OUTER HOUSE, COURT OF SESSION

[2023] CSOH 70

A176/20
A177/20

OPINION OF LORD PENTLAND

In the causes

KEIR CAMPBELL CUNNINGHAM MCCORMACK

Pursuer

against

(FIRST) SCOTT CAMPBELL MCKINNON; (SECOND) JOHN LYNCH; (THIRD) GRAEME HUNTER; and (FOURTH) MARGARET MCDONALD ROBERTSON MCKINLAY AS EXECUTRIX OF THE LATE DOUGLAS FRASER MCKINLAY, ALL AS TRUSTEES AND EXECUTORS OF THE ESTATES OF THE LATE JOHN MARSHALL MCKINNON AND MRS HELEN MCLEAN BROWN JACK OR MCKINNON

Defenders

Pursuer: A MacKenzie (sol adv); Harper Macleod LLP
First Defender: Party

13 October 2023

Introduction

[1] This opinion concerns two actions for count, reckoning and payment brought by the pursuer against the trustees and executors of the estates of his late grandparents, John Marshall McKinnon and Mrs Helen McLean Brown Jack or McKinnon. The pursuer, who was born on 3 March 1994, is the son of the first defender and his sole issue. The first defender is one of the trustees appointed under his parents' wills.

[2] On 14 June 2021 the actions insofar as directed against the third and fourth defenders were dismissed.

[3] By interlocutors of 24 November 2021 the Lord Ordinary granted summary decree and ordained the first and second defenders to produce full accounts of their intromissions with the estates of John and Helen McKinnon.

[4] Both cases came before me for a hearing on notes of objections to the accounts lodged by the first and second defenders and on their answers to the objections.

[5] The first defender represented himself at the hearing, two firms of solicitors having withdrawn from acting for him. The first defender had no apparent difficulty in following and understanding the proceedings at the hearing. I explained carefully to him the procedure that would be followed and granted him a number of short adjournments at his request. As I will explain more fully later in this judgment, the first defender is an experienced businessman with an understanding of financial matters. He is able to express himself clearly.

[6] The second defender reached a late settlement with the pursuer on the eve of the hearing. He agreed to pay him £70,000 in the John McKinnon action and £230,000 in the Helen McKinnon action, together with agreed amounts of expenses of £25,000 in each action.

[7] There was no dispute that there should be a single hearing encompassing both actions and that all the evidence was to be treated as evidence for the purposes of both actions.

John Marshall McKinnon and Mrs Helen Brown Jack or McKinnon

[8] John Marshall McKinnon lived at 1 Rhindhouse Road, Baillieston, Glasgow with his wife, Helen McLean Brown Jack or McKinnon. Mr McKinnon died on 19 April 1999 and Mrs McKinnon on 21 June 2001. They had a son, Scott McKinnon, who is the first defender in both actions. At the time of his death Mr McKinnon held 51 of the issued 100 shares in a private company, Ellon Properties Limited. The first defender owned the remaining 49 shares. The company traded as a garage and property letting business. In his evidence at the hearing the first defender said that he and his father had started the business together in the nineteen-eighties and had run the business jointly.

The relevant provisions of Mr and Mrs McKinnon's wills

[9] In their wills Mr and Mrs McKinnon set up trusts to hold certain assets and property for the benefit of the pursuer until he attained the age of 25. They nominated and appointed as their trustees and executors Graeme Hunter, a solicitor, Douglas Fraser McKinlay, a chartered accountant, and the first defender.

[10] By clause 4 of his will dated 4 March 1999 Mr McKinnon made *inter alia* the following provisions:

> "(i) I direct the trustees to make over all of my shares in Ellon Properties Limited to my said son, Scott McKinnon but in the event of my said son failing to survive me or in the event of my said son disclaiming or renouncing any part of this bequest as my said son is hereby expressly empowered so to do I direct the trustees to make over the said shares to such issue of my said son in accordance with purpose (6)(i) hereof.
>
> (ii) I direct the trustees to make over my whole rights in any loan by me to the said Ellon Properties Limited to such issue of my said son in accordance with the terms of purpose (6)(i) hereof."

[11] In terms of clause 5 of his will Mr McKinnon left the residue of his estate to Mrs McKinnon.

[12] Clause 6(i) of Mr McKinnon's will provided as follows:

> "In the event of my said spouse failing to survive me as aforesaid, or in the event that any part or the whole of the residue of my estate is disclaimed or renounced by my said spouse, as my said spouse is hereby expressly empowered so to do (the whole of such residue or such part thereof as is not effectively disposed of being hereinafter termed in this clause 'residue'), then I direct the trustees to make over the residue to any issue of my said son, Scott McKinnon as shall survive me and I direct the trustees to hold the residue for such issue of my said son Scott McKinnon as survive me and already have attained or shall thereafter attain the age of twenty-five years complete, equally per stirpes if more than one."

[13] By clause 7 the trustees were granted *inter alia* the fullest powers of investment of the trust estate and, without prejudice to that generality, they were empowered to invest or apply the trust estate or any part thereof in any way whatsoever in which a man of ordinary prudence would invest or apply his own funds.

[14] In her will, also dated 4 March 1999, Mrs McKinnon made no specific bequests or legacies. She appointed the same persons as executors and trustees as her husband had done in his will. By clause 4(i) Mrs McKinnon provided as follows:

> "I direct the trustees to hold the whole residue of my estate (the same being hereinafter termed in this clause 'residue') for such issue of my said son Scott McKinnon as survive me and have already attained or shall thereafter attain the age of twenty-five years complete, equally *per stirpes* if more than one."

[15] The same powers of investment were conferred on the trustees as in Mr McKinnon's will.

Confirmations to the estates

[16] On 15 December 2000 the nominated executors were confirmed on the estate of Mr McKinnon. The first defender signed a declaration to the effect that the inventory of the estate was a full and complete inventory of his father's heritable and moveable estate in Scotland. Amongst the moveable estate the inventory listed a loan to Ellon Properties Limited. The balance outstanding at the date of Mr McKinnon's death was given as £62,938.

[17] Confirmation on Mrs McKinnon's estate was granted on 4 June 2002 in favour of the nominated executors. Again, the first defender signed the requisite declaration to the effect that the inventory was full and complete. The inventory included the house at 1 Rhindhouse Road; it was stated to have an estimated value of £105,000. Also listed were two Clydesdale Bank accounts with combined balances, including accrued interest, of £11,406.78. An eik to the confirmation was granted on 7 July 2004. This added two items to the assets listed in the earlier inventory of Mrs McKinnon's estate: a loan to Ellon Properties Limited with a balance at the date of death of £112,860 and furniture and effects with an estimated value of £2,000. In his evidence at the hearing Mr Lynch explained, under reference to a letter he had written to Messrs Adie Hunter, solicitors, on 25 February 2003, that the balance on the loan at the date of Mrs McKinnon's death was correctly stated at £108,896. In the letter Mr Lynch also explained that the balance continued to attract interest after Mrs McKinnon's death and stood at £112,860 as at 31 January 2002.

Resignations of the third and fourth defenders and appointment and resignation of the second defender

[18] By deed of assumption and resignation effectual on 10 September 2004 Mr Hunter, Mr McKinlay and the first defender assumed John Lynch, the second defender, as an additional executor and trustee under Mr McKinnon's will. Mr Hunter and Mr McKinlay resigned their offices by the same instrument.

[19] At the same time identical steps were taken in the case of Mrs McKinnon's estate.

[20] By minutes of resignation dated 5 August 2019 the second defender resigned as a trustee of both trusts.

Accounts of the estates to the dates of Mr Hunter's and Mr McKinlay's resignations

[21] At the hearing evidence was given by Ms Sarah-Jane Macdonald, a solicitor with Messrs Gillespie McAndrew. She spoke to trust accounts prepared for the periods between the date of deaths of Mr and Mrs McKinnon and the dates of the resignations of Mr Hunter and Mr McKinlay as executors and trustees in September 2004. Ms Macdonald was a careful and helpful witness, whose evidence I had no difficulty in accepting. The first defender did not challenge any aspect of Ms Macdonald's evidence.

[22] Ms Macdonald explained that in the case of John McKinnon's trust the balance of the loan he had made to Ellon Properties Limited was assumed to have been assigned to the trust on the basis of correspondence with the company's accountant, Mr Lynch. The balance assigned was £62,938.

[23] So far as the Helen McKinnon trust was concerned, the estate comprised the sale proceeds of 1 Rhindhouse Road, the balances in the Clydesdale Bank accounts, furniture and personal effects and the balance of the loan by Mrs McKinnon to the company.

The trust assets

[24] From the foregoing evidence it can be seen that the assets of the trusts at their respective inceptions comprised in the case of John McKinnon's trust the creditor's interest in a loan to Ellon Properties Limited amounting to £62,938. The assets of Helen McKinnon's trust comprised the property at 1 Rhindhouse Road, the balances in the two Clydesdale Bank accounts, the furniture and effects, and the creditor's interest in the loan to Ellon Properties Limited of £108,896.

The accounts of Ellon Properties Limited and their treatment of the loans due to the trusts

[25] In his evidence at the hearing Mr Lynch explained that his firm, John Lynch & Co, chartered accountants, took over from Kidsons Impey as the accountants for Ellon Properties Limited with effect from the financial year ended 31 January 2001.

[26] Mr Lynch explained that the accounts of Ellon Properties Limited showed that before his death Mr McKinnon assigned to his wife his interest as creditor in the loan to the company to the extent of £100,000. The balance of the loan owed to Mr McKinnon was shown in the accounts for the year ended 31 January 2000 as £62,938 and as being owed to the John McKinnon trust "for benefit of family".

[27] Thereafter the company accounts showed the first defender as the sole director and shareholder until 7 April 2006 when he resigned as director and was replaced by his wife.

Mr Lynch explained that the two loans were recorded in the accounts for successive years under "other creditors" or "other loans". By the year ended 31 January 2006 the accounts showed that the loans owed to the trust stood at £207,725. Mr Lynch confirmed that this figure reflected the original two loans to the company by Mr and Mrs McKinnon together with the interest accumulated on the loans. It was clear, he said, that the two loans bore interest.

[28] Mr Lynch accepted that the company accounts for the year ended 31 January 2007 painted a dramatically different picture. Instead of the figure of £207,725, which had appeared in the 2006 accounts against the description "other loans", there was now simply a blank space. The figure against "directors accounts" under the heading "Creditors: amounts falling due within one year" had increased from £132 to £151,336.

[29] Mr Lynch was not able to offer any convincing explanation in his evidence for these remarkable entries in the 2007 accounts. He accepted that he had signed the accounts as the principal of his firm. He said that it looked as if the loan balances had been replaced by a director's loans account. He was not aware of the loans having been repaid to the trusts.

The loan by the Helen McKinnon trust to the first defender

[30] Ms Macdonald explained that the net balance of the proceeds of sale of 1 Rhindhouse Road amounted to £112,338.17. Her understanding was that this balance was paid direct to the first defender on the basis that the Helen McKinnon trust was lending it to him.

[31] Mr Lynch confirmed that such a loan had been made before he was assumed as a trustee. The existence and terms of the loan are set out in a standard security granted by the first defender over his home at 5 Hoylake Park, Castle Park, Bothwell in favour of the

previous trustees. The first defender undertook to pay the sum of £112,338.17 with interest thereon from 23 May 2003 at the rate of one and a half per cent over the Royal Bank of Scotland base lending rate and to do so by quarterly instalments commencing on 23 August 2003 and thereafter on 23 November, May and August each year. Mr Lynch said in evidence that so far as he was aware the first defender had never made any repayment in respect of the loan.

The accountings produced by the first defender

[32] In the action relating to John McKinnon's trust the first defender produced, in response to the court's order, an account of his intromissions as a trustee in the following terms:

> "**Ellon Properties Limited**
> **Analysis of Other Loans and Directors Current account**
>
> **lntromissions Al76/20**
>
> **Other Loans**

31.1.06	Loans bfwd	£138,489.29	
	Loans bfwd	£69,235.65	£207,724.94
31.1.07	Loan interest	£12,982.81	£12,982.81
			£220,707.75
	Directors loan account	£207,724.94	
	Loan interest cancelled	£12,982.81	£220,707.75
	Balance cleared		£0.00

> **Directors Loan account**

31.1.07	Opening balance	-£351.94
31.1.07	Cars personally	

	and purchased	£43,727.88	
	Other loans	-£207,724.94	
	Personal expenditure	£13,013.12	£150,983.94
			£151,335.88
31.1.08	Personal expenditure	£11,160.60	£11,160.60
			£140,175.28
31.1.09	Personal Expenditure	£50,168.78	
	Dividend declared	- £35,000.00	£15,168.78
			£125,006.50
31.1.10	Personal Expenditure	£45,489.09	£45,489.09
			-£79,517.41
31.1.11	Personal Expenditure	£30,812.09	£30,812.09
			-£48,705.32
31.1.12	Personal Expenditure	£48,549.34	
	Business expenses paid self	-£6,740.00	£41,809.34
			-£6,895.98
31.1.13	2012 funds repaid	£6,744.90	£6,744.90
			-£151.08

Ellon Properties Limited
Analysis of Other Loans and Directors Current account

lntromissions Al76/20

Directors Loan account

	Balance at 31.1.13		-£151.08
31.1.14	Business expenses paid self		-£674.89
			-£825.97
31.1.15	Business expenses paid self		-£1,281.85
			-£2,107.82
31.1.16	Salary adjustment	£6,639.01	
	VAT paid by director	-£3,524.77	
	Dividend declared	-£22,100.00	
	personal expenditure	£21,065.37	£2,079.61

			-£28.21
31.1.17	Personal Expenditure	£34,433.21	
	Dividend declared	-£34,500.00	-£66.79
			-£95.00
31.1.18	Personal Expenditure	£30,749.67	
	Dividend declared	-£31,100.00	-£350.33
			-£445.33
31.1.19	Personal Expenditure	735.51	
	Business mileage adjusted	-£633.20	102.31
			-£343.02
31.1.20	Personal Expenditure	£34,884.96	
	Dividend declared	-£35,000.00	-£115.04
			-£458.06
31.1.21	Personal Expenditure	£46,681.10	
	Dividend declared	-£40,000.00	
	repairs paid by director	-£4,600.00	£2,081.10
			£1,623.04

Note
Personal expenditure includes to (sic) capital expenditure carried out on Ellon Properties that had no verifiable vouchers.

Ellon Properties Limited
Analysis of Other Loans and Directors Current account

Intromissions A176/20

I herby certify that the above is a true extract of Other Loans and Directors Loan Account from 2006 until 2021.

Signed by Douglas Briggs CA

13th April 2022″

[33] In the action concerning Helen McKinnon's trust the first defender produced an account of his intromissons as trustee in the following terms:

"**Account of lntromissions A177/20**

Opened by a cheque from Adie Hunter Solicitors to Scott McKinnon

		£
Sum Introduced	16.02.07	112,191.92
Sums reimbursed to Scott McKinnon:		
a) In relation to schools fees see voucher from Glasgow Academy		(22,935.00)
b) sums due for the Builder Tomasz Drozwecnyzk		(42,610.00)
		65,545.00
Total sum due to be repaid to The Trust		46,646.92

I hereby certify that this is a true extract of the Halifax account number: 00472331

Signed by Douglas Briggs CA

Douglas Briggs FCCA FMAAT
Chartered Certified Accountant
Dated today – 12-4-22"

[34] The first defender produced along with the account relating to Mrs McKinnon's trust a number of invoices from Tomasz Drozwecnyzk, a general builder in Falkirk. The invoices, which bore to have been issued to the first defender in 2001 and 2002, were for work carried out at the property at 1 Rhindhouse Road. The first defender also produced a letter to him from the personal assistant to the head of finance at the Glasgow Academy dated 14 January 2022 confirming that tuition fees had been paid for the pursuer for his attendance as a pupil at the school between 1999 and 2003 when he was in year groups 1 to 5.

The objections to the accountings and the responses to the objections

John McKinnon's trust

[35] The grounds of objection to the account produced by the first defender for his intromissions with the John McKinnon trust were that the document produced was not such an account nor did it bear to be. It related to Ellon Properties Limited and bore to be an analysis of "other loans" and the "directors loan account". The account appeared to suggest that the balance of the loan by Mr McKinnon to Ellon Properties (believed to be represented by the figure of £69,235.65, the second entry in the account) had been "cleared" as at 31 January 2007. Loan interest was recorded as having been "cancelled" as at that date. Thereafter the account referred only to a "directors loan account" and did not relate to the trust at all. The loan balance due by Ellon Properties to the trustees could only have been "cleared" if the loan balance had been repaid in full, together with interest. The loan had not been repaid. No interest was paid.

[36] The pursuer also objected to the account on the ground that the first defender had a power and duty as trustee to invest the trust fund, and to accumulate the income of the fund with the capital. He had failed to do so.

[37] The first defender responded to the pursuer's objections in brief terms. He averred that the position in relation to the alleged loans by Mr McKinnon to Ellon Properties was not clear. The first defender had instructed that further accounting investigations should be carried out. He anticipated that these would be concluded within a period of 4 weeks. At the hearing there was no evidence that any such further investigations had ever been carried out.

Helen McKinnon's trust

[38] The pursuer objected to the accounting on a number of grounds. He noted that the account referred to only one asset, a sum of £112,191.92 introduced on 16 February 2007. No specification was provided as to the nature of that figure or where it might have come from. The first defender had completely failed to account for the trust assets. He was called upon to do so without further delay. He was also called upon to account for interest on any loan balances due to the trustees.

[39] The debit entries on the account did not bear to have been paid from trust assets nor was it apparent why the trust might have paid those sums. It appeared that the first defender had purported to debit items from the trust fund retrospectively. No such debits appeared on the accounts produced by any other defender.

[40] In response to the pursuer's note of objections the first defender averred that the sum of £112,191.92 comprised the free proceeds of the sale of the property at 1 Rhindhouse Road, which was remitted to him by Messrs Adie Hunter, solicitors, described as the former trustees of Mrs McKinnon's estate. The free proceeds of the sale were paid to the first defender by cheque, which he collected from Adie Hunter's offices.

[41] The first defender had no knowledge of the alleged loan by Mrs McKinnon to Ellon Properties. If any funds were retained in Clydesdale Bank accounts, such funds were dealt with by Adie Hunter. Furniture and personal effects left in the property at 1 Rhindhouse Road had no value and were disposed of by the first defender. The first defender had not failed to account for the trust assets. He had done so in terms of the accounting provided. The debit entries on the account related to legitimate expenses of the trust comprising school

fees paid for the pursuer's benefit and the sums incurred in the renovation of 1 Rhindhouse Road.

The evidence at the hearing

[42] As I have already mentioned, evidence was given at the hearing by Sarah-Jane Macdonald and John Lynch. It is unnecessary to say any more about their evidence except that it was troubling that Mr Lynch professed to know so little about the affairs of the trusts in respect of which he held office as a trustee for many years. His understanding of what had happened to the assets of the two trusts was vague and unsatisfactory. He was inclined in his evidence to blame others and to distance himself from taking responsibility for anything that had taken place during his trusteeships.

[43] The pursuer gave evidence at the hearing, having travelled from Western Australia to do so. He was an impressive witness, who testified in a measured and straightforward manner. I had no difficulty in accepting his evidence as credible and reliable.

[44] The pursuer explained that he had emigrated to Australia from Scotland with his mother, step-father and sister when he was 13. He had completed his education in Australia and was currently employed by a global consulting organisation in the sphere of cyber security. As a child the pursuer had been aware that his paternal grandparents had set up trusts for him and that he was entitled to receive the benefit of these when he attained the age of 25. He had instructed solicitors to try to establish what had happened to the trust funds. Nothing had ever been paid to him.

[45] The pursuer referred to a letter sent by John Lynch & Co in October 2018 to Graeme Hunter (by then a consultant with Messrs Mitchells Roberton) in which it was stated

that on the instructions of the first defender Mr Hunter was authorised to "remit the balance of the funds being the sum of £3,186.68 less your fees, if any, to (the pursuer) in full and final settlement of any claim he may have relating to the Trust (sic)." The pursuer had not accepted this proposal.

[46] The pursuer was also referred to a letter of 23 January 2019 in which Mr Lynch claimed that he had intimated his resignation to the first defender "at least 12 years ago" but had not completed a formal resignation.

[47] In February 2019 solicitors acting for the pursuer wrote to the first defender pointing out that "the trust" had been running for the pursuer since Mr McKinnon's death in April 1999. They asked for a note of the trust assets and said that a full trust accounting would be required soon after the pursuer's forthcoming 25th birthday. They added that they had been trying to obtain information from John Lynch & Co for some time and suggested that the first defender might wish to liaise with that firm.

[48] Thereafter the pursuer instructed Messrs Harper Macleod LLP to represent his interests. They attempted to find out what had happened to the trust estates by writing to Mr Hunter, Mr Lynch and the first defender. They asked for a full accounting. This was not supplied. Solicitors instructed by Mr Lynch said that he was not aware of any formal appointment as a trustee, that he had had no day to day involvement in the administration of the trusts and had no duty to provide an accounting.

[49] The pursuer was not satisfied with the explanations provided to him. He therefore decided to raise the present proceedings seeking accountings for the two trusts and payment of the funds rightfully due to him.

[50] Mr Keith Small, a chartered financial planner and managing director of Avoca Management Limited, gave expert evidence about how trustees should approach the investment of trust estates. Mr Small was clearly an experienced financial adviser. He gave convincing and authoritative evidence, which was not challenged to any material extent. I shall have more to say about some of the details of Mr Small's evidence at a later stage. For the present I simply record that I had no difficulty in accepting him as a credible, reliable and impartial expert witness.

[51] I turn now to consider the evidence given by the first defender.

[52] The first defender read out various documents as part of his evidence-in-chief. He added some other testimony by way of a narrative of his version of events. The first defender stated that he believed that the pursuer was making claims for unrealistic amounts. At the time of writing his will the first defender's father had been recovering from life-saving surgery and taking "seriously strong medication". The first defender knew that his judgement was seriously impaired; he died 5 weeks later. His father had not had full mental capacity at the time and possibly misinterpreted advice.

[53] The first defender had written to Mr McKinlay in September 2001 stating that the loan was in fact earnings owed to him by his father for commission on vehicle sales over a 5 year period accumulating to about £63,000. His father had used the money to invest in Ellon Properties Limited. The first defender claimed in the letter that the company owed him the money.

[54] In the letter the first defender also said that his mother had expressed to him before her death that she had signed a will and trust document not fully understanding its contents and that his father had put pressure on her to "just sign".

[55] The first defender ended the letter by saying that he wished to challenge the validity of the wills and trust documents. He had never done so, however.

[56] The first defender claimed that documentation had been signed allowing an emigration to take place with certain conditions. One was that the pursuer (to whom the first defender repeatedly referred in his evidence as "this boy") could not return to make any claims on the first defender's parents' estates. Unfortunately, 20 years later the first defender was unable, he said, to obtain the relevant document.

[57] The first defender said that the pursuer had now come back to Scotland to ruin a family's life financially. He had made no claim in more than 17 years.

[58] The first defender stressed that he was his father's son and "rightful heir". The first defender had built up the company with his father. His father had recorded that he loaned the company money, but the money rightfully belonged to the first defender. The first defender said that between about 1982 and 1999 he had conducted the company's business for his father. They had agreed to split the profits from car sales equally on a monthly basis. Later Mr McKinnon had the idea that the first defender should not take all his wages, but only one third of them. This had happened over a 5 year period resulting in the first defender being owed a sum in excess of £60,000. While his father had categorised this as a loan, in reality it was money which belonged to the first defender.

[59] In cross-examination the first defender was closely questioned about the details of his administration of the trusts. He had no satisfactory answer to any of the points put to him. He was unable to explain why the treatment of the loans was so significantly altered in the company's accounts for the year ended 31 January 2007. He could not say why the 2006 figure of £207,725 reflecting the two loans was replaced by a blank space. He had no idea

why the accountant had made the loans "disappear". He accepted that the 2007 accounts made it look as if the loans had been repaid. He was unable to produce any evidence to show that they had been repaid to the trusts. When asked what had happened to the money due to the trusts the first defender replied that this dated back to when he was trying to dispute the pursuer's paternity. He said that he thought that the accountants had simply written off the loans. The first defender was referred to the results of a scientifically accredited paternity test carried out by Key Forensic Services Limited in September 2021. This concluded that he was the pursuer's biological father. The first defender said that he accepted that the pursuer was his "biological son". He agreed that he had been entered as the pursuer's father on the birth certificate. The pursuer's mother had registered the birth and given the first defender's name as the father. The first defender had always had suspicions that he was not the pursuer's father; he suspected infidelity. That had been the ground on which the actions were originally defended.

[60] The first defender accepted that he had unilaterally decided that the trusts had failed and that he took the benefit of the trust funds from about 2007 onwards. He said that he had paid for school fees out of his own pocket. He had also paid for renovations to be carried out at 1 Rhindhouse Road.

[61] The first defender acknowledged that he was not personally entitled to the trust funds. His view was that he had taken back what was rightfully his. He might have borrowed some of the money, but he always intended to pay it back. He had used the money to shore up the company, but always on the basis that it had to be paid back. The first defender was asked about the level of the directors' loan account shown in the company's accounts for the year ended 31 January 2008. The figure stated was £140,175.

The unaudited financial statements of the company for the year ended 31 January 2021 showed advances to the first defender as a director with the outstanding debit balance stated as merely £1,623. That was the same figure as shown in the first defender's accounting in the case of the John McKinnon trust for the final balance of the director's loan account. It was put to the first defender that the sums described in the accounting as "personal expenditure" had been removed by him from the company for his personal purposes. He replied: "yes, I follow".

[62] Notwithstanding the weight of the evidence to contrary effect, the first defender maintained (at least at some points in his evidence) that he had not used trust funds for his own purposes. He said that he did not lead an extravagant lifestyle. The company still owed the money to the trusts.

[63] When shown his late mother's will the first defender said that he had not paid too much attention at the time to the trustees' investment powers. He was not too interested in stocks and shares, having been "burned before". He had never taken any investment advice in relation to the trust funds. He had never spoken to the other trustees about investment. He had a reasonable relationship with Mr Lynch and had asked him to become a trustee.

[64] In relation to the loan to him of the net free proceeds of 1 Rhindhouse Road, the first defender claimed that he had initially paid the interest on the loan. He said that he remembered writing a cheque for this. It went into Adie Hunter's client account. He accepted that no interest payments were shown in the accounts spoken to by Ms MacDonald. The first defender agreed that he had made no payments of interest after September 2004. For some reason Adie Hunter had "paid us a cheque back". The first defender then said that "we opened up an asset trust account with the Halifax Building

Society". This had later been closed. He had received a cheque for the balance. He had a copy in his briefcase.

[65] By 2019 the company did not have the money to repay what was due to the trusts. The company had been under financial pressure. It had been "put into a spot" whereby the first defender had not yet been able to repay to the trusts the amounts due.

[66] I regret to say that the first defender was an unconvincing, incredible and unreliable witness. He testified in a defensive manner, his evidence being punctuated by lengthy pauses, during which he appeared to be trying to think of an answer to straightforward questions asking him to account for his conduct as a trustee.

The relevant legal principles

[67] The legal principles which apply in the circumstances of the present case may be summarised as follows.

[68] The relationship between a trustee and beneficiary is fiduciary in nature. The first defender, therefore, owed the pursuer a duty to act in the utmost good faith in the performance of his duties as a trustee of both trusts.

[69] It is a fundamental principle of all fiduciary relationships that the fiduciary (in this case the first defender in his capacity as a trustee) must not place himself in a position where his personal interests come into conflict with the duties he owes to the beneficiary. As long ago as the mid-nineteenth century this principle was well-established. In *Aberdeen Railway Co* v *Blaikie Bros* (1854) 1 Macq 461 at 471 the Lord Chancellor (Cranworth) put the matter this way in the context of a fiduciary duty owed by an agent to his principal:

> "And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interest of those he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into"

[70] The trustee's duty is to manage the affairs of the trust with the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs (*Rae* v *Meek* (1889) 16 R (HL) 31 per Lord Herschell at 33).

[71] Where there are three or more trustees, their actions must be agreed by the majority. Where there are two trustees, both must agree to any action (*Wolfe* v *Richardson* 1927 SLT 490; *Gloag and Henderson,* The Law of Scotland, 15th ed paragraph 41.13).

[72] A trustee who has a personal interest in a matter under consideration by the trustees is not entitled to vote on a decision relating to that matter (*Shanks* v *Aitken* (1830) 8 S 639; *Gloag and Henderson,* The Law of Scotland, 15th ed paragraph 41.13).

[73] Where he has power so to do, a trustee has a duty to invest the trust fund in suitable investments. A trustee who fails to invest the trust fund in accordance with that duty may be found to liable to account to the trust for the investment return lost in consequence of that failure; liability for the failure may be competently entertained in an action for accounting (*Melville* v *Noble's Trustees* (1896) 24 R 243). Trustees holding trust funds should invest them so as to yield an investment return (*ibid* per the Lord Justice Clerk (Macdonald) at 249).

[74] Before exercising a power to invest, the trustee must have regard to the suitability of the proposed investment for the trust and the need for diversification of investments of the trust, in so far as appropriate to the circumstances of the trust. The trustee should also obtain and consider proper independent advice about the way in which the power of investment should be exercised (Trusts (Scotland) Act 1921, section 4A).

[75] A trustee must keep proper accounts of the trust estate (*Ross* v *Ross* (1896) 23 R (HL) 67. In that case, which involved proceedings brought by a son against his mother, the Lord Chancellor (Halsbury) said this at page 77:

> "… there are some lines which must be sharply drawn, and notwithstanding that the defender is a mother, one must not diminish, if one can help it, the obligation upon a person who is managing the estate and effects of another to be able to render an account afterwards of what he or she has done."

[76] A failure to maintain proper accounts amounts to gross negligence on the part of the trustee (*Wilson* v *Guthrie and others* (1894) 2 SLT 338).

[77] Where a trustee misappropriates trust funds or applies trust funds for his own purposes (or those of a company he controls), he may be found liable for such accumulation of income as the fund would have yielded had it been properly invested (*Campbell* v *Keith* (1840) 2 D 1367; *Cochrane* v *Black* (1857) 19 D 1019).

Conclusions on the first defender's performance of his duties as a trustee

[78] Applying these principles to the facts of the present case, it is clear that the first defender has acted in breach of his fiduciary duties as a trustee. Despite being given every opportunity to do so, the first defender was unable to explain in his evidence what had happened to the assets of the trusts. He produced no reliable accounts of his intromissions with the trust estates. The first defender failed to manage both trusts for the benefit of the pursuer, as he was required to do by the terms of his parents' wills. He allowed his own personal and business interests to come into conflict with the interests of the trust. He intromitted with the trust funds for his own benefit. He failed to give consideration to investment of the trust funds. He failed to seek independent financial advice. The first

defender is liable for his wrongful intromissions in breach of his duty as a trustee and for his failure to invest the trust funds.

[79] The only reasonable conclusion to draw from the accounts of Ellon Properties Limited, the accounting produced by the first defender in respect of the John McKinnon trust and the failure to maintain proper accounts for the trust is that the first defender intromitted with the two loans made by his parents to the company for his own personal benefit. The accounting shows that he depleted the director's loan account by personal expenditure. I reject the first defender's evidence that he invested the trust funds in the company. There is no documentary evidence to support that contention. The documentary evidence points in the opposite direction: the first defender misappropriated the loans and used the money for his own personal purposes.

[80] On or about 31 January 2007 the first defender misappropriated the balances of the loans due by Ellon Properties to the trusts and applied these sums for the furtherance of his own interests. That is the only reasonable inference to draw from the entries in the 2007 accounts of the company and the first defender's inability to explain what has happened to the money.

[81] So far as the loan made by the Helen McKinnon trust to the first defender is concerned, I reject the suggestion that the first defender invested this in the company. Again, there is no documentary evidence to support that proposition. In any event, any investment of trust funds in the company would have been in breach of the first defender's duty as a trustee since he owned all the shares in the company.

[82] In respect of the loan to him of the free proceeds of sale of 1 Rhindhouse Road, I find that the first defender paid no interest on the loan. No interest is shown in the trust

accounts spoken to by Ms Macdonald. The first defender's accounting purports to show that the loan money was paid into an account with the Halifax Building Society. He was unable to explain where the money now is. No documentation from the Halifax was produced. The only reasonable conclusion to draw is that on or about 31 January 2007 the first defender misappropriated the outstanding balance on the loan and applied it to his own interests.

[83] As to the invoices from the builder and the school fees, this was expenditure incurred by the first defender personally. There was no discussion with (far less approval obtained from) the other trustees.

[84] The first defender maintained that he agreed to reimburse the company for sums he had taken out. By the time he did so, the only other trustee was Mr Lynch. The first defender did not obtain Mr Lynch's agreement to any such arrangement.

[85] At the end of the day, I am left in no doubt that the first defender is a disappointed beneficiary, who resolved to take matters into his own hands by misappropriating his son's inheritance in defiance of the wishes expressed by his parents in their wills.

Remedies

[86] I have found that the first defender breached his fiduciary duties as a trustee by misappropriating the trust funds for his own personal benefit. He is, therefore, personally liable for the failure properly to invest the trust funds.

[87] Mr Small gave unchallenged evidence about the appropriate level of risk for the investment of trust funds. He referred to the Brewin Dolphin risk guide for intermediaries; this sets out various risk categories for investments. In the case of trusts such as those in the

present case, Mr Small's opinion was that selecting investments according to risk category 5 would have been appropriate given that the trust still had about 12 years to run from 2007 when the wrongful intromissions by the first defender took place. Another consideration favouring investment at risk category 5 was that the trust funds were unlikely to be called on until they matured upon the pursuer attaining the age of 25.

[88] On the basis of the first defender's accounting, the balance of the loan by the John McKinnon trust to the company as at 31 January 2006 was £69,235.65. Using the interest figure of £12,982.81 stated in the accounting, it is possible to work out that by 31 January 2007 the balance of the loan would have been £73,562.88 (£12,982.81 x £69,235.65/£207,724.94 = £4,327.23).

[89] If invested at risk category 5 from 31 January 2007 the current value of the loan owed by the company to the John McKinnon trust would be £208,036.47. From that figure the settlement amount contributed by the second defender of £70,000 falls to be deducted. That leaves the figure of £138,036.47 as a reasonable estimate of the loss sustained by the pursuer as a result of the first defender's wrongful intromissions with the funds of the John McKinnon trust. I have granted decree for payment of that sum by the first defender as an individual to the pursuer with interest at the judicial rate of 8 per cent per year from today's date until payment.

[90] In the case of the Helen McKinnon trust the balance of the loan due to the company as at 31 January 2006 was, according to the first defender's accounting, £138,489.29. Adding interest, the balance as at 31 January 2007 was £147,144.87.

[91] The balance of the loan by the Helen McKinnon trust to the first defender including interest as at 31 January 2007 was approximately £139,843.24 as shown in the following table.

Date	Interest for period	Applicable rate - (if two rates in relevant period, lower rate applied)	Balance outstanding
23 May 2003	n/a	n/a	£112,338.17
23 Aug 2003	£1,404.23	5	£113,742.40
23 Nov 2003	£1,421.78	5	£115,164.18
23 Feb 2004	£1,511.53	5.25	£116,675.71
23 May 2004	£1,604.29	5.5	£118,280.00
23 Aug 2004	£1,700.27	5.75	£119,980.27
23 Nov 2004	£1,874.69	6.25	£121,854.96
23 Feb 2005	£1,903.98	6.25	£123,758.95
23 May 2005	£1,933.73	6.25	£125,692.68
23 Aug 2005	£1,963.95	6.25	£127,656.63
23 Nov 2005	£1,914.85	6	£129,571.48
23 Feb 2006	£1,943.57	6	£131,515.05
23 May 2006	£1,972.73	6	£133,487.78
23 Aug 2006	£2,002.32	6	£135,490.09
23 Nov 2006	£2,117.03	6.25	£137,607.13
23 Feb 2007	£2,236.12	6.5	£139,843.24

[92] The aggregate value of the trust funds misappropriated by the first defender on or about 31 January 2007 from the Helen McKinnon trust is accordingly £286,998.11 (£147,144.87 + £139,843.24).

[93] Investment at risk category 5 would result in a current value of £811,604.93. From this the payment agreed to be made by the second defender of £230,000 falls to be deducted. That leaves a net loss to the pursuer of £581,604.93. I have granted decree against the first defender as an individual for payment of that sum to the pursuer with interest at 8 per cent per year from today's date until payment.

[94] The first defender accepted that there was a cash balance of £6,298.45 due to the Helen McKinnon trust in the client account of Adie Hunter. He ought to have arranged for this to be paid to the pursuer long ago. I shall separately grant decree against the first defender as an individual for payment of that sum to the pursuer with interest at 8 per cent per year from 30 March 2019 (the date of the pursuer's 25th birthday) until payment.

[95] The furniture and effects only ever had a relatively low estimated value and have long since been disposed of. For present purposes they can be left out of account as being *de minimis* in the overall scheme of things.

[96] I have reserved all questions of expenses.