EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 33
P208/23

Lord Malcolm
Lord Doherty
Lord Tyre

OPINION OF THE COURT

delivered by LORD TYRE

in the Petition

by

MICHAEL JAMES MESTON REID

Judicial Factor over the estate of M

Petitioner

for Directions

Petitioner: Watt; Shepherd & Wedderburn LLP
First Respondent: Trainer; TC Young LLP
Second Respondent: Inglis; Beveridge & Kellas

22 August 2023

Introduction

[1] Mr C died intestate on 7 February 2013. His sole heir was his son M (the first respondent), then aged 6. M's mother is Ms Z (the second respondent) who was Mr C's partner. Mr C left a substantial estate, including a house in Aberdeen; bank accounts, ISAs and shares in private companies in Scotland; quoted shareholdings in England and Wales;

and a property and a bank account in Thailand. On 26 March 2013 the second respondent was confirmed as executor dative *qua* guardian of the first respondent.

[2] The second respondent applied to the Accountant of Court in terms of section 9(2) of the Children (Scotland) Act 1995 for a direction as to the administration of the property in the estate. The Accountant of Court in turn applied to the sheriff court in Aberdeen under section 9(5)(a) of the 1995 Act for the appointment of a judicial factor to administer the property in the estate to which the first respondent (then aged 9) was entitled. That application was opposed by the second respondent, but a settlement was reached and on 8 March 2016 the sheriff, on a joint motion, pronounced an interlocutor appointing the petitioner as judicial factor and ordaining the executry agents to transfer to him the estate of the late Mr C.

[3] Since 2016 the petitioner has administered the estate, producing annual accounts of charge and discharge. At the time of the petitioner's appointment, the first respondent lived with the second respondent in the house in Aberdeen and was habitually resident there. In 2017, however, the respondents moved to live in Cambridge. The house in Aberdeen was sold and, at the second respondent's request, the petitioner purchased with estate funds a house in Cambridge where the respondents continue to reside. The first respondent is now considered to be habitually resident in England.

[4] The first respondent has attained the age of 16. He wishes the judicial factory to be ended, and has asked the petitioner to make over all of the moveable property in the trust estate situated in Scotland and in England and Wales. As regards the house in Cambridge, English law does not permit legal title to land to be held by a person under the age of 18. The first respondent has accordingly asked the petitioner to transfer the house - and also all of the moveable property situated in Scotland and in England and Wales – to the second

respondent and a family friend, to be held by them as trustees of a bare trust for him until he attains age 18 in 2024. The petitioner considers that these requests raise issues that must be resolved at or before the time when he applies to be discharged from office. In this petition he seeks directions from the court.

Legal background

Age of Legal Capacity (Scotland) Act 1991

[5] Section 1(1) of the Age of Legal Capacity (Scotland) Act 1991, as amended by the Children (Scotland) Act 1995 with effect from 1 November 1996, provides:

> "As from the commencement of this Act—
>
> (a) a person under the age of 16 years shall, subject to section 2 below, have no legal capacity to enter into any transaction;
>
> (b) a person of or over the age of 16 years shall have legal capacity to enter into any transaction."

Section 3(1) allows a person under 21 to apply to the court to set aside a transaction which he entered into while he was aged 16 or over but under 18 and which is a "prejudicial transaction", defined as a transaction which an adult, exercising reasonable prudence, would not have entered into in the circumstances of the applicant at the time when he entered into it, and which has caused or is likely to cause him substantial prejudice. Among the categories of transaction to which section 3(1) does not apply is a transaction ratified by the applicant after he attained age 18 and in the knowledge that it could be the subject of an application to the court to set it aside.

Children (Scotland) Act 1995

[6] Section 9 of the 1995 Act, entitled "Safeguarding of child's property", provides, so far as material, as follows:

> "(1) Subject to section 13 of this Act, this section applies where—
>
> (a) property is owned by or due to a child;
>
> (b) the property is held by a person other than a parent or guardian of the child; and
>
> (c) but for this section, the property would be required to be transferred to a parent having parental responsibilities in relation to the child or to a guardian for administration by that parent or guardian on behalf of the child.
>
> (2) Subject to subsection (4) below, where this section applies and the person holding the property is an executor or trustee, then—
>
> (a) if the value of the property exceeds £20,000, he shall; or
>
> (b) if that value is not less than £5,000 and does not exceed £20,000, he may, apply to the Accountant of Court for a direction as to the administration of the property.
>
> …
>
> (5) On receipt of an application under subsection (2) … above, the Accountant of Court may do one, or (in so far as the context admits) more than one, of the following—
>
> (a) apply to the court for the appointment of a judicial factor (whether or not the parent or guardian mentioned in subsection (1)(c) above) to administer all or part of the property concerned and in the event of the court making such an appointment shall direct that the property, or as the case may be part, concerned be transferred to the factor;
>
> (b) direct that all or part of the property concerned be transferred to himself;
>
> (c) direct that all or, in a case where the parent or guardian so mentioned has not been appointed by virtue of paragraph (a) above, part of the property concerned be transferred to the parent or guardian, to be administered on behalf of the child.
>
> …

(9) In this section 'child' means a person under the age of sixteen years who is habitually resident in Scotland."

Circumstances in which the petitioner seeks directions

[7] Section 9 of the 1995 Act makes no express provision for the termination of a judicial factory on a child's estate. The petitioner accordingly seeks guidance as to what he ought to do where the child has become habitually resident in a jurisdiction where the age of legal capacity is 18. He is willing to continue in office until the first respondent attains age 18.

[8] The petitioner avers that certain issues have arisen in relation to the administration of the estate. Firstly, although the property and the sum deposited in a bank account in Thailand have been included in the petitioner's accounts of charge and discharge, he has been unable to deal with or obtain control over these assets. The law of Thailand does not recognise his appointment relative to assets in Thailand. In order to acquire the right to intromit with such assets he requires the co-operation of the second respondent, which has not been forthcoming. He is unaware of the balance on deposit, and does not know what use has been made of the property in Thailand, its condition or current value, and whether any income (on which tax might be due) has been derived from it. He has not consented to any action taken unilaterally by the second respondent. Secondly, an ISA forming part of the estate was encashed by the second respondent in March 2020 without the consent of the petitioner. He has requested that the second respondent explain the value of the initial receipt and related income received since then, but she has declined to do so. The proceeds of the portfolio are due to be transferred to the petitioner. The second respondent advised the petitioner that she would do so, but to date has not.

[9] As regards the first respondent's request to have the house in Cambridge and other assets transferred to the second respondent and a trusted family friend to be held in a bare

trust for him pending his attainment of age 18, the petitioner invites the court to have regard to the following considerations: (a) the overriding aim, according to the petitioner, is to preserve the value of assets in the estate until the first respondent attains majority and is capable of dealing with them on his own account; (b) it is not clear that the proposed trustees are by virtue of qualification or experience well placed to administer a trust estate of significant value; (c) the wide scope of the trustees' powers in terms of the draft trust deed disclosed by the respondents at a late stage cause him concern; (d) the petitioner has encountered difficulties in administering the estate, particularly as regards the ISA; (e) he has unsuccessfully been seeking information for some time from the second respondent as to the value of the assets formerly in the ISA and as to income deriving therefrom and associated gains or losses, and also as to income and expenses pertaining to the property in Thailand, which information is material to the preparation of the first respondent's tax returns; (f) it is not clear how the proposed trustees intend to invest or otherwise deal with assets transferred to them; and (g) trustees are not required to find caution, and it is unlikely that the proposed trustees would be insured in the event of a claim against them by the first respondent.

[10] The petitioner has sought and obtained the opinion of Mr Owen Curry, a practising English barrister, regarding the inherent jurisdiction of the High Court in England and Wales to appoint a guardian of a child's estate, the exercise of that power by the court in accordance with the conditions in rule 21.13 of the Civil Procedure Rules; and the ability of a minor to enter into a binding contract. According to the advice received, rule 21.13 permits the court to appoint the Official Solicitor to be a guardian of a child's estate (which is not the same as a "guardian" appointed under section 5 of the Children Act 1989) where, *inter alia* (sub-para (c)), a court outside England and Wales notifies the court that it has ordered or

intends to order that money be paid to the child. The court may not appoint the Official Solicitor under this rule unless the person with parental responsibility agrees, or the court considers that their agreement can be dispensed with. The Official Solicitor's appointment may continue only until the child reaches 18. Mr Curry observed that appointments under rule 21.13 seemed to be rare but remained possible.

[11] Mr Curry further advised, under reference to Halsbury's *Laws of England and Wales*, "Children and Young Persons" (Vol 9, 2017, at paras 12, 41 and 46) that at common law a contract by a child is generally voidable at the instance of the child, although it is binding upon the other party. Exceptions to this rule are contracts for necessaries and certain other contracts such as contracts of service and apprenticeship, if they are clearly for the child's benefit. Contracts which are obviously prejudicial to a child are wholly void. A purchase of property, or the acceptance of a gift of property, by a child is voidable by him either by himself during minority, or upon attaining full age, but in the meantime it is valid. A child can dispose of property by sale or gift in the same manner as an adult, except where the alienation is clearly prejudicial to his interests. However, except in the case of alienation of property pursuant to or in performance of a contract which is in law binding upon him, a child cannot make a finally effectual disposition of property by deed, as the disposition is voidable by him when he comes of age.

[12] It is accepted by the petitioner that no issue arises for the court's determination in relation to the assets in Thailand. The petitioner's appointment is not recognised there, and the second respondent has been appointed by the court in Thailand to administer the Thai property on behalf of the first respondent.

Questions

[13] Against that legal background and in the circumstances narrated, the petitioner seeks directions from the court in response to the following questions:

> 1. Is the petitioner bound, or entitled, to transfer: (i) the moveable assets in the estate located in Scotland to the first respondent, and (ii) the heritable and/or moveable assets in the estate located in England and Wales, to either (a) the first respondent or (b) the second respondent as the person with parental responsibility for the first respondent in terms of section 3(3) of the Children Act 1989 or (c) the second respondent and another person to be held in a bare trust for the first respondent pending his attaining full capacity under the law of England and Wales?
>
> 2. Alternatively, is the petitioner bound, or entitled, to transfer the entire heritable and/or moveable assets in the estate located in Scotland and in England and Wales to either (a) the first respondent, or (b) the second respondent as the person with parental responsibility for the first respondent in terms of section 3(3) of the Children Act 1989 or (c) to the second respondent and another to be held in a bare trust for the first respondent pending his attaining 18 years of age?
>
> 3. Alternatively, is the petitioner bound, or entitled, to continue in office until the first respondent attains the age of 18?
>
> 4. Alternatively, is the petitioner bound, or entitled, to continue in office pending the outcome of notification by the sheriff or by your Lordships to the High Court under CPR rule 21.13(c)?

Submissions for the respondents

The first respondent

[14] It was submitted on behalf of the first respondent that question 1 should be answered in the affirmative as regards parts (i) and (ii)(c), in accordance with his instructions to the petitioner. The purpose of the petitioner's appointment was to preserve and protect the estate for the first respondent until it could be realised and distributed. The first respondent was now an adult in terms of Scots law and had capacity to give valid and competent instructions to the petitioner in relation to the factory estate. He had given competent and valid instructions to the petitioner as to how he would wish the property due

to him to be distributed. The petitioner had provided no cogent reason why such instructions should not be followed. Now that the first respondent had capacity to provide the petitioner with instructions in relation to distribution, the petitioner was under a duty to comply with those instructions and conclude the judicial factory. He had no discretion to withhold transfer of the assets or to look behind his instructions.

[15] If the first respondent had remained habitually resident in Scotland, no issue would have arisen: it would have been clear that the judicial factory terminated on his 16th birthday. To hold that it continued until he attained age 18 because he was now habitually resident in England would be to apply English law to a Scottish judicial factory. It was the clear intention of section 9 of the 1995 Act and of the Scottish Law Commission report which preceded it (Report on Family Law, Scot Law Com no 135, 1992, para 4.10ff) that the factory was fulfilled when he attained age 16.

[16] The petitioner had presented no evidence which would entitle the court to find that to transfer part of the estate into trust for the first respondent's benefit would have an adverse impact on the estate. Nor was there anything to indicate that the second respondent was not an appropriate person to act as a trustee in his interests. Failure to provide the petitioner with information did not amount to evidence that she had acted contrary to the first respondent's interests. In any event, regardless of the petitioner's view as to the second respondent's intentions and abilities as a potential trustee, he was not entitled to refuse to distribute the estate when the ward had full legal capacity in the jurisdiction responsible for the judicial factor's appointment.

[17] The court should decline to make any notification to an English court for the purposes of CPR rule 21.13. There was no evidence to suggest that it was in the first respondent's best interests for the estate to be overseen for a further 15 months by the

Official Solicitor. The appointment of a "guardian of the estate" would incur further expense to be met by the estate, which was not in his best interests.

The second respondent

[18] In her answers to the petition, the second respondent denied that she had failed to co-operate with the petitioner in relation to either the assets in Thailand or the English ISA. On 18 August 2022 she had been appointed as manager of the Thai assets by a court in Thailand because under Thai law, as the first respondent's mother, she was the person recognised as able to manage his estate. She avers that she has managed the Thai property judiciously on the first respondent's behalf and in his best interests, and that the Thai bank account has been frozen since 2014. The English ISA is held by Barclays Bank, whose policy did not permit the transfer of the portfolio into the judicial factory. She has attempted to transfer the portfolio appropriately and in accordance with Barclays' policy, and has completed forms requested of her by the petitioner. The only withdrawals made from the account have been to cover legitimate costs relating to the first respondent's well-being. In accordance with advice from the Accountant of Court, she has instructed an English solicitor to establish appropriate trust arrangements to hold the Barclays portfolio for the first respondent as sole beneficiary.

[19] The second respondent supported her son's aspiration to have sole possession of the assets in the estate, and his wish to have all of the assets transferred to trustees to be held for him on a bare trust. His clearly expressed wishes should be implemented if they were consistent with the law. The law of England and Wales required the house in Cambridge to be held in trust. The powers associated with her parental responsibility made the second respondent the primary candidate to act as trustee. The judicial factory and the fees which

the petitioner had charged had depleted the value of the estate to the first respondent's detriment.

Decision

[20] A distinction requires to be drawn between termination of the judicial factory on the one hand and discharge of the judicial factor on the other. Termination occurs – or should occur – when the purpose for which the factor was appointed has been fulfilled. Depending upon the nature of the factory, this may happen as a matter of law or as a result of a court order bringing the factory to an end. In the present case the purpose of the factory was the administration of the estate inherited by the first respondent during the period when he lacked legal capacity according to the law of Scotland. The question for determination is therefore whether the factory terminated on the first respondent's 16th birthday or whether, having regard to the restrictions placed upon the capacity of 16 and 17 year olds by both Scots and English law, the factory continues until brought to an end by the court.

[21] Under the law as it stood before 1991, a factor *loco tutoris* could be appointed to administer the estate of a pupil (ie a boy under 14 or a girl under 12). Section 11 of the Judicial Factors (Scotland) Act 1889 provided that where a pupil's estate had, up to the date of his becoming a minor, been administered by a factor *loco tutoris*, the factor *ipso facto* became *curator bonis* to the minor and continued the administration of the estate until the majority of the minor, or until he had himself chosen curators. The statutory language appears to indicate that the curatory terminated on attainment of majority without any court intervention, and it was consistently interpreted in that manner in text books and case law. Thoms, *Judicial Factors* (2nd ed 1881) stated at page 12:

> "The arrival of the ward at puberty is the period of expiry of the office of a factor *loco tutoris,* and the attainment of majority is the period of expiry of the curatory of a *minor capax*".

Irons, *Judicial Factors* (1908), referred at page 547 to the termination of a factory "by mere lapse of time or otherwise without the necessity of a formal recall – e.g. factors *loco tutoris*, or curators *bonis* to minors, or where the ward dies". *Green's Encyclopaedia of the Law of Scotland* (2nd ed 1929) vol 8, *sv* "Judicial Factor", stated at paragraph 1011:

> "The appointment of a judicial factor is always temporary in the sense that it may be recalled at any time by the Court, and that it is brought to an end by … the coming of age of a minor or a pupil …".

Walker, *Judicial Factors* (1974), stated (page 14) that a factory *loco tutoris* terminated on the ward attaining minority and (page 19) that curatory of a minor terminated when the ward attained the age of 18. Maxwell, *The Practice of the Court of Session* (1980), observed at page 484, in a passage dealing with recall of factory and exoneration and discharge:

> "Where the factory has come to an end by mere lapse of time, as where a minor has attained majority, the crave for recall may be dispensed with, and only exoneration and delivery of the bond of caution sought".

[22] These observations are supported by judicial authority. In *Edmond* (1853) 15D 521, a factor *loco tutoris* whose ward had attained minority continued by agreement to manage the minor's affairs. At the time when the pupil attained minority the factory was in credit but when the factor applied three years later for his discharge there was a debit balance and a question arose as to whether the factor was due to pay interest to the estate at a penal rate, in terms of a statute passed after the pupil had attained minority. The court held that he did not, because the factory had expired on the pupil's attainment of minority before the statute took effect: Lord President (McNeill) at 522, Lord Ivory at 523.

[23] More recently, in *McIntosh* v *Wood* 1970 SC 179, a factor *loco tutoris* was appointed to administer a sum of damages recovered by a father on behalf of his pupil child. The

interlocutor appointing the factor authorised him to act until the ward attained 21, the then age of majority. When the child attained the age of minority, the factor *loco tutoris* automatically became his *curator bonis*. After the ward had reached the age of 18 but before he attained 21, the Age of Legal Capacity (Scotland) Act 1969 reduced the age of majority to 18, and he sought to have the factory estate made over to him. Because there was an interlocutor specifying attainment of age 21 as the time for payment, the Lord Ordinary reported the matter to the Inner House, who held that the ward was entitled to have the sum in the factor's hands paid over to him. Delivering the opinion of the court, Lord President Clyde stated (page 181):

> "The factor was appointed under the powers conferred by what is now Rule 131 of the Rules of Court. Under Rule 131(c) it was only during the minority or pupillarity of the child that this appointment could operate. As the attainment of 21 years of age in 1955 marked the end of minority, the interlocutor appointing the factor was in order as the law then stood. But this is no longer the case. Under section 1(1) of the Age of Majority (Scotland) Act 1969, which has now come into operation, a person shall attain majority on attaining the age of 18, instead of on attaining the age of 21. Parliament, therefore, has limited the duration of the factor's appointment, so that it expires when [the ward] attained 18. He is entitled, therefore, to the sum left in the factor's hands."

The facts of *McIntosh* v *Wood* differed from those of the present case in that there was an interlocutor providing expressly for termination of the factory on the ward's attainment of the age of majority. We do not, however, regard that as a distinction of importance. As the court made clear in the last sentence quoted above, the duration of the factor's appointment was limited to the period of the ward's pupillarity/minority not by the interlocutor of the court but by operation of law.

[24] On the basis of all of the foregoing authorities we conclude that under the law as it stood prior to the enactment of the Age of Legal Capacity (Scotland) Act 1991, a factory being administered by a curator *bonis* for a person under the age of majority terminated by

operation of law on that person's attainment of age 18. That is not to say that the court relinquished control over the factor on that date. The factory continued to subsist for the purpose of requiring the factor to account for his intromissions: see eg Thoms (above) at pages 12-13, and the authorities cited including *Stewart* v *Scott* (1850) 12D 744 at 747; *Accountant of Court* v *Jaffray* (1851) 14D 292 at 296; and *Accountant of Court* v *M'Allister* (1853) 16D 301.

[25] The 1991 Act swept away the previously existing law in relation to management of children's property. Section 5(4) abolished the office of factor *loco tutoris*. In terms of section 5(1), any reference to the tutor of a pupil child was to be construed as a reference to the guardian of a person under the age of 16 years, and the guardian was accorded, in relation to such a person and his estate, the powers and duties which a tutor previously had in relation to his pupil. (Section 5(1) was subsequently amended by the Children (Scotland) Act 1995 to substitute references to a child's legal representative for references to his or her guardian.) Section 5(3) provided that as from the commencement of the 1991 Act, no person shall, by reason of age alone, be subject to the curatory of another person. Although the 1991 Act did not repeal section 1 of the Age of Majority (Scotland) Act 1969, which reduced the age of majority in Scotland to 18, the terms "majority" and "minority" do not feature in the 1991 Act, or in subsequent legislation.

[26] The 1995 Act was therefore enacted in the context of a regime which, subject to specific exceptions, confers legal capacity at age 16, and in which the word "child" is sometimes used to refer to a person under 16 and sometimes to refer to a person under 18. When enacting section 9, making provision for the appointment of a judicial factor to administer property owned by a child, Parliament chose to define a child for that purpose as a person under age 16. This may be contrasted with, for example, section 1(3)(f) of the

1991 Act, which permits the appointment of a curator *ad litem* in trust variation proceedings to a person over 16 but under 18. So far as section 9 is concerned, on the child's attainment of age 16, his or her property ceases to be property owned by a child and, in the same way as occurred under the pre-1991 law and despite the absence of an express statement to that effect, the factory comes to an end. It follows that there is no need for an interlocutor appointing a factor to administer property owned by a child to specify that the factory will terminate on the child's 16th birthday. As with the pre-1991 law, however, the factory continues to subsist for the purpose of requiring the factor to account for his intromissions before he is entitled to seek his discharge.

[27] A feature of the present case is that the first respondent is now habitually resident in England, where the age of legal capacity is 18 and not 16. This difference in law is of little practical significance. The age of majority is the same in both jurisdictions, and both make provision for prejudicial contracts entered into by persons under 18 to be set aside before they reach the age of 21. The only material difference is that title to land in England cannot be held directly by a person under 18. So in the present case it would not be competent for the first respondent to require the factor to transfer the house in Cambridge to him personally. That does not, however, require or empower the court to prolong the factory until he attains 18; that would be inconsistent with the terms of section 9 which only permit the appointment of a factor on the estate of a person under 16.

[28] It may be that circumstances could arise in which this court would have a duty to decline to require a factor to comply with a wholly irrational or irresponsible demand, by a ward who has attained age 16, for application of the factory estate in a particular manner. In *Balfour Melville* (1903) 5F 347, a ward whose estate was being administered by a judicial factor appointed by his father applied, during his minority, for the fund to be transferred by

the factor to a trust for his benefit. The court refused the application, Lord McLaren observing (page 351):

> "… (W)hen the estate of the ward has been placed in the hands of the Court, and an application is made to withdraw it, a public duty is cast on the Court to see that the fund is not withdrawn except under a proper and effective scheme of administration … I cannot overlook the possibility that under pressure from creditors the trust which is to be constituted might be revoked. I am not suggesting that that would happen in this case, but still there is a possibility. Meantime the estate is perfectly safe, and is being managed with due regard to economy. I think … that it is better to leave the estate under its existing administration."

The case is not directly analogous because the ward was still in minority, but it may suggest that so long as funds remain in the hands of an officer of the court, the court has a duty, in exercise of the *nobile officium*, not to require the factor to comply with an unreasonable demand by the person on whose behalf the funds are being administered. In *Leslie's Judicial Factor* 1925 SC 464, Lord President Clyde, while recognising that there are certain familiar classes of factories, observed at page 469:

> "Now, there is no limit to the circumstances under which the Court, in the exercise of its *nobile officium*, may appoint a judicial factor, provided that the appointment is necessary to protect against loss or injustice which cannot in the circumstances be prevented by allowing the ordinary legal remedies to take their course."

Standing the provisions of the 1991 and 1995 Acts, the mere fact that a person had attained age 16 but not age 18 could not of itself be a sufficient reason for appointment or for continuation in office.

[29] We do not, in the circumstances of the present case, have to reach a view as to the existence or scope of such a duty. The request that has been made by the first respondent is for the factory estate to be transferred to trustees to be held on a bare trust for him until he attains full age according to English law. That appears to us to be an entirely appropriate course of action. We do not share the petitioner's concerns regarding either the identity and qualifications of the proposed trustees or the terms of the proposed trust, whose provisions

appear to us to mirror, *mutatis mutandis*, those that one would expect to see in a trust for similar purposes created under Scots law. Nothing has been placed before us to suggest that the trust fund would not be properly administered for the benefit of the first respondent. The issues described by the factor in relation to provision of information regarding income from the Thai properties (whose only relevance for the factor appears to have been in relation to the submission of tax returns), and the unsanctioned operation by the second respondent of an account in England as a practical solution to difficulties encountered in dealing with Barclays Bank, do not persuade us that there is any risk that property held in the proposed trust will be misapplied during the period prior to the first respondent attaining age 18. We are satisfied that the correct course of action in the circumstances of the present case is to find that the petitioner is bound to comply with the request to transfer the fund to the trustees of the proposed trust.

[30] Nor, for the same reasons, do we consider that there is any need to make a notification to a court in England in terms of CPR rule 21.13. We see no grounds upon which a court would be likely to decide to dispense with the agreement of the second respondent and appoint the Official Solicitor as guardian of the first respondent's estate. The expense incurred by such a course of action would not be in his best interests.

[31] We therefore answer the questions as follows:

> 1 and 2. The petitioner is bound to comply with the instructions of the first respondent, so far as competent in law. We understand those instructions to be to transfer the entire heritable and moveable assets in the estate located in Scotland and in England and Wales to the second respondent and another to be held in a bare trust for the first respondent pending his attaining age 18. Those instructions are competent in law.

3. We answer this question in the negative.

4. We answer this question in the negative.

Expenses

[32] The petitioner moved for the expenses of the petition to be met out of the factory estate in his hands, regardless of the answers to the questions upon which the directions of the court were sought. The respondents did not seek an award of expenses in their favour but contended that the application had been unnecessary and that the petitioner should bear his own expenses. We are satisfied that the questions raised are of some novelty, and that they relate to the administration of the factory estate and require an immediate decision. The conditions stated by Lord President Normand in *Peel's Trs* v *Drummond* 1936 SC 786 at 794 are met. It was quite proper for the petitioner to seek the directions of the court, and we find him entitled to his expenses out of the factory estate.