

Opinion of the Dean of Faculty

For Rev Stuart Campbell

1. I refer to agents' recent email of instruction. Rev Campbell has instructed the drafting of a Summons for potential group proceedings against the SNP. I have provided that draft. I am now asked to advise whether, assuming the facts averred in the draft Summons are established at proof, (a) the crime of embezzlement is made out on those facts, and (b) the civil claim for fraudulent breach of trust is well founded. For the reasons which follow, I am of the view that both propositions are soundly based.
2. In offering this Opinion I confine myself to the question of fraudulent breach of trust and embezzlement. I say nothing about whether the initial solicitation of funds was itself fraudulent; that is a separate question which I am not asked to address.

The Creation of a Trust

3. The starting point is whether the donations made by Group Members to the Defender's ring-fenced independence referendum fund were held on trust. If so, the unauthorised diversion of those funds engages the law of breach of trust and, where dishonesty is present, the criminal law of embezzlement.
4. On this question, the law is clear. In the very recent decision of *Harper Macleod LLP, Petitioner* 2026 SLT 503, the Inner House cited with approval the dictum of Lord Deas in *Connell v Ferguson* (1857) 19 D. 482 at 487:

“Where parties join in a subscription to effect a particular object, and place the money subscribed in the hands of certain persons to carry out that object, I think the quasi trust, thereby created, is for the alternative purpose of either carrying out the object of the subscription, or, if that cannot be done, of paying back the money.”

5. The Inner House, in comments which are binding on first instance judges in Scotland, treated this passage as an authoritative statement of principle, applying it to hold that investors who had paid deposits for a specific purpose (the development of property) retained a radical beneficial interest in those funds, such that when the trust purposes failed, a resulting trust emerged in the investors' favour.
6. The principle stated by Lord Deas applies with full force to the present facts. The Group Members joined in a subscription — donations to the Defender — to effect a particular object: the funding of a future independence referendum campaign. They

placed the money subscribed in the hands of the Defender to carry out that object. On the authority of *Connell v Ferguson* and *Harper Macleod*, a quasi-trust was thereby created.

7. The terms upon which the trust was created are pellucidly clear. The Defender's party fundraiser wrote to donors on 29 March 2017 stating that their donation "will be ring fenced for a future Independence referendum" and that the purpose was to "build up a sizeable war chest to fight the campaign when the time comes" and to "ensure we are not outspent in the referendum campaign". The 2019 fundraising email was in materially identical terms: donations had "been put into a ring-fenced fund to build up a war chest to fight a future Independence Referendum". The same can be said of the fundraising form issued in 2020: donors were given an option to tick a box which stated, in clear and unambiguous terms, that they wished to add their personal donation "to the ring-fenced Independence Referendum Campaign fund".
8. There was no qualification or ambiguity in these representations. The trust purpose was singular and specific: a future independence referendum campaign. The Defender was not at liberty to treat the moneys as its own or to apply them to its general party activities. It follows that the Defender, through its office-bearers, occupied a position of trust in relation to the Group Members as donors.

The Breach of Trust

9. The Summons avers — and for present purposes I assume this will be proved — that the ring-fenced funds were not in fact held separately or applied to the stated purpose. Instead, they were absorbed into the Defender's general finances and applied to the Defender's ongoing party activities, unrelated to any independence referendum campaign.
10. On or about 3 June 2026, the First Minister of Scotland, John Swinney, publicly confirmed that the ring-fenced referendum funds had been applied to "the ongoing activities of the Scottish National Party". As I see it (and I can think of no other reasonable interpretation), this constitutes an unequivocal admission that the trust funds were diverted from their stated purpose.
11. The diversion was without the knowledge or consent of the Group Members. No communication was sent to donors informing them that the ring-fencing had been breached. The donors were not asked to, and did not, consent to such diversion.
12. Moreover, after the diversion had occurred, responsible persons within the Defender continued publicly to represent that the ring-fence remained intact. In March 2020, the fourth-named defender, Ian McCann, told a donor seeking a refund that "your other donations are in a ring-fenced fund to fight the next referendum, whenever we are in a position to call that. ... We are not in a position to refund those monies." In late 2020, the Defender's then Treasurer stated: "I am happy to confirm that ... [t]here are sums ring fenced for a Referendum which reflects specific donations for this purpose."

The Crime of Embezzlement

13. Embezzlement in Scots law consists in the dishonest appropriation of property by a person who holds it in a fiduciary capacity. The essential elements are (i) a position of trust, (ii) appropriation of the trust property to an unauthorised purpose, and (iii) dishonesty.
14. As to element (i): for the reasons set out above, the ingathering of funds for the express purpose of a referendum campaign created a trust. Those responsible for the custody and management of the Defender's funds occupied a position of trust in relation to the donors.
15. As to element (ii): the deliberate decision to apply trust funds to the Defender's general party activities, rather than to the stated purpose, constitutes appropriation. In *Moore v HMA* 2010 SCCR 451, the High Court of Justiciary held that the transfer of company funds into a director's personal accounts for his own purposes constituted embezzlement, observing that “the *actus reus* of embezzlement (appropriation) was proved” and that “the circumstance that the sums transferred were, in some instances, repaid is immaterial”. Even temporary appropriation suffices: the crime is complete as soon as the funds are diverted from their authorised purpose.
16. That principle is directly applicable here. The funds were entrusted to the Defender for one purpose only: a referendum campaign. They were applied to another: general party expenditure. The appropriation is complete regardless of whether the Defender intended or hoped to restore the funds at some future date.
17. As to element (iii) — dishonesty: the mental element of embezzlement was comprehensively considered in *Moore v HMA*. The High Court, following *HM Advocate v City of Glasgow Bank Directors* (1879) 4 Couper 161, held that what is required is “some element of bad faith, some corrupt motive, some guilty knowledge, some fraudulent intent”. The Lord Justice Clerk in that case observed that before a breach of fiduciary duty can amount to a criminal offence, “there must be superadded to the illegality of the act some element of bad faith.”
18. The leading authority on the proper test for dishonesty is *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391.
19. In that case, the Supreme Court (Lord Hughes JSC, delivering the unanimous judgment) disapproved the second limb of the test previously laid down in *R v Ghosh* [1982] QB 1053, and held that the correct test is as follows:

“When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his

conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

20. There is no doubt that this applies equally in Scotland: *Kidd v Lime Rock Management LLP* 2025 S.C. 301.
21. This test applies equally in civil and criminal proceedings. As Lord Hughes observed, "there can be no logical or principled basis for the meaning of dishonesty (as distinct from the standards of proof by which it must be established) to differ according to whether it arises in a civil action or a criminal prosecution. Dishonesty is a simple, if occasionally imprecise, English word. It would be an affront to the law if its meaning differed according to the kind of proceedings in which it arose."
22. The test accordingly involves two stages. First, the Court ascertains the actual state of the individual's knowledge or belief as to the facts, and it does so subjectively. Second, having established what the individual actually knew or believed, the tribunal asks whether, given that knowledge or belief, the conduct was dishonest by the objective standards of ordinary decent people.
23. Critically, there is no requirement that the individual must have appreciated that what he or she was doing was dishonest by those standards. As Lord Hughes explained, the principal objection to the former *Ghosh* test was that "the less the defendant's standards conform to what society in general expects, the less likely he is to be held criminally responsible for his behaviour." The law does not excuse those whose standards are criminal by the benchmarks set by society: "it is an important, even crucial, function of the criminal law to determine what is criminal and what is not; its purpose is to set the standards of behaviour which are acceptable."
24. Applying the *Ivey* test to the present facts, and with one *caveat*, the first stage is straightforward.
25. The *caveat* is that the information before me does not disclose **who** within the SNP authorized the disbursement of the relevant funds. That would be a crucial fact for any criminal prosecution, as only individuals can be dishonest. However, for reasons discussed below, that is immaterial for the purposes of a civil claim.
26. Leaving that *caveat* to one side, whoever it was within the Defender that authorized the payment of the ring-fenced funds for other purposes must, it can reasonably be inferred, have known that:
 - (a) *Donors had contributed money on the express basis that it would be ring-fenced for a future independence referendum campaign;*
 - (b) *The Defender had publicly and repeatedly promised that the money would be so ring-fenced;*
 - (c) *A decision was taken to apply the ring-fenced funds to the Defender's*

general party activities — a purpose materially different from that for which the money was given;

(d) Donors were not informed of this decision and did not consent to it;

(e) After the diversion, responsible persons continued publicly to assert that the ring-fence remained intact.

27. There is no question of any mistake of fact. Whoever authorized the disbursement of funds knew exactly what the money was given for, and they knew that they were spending it on something else.
28. Turning to the second stage: would ordinary decent people regard such conduct as dishonest? In my opinion, no other conclusion is rationally available. The scenario is elementary: money is given to you for one purpose; you promise to keep it for that purpose; you spend it on something else; you conceal that you have done so; and when asked directly, you falsely assert that the money is still ring-fenced. Ordinary decent people would unhesitatingly characterise such conduct as dishonest. As Rev Campbell has observed elsewhere, it is no different from crowd-funding moneys to contest the defence of a litigation which was genuinely in contemplation, and then (when the putative pursuer decided not to bring the claim) spending those moneys to go on holiday. The person who contended, in such a situation, that they genuinely thought the donors would not have minded the holiday because they would have understood the stress occasioned by the threatened litigation would find that line of defence falling on stony ground.
29. Moreover, it is no answer — under the *Ivey* test — for the relevant individuals to assert that they did not regard their conduct as dishonest, or that they believed in good conscience that the party's general expenditure was ultimately in service of the cause of independence. Lord Hughes was explicit: “There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.” Even if those responsible genuinely believed that spending the ring-fenced money on “the ongoing activities of the SNP” was justifiable, that belief — however sincerely held — cannot convert objectively dishonest conduct into honest conduct.
30. As Lord Hughes observed in *Ivey* itself, by way of analogy: “It is a fallacy to suggest that [a] finding that Mr Ivey was truthful when he said that he did not regard what he did as cheating amounted to a finding that his behaviour was honest. It was not. It was a finding that he was, in that respect, truthful. Truthfulness is indeed one characteristic of honesty, and untruthfulness is often a powerful indicator of dishonesty, but a dishonest person may sometimes be truthful about his dishonest opinions.”
31. In the present case, the position is even stronger than in *Ivey*. There, Mr Ivey genuinely believed his gambling technique was legitimate “advantage play”, and there was no finding of deception by the trial judge. Here, by contrast, the concealment and active misrepresentation are patent. Those responsible did not

divert the funds while openly acknowledging to donors that they were doing so — in which case some sort of argument about honest belief might conceivably be advanced. They diverted the funds covertly, denied doing so when asked, and continued to solicit further donations on the same false basis. The concealment and continuing misrepresentation are themselves powerful indicators of a consciousness that what was being done was wrong.

32. In summary: on the *Ivey* test, dishonesty is established where a person, knowing the true facts, acts in a way that ordinary decent people would regard as dishonest. Whoever authorized the disbursement of funds knew the true facts — they knew the money was given for a referendum, they knew they were spending it on other things, and they knew they were concealing this from donors. Ordinary decent people would regard that conduct as dishonest. It follows that the element of dishonesty, whether for the purposes of the criminal law of embezzlement or the civil claim for fraudulent breach of trust, is amply satisfied on the assumed facts.
33. In *Moore*, the High Court held that the amounts and frequency of withdrawals, in the absence of any *bona fide* explanation, pointed to a dishonest intent, and that use of funds for the accused's own purposes was “consistent with an intention to deprive the company” of the monies. The same reasoning applies here: the Defender diverted funds exceeding £600,000 to its own general expenditure, without authorisation, explanation, or consent.
34. Accordingly, assuming the facts averred in the Summons are proved, all elements of the crime of embezzlement are made out.

The Civil Claim for Fraudulent Breach of Trust

35. Turning to the civil claim: the Summons seeks declarator that the Defender held the donated sums in trust, that the knowing application of those funds to other purposes constituted a fraudulent breach of trust, and payment of damages.
36. At the outset, the problem discussed earlier regarding the need to identify who it was that authorized the illegitimate use of the moneys before prosecution could follow does not apply to a civil claim: it would suffice to say that *someone* (to the pursuers unknown) so authorized; that they are inferred (on balance of probability) to have done so dishonestly; and that the SNP is liable therefor.
37. The existence of the trust is, for the reasons already stated, established by the authorities. The principle in *Connell v Ferguson*, as approved in *Harper Macleod LLP*, is that where parties subscribe money for a particular object and place it in the hands of others to carry out that object, a quasi-trust is created for the alternative purpose of either carrying out the object or paying back the money. The trust is created by operation of law upon receipt of the funds: it does not depend upon the existence of a formal trust deed or separate bank account.
38. The Court in *Harper Macleod* further held that “the provider of the trust funds retains a radical beneficial interest in them” and that, where the trust purposes fail

or are not carried out, the funds fall to be returned to the providers. That is the position here: no independence referendum campaign has taken place, the funds have been spent on other matters, and the donors are entitled to repayment.

39. As to fraudulent breach: the breach is constituted by the deliberate application of trust funds to an unauthorised purpose without the knowledge or consent of the beneficiaries (the donors). The breach is fraudulent because it was accompanied by dishonesty — evidenced, as discussed above, by concealment, active misrepresentation that the ring-fence was intact, and the absence of any *bona fide* belief that the diversion was authorised. The analysis of dishonesty above, under reference to the case of *Ivey* as applied in *Kidd*, is precisely the same.
40. The obligations arising from fraudulent breach of trust are imprescriptible under s.7(2) of and Schedule 3 to the Prescription and Limitation (Scotland) Act 1973. That is significant given that many of the donations were made more than five years ago. There is no prescriptive bar to the claim.
41. It is also no answer to the claim to say that the funds were used for other worthwhile purposes, or that the Defender is “the party of independence.” The trust was specific: a referendum campaign. As the Court observed in *Harper Macleod*, it is the stated purpose of the trust — and no other — which governs the permissible application of the funds. The Defender's own Treasurer acknowledged this distinction by repeatedly assuring members that the ring-fenced sums were separate from general party expenditure.
42. Nor is it an answer that no formal trust deed was executed or that the funds were not held in a separate bank account. Lord Deas' *dictum* in *Connell v Ferguson* makes clear that the trust arises from the subscription itself and the terms on which it was made; it does not depend upon the mechanics of how the trustee chooses to hold the funds. Indeed, the failure to maintain a separate fund, far from excusing the breach, is itself evidence of a cavalier disregard for the trust obligations which the Defender assumed. A failure to segregate trust funds would imperil them in the event of insolvency.
43. On the assumed facts, the civil claim for fraudulent breach of trust is, in my opinion, nigh on irresistible. The trust was created; it was breached; the breach was dishonest; and the donors have suffered loss in the amount of their unrefunded donations.

Conclusion

44. For the foregoing reasons, I am of the opinion that:

- (a) Assuming the facts averred in the Summons are proved, all elements of the crime of embezzlement under Scots common law are made out: position of trust, appropriation of trust funds to an unauthorised purpose, and dishonesty;

(b) The civil claim for fraudulent breach of trust is close to irresistible: the donations created a trust; the trust was deliberately and dishonestly breached; the donors retain a radical beneficial interest in the diverted funds and are entitled to repayment together with damages for the fraudulent breach.

45. I should also state that additional claims are potentially available to the donors.

46. First, albeit claims for distress falling short of psychiatric injury are not generally available, the position may be otherwise in the case of deliberate wrongdoing. In that case, the *actio iniuriarum* may be available under Scots law, entitling the donors to claim damages for distress or inconvenience. As Lord Clark found recently, “where there is an intentional delict ... mental health problems falling short of psychiatric illness or psychological condition which are attributed to the abuse can form part of the award of *solatium*”: *D v Bishop’s Conference of Scotland* 2022 SLT 816.

47. Second, albeit in general claims for payment only attract simple interest, for claims based in fraud the position is also otherwise: there, compound interest may be awarded by the Court (*Kazakhstan Kagazy Plc v Zhunus* [2018] EWHC 369 (Comm)). Albeit that authority is English, the same position applies in Scotland in the present context. In *Douglas v. Douglas’s Trs* (1867) 5 M. 827, 836, the Lord Justice Clerk said:

“A claim for compound interest, with annual rests, is a demand which can only be maintained, either in the case of a fixed usage in commercial dealings, **or where there has been an abuse in a party trusted with funds and violating his trust**”.

48. This would be significant. Compound interest at 8% on payments made in March 2017 would mean a total interest rate of almost 100%: i.e. for a payment of £1,000 paid then, £2,000 would now be repayable.

49. For these reasons, in my view the donors have claims for:

- (a) Repayment of the donations which have been spent elsewhere;
- (b) Interest thereon at the judicial rate (8%), compounded at annual rests; and
- (c) *Solatium* for distress and inconvenience.

I trust the foregoing is clear, and should be happy to address any queries that may arise.



Roddy Dunlop KC

Dean of Faculty

9 July 2026