OUTER HOUSE, COURT OF SESSION

[2026] CSOH 73

P319/25

OPINION OF LORD RICHARDSON

In the cause

ALEXANDER LAMB

as judicial factor on the assets of the trust known as the Old Waughton Discretionary Trust

Noter

for

Special Powers

Noter: Colquhoun; Lindsays LLP
Respondent: R MacLeod; Shepherd and Wedderburn LLP

4 August 2026

Introduction

[1] The background to this case has been neatly summarised by Lord Braid in his opinion having heard the parties at debate ([2025] CSOH 79):

> "[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 disponed 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 interested 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 sequestrate 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."

[2] In the event, Lord Braid refused the noter's motion to repel the respondent's answers and allowed the parties a proof, and the case called before me on that basis.

The evidence

Joint minute

[3] The parties had entered into a joint minute of agreement. In terms of the joint minute, the parties agreed the background which I have set out above together with the terms of various documents and other matters as follows.

The trust deed

[4] Mr Wilson had instructed Paris Steele, solicitors, to frame his will and the associated trust deed. He had met with Gordon Symon, solicitor, in respect of his testamentary plans.

[5] For present purposes, the trust deed provided as follows:

> "I, IAN JAMES WILSON, residing at Old Waughton Farm, East Linton, East Lothian wishing to make a Trust (to be known as 'The Old Waughton Discretionary Trust') under the terms hereinafter set forth DO HEREBY appoint my wife MRS CHRISTINE HELEN WILSON… and my friend ALEXANDER HODGE… to be the original Trustees of the Trust (who along with any other persons who may be appointed or assumed are referred to as 'my Trustees');… and I direct my Trustees to hold the Trust Fund for the benefit of such one or more of (A) my wife the said Mrs Christine Helen Wilson, (B) any other individual who may be selected by my Trustees, and (C) any charitable or educational body or organisation selected by my Trustees, in such shares or proportions and subject to such conditions as to vesting or otherwise as they may at any time in their absolute discretion determine. …"

The letter of wishes

[6] Along with preparing his will and the trust deed, Mr Wilson had instructed that a letter of wishes be drafted. He had signed all of these documents on the same date of 12 July 2016. For present purposes, the letter of wishes provides as follows:

> "I IAN JAMES WILSON… considering that I am making a Will whereby I bequeath the farm at Old Waughton, East Linton to the Old Waughton Discretionary Trust, and having appointed my wife MRS CHRISTINE HELEN WILSON and my friend ALEXANDER HODGE to be the Trustees thereof, do hereby set forth the following expression of wishes for their assistance:
>
> 1. I wish my brother in law Bobby to be allowed to keep his storage container at Old Waughton Farm for as long as he shall wish without payment of rent, or in the event that the farm is being sold that suitable other arrangements are made for him.
> 2. I wish Ian Purves to continue to have the use of the shed that he currently uses at Old Waughton for as long as he shall wish, and again in the event of the farm being sold, I hope that suitable alternative arrangements can be made for him.
> 3. I wish my Trustees to ensure that suitable financial provision is made for my wife Christine and that she should be free to reside in the house at Old Waughton for as long as she shall wish.

4. It has always been my hope that some young person, either within the family or outside it, will show an interest in farming and will wish to make a career of it, and that they should be afforded the opportunity of farming at Old Waughton, and I leave it to my Trustees to decide, if such a person is found, whether they should be allowed to farm on a rent free basis, whether they should be granted a lease of the farm, or whether indeed the farm should be transferred to them.
5. If no such person can be found, and my Trustees do not wish themselves or through a Factor to continue running the farm, then I would hope that a suitable charity or educational institute such as the University of Edinburgh might be found who would be interested in taking over the farm.
6. Whatever course of action is followed, it is my earnest wish that the farm should remain as a single unit and should not be incorporated within neighbouring farms nor should it be converted to other uses; and
7. In all matters I trust implicitly the judgement of my Trustees, and whilst these are my wishes, I fully appreciate that it may not be possible to adhere to all or any of them, and if that should be the case then my Trustees should act accordingly."

The administration of the trust and the appointment of the noter

[7] Following Mr Wilson's death on 1 April 2018, the trustees commenced the administration of his estate but they were unable to complete the administration and assign the farm to the trust. No individuals, or charitable or educational organisations have been selected by the trustees. Accordingly, at present, Mrs Wilson is the sole beneficiary of the trust.

[8] The appointment of the noter on 13 March 2019 was brought about as a result of a total breakdown in relations between the trustees. Following his appointment, the noter proceeded to administer Mr Wilson's estate. That process is now largely complete.

[9] In June 2019, the noter obtained a report and valuation from Savills, the surveyors, which valued the farm at £950,000. In March 2020, the noter obtained a further report from Chrisopher Hadley of Savills on the future of the farm. Mr Hadley provided advice to the noter on how the farm might be worked profitably. He gave his opinion on the level of

capital investment which would be required in order to maintain the farm in good condition. He also expressed a view as to the level of experience which would be required to work the farm effectively.

[10] In August 2020, the noter was approached by Linzi Jamieson, Mr Wilson's niece. Ms Jamieson was a beneficiary under Mr Wilson's will in terms of which she received a legacy of £10,000. Ms Jamieson wrote to express her interest in taking on the farm. She noted that she would be a new entrant into agriculture with little prior experience but she felt that taking on the farm would give her the opportunity to continue the family farming tradition. In response, the noter, having taken advice from Savills, wrote back to Ms Jamieson asking for more detail of (i) her proposals for working the farm; (ii) relevant training or experience; (iii) her capital resources; and (iv) detailed budgets and business plans. Following a subsequent exchange of emails between Ms Jamieson's lawyers and the noter's firm, no further information was provided by Ms Jamieson. In 2025, Ms Jamieson expressed renewed interest in taking on the farm to the respondent.

[11] In September 2022, the noter wrote to a number of charitable and educational institutions together with other bodies including the Princes Trust, MacMillan Cancer Support, RHASS, NFU Scotland, the James Hutton Institute and the Scottish Rural College to enquire whether any had an interest in taking on the farm. No response was received to these enquiries.

[12] The noter proposes to sell the farm to David Leslie for full value. Mr Leslie is a farmer with a wife and family. Mr Leslie has provided the noter with a business plan. In June 2024, the noter lodged a report with the Accountant of Court setting out the circumstances of the trust and the noter's reasons for seeking the special powers sought in the present proceedings. The Accountant of Court issued an opinion dated 28 October 2024

to the effect that, in all the circumstances, it would be prudent and in the interest of the estate and trust to grant the noter the special powers sought.

Witness evidence

[13] I also heard evidence from the following witnesses.

The noter

[14] Mr Lamb gave evidence by reference to an affidavit which he adopted. He set out his understanding of the background to his appointment and, in particular, the breakdown in relations between Mrs Wilson and the respondent. The noter understood that, before Mrs Wilson had commenced proceedings to appoint him, there had been discussions between her and the respondent about appointing a further trustee. However, these discussions had been unsuccessful with the trustees being unable to agree. In advance of his appointment, the noter was told that relations between the trustees had irretrievably broken down. During the period of the judicial factory, the noter considered that relations between the trustees had not improved and may, in fact, have worsened. So far as the noter was aware, there had been little if any communication between them directly and only limited correspondence between their respective solicitors.

[15] After the noter had intimated his intention to raise the present proceedings in June 2024, he had received no formal response from the respondent. However, more recently the respondent's solicitor advised the noter that the respondent was willing to co-operate with Mrs Wilson. The noter was very surprised by this apparent change of heart by the respondent. However, in the event, so far as the noter was concerned, no progress had

been made by either of the trustees towards reaching an agreement. It appeared to the noter that, in fact, the situation remained as it had been when he was appointed.

[16] The noter explained the background to his decision to raise the present proceedings. The judicial factory had been ongoing for around 6 years. The trust's only ongoing purpose was to benefit the beneficiaries. At present, there was only one identified beneficiary being Mrs Wilson. The noter had been unable to find either an individual or an organisation to take on the farm in accordance with the letter of wishes. The noter had considered either leasing out the farm or employing someone to run the farm on behalf of the trust. Having taken advice from Savills, the noter was of the view that, given the significant costs both of running the farm and continuing the judicial factory, neither of these options was likely to be in the best interests of the trust. In this regard, the noter had in mind Mr Wilson's desire that the trustees ensure that suitable financial provision be made for Mrs Wilson. Fundamentally, it was not in the interest of the trust estate for the farm to remain in limbo being administered by the noter.

[17] Having considered a number of options, the noter ultimately formed the view that the farm should be sold. He had received an offer from Mr Leslie who had also prepared a business plan. Mr Leslie had been introduced to the noter by Mrs Wilson. Mr Leslie was currently employed by a local farming enterprise, W&R Logan. W&R Logan was currently renting the farm's land. In the business plan, Mr Leslie set out his intention to continue to operate the farm as a single unit. At the outset, Mr Leslie outlined that while he and his wife were starting up, they would continue the current relationship with W&R Logan.

[18] Having received the offer, the noter again took advice from Savills who considered that the offer was a good one. Accordingly, thereafter, the noter had prepared a report to the Accountant of Court and, thereafter, raised the present proceedings.

[19] Overall, having considered the letter of wishes, the noter had reached the view that it would be impossible to fulfil every wish of Mr Wilson. Apart from anything else, the letter set out various alternatives. In the circumstances, the noter considered that the best he could do was to try and fulfil as much of the letter as possible. He was of the view that accepting Mr Leslie's offer would achieve this. The farm would remain as a single unit and would be farmed by a young person with an interest in farming who wanted to make a career out of it. Financial provision would also be ensured for Mrs Wilson.

[20] It was put to the noter in cross-examination that Mr Leslie was actually in his forties or fifties. The noter was not aware of his precise age. However, he pointed out that Mr Leslie had a young family with both of his two children being at school.

The respondent

[21] The respondent explained that he had been a farmer all of his life. He had also known Mr Wilson since they were both children. They had been very close. He had known Mr Wilson since the latter's family had been tenants at Old Waughton and then, when the opportunity presented itself, bought the farm.

[22] The respondent explained that Mr Wilson had been very close to his nephew, Niall Anderson. So far as the respondent knew, he had wanted Niall to inherit the farm. Unfortunately, Niall had died of cancer in or around 2011.

[23] The respondent also gave evidence about the background to the signing of the trust deed and letter of wishes by Mr Wilson. It was his understanding that Mr Wilson had wanted to make financial provision for Mrs Wilson and also, if possible, to find a new entrant to take on the farm.

[24] The respondent had met Mr Leslie and was of the view that he was well on in his forties. So far as the respondent was concerned, Mr Leslie could not be described as a young man and was not a new entrant to farming. On this basis, the respondent did not think that selling the farm to Mr Leslie was consistent with the letter of wishes and, in particular, paragraph 4.

[25] The respondent was asked about a letter which had been written on his behalf by his solicitors to the noter dated 5 December 2023. This letter followed a conversation between the noter and the respondent's solicitors in which the noter had set out his proposals to sell the farm to Mr Leslie. In that letter, the respondent's solicitors had made clear his objection to the noter's proposed approach. The letter had also noted that progressing matters would require the trustees to resume management of the estate and, to that end, the respondent would be happy to co-operate in the process of assuming or appointing further trustees to the trust.

[26] When asked about this in cross-examination, he accepted that he had taken no steps to do this. The respondent's position was that the noter had not responded to him and it was not his place to take any further action.

Gordon Symon

[27] Mr Symon was the solicitor who had advised Mr Wilson in relation to the preparation of the trust deed and the letter of wishes. He had prepared an affidavit which he adopted as his evidence.

[28] Prior to Mr Symon giving evidence, counsel on behalf of the noter objected to part of Mr Symon's evidence on the basis that it strayed into questions of Mr Wilson's intentions as opposed to giving evidence about the factual background to the preparation of the

documents. In response, counsel on behalf of the respondent was careful to make clear that he was not seeking to adduce extrinsic evidence of Mr Wilson's wishes. The evidence he sought to lead from Mr Symon related to the factual context in which the trust deed and letter of wishes had been prepared (see *Marley* v *Rawlings* [2015] AC 129 at paragraphs 19 to 23).

[29] Given the short compass of Mr Symon's evidence and having had the opportunity to consider the affidavit he had prepared in advance, I decided to hear the evidence reserving all questions of competency and relevancy to be dealt with in submissions.

[30] Mr Symon began by explaining that he retired in 2016. As such, he had been hampered in his recollection by the fact that he had only had access to Mr Wilson's will, the trust deed and the letter of wishes. The solicitors instructing the respondent had been unable to recover any additional documents from his former firm, Paris Steele.

[31] More generally, he remembered the Wilson family well. He had acted for Mr Wilson's mother in her purchase of Old Waughton farm. He also remembered the tragic passing of Mr Wilson's nephew Niall. He confirmed that, prior to Niall's death, Mr Wilson's intention had been to pass the farm to him.

[32] As to Mr Wilson, Mr Symon's recollection was that it had been difficult to persuade him actually to make a will. Mr Wilson had kept putting it off. Mr Symon had advised Mr Wilson about what would happen in the event of intestacy – namely that everything would go to Mrs Wilson. According to Mr Symon, Mr Wilson was not keen on that outcome particularly in relation to the farm. Mr Symon remembered Mr Wilson saying that he wanted to "help some young lad get into farming" or words to that effect.

[33] In relation to the trust, Mr Symon remembered advising Mr Wilson to appoint a third trustee in order to avoid a potential deadlock situation. However, the two people

Mr Wilson trusted were Mrs Wilson and Mr Hodge. Mr Symon thought that this was something which Mr Wilson felt that he could revisit in future. As to the farm, Mr Symon remembered that Mr Wilson was very keen that the farm, which is actually quite small comparatively, ought to remain as a single unit and as a farm.

[34] Finally, Mr Symon did also give his own opinion that selling the farm to Mr Leslie and providing the proceeds of sale to Mrs Wilson would not have been in line with Mr Wilson's wishes. In his view, Mr Leslie, a married man currently employed by a well-known farming contractor, was not the type of person that Mr Wilson had in mind as a recipient for the farm. So far as Mr Symon was concerned, in the absence of Niall, Mr Wilson wished another young person to be given the opportunity to farm at Old Waughton. The difficulty was that, at the time of preparing his will and associated documents, he could not think of anyone. However, Mr Symon also accepted that at the point the trust deed and letter of wishes had been framed, Mr Wilson had been undecided. He agreed that the trust deed and letter of wishes left things very open for the future. In his words, they represented Mr Wilson "kicking the can down the road".

The noter's submissions

[35] Counsel for the noter moved me to grant the two special powers set out in the prayer of the note, namely:

> "to (i) authorise the noter to enter into a contract or contracts for the sale of the house, steading, and farmland at Old Waughton, or any part or parts of them, together with all stock, machinery, and growing crops, or any part or parts of them, to David Leslie on the terms approved by the Accountant of Court in her Opinion, and thereafter to execute a disposition or dispositions of the same in implement of the said contracts of sale; and (ii) to authorise the noter to appoint that the whole trust fund of the Old Waughton Discretionary Trust shall be held absolutely for the benefit of Mrs Christine Helen Wilson;"

[36] Counsel submitted that the test that the court required to apply in considering whether to grant such powers under section 7 of the Judicial Factors Act 1849 was one of expediency. That much was clear from the terms of the statute itself. He submitted that the authorities did not provide much by way of further guidance.

[37] Counsel submitted that the powers sought did not fall into the category of the "usual powers" which had been conferred on the noter on his appointment by the court in terms of its interlocutor dated 13 March 2019. The "usual powers" were those conferred on a judicial factor to fulfil his administration and conserve the trust estate. These powers did not include those which required the exercise of discretion by the judicial factor (*Carmichael's Judicial Factor* v *Accountant of Court* 1971 SC 295 at 299 and 302-4).

[38] Counsel approached the powers sought by the noter in reverse order as the principal question was whether the noter ought to be empowered to appoint the trust estate to be held for the benefit of Mrs Wilson. If that power were to be granted, the power of sale arose as a matter of necessity.

[39] The background was important. Following Mr Wilson's death, it appeared that the trustees had almost immediately fallen out. Counsel submitted that the reasons for this disagreement were not important for present purposes. However, following that breakdown in relations, the noter had been appointed following a court process. The noter understood that his appointment had been regarded by both parties as a last resort. Prior to this, the noter understood there had been negotiations between the trustees in an attempt to identify an additional trustee and or for one of the trustees to resign. These negotiations had been unsuccessful.

[40] So far as the noter understood, the impasse between the trustees which had led to his appointment in 2019 had not significantly changed. There had been no further successful

negotiations between the trustees. Neither trustee had taken any action to progress matters. At no point during the course of the judicial factory had either trustee sought to have the noter replaced or removed. At no point had either trustee sought to have the judicial factory recalled. Instead, as counsel put it, the trustees had "sat on their hands". In particular, neither trustee had sought to petition the court for the appointment of a third trustee.

[41] Turning to the power of appointment sought by the noter, as matters stand, there is only one beneficiary of the trust – Mrs Wilson. Although she had no vested right, because the trust was discretionary, there was no-one else to whom the trust fund could be made over. Counsel submitted that there was little if any chance of that situation changing. Although, in theory, additional beneficiaries might be able to be identified, they could not be appointed unless and until the trustees were able to co-operate and to agree it. There was no sign that this was ever going to happen.

[42] Counsel submitted further that there was no basis for inferring that the theoretical possibility of a new, independent, trustee altered this position. First, there was no realistic basis for concluding that the trustees would be prepared to agree on a third trustee. Based on the noter's experience to date, it appeared that neither trustee would agree to a third party unless that person agreed with them. Secondly, and in any event, there was no reasonable basis for considering that an independent trustee would reach a different view to the noter.

[43] In these circumstances, the noter considered that there were good reasons to wind up the trust. As Mrs Wilson was the sole beneficiary and there was no realistic prospect of any further beneficiary being identified and appointed, the continued trust structure was not justified. The alternative, the continuation of the judicial factory was very unattractive.

It would result in a continuing financial burden being imposed on the trust estate for an indefinite period of time. The administration of the trust would essentially be held in limbo.

[44] Counsel submitted that the noter's proposed course of action in selling the farm to Mr Leslie was entirely consistent with Mr Wilson's letter of wishes. First, it was notable that the letter clearly envisaged the sale of the farm (see paragraphs 1 and 2). Second, counsel drew attention to the fact that Mr Wilson had expressed his desire that suitable financial provision be made for Mrs Wilson in clear terms: his trustees were to ensure that this occurred (paragraph 3). This language could be contrasted with the much less precise language used to express Mr Wilson's "hope" that a young person could be found to take on the farm in paragraph 4. In any event, a sale of the farm to an appropriate person was not inconsistent with the language of paragraph 4 which did prescribe the manner in which the farm was to be transferred to the potential new farmer. The noter had made inquiries in relation to paragraph 5 and received no positive responses. Finally, in paragraph 6, Mr Wilson had expressed his earnest wish that the farm remain as a single unit. That would be achieved by the sale to Mr Leslie.

[45] Counsel did not particularly take issue with the views expressed by the respondent and Mr Symon that Mr Wilson had had a new entrant in mind. However, equally, counsel submitted that it was entirely reasonable and appropriate for the noter to have taken advice from Savills. That advice had emphasised the difficulties which would arise were a new, inexperienced operator to try and take over operating the farm without adequate capital reserves. The Savill report had also highlighted the fact that while Mr Wilson was alive, the farm had been operated by him as part of a wider enterprise along with his agricultural contracting business.

[46] Counsel submitted that the respondent's position amounted to no more than a disagreement as to the appropriate management of the trust. The respondent would have preferred the noter to take a different approach. However, this overlooked the fact that the reason why the noter had been appointed in the first place was that the trustees were unable to administer the trust themselves. In those circumstances, the court had appointed the noter to administer the trust on its behalf. The fact that the respondent could identify a possible alternative course of action did not mean that the noter's approach was inappropriate or unreasonable. Reverting to the noter's application in these proceedings, the role of the court was to determine whether what was proposed by the noter was expedient. It was not to decide whether it preferred the respondent's proposed course of action to that proposed by the noter.

The respondent's submissions

[47] Counsel for the respondent moved me to sustain his first plea-in-law and to refuse the note. The respondent's position was encapsulated in that plea-in-law:

> "There being a continuing trust purpose which is capable of being fulfilled and the Respondent not having been removed as trustee and being willing to select a beneficiary to give effect to the truster's wishes, *et separatim*, the Court having power to appoint further trustees to exercise such power of selection, the powers sought by the Noter are unnecessary."

[48] This was the issue between the parties. Counsel submitted that there was no significant difference between the parties as to the law. The respondent accepted that the two powers sought by the noter required the sanction of the court.

[49] Counsel submitted that it was clear from the plain meaning of the trust deed that it had an ongoing purpose. The trustees were directed to hold the trust fund for the trust

purposes. Mr Wilson had executed the letter of wishes with the intention that the trustees would follow those wishes.

[50] The noter's proposals to exercise the powers sought would not obtemper the wishes of Mr Wilson set out in paragraphs 4, 5 and 6 of the letter of wishes. In particular, Mr Leslie could not be described as young. He was a pre-existing farmer and therefore not a new entrant. The respondent understood that it was Mr Leslie's intention to lease the farm to a larger entity thereby acting contrary to paragraph 6 of the letter. Counsel also submitted that appointing Mrs Wilson as the sole beneficiary arguably went beyond paragraph 3 of the letter which referred only to "suitable financial provision".

[51] In these circumstances, it could not be said that it would be impossible for the trust estate to be administered in accordance with paragraphs 4, 5 and 6 of the letter of wishes. The noter had only taken limited steps to administer the farm in accordance with paragraphs 4 and 5. In respect of paragraph 4, it appeared that the noter had only engaged with two individuals – Mr Leslie and Ms Jamieson. It could not be said that those steps were exhaustive. For example, there had been no evidence of any attempt to advertise seeking a new entrant.

[52] The respondent remained willing to assume or seek the appointment of an additional trustee. In that regard, counsel submitted that it would, in the present circumstances, be competent for the court to appoint a new trustee *(Davidson (Robbie's Judicial Factor)* v *Macrae* 1893 20 R 358 at 362 (per Lord MacLaren with whom the Division concurred). A new trustee would not be constrained in the way that the noter was because as a trustee, he or she would be empowered fully to exercise the discretionary powers provided for in the trust deed. Such a new trustee might take a different view from the noter.

[53] Finally, counsel contended that the respondent had acted reasonably in opposing the present proceedings on that basis. As had been reflected in his evidence, the respondent had been moved to act in this way on the basis of his understanding of Mr Wilson's wishes based on what Mr Wilson had said to him. In these circumstances, it was appropriate for him to act as a contradictor in the present proceedings. Furthermore, the respondent should not be criticised for having taken no steps to appoint a new trustee during the course of the judicial factory. It had been reasonable for him to consider that the trust was being administered by the noter. This was particularly so given the legal complexities which arose when, as in the present case, a trust was being administered by a judicial factor.

Decision

[54] This is an application in terms of section 7 of the Judicial Factors Act 1849. That section provides as follows:

> "If at any time it shall appear to the factor that there is a strong expediency for granting abatement of rent, either temporarily or permanently, or for renewing or granting a lease for a period of years, or for draining, or for erecting buildings or fences, or for otherwise improving the estate in a manner not coming within the ordinary course of factorial management, he shall report the same to the accountant, who may order any necessary inquiry, and shall state his opinion thereon in writing; and such report and opinion may be submitted by the factor to the lord ordinary, with a note praying for the sanction of the Court to the measure proposed; and the lord ordinary shall, with or without further inquiry, report the matter to the court, who, if they consider it expedient and consistent with due regard to the amount of the estate at the time, may sanction the measure, and the decision of the court shall be final, and not subject to appeal; … and in all other matters in which special powers are, according to the existing practice, in use to be granted by the court, the court shall have power to grant the same in like manner and form as is above provided."

[55] The procedure for dealing with such applications is now set out in Chapter 61 of the Rules of Court and, in particular, in Rule 61.15 with applications now being made to the Lord Ordinary.

[56] As noted above (at [35]), the noter seeks two powers. In short, these are first, the power to sell the farm; and second, the power to appoint that the whole trust fund be held for the benefit of Mrs Wilson.

[57] By the point of submissions, there was no difference between the parties as to the competence of the noter's application. The parties agreed that the authority of the court in terms of section 7 of the 1849 Act was necessary to grant the powers sought to the noter because those powers did not fall into the category of the "usual powers" granted to the noter on his appointment in terms of the interlocutor dated 13 March 2019. In light of the authorities cited to me, I consider that this analysis is correct. The two powers sought by the noter go beyond what is necessary to collect and administer Mr Wilson's estate (*Carmichael's Judicial Factor* at 299, 302-4).

[58] Accordingly, in terms of section 7, the issue which I require to consider is, essentially, whether, in all the circumstances, the powers sought by the noter are "expedient and consistent with due regard to the amount of the estate at the time".

[59] Having heard the noter give evidence, it is clear to me that the starting point for the noter is the continuing deadlock between the trustees. That deadlock formed the basis upon which the noter was appointed as the judicial factor to the estate. Furthermore, it is that continuing deadlock which, in his view, is preventing the identification either of another beneficiary or a third trustee. In accordance with the rules of court, the noter has prepared a report setting out the reasons he seeks the special powers sought in these proceedings. The views of the noter remain as summarised in his report:

> "The judicial factor considers that, given that there is only a single beneficiary of the Old Waughton Discretionary Trust (namely, Mrs Wilson), the most appropriate course of action would be to sell the farm to Mr Leslie, and to distribute the sale proceeds to Mrs Wilson. There are no trust purposes to be fulfilled which justify maintaining the trust in existence in the long term, and continuing to incur the

> expense of the judicial factory. The proposed sale would place Old Waughton Farm in the hands of a young farmer, and would not have the effect of amalgamating it with any surrounding land. It would also ensure that suitable financial provision is made for Mrs Wilson. The judicial factor considers that the proposed course of action will therefore be in accordance with the wishes expressed by the deceased in his Letter of Wishes (although neither the judicial factor nor the Court is not bound [sic] by those desires)."

[60] Having considered the noter's report, the Accountant of Court agrees, stating the view that: "… it would be prudent and in the interest of the estate and trust to grant the Judicial Factor the special powers sought." The Accountant of Court also acknowledges that "…the relationship between the appointed trustees … has broken down irreparably."

[61] The respondent moves me to dismiss the note on the grounds that it is unnecessary for two related reasons. First, the respondent argues that there is a continuing trust purpose which is capable of being fulfilled – namely, that which was set out in the letter of wishes signed by Mr Wilson. In contrast, the course of action identified by the noter would, so argued the respondent, not be in accordance with the letter of wishes properly construed. Secondly, the respondent argues that the note is unnecessary because the court has the power to appoint further trustees to break the current impasse between the respondent and Mrs Wilson.

[62] Notably, contrary to what had been pled in the answers, no evidence having been led as to the suitability of Linzi Jamieson as a potential beneficiary to take on the farm, no submissions were made on behalf of the respondent in this regard.

[63] I am not persuaded by either of the arguments that were advanced on behalf of respondent.

[64] As a preliminary point, I consider that it is striking that the respondent framed his arguments by reference to what was "necessary" (see [47] above). That is not the correct test. The wording of section 7 makes it clear that, essentially, I require to be satisfied that, in

all the circumstances, the grant of the powers to the noter would be expedient. That is a different and significantly lower test than deciding that such grant is necessary. To put the point in a different way, the court could be satisfied that a proposed course of action was expedient even if there were possible alternatives. Whereas, where there are possible alternatives, it is much more difficult to demonstrate that the proposed course is necessary.

[65] The fact that the respondent has, in advancing his arguments, applied the wrong test may explain why those arguments seem to me to be rather beside the point. It is, of course, correct that the trust purposes remain. However, what the respondent overlooks is that, as a result of the deadlock between the trustees, it is extremely unlikely that any further progress will be made in achieving those purposes. In the same way, the respondent is correct that if a further trustee were assumed or appointed by the court, the deadlock might be broken. However, again, given the continuing impasse, it is not clear when, if at all, it is reasonable to consider that a third trustee will be assumed or appointed.

[66] Fundamentally, the respondent's arguments fail to engage with the reality of the deadlock between the trustees. In 2019, in the petition appointing the noter, Mrs Wilson averred:

> "…the relationship between… [Mrs Wilson and the respondent] has irretrievably broken down. There is no prospect of the relationship being repaired. [They]… are unable to work together in the best interests of the Deceased's estate and the Trust." (Statement 3)

The petition was not opposed by the respondent and the noter was appointed. Based on the evidence that I have heard, I am satisfied that the position has not altered in the 6 years that have elapsed since then. That was the clear and, essentially, unchallenged evidence of the noter himself. There was also no evidence from Mrs Wilson to suggest that her position had changed.

[67] As regards the respondent, while I am not doubting the sincerity of his evidence that he was prepared to co-operate in the process of assuming or appointing further trustees, I do not consider this to be of much significance. For all of his expressed intentions, it was notable that the respondent had, since the appointment of the noter, taken no action whatsoever which actually involved co-operating with Mrs Wilson. It was unclear whether the two trustees had even communicated during this period. Having listened to his evidence, it appeared to me that, based on his conversations with Mr Wilson and his knowledge of him, the respondent had reached a view as to what Mr Wilson had intended to happen to the farm. Nothing that had happened since then had caused the respondent to change his mind or otherwise alter his position. On the basis of this evidence, I consider that the noter was correct to conclude in his report that it was "vanishingly unlikely" that the trustees would agree to the addition of a new beneficiary.

[68] Furthermore, against this background I am also highly sceptical that the respondent's professed intention to co-operate in the process of assuming or appointing a new trustee represents a possible way of breaking the present deadlock. In this regard, it was striking that the respondent and those representing him also seemed to have no very clear idea about what form the process of assuming or appointing a new trustee would take. Although, in his answers to the note, reference was made to an "independent individual who is willing and able to act as a trustee" (answer 4), no evidence was led about this. Moreover, despite being legally represented, the respondent has taken no steps to raise proceedings to appoint a trustee during the 6 years of the judicial factory along the lines of those suggested by counsel on his behalf during submissions.

[69] Secondly, implicit within the respondent's first argument is the proposition that, having been given the two powers sought, were the noter to follow his proposed course of

action this would run contrary to the wishes of Mr Wilson. I reject this argument on the basis that it fails properly to take account of the terms of the letter of wishes.

[70] Before turning to the letter of wishes itself, it is necessary to deal with the objection to the evidence of Mr Symon (see [28] above). Having considered Mr Symon's affidavit and listened to his evidence, in my view there is some force in the objection made on behalf of the noter. Mr Symon did give some useful and admissible evidence as to the background against which Mr Wilson executed his will, the trust deed and the letter of wishes. I return to this below. However, his evidence also clearly strayed into giving evidence about what, in Mr Symon's opinion, were Mr Wilson's intentions and, relatedly, what the letter of wishes meant. On this basis, to the extent that Mr Symon was giving subjective evidence of Mr Wilson's intentions, I uphold the noter's objection and disregard that part of Mr Symon's evidence.

[71] I consider that a similar point can be made in respect of parts of the respondent's evidence concerning his view of Mr Wilson's intentions and will disregard it for the same reasons.

[72] In construing the letter of wishes itself, it is first necessary to consider the evidence as to the circumstances in which the letter of wishes was executed. In this regard, I accept Mr Symon's evidence that, at that time, Mr Wilson remained uncertain about what should happen to his property and, in particular, the farm, on his death. I also consider it to be of significance that Mr Wilson was advised of the possibility of a potential deadlock between the two trustees but, nonetheless, did execute the trust deed and letter of wishes in their present terms.

[73] Turning then to the letter itself, I think that the final paragraph, paragraph 7, is a useful starting point because it makes it clear that Mr Wilson recognised that he was not

setting out a detailed set of instructions which ought to be carried out but, rather, a list of wishes to assist his trustees. Notably, he also recognised that none of his wishes might be capable of being carried out and he left matters to the discretion of his trustees.

[74] Looking at the body of the letter, there are clearly two principal matters about which Mr Wilson was concerned: suitable financial provision for Mrs Wilson (paragraph 3) and his hopes for the future of the farm (paragraphs 4 and 5). As is apparent from the underlying difference in opinion between the trustees, which lies at the heart of the dispute, these two wishes cannot necessarily easily be reconciled.

[75] In construing the letter as a whole and weighing up the inter-relationship between the wishes, I note two things. First, it is striking that whereas, in terms of paragraph 3, the trustees are to "ensure" that suitable financial provision is made for Mrs Wilson, paragraph 4 is framed in much vaguer and aspirational terms – both paragraphs 4 and 5 are expressed in terms of "hope". The natural meaning of this language would clearly suggest that Mr Wilson was more definite in respect of the first wish than the second. In addition, it is of significance that under the trust which Mr Wilson has set up the sole named beneficiary in terms of the trust deed is Mrs Wilson and, further, that Mrs Wilson is also one of only two trustees. As such, under the scheme which Mr Wilson has created, because the selection of further beneficiaries would require agreement between the trustees, Mrs Wilson was effectively given a veto. As Mr Symon made clear in his evidence, this was an aspect of the arrangements about which Mr Wilson was advised but, nonetheless, retained.

[76] When the course of action proposed by the noter is considered against the background of the letter of wishes, I am unable to detect any significant contradiction. First, obviously, the noter's course of action will ensure that suitable financial provision is made for Mrs Wilson. Second, in accordance with Mr Wilson's hopes, a person with an interest in

farming and who is desirous of making a career out of it is being given the opportunity of farming Old Waughton. That person has made clear his intention to continue to farm Old Waughton as a single unit consistent with Mr Wilson's wish. The letter of wishes clearly envisages the possible sale of the farm (see paragraphs 1 and 2) and the trustees are expressly given discretion as to how the transfer to the new farmer is to be effected.

[77] The respondent's argument to the contrary appeared to be based primarily on the fact that Mr Leslie could not be described as a "young person" in accordance with paragraph 4. In his evidence, the respondent developed this point on the basis that Mr Leslie was also not a "new entrant" to farming. In relation to the latter issue, it is sufficient to note that this wording does not appear in the letter of wishes itself. As to whether Mr Leslie is or is not young, I do not consider this to be an issue of significance. To start with, Mr Leslie's precise age was unclear on the evidence. All that could be said on that score was that in the business plan submitted by him in or around 2024, Mr Leslie refers to having two school-age children. Further, whether someone is "young" is inevitably a relative concept and I do not consider that any great weight can be attached to this word alone. Overall, in my view, providing Mr Leslie the opportunity to farm Old Waughton seems entirely consistent with paragraph 3 of the letter of wishes. As I understand it, Mr Leslie, although experienced in agricultural work as a contractor, was not currently running a farm. He has expressed the wish to take on the farm and to operate it in accordance with Mr Wilson's wishes.

[78] The respondent also sought to argue that, in some way, Mrs Wilson receiving the whole proceeds of the farm went beyond what was intended by the reference to "suitable financial provision" in paragraph 3. The basis for this argument was unclear to me. As I have noted above, I consider that the wording of the letter of wishes makes clear that

Mr Wilson was more definite and certain about his intention that Mrs Wilson be suitably provided for than his hope in respect of the farm.

[79] Having rejected the respondent's arguments, I still remain to be satisfied whether, in terms of section 7 of the 1849 Act that what is proposed by the noter is "expedient and consistent with due regard to the amount of the estate at the time".

[80] Essentially for the reasons I have set out above in dealing with the respondent's arguments, I am so satisfied. It will enable the trust efficiently to be wound up and the judicial factory to be brought to an end. The course of action proposed by the noter broadly achieves the purposes for which the trust was established. As Mr Wilson wished, suitable financial provision for Mrs Wilson will be ensured and Old Waughton will continue to be farmed as a single unit in the hands of an individual with an interest in farming.

[81] Bearing in mind the prolonged and continuing deadlock between the trustees, the noter's course of action appears highly expedient. Based on the evidence I have heard, there appears not to be any reasonable or realistic alternative. In my opinion, taking no action and simply allowing the trust estate gradually to diminish under the continuing burden of funding the judicial factory would not be a reasonable course of action. I am also not persuaded that the respondent's suggestion of proceedings being brought seeking the appointment of a further trustee is either reasonable or realistic. Were it to be otherwise, it would be surprising in the extreme that the respondent had taken no action whatsoever in preceding 6 years to take such action. Beyond opening another front in the parties' dispute, the respondent has, in my view, failed to demonstrate how further contested trust litigation would be likely to break the deadlock on any kind of reasonable timescale. Fundamentally, there is no reason to believe that, even were another trustee to be appointed, that he or she would reach a conclusion different to that being proposed by the noter.

Disposal

[82] In light of the foregoing, I will grant the noter the two powers he seeks.

[83] In the event that the noter was successful, the parties were agreed that the question of expenses should be reserved meantime so that the noter could consider his position in light of my decision. In the circumstances, I am content to accede to this.