**OUTER HOUSE, COURT OF SESSION**

**[2018] CSOH 88**

**PD150/16**

OPINION OF LORD CLARK

In the cause

MARY FORBES AND OTHERS

Pursuers

against

ENOS McLEAN

Defender

**Pursuer: D I McKay QC, McNaughten; Digby Brown LLP**
**Defender: N McKenzie; Clyde & Co (Scotland) LLP**

24 August 2018

**Introduction**

[1] In this action, the widow, four children and three grandchildren of Mr Frederick Forbes seek damages under section 4(3)(b) of the Damages (Scotland) Act 2011. There are also claims for loss of support and loss of personal services. Mr Forbes died on 24 December 2014, as a result, the pursuers aver, of his exposure to asbestos dust and fibres and his consequent development of mesothelioma.

[2] The pursuers sue the defender is his capacity as the executor on the estate of his late father, Enos McLean (Senior),who was a partner in a now dissolved partnership ("the firm") which carried on business as painters and decorators. The pursuers aver that Mr Forbes

worked for the firm from about 1957 to about 1964 and that he was exposed to asbestos during the course of his employment with the firm.

[3] The pursuers' averments go on to state:

> "The defender is sued as executor of the estate of the late Enos McLean (Senior). On 2 September 1994 the defender was confirmed in the Court Books of the Commissariot of Tayside, Central and Fife at Dundee as Executor of the late Enos McLean (Senior). The pursuers sue the defender for the purposes of constituting a claim against the estate of the deceased Enos McLean (Senior)."

[4] The defender's averments in answer include the following:

> "Any liability that the defender may have had as Executor did not extend beyond the estate committed to his charge. As Executor, the defender was *eadem persona cum defuncto*. In any event, an Executor's office is terminated once the whole estate has been administered without the need for discharge. Explained and averred that the entire estate was distributed and the administration of the estate completed in or around March 1995. At the same time, the defender's office as executor to the estate of the late Mr McLean (Senior) terminated. The defender is no longer executor to the estate of Mr McLean (Senior) and his estate is no longer extant. The pursuers are called upon to aver the basis upon which they assert that the defender continues to be Enos McLean Senior's [*sic*] Executor. Their failure to do so will be founded upon."

[5] The defender sought dismissal of the action on the grounds that the pursuers' averments were irrelevant *et separatim* lacking in specification. The case called before me on the procedure roll, for debate. The central issue raised at the debate was whether a relevant claim was made against the defender in his capacity as executor, if the estate had been ingathered and distributed and he had been discharged as executor.

**Submissions for the defender**

[6] The submissions advanced for the defender can be summarised as follows. The pursuers' case was irrelevant and lacking in specification and should be dismissed. Any liability on the part of the late father of the defender had ended when the estate was distributed to beneficiaries under his will. This occurred long before the present action was

raised. The pursuers' claim was bound to fail. As executor, and being *eadem persona cum defuncto*, the defender merely stood in the shoes of his late father. What happened after confirmation was granted on 2 September 1994 "was lost" to the defender. It could however be presumed, given the passage of time, that debts were paid and the remainder of the estate was distributed. On that assumption, the estate was gone and nothing remained. The claim being made by the pursuers was an illiquid claim against the defender as executor. But his office had come to an end on distribution of the estate, in accordance with the usual practice. Reference was made to *Johnston's Executor* v *Dobie* 1907 SC 31. A formal discharge by the beneficiaries was not necessary for the office to come to an end.

[7] The question of the liability of discharged testamentary trustees had been raised in several cases arising from the failure of the City of Glasgow Bank in 1878. One such case was *Assets Co Ltd* v *Falla's Trustee* (1894) 22 R 178, in which Lord Kyllachy had held that it was not incompetent to sue even a discharged trustee for the purposes of constituting a claim against the estate. On appeal, this view had been endorsed by the Inner House. However, in *Assets Co Ltd* v *Bain's Trustees* (1904) 6 F 692, after proof, Lord Kyllachy had analysed the matter in more detail and concluded that he had expressed the wrong view in *Assets Co Ltd* v *Falla's Trustee*, which view had gone uncorrected by the Division. Lord Kyllachy had explained that discharged trustees were *functi officiis* and that a decree *cognitionis causa tantum* could be brought against an heir but not against a former trustee. Any decree against the trustees was not enforceable against them, nor would it assist in a claim against the beneficiaries, who could be sued directly. The decree sought was held by Lord Kyllachy to be both unnecessary and futile. The reclaiming motion was heard by a court of seven judges and, while it was correct that the majority concluded (by four to three) that the trustees in that case could be

sued for the purpose of constituting a claim against the estate, it had to be recognised that only the Lord President had expressed the view that this could occur even where all of the assets of the deceased had been ingathered and distributed. Lord Trayner, with whom two of the other judges in the majority agreed, had explained that the pursuers claimed that some of the assets of the estate remained extant and were still to be ingathered and distributed. The trust had therefore not come to an end. The trustees remained vested in that part of the estate. This should be viewed as part of the *ratio decidendi* of the decision of the majority. On appeal to the House of Lords, it was correct that the focus was on other aspects of the claim, in particular the contention that assets had been fraudulently concealed by the now deceased person. The question of whether any part of the estate remained extant was not discussed nor was the issue of whether discharged trustees could properly be sued. However, there were expressions of view by the judges in the House of Lords to the broad effect that the judgment of the Lord Ordinary was sound, as was that of the dissenting judges in the Inner House. It could therefore be concluded that the views reached by the Inner House in *Assets Co Ltd* v *Falla's Trustee* and in *Assets Co Ltd* v *Bain's Trustees* were unsound.

[8] The defender here was not raising an issue of competency. It was a question of relevancy. Lord Kyllachy's views in *Assets Co Ltd* v *Bain's Trustees* after proof, expressed on reflection, were correct. The conclusions in the present case were in the ordinary form, seeking payment from the defender as executor. But no such decree could be enforced against him. The defender is a man in his eighties. If he were to die, it could not be correct that his executor would be open to an action by the pursuers on the same basis as currently claimed against him. As was made clear in *Ainslie* v *Ainslie* 1886 14 R 209, the liability of an executor is limited to the amount of the estate and otherwise he is simply a debtor. The

decision of the majority in the court of seven judges in the Inner House in *Assets Co Ltd* v *Bain's Trustees*, if taken to apply to discharged trustees, was inconsistent with the underlying principle that following discharge, trustees have no continuing liability or duty. But the views of the majority were in any event restricted to circumstances in which the estate had not been fully ingathered and distributed.

[9] The pursuers made no averments about the existence or otherwise of a discharge of the defender as executor. They did not suggest that he was being sued *cognitionis causa tantum*. The conclusions were not restricted to him in his capacity as executor. Any decree pronounced against the defender would therefore be unrestricted, whether as to his capacity as executor, or by being a decree *cognitionis causa tantum* or by limiting decree to the extent of the deceased's estate. On the assumption that the estate had been distributed, these conclusions were all futile.

[10] The defender's liability as a former executor had come to an end. If the pursuers were correct, it existed in perpetuity. In any event, the facts of the present case differed from the facts in the authorities founded upon by the pursuers, which primarily concerned questions of fraud.

**Submissions for the pursuers**

[11] The submissions on behalf of the pursuers can be summarised as follows. The pursuers offered a proof before answer on the whole averments on record. The pleadings made clear that the purpose of the action was to constitute a claim against the estate of the deceased, who was a former partner in the firm. The defender had averred that the entirety of the estate had been distributed, although in oral submissions it was said that what had

happened to the estate had been "lost to us", that is, that it was not known what had occurred. In essence, an assumption of ingathering and distribution of the estate was being relied upon, but the court could not make that assumption. The pursuers did not admit that the estate had been ingathered and distributed and that issue, and the concomitant question of implied discharge, was therefore a matter for proof. In *Assets Co Ltd* v *Falla's Trustee* Lord Kyllachy had allowed a proof about the effects of the alleged express discharge. In the present case the pursuers were on stronger ground: no express discharge was founded upon. For that reason alone, a proof before answer had to be allowed.

[12] In the case of *Assets Co Ltd* v *Bain's Trustees*, there was again an express discharge. The House of Lords had restricted its analysis to the issue of whether there was fraudulent concealment of assets. The issue of the competency and relevancy of a claim against discharged trustees was simply not discussed. The speeches in the House of Lords did not disagree with or disapprove of the views expressed by the majority in the court of seven judges in the Inner House. As to the judgement of Lord Kyllachy, the pursuers in the present case were still entitled to a proof on the question of discharge. That was the case even if for some reason the House of Lords was taken to have overruled the majority view. But it had not done so. The *ratio decidendi* of the decision in the Inner House was binding, whether or not the executor had been discharged.

[13] The facts of the present case differed from those in the cases of *Assets Co Ltd* v *Falla's Trustee* and *Assets Co Ltd* v *Bain's Trustees*. The present claim was based upon events in 2014. It was surprising to hear the pursuers' claim described as futile. An employer required to have employers' liability insurance. There was such cover in respect of the firm, which had employed the deceased and in which the defender's father had been a partner. Decree of the

type sought would not by any manner of means be futile. It was in fact necessary in order to invoke a claim against the insurers.

[14] The decisions of the Inner House in *Assets Co Ltd* v *Falla's Trustee* and *Assets Co Ltd* v *Bain's Trustees*, to the effect that even a discharged trustee could be sued for the purposes of constituting a claim, were binding upon this court. That this was the law was confirmed by the references to these cases in leading texts, which supporting the proposition that an executor, even if discharged, can be sued. Reference was made to the section in the *Stair Memorial Encyclopaedia of Scots Law* (re-issue) on Trusts, Trustees and Judicial Factors (para 216) and to Wilson and Duncan, *Trusts, Trustees and Executors* (at 449), which stated, in reliance upon *Assets Co Ltd* v *Falla's Trustee*, that a pursuer can sue in order to constitute a claim against the estate even where the trustee has been discharged.

[15] If the action in the present case was successful, the insurers would pay out. The situation was not unlike that of restoring a dissolved company to the Register of Companies in order to bring proceedings such as the present. In effect, that was what was sought: restoring the executry. The purpose was not to claim against the beneficiaries, but rather to constitute a claim against the estate so that the insurers would require to meet it. It may be correct that in a question with the beneficiaries a discharged trustee is *functus*, but that was not the point of the present action. Cases such as *Johnston's Executor* v *Dobie* and *Ainslie* v *Ainslie* were not in point. The pursuers in the present case could not possibly have made a claim at the time of the executry being in process.

**Reply for the defender**

[16] It was the winding up of the estate, by distributing the assets, that was important.

There was a presumption of regularity and hence that this had occurred. The question of insurance was *res inter alios acta*. What was sought here was an open decree. The position of a dissolved company differed from that of an executor. Where the employer of a deceased person who had been exposed to asbestos had been a partner in a firm or a sole trader, there was no remedy equivalent to that of restoring a dissolved company to the register of companies. This was an accident of the rules on limitation of actions. The sole purpose of an executor was to distribute the estate and his liability was limited to the value of the estate. These were important factors.

**Decision and Reasons**

***The central issue***

[17] The present case focuses on the discrete legal point as to the relevancy of the claim made against an executor, who avers that he has been discharged, for the purposes of constituting a claim against the estate of the deceased. That is the point of law in issue. There is, however, a wider practical and policy question, which was adverted to briefly in submissions, the answer to which flows from the decision on the legal point in dispute. It is this: where an employee claims to have suffered personal injury at the time of his employment and the employer was either a partner in a partnership or was a sole trader, who has died, can the former employee (or his family members if he is also now deceased) sue the executor of the former partner or sole trader, perhaps long after the executor has ingathered and distributed the estate, as a means of seeking to cause the insurers under the employers' liability insurance policy to meet the claim?

[18] If the injured person was employed by a company which was later dissolved, the company can of course be restored to the Register of Companies for the purposes of proceedings being raised. It was implicit in the pursuers' position that, where the employer was a partnership or a sole trader, the law should allow proceedings to be taken against the former executor of a deceased partner in the partnership or of the deceased sole trader, because otherwise there would be a potentially significant *lacuna* in the provision of means of redress under Scots law. That point is, however, of no direct relevance to the legal analysis. The central issue before me is simply whether or not Scots law recognises a remedy against an executor in circumstances such as the present, albeit solely to constitute a claim against the estate.

***Should the central issue be decided only after proof?***

[19] The pursuers also contend that this case must in any event be appointed to a proof before answer because the pursuers do not admit (indeed they deny) the defender's averments that the estate has been distributed and that the defender had impliedly been discharged as executor some years ago. The question therefore arises as to whether, if I accept this contention of the pursuers, I should simply fix a proof before answer and express no view on the central issue argued before me, leaving that matter to the judge hearing the proof. I have concluded that this is not the course I should take. It is true that there is a factual dispute as to whether or not the executry is at an end, but there is an overarching argument to the effect that the result of the factual dispute does not matter. It seems to me that it is only if the overarching dispute is resolved in favour of the defender that the secondary issue arises as to whether proof on the fact of discharge should be fixed. I say more later about this secondary issue, but I will deal firstly with the central issue.

***The authorities***

[20] There are certain key cases which assist in dealing with the central issue. *Assets Co Ltd* v *Falla's Trustee* (on occasion referred to in the plural, as *Falla's Trustees*) is the first of these cases. In terms of the City of Glasgow Bank (Liquidation) Act 1882 all assets belonging to or vested in the bank or its liquidators were transferred to and vested in Assets Co Ltd. The company raised an action against the sole surviving trustee of the deceased, Robert Falla, seeking reduction of an agreement and discharge executed by Mr Falla and the liquidators of the City of Glasgow Bank in 1879 and for count, reckoning and payment. The basis upon which these remedies were sought was that the discharge of Mr Falla had been granted in reliance upon and on condition of the truth of certain statements made by him as to the extent of his means and estate and that it had subsequently become clear that he had fraudulently concealed several important assets. The defender averred that the estate had been distributed, conform to discharges of the trustee, which were produced. Thereafter, the pursuer raised a further action for reduction of the agreement and discharge granted by Mr Falla against the beneficiaries on the estate of Mr Falla. The two actions were conjoined. In his opinion, the Lord Ordinary made the following observations (at 179):

> "Now, I am not sure that, upon the materials before me, I could without inquiry affirm the fact on which the defence rests. But I do not find it necessary to consider that question, because I am of the opinion that, even if the fact be as the trustee states, the action is not incompetent, at all events as an action for constitution. The trustee may of course defend upon the merits, or abstain from defending as he chooses; but I am not prepared to say that it is incompetent to sue even a discharged trustee for the purpose of constituting a claim against the trust-estate."

The defenders reclaimed and argued *inter alia* that the action against the trustee was incompetent. They argued that the trust estate had been distributed and the trustee discharged.

The defender was sued as trustee but no longer held that office. Constitution of the debt against the trust-estate was not necessary. The beneficiaries into whose hands the estate had passed could be sued directly. The Inner House refused the reclaiming motion. The Lord President (with whom the three other judges concurred) agreed with the Lord Ordinary and stated (at 181):

> "…I think the reclaimers exaggerate the importance of the conclusion against the trustee, for he is brought into the action only as a trustee to see something being done with the trust-estate. It is for him, as the Lord Ordinary says, to consider whether he will appear to defend or not, but to say that it was in any way incompetent for the pursuers to call him appears to me to be out of the question."

This case therefore provides authority, albeit without very detailed reasoning, for the proposition that the present claim is competent.

[21] In *Assets Co Ltd* v *Bain's Trustees* (1904) 6 F 676 and 692, and *Assets Co Ltd* v *Phillips' Trustees* (1904) 6 F 754, the pursuer again sued testamentary trustees seeking reduction of discharges granted by the liquidators to contributories, who, it was averred, had failed to disclose the existence of certain properties in the statements of assets they had provided prior to the discharges being granted by the liquidators. The two cases gave rise to three reported decisions of relevance for present purposes. The first of the three reported decisions, reported at (1904) 6 F 676, was issued following an appeal to the Inner House after a debate. The Lord Ordinary (Lord Kyllachy) had, following the debate, sustained the first and second pleas-in-law for the defenders in *Assets Co Ltd* v *Bain's Trustees* and granted absolvitor. The first plea was to the relevancy of the action and second was that the pursuer was barred as a result of *mora* and taciturnity. The Lord Ordinary had reached his conclusion principally on the ground that a pursuer in a case such as that before him, which involved allegations of fraud, must bring his case within a reasonable time. In his opinion, the Lord Ordinary did not

consider the further plea by the defender that, having *bona fide* distributed the estate and having been duly discharged as trustees, they should be assoilzied from the pecuniary conclusions of the summons. The pursuers reclaimed.

[22] *Assets Co Ltd* v *Phillips' Trustees* raised issues of a similar kind, except that the defenders in that case had never been discharged or divested of their character as trustees. In that action, the Lord Ordinary (again Lord Kyllachy) allowed a proof before answer. The defenders reclaimed.

[23] The reclaiming motions in the two cases were heard and advised together by the Second Division, which allowed a proof before answer in both cases. The Lord Justice Clerk stated (at 686):

> "…the case of *Falla's Trustees* seems also to be conclusive upon the question whether trustees who have been discharged can be called in such an action."

To that extent, this decision of the Second Division supports the decision reached in *Assets Co Ltd* v *Falla's Trustee*. However, this issue was not referred to by the Lord Ordinary and similarly was not touched upon in the opinions of the other judges in the Inner House (Lord Young, Lord Trayner and Lord Moncreiff). The two actions then proceeded to proof.

[24] The cases were then heard together in conjoined proofs on the merits by the Lord Ordinary (Lord Kyllachy) and then advised separately. In both cases, the Lord Ordinary assoilzied the defenders and the pursuer then reclaimed. In *Assets Co Ltd* v *Bain's Trustees* the decision of the court of seven judges who heard the reclaiming motion is reported at (1904) 6 F 692 (the opinion of the Lord Ordinary being set forth at page 694 *et seq*). By a majority of four to three, the court held (*per* the Lord President, the Lord Justice-Clerk, Lord Adam, and Lord Trayner) that the reclaiming motion should be allowed and that (reversing the judgment

of Lord Kyllachy) the action was competent in order to constitute a claim against the trust-estate. Lord Young, Lord Kinnear, and Lord Moncreiff dissented.

[25] The reasoning of the Lord Ordinary can be summarised as follows. The trustees had established that they had long since ceased to have any connection with the trust-estate, which had been administered and distributed. An extrajudicial discharge had been granted by the whole of the beneficiaries. The former trustees were *functi officiis* and the remedy of a creditor was to proceed directly against the beneficiaries. The pursuer did not dispute these points and disavowed any intention to establish any personal liability against the trustees. The decree would not be enforceable. A decree of constitution *cognitionis causa tantum* was only appropriate in different circumstances. The pursuers were not entitled to decree. The decree sought would be unnecessary and indeed futile. Turning to the views he had expressed in *Assets Co Ltd* v *Falla's Trustee*, he said (at 696-697):

> "And, indeed, I doubt whether the contrary would have been seriously maintained were it not for a supposed decision of the point in the case of the *Assets Co.* v. *Falla's Trustees* 22 R. 178, or perhaps rather for a gratuitous and, I am afraid, not well-considered observation in my own judgment in that case—an observation not essential to the judgment, but which somehow escaped correction in the Inner-House…
>
> But as regards the substance of the defence founded on the discharge, what happened was this: I held that the admission of the discharge was insufficient, and accordingly allowed a general proof, and to this the Inner-House adhered. But I appear to have added that, even if the discharge was admitted, the decree asked against the trustees might still be granted as a decree of constitution. And this, as I think unfortunate observation, although not adopted, was not corrected in the Inner-House. That is really the whole foundation for the pursuers' contention that the point now in question was decided in the case of *Falla.*"

In short, the Lord Ordinary recanted on the views he had expressed in *Assets Co Ltd* v *Falla's Trustee* and now took the view that where trustees had been discharged they could no longer be sued, even for the purposes of constituting a debt against the estate.

[26] The Lord President did not agree with the Lord Ordinary's reasoning, and said (at 704):

> "… it is to be observed that the pursuers do not ask any decree for payment against the testamentary trustees of Mr Bain personally, but merely desire to have the sum sued for constituted as a valid debt against his testamentary trust-estate. Where the representatives of a deceased person have taken no steps to have themselves confirmed, or where they have renounced the succession, the pursuer of an action against them may restrict his claim to a decree *cognitionis causa tantum*, which gives him a right to attach the estate of the deceased person, but imposes no personal obligation or liability upon the defenders— *vide Forrest* v. *Forrest* 1 Macph. 806. In that case the pursuer restricted his demand to a decree *cognitionis causa tantum*, and obtained decree in terms of the conclusions of the summons as so restricted. I think it may be correctly stated as a general proposition that a person is entitled to bring an action of constitution against the representatives of his debtor, for the purpose of establishing the liability of his (the debtor's) executry estate for a money claim, even if he, (the pursuer), may be unable to obtain a decree for payment against these representatives. The fact of a testamentary trustee having resigned, or executed the trust, does not, in my judgment, deprive a creditor of this right, although other remedies, such as confirmation as executor creditor, may possibly be open to him. It is to be kept in view that both the defenders, the testamentary trustees of Mr Bain, and Mr William Bain junior, as an individual, appeared and lodged defences in the present action, but neither the trustees nor Mr William Bain junior pleaded that the action is incompetent as directed against them respectively.
> The defenders suggest that the proper course for the pursuers was to sue the beneficiaries of Mr Bain directly, and it may be that they could follow the funds, (if they are extant), into the hands of any gratuitous taker, but these beneficiaries would, doubtless, have pleaded that they knew nothing as to the facts alleged by the pursuers, and that, having received the funds in *bona fide* from the persons authorised to administer them, they were not liable in accounting and payment. The most obvious and natural course seems to me to be the one which has been followed, of proceeding against the testamentary representatives of Mr Bain, into whose hands the funds, *ex hypothesi*, came, and who are the proper persons to account for their disposal. In this connection I may refer to the case of the present pursuers v. *Falla's Trustees* 22 R. 178 in which it was held, (affirming the judgment of Lord Kyllachy), that it is competent to sue a trustee who has distributed the whole trust-estate, and been discharged by the beneficiaries, for the purpose of constituting a claim against the trust-estate. The beneficiaries can effectually discharge, or affect, their own rights, which have come to them by the bounty of the testator, but they cannot, in my judgment, discharge or affect the rights of creditors of the testator who claim not under, but against, his trust."

[27] The Lord Justice-Clerk agreed with the Lord President stating that the opinion he had formed was to the same effect, adding "and for the grounds of it I would refer to the opinion to

be delivered by Lord Trayner". Lord Adam also agreed with the reasoning of Lord Trayner, who said:

> "But that an action is competent against trustees who have been discharged, where its purpose is to constitute a claim against the estate of the truster, has been in terms decided in the case of *Assets Company* v. *Falla's Trustees* 22 R. 178. We were asked (being a Court of seven Judges) to reconsider that decision. I have done so, and see no reason to doubt its soundness. But it is unnecessary to discuss here whether trustees who have been discharged on the fulfilment and termination of the trust, can competently thereafter be called as defenders in an action based upon the debt or obligation of the truster. The trust here has not come to an end."

Thus, Lord Trayner expressed agreement with the decision in *Assets Co Ltd* v *Falla's Trustee* but also concluded that it was not necessary to deal with the point decided in that previous case, as the trust in the case now being decided had not come to an end.

[28] As noted above, Lord Young, Lord Kinnear and Lord Moncreiff dissented. As Lord Young put it (at 713), the pursuer's claim was in effect:

> "that by such intimation and this action following upon it, the trust, which for thirteen years had been dead, as I think, or slumbering, as they might prefer to call it, was revived, or awakened, and the defenders restored to sleepless life as trustees destitute of estate, but with anxious and costly duties to be performed by them at their personal and individual expense for behoof of the pursuers…"

The existence of a claim against trustees in the present context therefore meant that trustees would be exposed to liability for a lengthy period. The dissenting judges were of the view that the Lord Ordinary was correct to find that the defenders were under no liability as trustees, because they had been discharged of all their trust obligations. That such a discharge put an end to the trust was beyond question. There could be no liability to the residuary legatees, because their own discharge was a conclusive answer to any demand at their instance. There could be no liability to the truster's creditors, because the trustees had divested themselves of the trust-estate. It would make no difference that there was a part of the estate still outstanding.

[29] In both *Assets Co Ltd* v *Bain's Trustees* and *Assets Co Ltd* v *Phillips' Trustees* the views of the majority of the court of seven judges in the Inner House resulted in the grant of the pursuer's reclaiming motion and the allowance of a proof on the issue of undue concealment of funds. Accordingly, the Lord Ordinary's conclusion, after proof, in *Assets Co Ltd* v *Bain's Trustees* that the discharged trustees could not be held liable was overturned. In both cases, the pursuers then appealed to the House of Lords. The decision of the House of Lords is reported as *Watt and others* v *Assets Co Ltd* and *Bain and others* v *Assets Co Ltd* [1905] AC 317. The author of the case report states that the only point of difference between the two cases was that in the *Bain* appeal "the appellants' trustees had long since paid over the whole estate in their hands to the beneficiaries and been discharged from their office." The case report goes on to narrate that counsel for the appellants made this point in argument. However, this issue is not referred to at all in the speech of the Lord Chancellor, with which the other four judges concurred. The speech deals with the question of *mora*. While three of the concurring judges endorsed the judgment of Lord Kyllachy, no reference is made to the issue of competency of the claim against the trustees. The House of Lords allowed the appeals and restored the interlocutor of the Lord Ordinary.

[30] The textbooks to which I was referred treat the central issue in the present case as having been determined by the decisions in *Assets Co Limited* v *Falla's Trustee* and the first of the *Assets Co Limited* v *Bain's Trustees* cases ((1904) 6F 676). In the *Stair Memorial Encyclopaedia of Scots Law* (re-issue), on Trusts, Trustees and Judicial Factors, at paragraph 216, it is stated:

> "Where a trustee has distributed the whole trust estate and been discharged by the beneficiaries, it is competent for a creditor to sue him for the purpose of constituting a claim against the trust estate."

In Wilson and Duncan, *Trusts, Trustees and Executors*, at 449, *Assets Co Limited* v *Falla's Trustee*

is founded upon to support the proposition that:

> "A trustee who has been discharged by the beneficiaries can be sued in order to constitute a claim against the trust-estate".

[31] I am in no doubt that these propositions are supported by the cases founded upon. The second of the decisions of the Inner House in *Assets Co Limited* v *Bain's Trustees (*that is, the decision of the court of seven judges which followed upon the proof) is not referred to in support of the propositions in the textbooks. I assume the reason to be that, as is explained above, it proceeded, so far as three members of the majority of the court were concerned, on the basis that the pursuer offered to prove that the estate had not all been ingathered. However, as I have noted, Lord Trayner expressed what might properly be regarded as the *obiter* view that *Assets Co Ltd* v *Falla's Trustee* had been correctly decided, with which two of the other judges agreed and which accorded with the views expressed by the Lord President. In view of the fact that this issue is not mentioned at all in the speeches in the House of Lords on appeal, I cannot regard the broad endorsements by the judges in the House of Lords, of the Lord Ordinary's views, as including any specific endorsement of his departure from his earlier view on the question of competency of the claim against discharged trustees. If the judgment of the House of Lords was intended to overrule the decisions of the Inner House in *Assets Co Ltd* v *Falla's Trustee* and the point made by the Lord Justice-Clerk in the first of the *Assets Co Ltd* v *Bain's Trustees* appeals, that would have been made clear. It can therefore be said that the second of the decisions of the Inner House in *Assets Co Limited* v *Bain's Trustees* is not directly authoritative on the issue in the present case. However, the other two decisions of the Inner House (in *Assets Co Ltd* v *Falla's Trustee* and the first of the *Assets Co Ltd* v *Bain's Trustees* appeals) are in my view conclusive and, moreover, are binding on me.

[32] That being so, there is no real point in analysing in any detail the views put forward

by the Lord Ordinary and the three dissenting judges in the second of the *Assets Co Limited* v *Bain's Trustees* reported decisions. The decision was not directly relied upon by the pursuers in the present action, other than in support of the proposition (the views on which, as I have said, may properly be regarded as *obiter*) that a trustee could be sued even if discharged. In particular, it was not averred or suggested that the claim on the employers' liability insurance policy in the present case represented an asset of the estate of the defender's late father which was yet to be ingathered. I was not addressed on the question of how, when, and in respect of a claim by whom, the insurance claim or its proceeds was or might become an asset of the estate. For example, I was given no information on whether the employer's liability insurance policy, as a contingent policy at the time of the death of the defender's father, had been confirmed by the defender as executor. I therefore make no observations on any of these matters.

[33] In light of these points, questions remain, if the pursuers succeed, about the usefulness and effect of any decision against the defender in the present action. In particular, such a decision cannot be *res judicata* in a claim against the beneficiaries (the making of such a claim being in any event, I note, disavowed by the pursuers). Whether it can assist in relation to a claim against the insurers may depend on the points identified in the preceding paragraph. Whether any issue arises as to the insolvency of the estate and thus about the availability of any right under the legislation dealing with third party rights against insurers also remains to be seen. I offer no view on these issues, not having been addressed on them in any detail. As presently advised, however, I do not consider that I can conclude that the pursuers' case is either unnecessary or futile. Of course, if executors or trustees can be sued in that capacity many years after their roles have, as they see it, terminated, that may be viewed as an

unfortunate burden facing such persons (although perhaps not quite as onerous as the comments of Lord Young, noted above, suggest). However, all that the authorities founded upon by the pursuers concern is the question of suing for the purposes of constituting a claim against the estate and it may be that a person sued in that context would not see any need to defend the claim. In a case such as the present, there is no question raised of any personal liability on the part of the defender. Although this was not the subject of submissions, the short point of principle might simply be that where the right to claim on an insurance policy formed part of the estate when the executor was appointed, and a subsequent claim by a creditor of the estate would allow such an insurance claim to be made, the estate has not been the subject of a final distribution and a case such as the present can be brought to seek to assist in accessing the rights under the policy.

[34] While the case law deals with testamentary trustees, I do not see any material distinction between trustees and executors for the purposes of the issues raised in the present case. Also, I am not persuaded (and indeed little was said on the point in submissions) that the absence of any restriction in the instance to the claim, or the conclusions, as being directed against the defender solely in his capacity as executor is of importance. No authority was referred to in support of the point. In any event, the averments made by the pursuers make the position clear. It is true that the principal authorities founded upon by the pursuers apparently proceeded on the basis that the case made was not incompetent. However, I consider that the observations in *Coutts* v *Coutts* 1866 4 M 802, at 803, apply also in a case such as the present:

> "Whether the action is irrelevant in one sense of the word, or in a strict view incompetent, is a very nice question, because they run very much into one another."

In my view, no sound reasons exist for concluding that the claim in the present case, which,

based on the authorities, is competent, can be said to be nonetheless irrelevant. I conclude that the pursuers' case is competent and relevant.

[35] I turn now to consider the pursuers' contention on the secondary issue, that is, the need for proof on the question of whether the defender has been discharged as executor. The averments on this matter are set out above (paras [3] and [4]). As I have also noted above, the defender's position was qualified in oral submission to the effect that the discharge of the defender as executor was implicit or to be presumed, given the passage of time, the details of the executry being "lost". The defender's averments on these matters are met with a general denial. While the pursuers have no specific averments to the effect that the executry is continuing or that the estate has not been fully ingathered, it is (as the defender recognises in his averments) the pursuers' position that the defender *is* the executor. A discharge is something expressly or impliedly granted by the beneficiaries and its effect in circumstances such as the present is not something dealt with in the authorities to which I was referred. In my view, if I was not with the pursuers on the central issue, it would be necessary for the circumstances giving rise to the implicit or presumed discharge to be dealt with in evidence. Once that evidence has been led, it would be necessary to hear submissions on whether the executor has been discharged and the legal effect of such a discharge, where the issue at large is a claim by a person who claims to have become a creditor of the estate and in respect of whose claim the proceeds of an insurance policy may become available to the estate. Accordingly, had I not been of the view that the pursuers' claim against the executor, even if discharged, is competent and relevant, I would have accepted the pursuers' submission that whether there has been a discharge and its legal effect in circumstances such as the present are matters to be dealt with after proof.

**Conclusion**

[36] For these reasons, I shall refuse the defender's motion to dismiss the action and I shall appoint the cause to a proof before answer. In the meantime, I reserve all questions of expenses.