes requires to be afforded weight and that it can be given effect to by the selection of an additional beneficiary, whom he has identified and that an alternative trustee could be appointed by the court, in order to break the deadlock which existed between the trustees. In circumstances where the judicial factor was appointed by Mrs Wilson and she is the person who will benefit should the note be granted it seems to me appropriate that there should be a contradictor who is entitled to argue that, contrary to what is asserted by the noter, there is an alternative course of action to that proposed by the noter; and that the respondent, as the other trustee, does have an interest to present an argument (whether it is relevant or not is a question best deferred to another day) that the letter of wishes should be afforded weight. By no stretch of the imagination can he be described as just "anyone" who happens to have a view. Accordingly, the respondent has both title and interest to insist in his answers. (If the petition is nonetheless granted, and the answers have resulted in a prolongation of the procedure which there would otherwise have been, then he may be found liable in expenses, notwithstanding the suggestion in his written note of argument that he should be indemnified by the notier, but that, too, is a question for another day.)

Disposal

[14] For these reasons, I will refuse the noter's motion that I repel the answers, reserving meantime the question of expenses of the hearing before me. The parties agreed that in that event, I should fix a period of mutual adjustment of 28 days, which I shall do. I shall decline the petitioner's suggestion that I order further service of the note, and answers, on Mrs Wilson. She has had the opportunity to lodge answers and has not taken that opportunity, in the (presumed) knowledge that Mr Hodge might do so. To afford her the further opportunity to lodge answers, on a further period of notice, would be an unusual step and would risk the procedure becoming unnecessarily unwieldy. In any event, it is difficult to see what she could add to the noter's position. Should she become aware of the fact that Mr Hodge has lodged answers and seek herself to lodge answers late, that can be dealt with as and when it arises.