SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2022] SC GLW 33

GLW-CA26-20

JUDGMENT OF SHERIFF JOHN N McCORMICK

in the cause

BILLY GRAHAM EVANGELISTIC ASSOCIATION

Pursuer

against

SCOTTISH EVENT CAMPUS LIMITED

Defender

Pursuer: A O'Neill KC & D Welsh, instructed by Balfour & Manson LLP
Defender: Dean of Faculty (R Dunlop KC), J McGregor KC & Ms V Arnott, instructed by CMS LLP

Glasgow, 24 October 2022

The sheriff, having resumed consideration of the cause, makes the following findings-in-fact.

Findings in fact:

(1) The pursuer is a private company limited by guarantee (company number: 567778).

(2) The pursuer is a charity registered with the Charity Commission for England and Wales having charity number 233381. The pursuer is a religious charity having its registered office at Victoria House, Victoria Road, Buckhurst Hill, Essex, IG9 5EX.

(3) The objects of the pursuer within the United Kingdom include supporting and extending the worldwide evangelistic mission of the Billy Graham Evangelistic Association based in the United States of America.

(4) The defender is a private limited company incorporated in Scotland having company number SC082081. The defender has its registered office at the Scottish Event Campus, Glasgow, G3 8YW. This court has jurisdiction.

(5) Over 90% of the shares in the defender are owned by Glasgow City Council (GCC), City Chambers, Glasgow, G2 1DU.

(6) On or around 31 July 2019 the pursuer and the defender entered into a contract (the "agreement") which included the pursuer hiring the SSE Hydro Arena and the SSE Hydro Box Office for the period from 08.00 on 30 May 2020 until 02.00 on 31 May 2020.

(7) The scheduled event was to be known as the "Franklin Graham Event". The Franklin Graham Event ("the event") scheduled for 30 May 2020 was the first date in a UK tour being organised by the pursuer at various venues within the United Kingdom.

(8) The pursuer had also booked venues at the Utilita Arena, Newcastle; Fly DSA Arena, Sheffield; Marshall Arena, Milton Keynes; the M&S Bank Arena, Liverpool; the ICC Wales, Cardiff and The Arena Birmingham, Birmingham. The tour was to commence on 30 May 2020 at Glasgow concluding on 17 June 2022 in Birmingham.

(9) Other venues cancelled the pursuer's booking. As at the proof four had rescheduled.

(10) The Glasgow venue could accommodate over 12,000 people. The hire cost of the venue was to be £50,000. The pursuer paid a deposit of £6,000 the refund of which has been offered but thus far declined.

(11) Preparations for the event included the pursuer engaging staff, hiring equipment, hosting pre-event receptions and prayer meetings, the sunk costs of which were wasted as a consequence of the cancellation.

(12) Although the event scheduled for 30 May 2020 is described in the agreement as a "private" event it was known to and agreed by the defender (from email chain dated 22 to

30 July 2019 between Sue Verlaque and Ray Critchley and between Sue Verlaque and David Orridge dated 18 November 2019) that the event would be a free, non-ticketed event. Members of the public would attend and be allowed entry free of charge. The defender would use a dummy bar code scanning system to count/control numbers on the day.

(13) The pursuer utilised and had intended to use various platforms to promote the event including social media, the pursuer's website, flyers, advertisements on buses and the holding of pre-event prayer meetings/launch events/receptions.

(14) The tour was an evangelistic outreach event to profess and promote religion or philosophical belief. The religion and philosophical belief to be professed was Christianity derived from an interpretation of the bible. The intended audience was the general public, irrespective of any religious belief or none and irrespective of sexuality.

(15) The principal or keynote speaker at the event was to be Franklin Graham a contentious American evangelist, son of the late Billy Graham (also an American evangelist). Franklin Graham is associated with the pursuer.

(16) In November 2019 the defender became aware of opposition to the event. Between November 2019 and January 2020 this opposition took various forms including in the mainstream press, on social media, a petition and email. These objections were drawn to the attention of Peter Duthie, the defender's Chief Executive Officer.

(17) The pursuer had also become aware of growing opposition to the UK tour. On 27 January 2020 Franklin Graham posted a letter addressed to the "LGBTQ" community which began: "It is said by some that I am coming to the UK to bring hateful speech to your community. This is just not true".

(18) Within the same Facebook post Mr Graham invited "everyone in the LGBTQ community" to the event. He concluded "You are absolutely welcome".

(19) The decision to terminate was one within the remit of the Chief Executive Officer, Mr Peter Duthie. The decision to terminate the agreement was taken by Mr Peter Duthie on or about 28 January 2020 but not implemented until he had secured support from the defender's board of directors on 29 January and from its principal shareholder.

(20) Preparations to terminate the contract were made on 28 January 2020. On 28 January 2020 Kirsten McAlonan, Head of Public Relations for the defender wrote to Colin Edgar, Head of Communications at Glasgow City Council, stating "We have made a decision not to go ahead with this". She suggested a draft wording for a press release and advised that Peter Duthie intended to raise the matter at a board meeting the following day.

(21) The implementation of the decision was delayed until the following day, 29 January 2020, when the views of the board could be ascertained and a written request to cancel had been received from Glasgow City Council.

(22) On 29 January 2020 the board convened. The then board consisted of Peter Duthie, the Chief Executive Officer, William Whitehorn, Chairman, William McFadyen, Morag McNeill, John Watson, Pauline Lafferty and those nominated by Glasgow City Council, Susan Aitken, George Gillespie and Frank McAveety (Carole Forrest did not attend the meeting). At that meeting the view of Glasgow City Council was conveyed to all present in unambiguous terms that the event should be cancelled.

(23) At the board meeting discussions included the nature of the proposed event. In particular, the supposed religious and philosophical opinions of Franklin Graham were discussed and considered as was the reaction by others to those religious and philosophical beliefs. The minutes disclose, for example, that "we have to be careful of being judge and jury if the law hasn't been broken"; "there was a scale on the message that was being preached which is darker than seen before"; "the nature around the event is darker", "contractually we may be

in breach" and "it's about "doing the right thing" notwithstanding the contractual position". (sic) Standing the defender's position at proof, there was no basis for such concerns.

(24) Such concerns stemmed not from the pursuer but from those who mischaracterised the event, its purpose and what would be said.

(25) Commercial considerations were also discussed at the board meeting in light of the religious and philosophical views of the pursuer and of Franklin Graham as interpreted by the defender. Mr Duthie could foresee a scenario where artists would refuse to play at the defender's venue as a result of the event. In addition, he had received concerns from the venue's principal sponsor which did not want its name associated with it.

(26) Security concerns relating to the event were also discussed at the board meeting.

(27) No vote or decision was taken at the board meeting on 29 January 2020. There was no need. Susan Aitken addressed the board on the view of Glasgow City Council that the event should not go ahead.

(28) Glasgow City Council had made its position clear to the meeting. Those Directors not nominated by Glasgow City Council were consulted for their views. They agreed that the event should be cancelled. Their views were confirmed by emails after the meeting and after a letter dated 29 January 2020 from Glasgow City council had been received.

(29) In its letter dated 29 January 2020 Glasgow City Council wrote to the defender as its "majority shareholder" requesting that the event be cancelled. In Mr Duthie's view, when his major shareholder expresses concern, he listens. The letter expressed concern for what might be said at the event. The letter made no reference to security concerns.

(30) No security concerns were raised with the pursuer. No security concerns were canvassed with the Police. No view was sought from G4S security at the venue (until after the event was cancelled).

(31) Although discussions at the board meeting on 29 January 2020 had included security issues, those were not the sole or the main reason for the event being cancelled four months prior to the event.

(32) The event was cancelled because of (a) the religious or philosophical beliefs of the pursuer and Franklin Graham as viewed by the defender and (b) the reaction by others to the religious or philosophical beliefs professed by the pursuer and/or Franklin Graham. Those objectors had included the defender's principal shareholder, its sponsor, objectors on social media, some press, an MSP and persons representing contrasting religious views.

(33) By email dated 29 January 2020 sent at 16.10, Peter Duthie wrote to the chairman enclosing the letter from GCC and advising that the event be cancelled "in the best interests of the business".

(34) Despite the defender now claiming that the decision was taken solely on the basis of public safety *that* reason was not conveyed to the pursuer (or to the public). By letter dated 29 January 2020 the defender terminated its agreement with the pursuer. The letter made reference to the pursuer's obligations not to act, or not to omit to act, in any way reasonably likely to bring the defender into disrepute. No mention was made of protest or security concerns.

(35) The termination letter dated 29 January 2020 stated that the basis of the decision involved "adverse publicity" which the defender had "reviewed with our partners and stakeholders". The letter concludes: "This is not capable of remedy" (clause 5.1.2 of the agreement had provided for "a reasonable time" to cure any breach capable of remedy). The reasons proffered to justify the termination differ from those advanced at proof.

(36) Subsequent press releases made no mention of security concerns.

(37) By terminating the agreement the defender directly discriminated against the pursuer in that it treated the pursuer less favourably than it would have treated others. The defender had

hosted other religious events but here it terminated its agreement because of a protected characteristic, namely, the religious or philosophical beliefs of the pursuer and Franklin Graham. It acted under pressure from others.

(38) The defender has evidenced an intention not to reschedule the event.

(39) The pursuer should have realised that the event would not be rescheduled by 30 June 2020 at the latest.

(40) The decision to terminate the agreement resulted in pecuniary losses to the pursuer totalling £97,325.32 to 30 June 2020 comprising the refund of the deposit (£6,000); costs of a prayer meeting and an event launch and cost of catering for a reception on 5 December 2019 ((£6,650, £3,000.70 and £1,448); cost of parking (£850); rent of staff apartment (£6,600); staff salaries, National Insurance and pension contributions (£63,123.50) and events at "DoubleTree by Hilton" (£9,400) and St George's Tron (£253.12). These costs were reasonably incurred by the pursuer in anticipation of the event taking place. They were costs wasted by the wrongful cancellation.

Finds in Fact and in Law that:

The pursuer having proved, on balance of probabilities, facts from which the court could decide, in the absence of any other explanation, that the defender contravened sections 10 and 29 of the Equality Act 2010 and the defender, having failed to prove, on balance of probabilities, that its decision had nothing to do with religion or philosophical belief, the court grants decree in favour of the pursuer as it must.

THEREFORE repels the remaining pleas in law for the defender; sustains the pursuer's objection to the relevancy of the evidence of Mr Francis Cooper; sustains the fifth plea in law for the

pursuer whereby: FINDS and DECLARES THAT ON 28TH AND 29TH JANUARY 2020 THE DEFENDER DISCRIMINATED AGAINST THE PURSUER ON THE BASIS OF A PROTECTED CHARACTERISTIC FOR THE PURPOSES OF THE EQUALITY ACT 2010; refuses the pursuer's sixth plea in law and dismisses crave one; sustains the pursuer's seventh plea in law WHEREBY GRANTS DECREE for payment by the defender to the pursuer of the sum of NINETY SEVEN THOUSAND THREE HUNDRED AND TWENTY FIVE POUNDS AND THIRTY TWO PENCE (£97,325.32) STERLING together with interest thereon at the rate of eight per centum per annum from the date of citation until payment in accordance with section 119 of the Equality Act 2010; meantime reserves all question of expenses; assigns the 18th day of January 2023 at 10am as a date for a hearing on expenses.

NOTE:

Structure of note:

[1] The structure of this note will be as follows:

Preface – paragraphs [2] – [5]

Background – paragraphs [6] – [7]

Agreed facts and general narrative – paragraphs [8] – [11]

Statutory framework – paragraphs [12] – [16]

Is a comparator required? – paragraphs [17] – [26]

Which is correct: should a protected characteristic within the 2010 Act have "nothing to do" with the decision or merely "no significant influence" on the decision to terminate the agreement? - paragraphs [27] – [40]

Burden of proof – paragraphs [41] – [50]

Preface.

[2] Mindful that this judgment may be quoted out of context I commence by stating the obvious: the Equality Act 2010 applies to all, equally. It is an Act designed to protect cornerstone rights and freedoms within a pluralist society. It applies to the LGBTQ+ community as it does to those of religion (including Christianity) and none. It follows that in relation to a protected characteristic (here: religion or philosophical belief) no section of society can discriminate against those with whom he, she or they disagree. The court was told, in terms, that it is no part of the defender's case that the activities of the pursuer were unlawful. The event on 30 May 2020 was a Christian evangelical outreach event. Whether others agree with, disagree with or even, as was submitted on behalf of the pursuer, find abhorrent the opinions of the pursuer or Franklin Graham is not relevant for the purposes of this decision. This applies even where, as I heard evidence, members within the Christian community may not agree with the pursuer. The court does not adjudicate on the validity of religious or philosophical beliefs.

[3] It was said during the hearing that nobody has the right not to be offended by the opinions of others. This is somewhat glib as there are also curbs on free speech. However, standing the lawful

purposes of the planned evangelical event in this case, curbs on free speech (for example, "hate speech") are not issues which I require to explore.

[4] I have edited the names of a Member of the Scottish Parliament (MSP) and two Ministers of the Church of Scotland. I do so primarily because although their lobbying/writings featured in the case, they were not witnesses. In addition, the (on occasion, polemical) terms of what they were reported to have written and their mischaracterisation of the event was neither supported by the facts nor by either party to the case.

[5] A theme among those seeking cancellation of the event included prefacing their remarks with a professed belief in free speech while denying that right to others and denying third parties their choice to attend.

Background

[6] This case was raised at the commercial court in Glasgow. The case had earlier proceeded to debate on 21 December 2020 (*Billy Graham Evangelistic Association* v *Scottish Event Campus Ltd* 2021 SLT (Sh Ct) 185). The case then proceeded to proof on whether the defender had breached the provisions of the Equality Act 2010 and, if so, on the appropriate remedy. Many issues and remedies have not been litigated previously in Scotland. I have found some wanting. The remedies here do not match the wrong.

[7] The proof took place on 13 to 16 December 2021 and from 5 to 7 April 2022. The proof was spirited at times. Parties had agreed a joint minute. All but one of the witnesses had sworn affidavits as his or her evidence in chief. A hearing on submissions took place on 5 July 2022. Prior to the hearing on submissions parties had exchanged and lodged extensive submissions. Standing the breadth and depth of those submissions and to ensure that those qualities are not diluted by summarising them, I incorporate the submissions as an appendix to this decision.

Agreed facts and general narrative

[8] The pursuer is a company limited by guarantee and is a registered charity. Importantly, the pursuer is a religious charitable organisation which, as the name suggests, is evangelical in purpose. A UK tour was organised for 2020.

[9] In terms of booking form dated 31 July 2019 the pursuer hired premises at the SEC Hydro Arena from 0800 hours on 30 May 2020 to 0200 hours on 31 May 2020 for an event to be known as the "Franklin Graham Event".

[10] On 29 January 2020 the Chief Executive of Glasgow City Council wrote to the defender as follows:

> "I write regarding the SEC's proposed hosting of an event featuring Franklin Graham.
>
> On behalf of the council, as the majority shareholder of SEC Ltd, I have to ask you to cancel this booking for the following reasons.
>
> Firstly, as you may be aware, there is potential for Mr Graham to make homophobic and islamophobic comments during his public speaking engagements. Among other concerns, this could raise issues for the council in terms of its duty under the Equality Act 2010 to eliminate discrimination, harassment, and victimisation and to foster good relations between different groups.
>
> Secondly, I have a concern for the city's reputation. Glasgow is well known as a city which is friendly to all people, but particularly including people from the LGBTQ and Muslim communities. I do not want to send a message to those communities that the council is prepared to welcome any person who has the potential to make such comments."

[11] Glasgow City Council owns over 90% of the shareholding of the defender. Following both a board meeting and the receipt of the above letter on 29 January 2020 the defender wrote to the pursuer on the same say in the following terms:

> "Regrettably, the Board of Scottish Event Campus Limited ("SEC") have determined that the Hire Agreement is hereby terminated with immediate effect under clause 5.1.2 of SEC's Terms of Business. This is by reference to your material breach of the Hire Agreement pursuant to clause 8.1.6 of SEC's Terms of Business, which sets out your

obligations not to act, or not to omit to act, in any way reasonably likely to bring SEC into disrepute.

This is on the basis of the recent adverse publicity surrounding your tour, which we have reviewed with our partners and stakeholders, and who are of the view that this brings both SEC and potentially, Glasgow, as a city, into disrepute. This is not capable of remedy."

Statutory framework:

Part 3: Equality Act 2010

[12] The principle which the court must apply is commendably brief and found within section 13(1) of the Equality Act 2010:

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

[13] In this case the protected characteristic founded upon by the pursuer is religion or belief. Section 10 of the 2010 Act reads:

> *"10 Religion or belief*
> (1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
> (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
> (3) In relation to the protected characteristic of religion or belief—
> (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;
> (b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief."

[14] The defender is a service provider. Section 29(1) of the 2010 Act reads as follows:

> "A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service."

[15] Although the Act refers to "a person" it is accepted that the pursuer, a company limited by guarantee, is protected from discrimination as it possesses a protected characteristic (*EAD Solicitors LLP* v *Abrams* [2015] BCC 882 at paragraph 14). The pursuer is therefore protected by the Act.

[16] Note that there is no "business case" defence (that to treat another less favourably might be excused on the basis that, for example, it might affect future trade, embarrass customers, encourage industrial action or avoid offence). See, for example: *James* v *Eastleigh Borough Council* [1990] 2 AC 751.

Is a comparator required?

[17] The defender submits (paragraphs D94 and D95) that in terms of section 23 of the 2010 Act a suitable comparator requires to be identified and criticises the pursuer for having "led no evidence that an appropriate comparator would have been treated differently". The first issue which I will address is whether a comparator is required?

[18] Section 23 reads:

> "**23 Comparison by reference to circumstances**
>
> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.
> (2) The circumstances relating to a case include a person's abilities if—
> (a) on a comparison for the purposes of section 13, the protected characteristic is disability;
> (b) on a comparison for the purposes of section 14, one of the protected characteristics in the combination is disability."

[19] In relation to section 23, I refer to the defender's submission at paragraph D95:

> "The defender submits that individuals and entities who receive adverse publicity are not a suitable comparator in this case. A suitable comparator would be an individual or entity whose event gave rise to concerns about public disorder, safety and reputational risk and which was due to take place in Glasgow within a similar timeframe as the pursuer (given the particular volatilities present in Glasgow at that time)."

[20] There will be many circumstances where a suitable comparator can readily be identified. Take, for example, an hotelier refusing an available room to a same sex couple. However, there are many circumstances where a product or a service may be sufficiently distinct that no appropriate comparator could realistically be identified. In my opinion that is the situation which pertains here.

[21] The pursuer is a registered charity, evangelical in the promotion of Christian beliefs based on an interpretation of the bible – it may not be an interpretation which all Christians ascribe to, but that is a separate matter.

[22] Constructing a comparator would defeat the purpose of the Equality Act 2010 by placing an impossible hurdle on a pursuer. The essence of discrimination is that it can be obvious or it can be latent. As I understand the pursuer's case, here it is suggested that a reason for the cancellation involved a breach of a protected characteristic under the 2010 Act (disguised with excuses which may have had a bearing on, but were not the true reason for, the decision).

[23] In *Page* v *NHS Trust Development Authority (CA)* [2021] EWCA Civ 255 Lord Underhill, at paragraph 79, in relation to the construct of a hypothetical comparator commented:

> "There is nothing in this point. It is trite law that it is *not* necessary in every case to construct a hypothetical comparator, and that doing so is often a less straightforward route to the right result than making a finding as to the reason why the respondent did the act complained of: see the very well-known passage at paras 8 – 13 of the speech of Lord Nicholls of Birkenhead in *Shamoon* v *Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337."

[24] *Page* echoed a point made by Elias LJ in *JP Morgan Europe Ltd* v *Chweidan* [2011] EWCA Civ 648 where he said at paragraph 5:

> "In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short-circuit that step by focusing on the reason for the treatment". (My emphasis)

[25] In short, a pursuer is not required to provide or construct a comparator and, although in many cases a comparator may be available, to construct a hypothetical comparator would be a distraction from the real issue. That is not something I propose to do.

[26] Here it is accepted that the defender is a service provider in terms of section 29 of the 2010 Act and "must not discriminate against a person requiring the service by not providing the person with the service". No comparator is required.

Which is correct: should a protected characteristic within the 2010 Act have "nothing to do" with the decision or merely "no significant influence" on the decision to terminate the agreement?

[27] I address these two competing submissions. Is it correct - as the defender contends: *Nagarajan* v *London Regional Transport* [2000] 1 AC 501 – that, for a pursuer to succeed, a breach of a protected characteristic must have had a "significant influence" on the decision? In *Nagarajan* v *London Regional Transport* the court considered discrimination on racial grounds in terms of section 1(1)(a) of the Race Relations Act 1976. In *Nagarajan* Lord Nicholls of Birkenhead observed, at page 512H:

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision…If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out".

Again, at page 513, Lord Nicholls opined:

> "If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out. Read in context, that was the industrial tribunal's finding in the present case." (My emphasis)

[28] If a breach of a protected characteristic has a "significant influence" on a decision, the question becomes: what is a "significant influence"? That question was answered in *Igen Ltd* v *Wong* [2005] EWCA Civ 142 at paragraph 37 where the words "significant influence" were interpreted as: "a 'significant' influence is an influence which is more than trivial" and in *JP Morgan Europe Ltd* v *Chweidan* [2011] EWCA CIV 648 where Elias LJ said at paragraph 5:

> "This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial – must be the claimant's disability."

[29] Therefore a significant reason is a reason which is more than a trivial reason.

[30] On the other hand the pursuer contends that a protected characteristic must have nothing (at all) to do with the decision (not merely no "significant influence" on that decision).

[31] To resolve these issues, I begin with reference to section 136(2) of the 2010 Act:

> "If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred".(My emphasis)

[32] In *Efobi* v *Royal Mail Group Ltd* [2021] UKSC 33 the Supreme Court examined section 136(2) of the 2010 Act when considering an allegation of discrimination made by a postman of Nigerian ethnic origin.

[33] I quote Lord Leggatt at paragraph 28:

> "28 The aspect of section 136(2) which is the focus of this appeal is not the only respect in which the opportunity was taken to alter the wording of the old provisions so as more clearly to reflect the way in which they had been interpreted by the courts. The old provisions referred to "an adequate explanation" (or "a reasonable alternative explanation"). Those phrases were also apt to mislead in that they could have given the impression that the explanation had to be one which showed that the employer had acted for a reason which satisfied some objective standard of reasonableness or acceptability. It was, however, established that it did not matter if the employer had acted for an unfair or discreditable reason provided that the reason had nothing to do with the protected characteristic: see e g *Glasgow City Council* v *Zafar* [1998] ICR 120, 124; *Law Society* v *Bahl* [2004] IRLR 799; *Laing* v *Manchester City Council* [2006] ICR 1519, para 51." (My emphasis)

[34] I have also examined the cases referred to by Lord Leggatt at paragraph 28 which he quotes with approval. In, for example, *Laing* v *Manchester City Council and Another* [2006] ICR 1519, a case under section 54A of the Race Relations Act 1976, Elias J, President of the Employment Appeal Tribunal wrote, at paragraph 51:

> "We note in particular three features of this section. First, the onus is on the complainant to prove facts from which a finding of discrimination, absent an explanation, could be found. Second, by contrast, once the complainant lays that factual foundation, the burden shifts to the employer to give an explanation. The latter suggests that the employer must seek to rebut the inference of discrimination by showing why he has acted as he has. That explanation must be adequate, which as the courts have frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with race: see *Glasgow City Council* v *Zafar* [1998] ICR 120 and *Bahi* v *The Law Society* [2004] IRLR 799." (My emphasis)

[35] The case referred to by the defender, *Nagarajan*, was decided in 2000 and referred to the Race Relations Act 1976. While I accept the Dean's submission that *Nagarajan* may not have been

overruled explicitly, there is a subtle but important difference between whether a defender has, on the balance of probabilities, to prove either (a) that a protected characteristic had no significant (ie no more than a trivial) influence on the outcome or (b) that a protected characteristic had nothing to do with the decision.

[36] In oral submission the Dean accepted that in this particular case if a breach were established, there would be "no material difference" in the result. Here it is conceded that, if established, a breach could not be described as trivial.

[37] As an aside, and because I raised the point with the parties in advance of the hearing on submissions, within its rubric, the editor summarised the effect of *Efobi* as "The burden moved to the employer at the second stage to explain the reason(s) for the alleged discriminatory treatment and satisfy the tribunal that the protected characteristic had played no part in those reasons;". The rubric is of course not part of the decision but an interpretation of it. Although I had canvassed with parties concerns that the wording of the rubric ("played no part") went too far in its analysis of *Efobi*, I am persuaded that it is accurate.

[38] *Efobi* is a Supreme Court decision. It was decided in 2021 and its reasoning involves the 2010 Act. It is clear, in point and I propose to follow it.

[39] Therefore, although, for the factual reasons that I will set out, I consider that both tests have been met; I prefer the opinion of Lord Leggatt in *Efobi* at page 801C, namely, that (assuming the first part of the test - section 136(2) of the 2010 Act - is met) the defender here has to show that the reason for the decision had "nothing to do with" a protected characteristic (here: religion or philosophical belief) of the pursuer. That is the test which I will apply.

[40] If the above analysis of the law is correct, this has a practical effect on my findings-in-fact and note. The issue is succinct. I say this because, if a protected characteristic had nothing to do with the decision the burden on the defender should be readily discharged. That would be an end to the case.

The opposite also applies. Where, as here, there are minutes, emails, affidavits and oral testimony to evidence that it cannot be said that the protected characteristic had "nothing to do with" the decision, a court can focus its findings-in-fact and its summary of the evidence accordingly. That is because the court "must" then find in favour of a pursuer. This brings me to the burden of proof.

Burden of Proof (and inferences capable of being drawn when that burden passes to a defender)

[41] It is important to understand where the burden of proof lies. This is contained in section 136 of the 2010 Act:

> "**136 Burden of proof**
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

[42] Referring again to *Efobi* the Supreme Court examined section 136(2) of the 2010 Act, I quote Lord Leggatt at paragraph 15:

> "15 The rationale for placing the burden on the employer at the second stage is that the relevant information about the reasons for treating the claimant less favourably than a comparator is, in its nature, in the employer's hands. A claimant can seek to draw inferences from outward conduct but cannot give any direct evidence about the employer's subjective motivation – not least since, as Lord Browne-Wilkinson observed in *Glasgow City Council* v *Zafar* [1998] ICR 120, 124: "those who discriminate…do not in general advertise their prejudices; indeed they may not even be aware of them."" (My emphasis)

[43] In *JP Morgan Europe Ltd* v *Chweidan* [2011] EWCA CIV 648 Elias LJ said at paragraph 6:

> "In practice a Tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a *prima facie* case, i.e. if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason,

then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason". (My emphasis)

[44] In terms of section 136(3) of the 2010 Act the burden does not shift to a defender unless a pursuer succeeds in showing, on balance of probabilities, that a court "could" decide that a contravention had occurred (section 136(2) quoted above). Only then does the burden of proof tip against a defender. Of course, it follows that if a pursuer is unable to show that the court "could" conclude that a contravention has occurred, then that is an end to the case.

[45] Drawing the above together, here the pursuer has to prove facts from which the court could decide, in the absence of any other explanation, that the defender contravened the provision concerned. That done, the burden shifts to the defender to show that the decision had nothing to do with a protected characteristic. If the defender is unable to discharge that burden, the court *must* hold that the contravention occurred.

[46] At paragraph P8.42 of the pursuer's submission it is said that the defender formed the view that the pursuer is associated with Franklin Graham and that Frank Graham holds (or is at least attributed as holding) certain religious beliefs which are regarded as controversial by certain sections of society. At the hearing on submissions, both points were conceded by the defender.

[47] The third point is not conceded, namely, that because Franklin Graham held views which the defender judged (or that others found) objectionable, the defender no longer wished to provide the services which it was contractually bound to supply to the pursuer.

[48] As I understand it, the defender's position may be summarised as follows: if the concerns in relation to public disorder were genuinely held and the decision to cancel the event taken solely on those grounds, the result – cancellation – of those concerns would have been the same irrespective of the nature of the proposed event, as all events (in relation to public disorder issues) are treated the same. Therefore, there would be no unlawful discrimination. The Dean referred to the example of a

genuine terrorist threat at the venue. That, he said, may lead to an event being cancelled even at the last minute.

[49] I agree with the Dean's proposition in principle, namely, that issues of public safety might cause an event to be cancelled. A terrorist threat may well result in a benign exhibition or a contentious political rally being cancelled. A defender could readily show that that decision had nothing to do with a protected characteristic. However, we are not in that territory here.

[50] I pause to mention four matters. Firstly, that the fear for public safety must be one genuinely and responsibly held, not an excuse. Secondly, in the above example, the reason for cancellation by the venue would have had nothing do with a protected characteristic. The decision to cancel would have been taken *solely* because of the threat, irrespective of the type of event planned (therefore no breach/discrimination). Thirdly, in the context of a transient public order issue (a terrorist threat), an event might be postponed rather than cancelled, or its character changed so as to provide for such a threat. Fourthly, here, concerns regarding possible protest occurred four months prior to the event date. They could not be described as immediate.

Summary of the evidence

[51] Parties had agreed (a) a joint minute and (b) that the evidence in chief from all but one witness would be given in affidavit form. In all the court heard evidence from fifteen witnesses. The shorthand writer's notes were extended.

[52] As case law informs, it is important to consider not only what was said in evidence but also what was written contemporaneously to the decision making process; the internal communications, the communication between the parties, the chronology involved in the process and any reasonable inferences to be drawn. People rarely admit to discriminatory motives. Against that, the court should be careful not to over interpret legitimate actions.

[53] In relation to the significance of contemporaneous documentation, I refer to *Simetra Global Assets Ltd & Anor* v *Ikon Finance Ltd & Ors* [2019] 4 WLR 112, where, at para [48] Males LJ said:

> "In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence."(my emphasis)

[54] Here it is apparent that the email correspondence discloses when the decision was taken (28 January 2020), by whom (Peter Duthie) but also that the implementation of decision was subject to approval by the board as indeed happened the following day.

[55] Accordingly, when I summarise the evidence in relation to the case I do so with the following issue in mind, namely, that the chronology as I have narrated it is not seriously in dispute – but the reasons/motives are, which is why I focus on those aspects.

[56] Unusually I have peppered the summary of the evidence with quotations from the evidence. I do so to convey not only what was said but so that the reader might see why I have interpreted the evidence as I have.

[57] In relation to the witnesses for the pursuer, I found them credible and, apart from Simon Herbert, reliable. Indeed much of their evidence was not in dispute standing the position of the defender at proof. In relation to Mr Herbert he was not as grounded in the figures relating to the losses as he might have been. For example he could not explain why Value Added Tax (VAT) had been included in certain invoices for outlays but not others (for similar outlays) nor why claims for mobile phones extended to long after the scheduled date for the event.

[58] In so far as the witnesses for the defender are concerned, again, I found each credible but unreliable in many respects. As will be seen, at proof there remained a divergence of views as to who made the decision to terminate the agreement and when. There was a tendency to talk up the security issue while ignoring the wealth of evidence concerning the true reasons – the supposed views of Franklin Graham, what would or might be said at the event, pressure from the major shareholder and the reactions of others, including existing and future commercial considerations - which were clearly to the fore when one considers the internal emails, the board minutes, the views of Glasgow City Council expressed at the meeting and by letter on 29 January 2020 and concerns regarding securing the COP26 contract as described in evidence before me. In addition, the board and Mr Duthie were unaware that, for example, although the agreement had referred to a "private" event; the defender had earlier agreed that the event would be an unticketed free event open to the public – email chains dated 22 July 2019 and 19 November 2019 between Sue Verlaque and Ray Critchley and 18 November 2019 between Sue Verlaque and David Orridge. Neither Mr Duthie nor the board were aware on 29 January 2020 that transcripts and videos of prior similar events had been offered to the defender but declined in 2019. These aspects therefore rendered some evidence from the board members irrelevant or unreliable.

First witness for the pursuer: Joseph Walker Clarke Jnr

[59] Mr Clarke adopted his affidavit. He is the Director of Program, Production & Venue for the Billy Graham Evangelistic Association. As part of this task he identified suitable venues and managed the deployment of, for example, staging, audio, video and lighting together with planning and producing musical artists for the event. Mr Clarke spoke about the history of the Billy Graham Evangelistic Association (BGEA) and that Franklin Graham is the President and Chief Executive Officer of BGEA in the United States and is on the BGEA-UK's Board of Trustees among other roles.

[60] Mr Clarke described that preparations for the tour in the United Kingdom had began in earnest in 2019. These activities included establishing local offices in each city, opening bank accounts, recruiting and appointing City Directors and teams to handle various aspects of the ministry campaign and the organisation of local logistics including briefings with pastors, churches, ministry trainers and volunteers.

[61] Mr Clarke explained that each event was to take the form of a free evangelistic outreach event open to members of all faiths and none. Each event would have featured music, prayer and a gospel presentation by Franklin Graham. On occasion, registration of those attending might be required. I say this because he says, at paragraph 20 of his affidavit: "Even where registration was required, there was no charge for people to attend the event".

[62] In Glasgow there was to be no requirement on the public to register or to obtain a ticket. Instead Mr Clarke said that the defender had agreed to a "dummy barcode" system whereby members of the public would be counted as they entered the venue.

[63] Mr Clarke gave evidence that preferred venues would have the capacity for between 8,000 and 20,000 people along with logistical requirements so as to accommodate the production and the backstage personnel, catering, television and internet streaming.

[64] The venue hire agreement was entered into on 31 July 2019 and the deposit paid. Thereafter dialogue took place between the pursuer and the defender at a local level. According to Mr Clarke the defender was aware that the event was to be non-ticketed, free and open to all.

[65] Mr Clarke also spoke to the receipt of the termination letter. He also spoke to the beliefs and values of Franklin Graham being no different to those of his late father, Billy Graham. He described those beliefs as being "mainstream in evangelical Christianity and are shared by millions of Christians in the United Kingdom and worldwide".

[66] Mr Clarke also expressed his concern that in the days following the termination letter issued by the defender, other venues indicated that they too would no longer honour their contracts. He was concerned that the venues were in touch with each other and would follow the lead taken by the defender. He described that certain groups opposed to the views of Franklin Graham and the pursuer "who oppose other religious beliefs had once again engaged in a predictable pattern of harassment and bullying designed to generate negative press coverage, frustrate or, if possible, cancel its activities".

[67] In cross-examination the Dean made it clear that he did not propose to enter into a theological debate as it was no part of the defender's case that the beliefs of the Association were unlawful. Mr Clarke was referred to an email by an MSP which included "Glasgow and Scotland aspire to the values of equality in human rights and we are a diverse society in which residents and visitors alike should be able to expect to be protected from hostility and prejudice. Mr Graham has a long track record of openly homophobic, transphobic, misogynist and Islamophobic statements". Mr Clarke was asked if he was aware that persons had expressed those criticisms of Mr Franklin Graham. Mr Clarke accepted that these might well be the opinions of the author.

[68] It was suggested to Mr Clarke that the contract provided for a "private" event. Mr Clarke explained that it was known to the SEC that the event would be a non-ticketed event open to the public. The defender had been told and there were emails to confirm that.

[69] Mr Clarke was asked whether he was aware that LGBTQ+ rights and Islamic rights have provoked stark controversy and very entrenched views which Mr Clarke replied "On both sides, I agree with that."

[70] In re-examination Mr Clarke advised that, thus far, four of the other venues which had cancelled had agreed to reschedule.

Second witness for the pursuer: Simon Paul Herbert

[71] Simon Paul Herbert is the Finance Director and Company Secretary of the pursuer. He provided background information in relation to the pursuer and, in relation to the UK tour, he described this as a "major undertaking, logistically and financially" having contracted with venues in Glasgow, Newcastle, Sheffield, Liverpool, Cardiff, Birmingham and Milton Keynes. Mr Herbert had produced a Table 1 to summarise the total financial commitment represented by the tour, Table 2 to show the non-refundable amounts and sunk costs associated with the contracts relating to the Glasgow event (£39,555) and Table 3 with the costs allocated to the tour event in Glasgow (£149,762). By his calculation the costs "wasted" as a result of the cancellation comprised the total of Tables 2 and 3 (£199,165). There were a number of issues which the Dean criticised in relation to the level of damages claimed. For example the payroll for Glasgow is claimed from July 2019 to January 2021 being one year after the event was cancelled. I deal with this evidence in greater detail when considering the issue of pecuniary loss. I have had to apportion certain entries and refuse others.

Third witness for the pursuer: Darren Tosh

[72] Darren Tosh is the Executive Director of the pursuer. In his affidavit he described the pursuer as a company limited by guarantee incorporated on 19 June 1956. He described the objects of the pursuer as the advancement of religion and "in particular the promotion of the Gospel of the Lord Jesus Christ, as supported by the evangelistic teachings of the ministry of Franklin Graham, based on the lifelong work of Billy Graham".

[73] Mr Tosh spoke of the event in Glasgow as following that of an earlier event in Blackpool "with a short inspiration message (20 minutes or so) by Franklin Graham at the end."

[74] The purpose of Franklin Graham's speech was not to speak "against" a particular group, or individual or about controversial or political matters. The purpose of his speech would have been

about the love and forgiveness of God. A video of each night of the earlier Blackpool festival had been posted online and was available for anyone who might wish to view it. Transcripts had been offered to venues in the UK but declined. He was referred to an email written to the defender on 2 February 2020 by a member of the public expressing support for the event which, by then, had been cancelled. Its author stated that she had attended the three day festival in Blackpool which had been "similarly targeted". Mr Tosh explained that the venue in Blackpool had the capacity for 8,000 people each night. On the first night thirty people had protested peacefully, less than a dozen on the second night and one or two on the third.

[75] The planned outreach events have been similar both in the United Kingdom and around the world for over 60 years. He described the discussions taking place between the parties. In particular he was referred to an email exchange dated 22 July 2019 wherein it is made clear that the provisions relation to ticketing were not appropriate as this was to be a free non-ticketed event. The defender had agreed to remove the ticketing/data collection and commission provisions.

[76] In Mr Tosh's opinion, as the preparations progressed for the event, the SEC had come under pressure from its principal shareholder and others to cancel the event. In his opinion the criticism, as it appeared in the media, related to the religious beliefs and views of what the Bible says about marriage, sexuality and gender which, he said was "A view held by the majority of Christians down the ages of all denominations".

[77] Mr Tosh expressed concern that "Well organised active groups who hold to differing views engage in cancel culture and seek to silence any other voice that dares to differ, particularly a Christian voice when it comes to matters of religious belief over such matters as marriage and sexuality."

[78] In evidence Mr Tosh was referred to an email from Sue Verlaque dated 22 July 2019 in relation to among other issues, the booking form containing provisions dealing with ticketing. Ray

Critchley, on behalf of the pursuer, comments "If this is a non-ticketed event, then these provisions should be removed" to which the reply by the defender is "This is not a problem. As there will be no tickets on sale for the event, I am happy to remove ticketing clauses from the Booking Form." Mr Tosh also spoke to the terms of a Facebook post at the instance of Franklin Graham on 27 January 2020. [I deal with this later in my decision].

[79] In cross-examination Mr Tosh was referred to the minutes of a board meeting held by the defender on 29 January 2020 and the concerns expressed at the meeting in relation to issues of public disorder and how that would be dealt with. Mr Tosh had not been at the defender's board meeting and could not comment on what had been discussed. As far as he was aware the reasons for the termination were those contained in the termination letter dated 29 January 2020.

The defender's case – first witness, Peter Duthie.

[80] The first witness for the defender was its Chief Executive, Peter Duthie. It is fair to say that he is critical to the case both for the pursuer and for the defender. Parties referred to his evidence at length in their submissions. I consider his evidence later in the note. For the moment I record the following.

[81] According to paragraph 4 of his affidavit, dated 29 October 2021, the event came to Mr Duthie's attention at the end of 2019. Self-evidently this was after the contract had been entered into between the parties. The event was "flagged" to him as it had been "starting to attract negative media attention". Within the same paragraph of his affidavit he advises that he had been informed that "there had been protests over whether the event should go ahead". These "protests" were on social media.

[82] Mr Duthie had been copied into an email from the defender's Head of Public Relations, Kirsten McAlonan, to Colin Edgar, Head of Communications at Glasgow City Council on 21 January

2020 within which Ms McAlonan had commented that there had been "a lot of controversy especially around reports that [Franklin Graham] arguably endorses homophobic views and there have been a lot of discussions between venues on the tour".

[83] At paragraph 6 of his affidavit Mr Duthie commented that on or around 26 January 2020 the Liverpool Arena cancelled their date on the pursuer's tour. This, Mr Duthie said, sparked a new level of interest in the Glasgow date. The defender was tagged by an MSP in a tweet and Mr Duthie received emails from church ministers asking for the event to be cancelled. Mr Duthie believed that Glasgow City Council were also being lobbied along similar lines. Glasgow City Council is a majority shareholder of the defender.

[84] Mr Duthie did not play a part in negotiating the contract. The contract terms would have been agreed on behalf of the defender by Debbie McWilliams supported by Sue Verlaque and Jacqueline Elder.

[85] In paragraph 9 of his affidavit Mr Duthie says that he heard an interview which Mr Franklin Graham had given to BBC Radio 4 in February 2020 in relation to statements that he may have given "some 20 years ago". I am uncertain of the relevance of paragraph 9 of his affidavit coming as it does after the contract was terminated.

[86] At paragraph 11 Mr Duthie comments that he was "extremely concerned" about the damage the event would have on the defender's reputation and that it would "alienate some of our stakeholders and elements of the community in Glasgow".

[87] At paragraph 13 of his affidavit he says "We acknowledged that there was a vocal media campaign against the event, which suggested it may preach a message of hate against persons in the community." Significantly, despite these concerns, at no point did Mr Duthie or, it seems, anyone else from the defender, contact the pursuer to confirm, clarify or allay such concerns. Indeed, in his

oral evidence Mr Duthie accepted that although anything might be said from a platform in reality this was a Christian evangelical outreach event.

[88] A board meeting had been scheduled for Wednesday, 29 January 2020. The event was placed on the agenda. At proof much was made of who took the decision to cancel the event and when. In the termination letter dated 29 January 2020 it is said that the decision was taken by the board. That is not correct.

[89] The decision was Mr Duthie's to take. That seems obvious as he is the chief executive. He brought the matter to the board to seek their views. Again, that seems prudent in relation to such a high profile event where the chief executive has concerns.

[90] At paragraph 14 of his affidavit Mr Duthie says that "We understood that BGEA would approach local churches and invite delegates. It was not to be available for public attendance and there would be no tickets available for the general public." In cross examination he accepted that that was a misunderstanding.

[91] Mr Duthie goes on to say in his affidavit: "If the original intention was for members of the public at large to attend, I would have expected to see this clause in the contract, but it was not included. I should note that this information came to me from the sales team" (my emphasis). At paragraph 15 Mr Duthie says that the day prior to the board meeting it had become clear through an announcement made on social media that the pursuer "no longer intended the event to be private". Mr Duthie goes on to say that the event was "now" to be open to all. That was a misrepresentation of the pursuer's intentions. I do not suggest that this was deliberate. However, the pursuer's intention had always been that the event should be open to the public. The venue could accommodate 12,000 people.

[92] On 27 January 2020 Mr Franklin Graham had posted a response to the criticism within which he said "I invite everyone in the LGBTQ community to come and hear for yourselves…You are

absolutely welcome". I quote it in full later. In Mr Duthie's view this changed the dynamic. In his affidavit he said that this was "a major shift away from what had previously been intended, and what SEC had agreed to and was prepared to agree with BGEA". Again, that is simply not correct.

[93] I have little doubt that concerns may have arisen at the prospect of those who supported Franklin Graham and his views coming together with those who were critics of those views, but it could not be said that the event itself was anything different to what had been agreed by the SEC.

[94] At paragraph 16 Mr Duthie says that:

> "What Mr Graham was now envisaging posed, in our view, a very high risk of public disorder. It was an escalation of the already hostile dynamic that existed between his supporters and his critics. We were facing a situation where there would potentially not only be protests outside the venue, but inside it too. The fact that there would be no way of distinguishing between those who supported BGEA and those who opposed BGEA would have been hugely problematic."

On the face of it, I can accept these concerns. I heard evidence that there had been something of a febrile atmosphere in Glasgow in the preceding months and this is also referred to in Mr Duthie's affidavit.

[95] Turning to the board meeting of 29 January 2020, this is dealt with by Mr Duthie at paragraph 17 to 20 of his affidavit. I deal with this now as it features in part of my reasoning later. It is a glimpse into his thinking and bears directly on the issue which the court has to decide. At paragraph 18 of his affidavit Mr Duthie says that he spoke to the board meeting in relation to four issues. The first was a "serious risk of public disorder".

[96] Secondly, "the LBGTQ+ community has strong representation within the international artistic community; I could foresee a scenario where artists would say they would not play our venue." I pause to reiterate that there is no "business case" defence to the obligations incumbent under the Equality Act 2010.

[97] Thirdly, Glasgow City Council had raised concerns which: "When your major shareholder expresses concern, you listen." I have quoted those concerns earlier. They do not relate to security issues.

[98] Fourthly, that the principal sponsor, SSE, had raised concerns. They felt that the event was "not compatible with their values and did not want their name associated with it."

[99] Tellingly, at paragraph 19 of his affidavit Mr Duthie comments:

> "At no time did I suggest to the Board that SEC should cancel the Event to prevent BGEA and/or Franklin Graham from expressing their religious views. We recognise that our role is not to deny someone the right to free speech, if what they intend to say is lawful."

In evidence it was not suggested that BGEA or Franklin Graham would say something inconsistent with a Christian evangelical event.

[100] In cross-examination Mr Duthie explained that the "protests" at other venues had been on social media not physical demonstrations.

[101] Mr Duthie had not been aware that there had been an earlier similar event at the Lancashire Festival of Hope, Blackpool run by BGEA and attended by Franklin Graham.

[102] Mr Duthie was referred to an email chain dated 21 January 2020 from Kirsten McAlonan to Colin Edgar, the Head of Communication for Glasgow City Council. Within the email Ms McAlonan writes:

> "There has been a lot of controversy especially around reports that he [Franklin Graham] arguably endorses homophobic views and there have been a lot of discussions between venues on the tour."

Mr Duthie was asked about the word "arguably" where it occurs in the sentence quoted above. His position was that he himself had made no comment or mention of Mr Graham's homophobic views to Kirsten McAlonan but simply that Franklin Graham was a controversial character.

[103] Mr Duthie was referred to statements attributed to Franklin Graham in relation to homosexuality being sinful and he was asked whether that is a religious view to which he replied "It would be, yes".

[104] Mr Duthie was taken to the letter dated 29 January 2020 giving notice of the termination of the hire agreement by the defender to the pursuer. It was suggested to Mr Duthie that the event had been cancelled because of the reaction of people who objected to religious views expressed by Franklin Graham. Mr Duthie disputed that.

[105] When pressed further on this topic Mr O'Neill posed "So, 'Because people are protesting online about your religious views, that is your fault, that brings SEC into disrepute, we are cancelling this contract, this cannot be remedied, it's finished'" to which Mr Duthie replied "As I said earlier, the [termination] letter doesn't state it as clearly as I would like it to do, but that is why we are cancelling the event."

[106] In the letter dated 29 January 2020 terminating the contract, the defender had written that the alleged breach "is not capable of remedy". Mr Duthie conceded that at no stage was the pursuer contacted in relation to the concerns of the defender. There were no discussions in relation to whether the non-ticketed event might have become a ticketed one or the possibility of greater security.

[107] When it was suggested to Mr Duthie that other arenas had agreed to reschedule the tour, Mr Duthie said that that was their decision. Mr Duthie thought that the same considerations which had caused the event to be cancelled in 2020 still pertained but he sought to blame the pursuer for that and had no regard for the fact that other venues had managed to reschedule their dates.

[108] Mr Duthie was asked whether he was aware that transcripts and videos of earlier events had been offered to all venues but Mr Duthie replied that he was not concerned with what Mr Graham was going to say at the Glasgow event.

[109] Mr Duthie was asked about his earlier attendance at a Billy Graham evangelical event and he would therefore know that it was open to members of the public at large. He was asked if he was aware that there would be public advertising of the event. He accepted that there would be.

[110] Mr Duthie accepted that the purpose of the pursuer and the intended message of Franklin Graham arose from a fidelity to biblical texts.

[111] When asked directly if Franklin Graham uses the tours to "spread homophobic, transphobia and hate speech about immigrants" (being a concern raised by an MSP) Mr Duthie said "No, I don't think that's correct." Mr Duthie was asked whether the pursuer had intended the event to be a platform for homophobic and transphobic hatred to which Mr Duthie replied "No" and "I don't actually believe that Franklin Graham was going to be preaching hatred".

[112] Mr Duthie was taken through the correspondence between the pursuer and the defender and between the defender and Glasgow City Council. I will come to that correspondence in my reasoning.

[113] Suffice to say that where Mr Duthie's interpretation of the internal email correspondence differs from its plain reading, I prefer to give the documents their plain reading. The correspondence provides contemporaneous insight into his thinking as events unfolded and, as I have alluded to earlier, the pressures being brought to bear on the defender.

Second witness for the defender: George Charles Gillespie

[114] Mr Gillespie is a non-executive director of the defender. In a short affidavit he explained that he is a Chartered Civil Engineer by profession and that he was appointed as a Non-executive Director of the defender on 12 September 2019. In his affidavit he explained that Mr Duthie had indicated that he would seek the formal position of the majority shareholder albeit that the defender had to make its own decision. In his affidavit at paragraph 9 Mr Gillespie says:

> "I am aware that a decision to cancel the Event was taken by the non-GCC board members of SEC following the board meeting on 29 January 2020".

[115] The decision to terminate was taken by Mr Duthie. The board supported that decision.

[116] Mr Gillespie was questioned in relation to the board meeting and in particular that it appeared that there was a time pressure to decide on cancellation. He described a political controversy concerning the event which Glasgow City Council wished to avoid. He had difficulty explaining why the decision to terminate had to be taken so quickly. He explained that Glasgow City Council "have an influence". Mr O'Neill asked Mr Gillespie "So, just to be clear, then, the security concerns arise because of the possibility of disruption or unrest or violence perhaps but it is resulting from the fact of people being opposed to the views being set out at the event, the religious views of BGEA?" to which the response was "Yes".

Third witness for the defender: Francis Michael Cooper

[117] The evidence of this witness was objected to by the defender. I heard his evidence under reservation as to its relevancy. I have decided to uphold the objection. I do not consider Mr Cooper's evidence to be relevant to the issues which I have to determine.

[118] In summary, Mr Cooper is employed by G4S formerly known as Group 4 Security. He had worked at the Scottish Exhibition Centre for G4S for 12 years. Mr Cooper had prepared a short report dated 11 March 2020. I exclude this from my consideration because the report was not available to Mr Duthie (or, for that matter, the board) when the decision was taken at the end of January to terminate the event. The report seems superficial and I am not persuaded that it has any relevance either to the decision which I have to make on the one hand or to whether the event might be rescheduled.

[119] For these reasons I uphold the objection and exclude the evidence of Mr Cooper from my consideration.

Fourth witness for the defender: Miss Pauline Ann Lafferty

[120] Miss Lafferty has been a non-executive director of the defender since 2014. In her affidavit she emphasised her role to act independently, irrespective of the wishes of the majority shareholder. She spoke to the minutes of the board of directors who met on 29 January 2020.

[121] When asked to comment on the email exchange from Kirsten McAlonan, Head of Public Relations for the defender and Colin Edgar, Head of Communication and Strategy Partnerships for Glasgow City Council dated 28 January 2020, Miss Lafferty did not accept that the email exchange indicated that Mr Duthie had made a decision (despite the terminology within the email). Instead she focused on the comment that Mr Duthie intended to raise the matter at the board meeting, which he did. That said, she accepted that she was speculating as she had not seen the email exchange previously.

[122] At the board meeting Miss Lafferty described Mr Duthie as seeking the board's opinion and the board's support. When asked who had taken the decision to cancel, she said that it was the executive team supported by the board.

[123] Miss Lafferty was taken through the terms of the minutes of the meeting. She was also asked to comment on the evidence of other witnesses. There had been sectarian trouble in the city not long before the board meeting in January 2020. She said that the board took the decision to cancel the event yet there was no vote and the Glasgow City Council directors were not party to the decision (while they had made their views clear, there was no board decision).

[124] It was within the chief executive's power to decide on whether the event went ahead or not. Had Miss Lafferty known that a similar event has passed off peaceably in Blackpool in 2018 that is something which might have affected her decision.

Fifth witness for the defender: John Watson

[125] John Watson was appointed as a Non-executive Director to the defender in March 2019.

[126] Mr Watson referred to two stages in the conversations during the board meeting on 29 January 2020. The first, led by the Council Leader, Susan Aitken, that this was "not the type of event Glasgow wanted to sponsor" while referring to Franklin Graham's comments as "not being gender inclusive". The second stage was whether, operationally, the defender should take "this event forward considering the risks".

[127] In his affidavit, at paragraph 9, a director is minuted as having said to have "added that we have to be careful of being judge and jury if the law hasn't been broken" but Mr Watson recalled the director as saying "We are not judge and jury. The law has not been broken." Mr Watson had concerns that the event might have escalated into something more serious including risking the safety of attendees and staff. He was also concerned at the reputation of the defender having regard to the proposed COP26 conference.

[128] Tellingly, Mr Watson said:

> "…there is an assumption that large events and events with a potential risk to the surroundings or to the public like this can really only take place with the support and involvement of Glasgow City Council ('GCC') and Police Scotland."

[129] He added that "The message being shared with us from GCC was that this event should not go ahead. Susan Aitken was quite unequivocal about this during the board meeting." Mr Watson did add that the board of the SEC is independent from its principal shareholder.

[130] In oral evidence Mr Watson said that the decision was made by the board: Mr O'Neill QC to Mr Watson: "So, you understood that ultimately you [the board] were to make a decision and that ultimately you did made a decision?" to which Mr Watson replied "Yes, at the board meeting we knew we would have to make a decision."

[131] And again, subsequently Mr Watson was asked "But your understanding and your evidence is, no matter what Peter Duthie thinks, you think that you as a board were making the decision?" to which he replies "That's correct".

[132] That is not correct – no vote was taken, or minuted, merely approval sought from the non-executive directors. Those non-executive directors were not quorate. The directors nominated by Glasgow City Council had made their views known. The non-executive directors were asked for their views. Those views were confirmed by email after the board meeting. The decision was one for the chief executive. This is not a criticism of what happened. The board were of the one view – to cancel - but the board as such did not take the decision. They supported it.

[133] It was suggested to Mr Watson that it would not be possible for a valid decision to be taken without the involvement of a Glasgow City Council Director. The Dean objected to that line of questioning. I allowed the line under reservation because Mr Watson's evidence appeared to contradict the position being adopted by the defender at proof, namely, that Mr Duthie had made the decision. Having done so, I assessed the evidence as relevant to questions of credibility and reliability as it is quite clear that the non-executive Directors did not make the ultimate decision. Mr Watson did not appear to grasp the significance of the issue being put to him as to whether the board itself had made the decision to cancel or was simply agreeing to give support to such a decision made by the Chief Executive.

[134] It was suggested to Mr Watson that Glasgow City Council was not just unsupportive, but was actively opposed to the event to which he replied "I think that's probably fair to say".

[135] Mr Watson was asked if he knew of the likely content of the event. He thought that Susan Aitken had referred to the likely content of the event. It is now accepted that the content was based on religious or philosophical belief.

[136] Mr Watson was not aware that a similar event had taken place in Blackpool in 2018 nor that transcripts and videos of that event had been offered to all venues in relation to the 2020 tour.

Sixth witness for the defender: William Whitehorn

[137] William Whitehorn joined the defender's board in 2010 becoming Chair of the Board in 2014. Mr Whitehorn spoke to the minutes of the board meeting on 29 January 2020. In his affidavit he considered the risk to public disorder, both inside and outside the venue to be "high". He described Glasgow as "not the same as other places. Its social context is different" referring to sectarian issues which affect Glasgow and which he said made the city vulnerable to a disturbance of the sort he thought would happen if the event went ahead. In his affidavit, at paragraph 18, Mr Whitehorn indicated that a decision would be taken "by the Board, but excluding GCC members".
Mr Whitehorn also recalled Susan Aitken speaking at the meeting to convey the views of Glasgow City Council. Mr Whitehorn suggested if he could not prove to the COP26 organisers that the defender could handle "a small event like the BGEA event" it would be difficult to convince them that the defender was capable of hosting a globally significant event like COP26. In cross examination and re-examination Mr Whithorn said that the COP26 event was not mentioned in the minutes under this heading (but it was on the agenda, at point 8, for the meeting) nor in the internal correspondence produced at proof. Mr Whitehorn said that the COP26 conference was on his mind at the time, on the agenda and that: "everyone knew it was happening".

[138] The defender had subsequently issued a letter on 27 March 2020 implementing the force majeure provision within the agreement (Covid) which was sent on the basis that the pursuer had not accepted the earlier termination as valid. Mr Whitehorn referred to the defender then "building the NHS Louisa Jordan Hospital" on the campus.

[139] At paragraph 29 of his affidavit Mr Whitehorn referred to Franklin Graham "and his cohort" and in relation to the possible rescheduling of the event, Mr Whitehorn was guarded:

> "But if they [the pursuer] wanted to make a booking for a new event, on a new date, and there was good reason to believe that there was no public order risk to hosting the event, then I wouldn't necessarily see a problem". (My emphasis).

[140] In oral evidence, he initially maintained that the board had made the decision but, as I understood his evidence, shifted his position in the sense that the board had reached a consensus (excluding the GCC nominated Directors) albeit one not voted on and not taken at the board meeting itself.

[141] Mr Whitehorn was taken through the terms of the board minutes. He considered that the minutes conveyed a good flavour of the meeting.

[142] Mr Whitehorn said that the venue is not designed for conflict but for entertainment. Mr Whitehorn's relied on experience rather than a risk assessment when considering the risk.

[143] Mr Whitehorn explained that in general board meetings are collegiate. It is only where a significant disagreement arises that people will be called upon to vote. Mr Whitehorn said that he had suggested the procurement of the letter which Peter Duthie had requested from Glasgow City Council and which the non-GCC nominated directors would consider. For these reasons the meeting never came to a vote. It did not need to. Ultimately Mr Whitehorn agreed that it was a question of casting an eye over the letter from Glasgow City Council once it was received and, unless one of the non-executive directors objected, then the CEO, Peter Duthie, could proceed to cancel the event. Mr Whitehorn was not consulted in relation to the wording of the termination letter.

[144] Although Mr Whitehorn was aware of other venues rescheduling, he would "want to do it differently" and would not agree to a non-ticketed event. He was concerned to avoid potential conflict at a future event.

Seventh witness for the pursuer: Morag McNeill

[145] Morag McNeill is a solicitor by profession and has been a non-executive director for the defender since 2014. At paragraph 9 of her affidavit she expressed the view that the decision to terminate "had to be a board-wide decision, not just an executive one, albeit strictly speaking an executive decision wouldn't have been incompetent…"

[146] At paragraph 13 of her affidavit Ms McNeill explained that the decision to cancel the event was not taken "during" the board meeting. She considered that there would be a "real danger of public disorder" and that the defender had a duty of care to their employees, contractors and venue users.

[147] Significantly, at paragraph 16, she says:

> "Ultimately, it is not for a non-executive director to second guess an executive director in matters of safety. I don't know enough about the operational security matters at the SEC so it is not for me to say whether there is nor is not a security risk. If the executive directors tell me there is a security issue, I rely on their expertise. I rely on the Chief Executive's views and the views of his team".

[148] In cross-examination Ms McNeill confirmed that she was relying (in relation to risk assessments and the like) on the expertise of the defender's executive.

Eighth witness for the defender: Francis McAveety

[149] Francis McAveety is a Councillor for Glasgow City Council and a non-executive director of the defender. He was aware that there had been local media coverage about the event. He had attended the board meeting on 29 January 2020 but he did not vote [nobody had, that is an observation not a criticism] on the decision to terminate the contract between the pursuer and the defender.

[150] Mr McAveety explained that from his perspective the principle of equality was at the forefront of his mind. With reference to the minutes of the meeting on 29 January suggesting that he

had said words to the effect that the message being preached is darker than seen before he was referring to statements made publicly by "some people who did not agree with BGEA". As far as Mr McAveety was concerned, the decision to terminate was made after the board meeting.

[151] Mr McAveety was referred to an article dated 28 January 2020 which had appeared in the Evening Times with a particular focus on what was reported as having been said by a member of the Scottish Parliament. Mr McAveety said that he had known the MSP for ten years and commented that "it's typical heated language" for that MSP.

[152] Mr McAveety was also referred to the open letter by Franklin Graham to the LGBTQ community on 27 January referred to in the Evening Times article. It was put to Mr McAveety that the event was "fundamentally a religiously based event which people would be coming together to listen to a religious message and manifest their own particular religious views. That's what this about?" (sic) to which Mr McAveety replied "Certainly the event itself that was being run was primarily for that purpose, yes".

Ninth witness for the defender: Susan Aitken

[153] Susan Aitken is the leader of Glasgow City Council and one of the Non-executive Directors of the defender appointed by Glasgow City Council. She described the defender's relationship with Glasgow City Council as "an independent, autonomous business, which makes its own decisions independently, having regard to its business aims". She described receiving email complaints in relation to the event that "the event's message was hate speech". She was aware that there was media coverage surrounding the pursuer's tour and politicians were calling for the event to be cancelled. She referred to an extract from the chief executive's report which had referred to "some public criticism based on the content of Franklin's message". At paragraph 16 of her affidavit she recalled that "part of the discussion at the board meeting was around the balance between the

freedom of speech and the fact that SEC's role is not to judge which event should or should not take place".

[154] In her affidavit she said that Glasgow City Council did not instruct the defender on what to do. That was an operational decision "for the SEC board". Ms Aitken took no part in the vote or the decision [there was no vote]. The views of Glasgow City Council were, through its representatives on the board, made known to the board and the chief executive of Glasgow City Council wrote a letter after the board meeting seeking cancellation of the event. That said, her position was that the SEC acts autonomously.

[155] It was suggested to Ms Aitken that the tenor of the minute indicated that the defender could either adhere to its contract or "do the right thing" provided Glasgow City Council asked for the event to be cancelled. Ms Aitken advised that she was aware that there were concerns but not that any decision had been taken prior to the meeting. She disagreed that a decision had been taken for which justification was being sought. She said that Peter Duthie certainly "made his views very clear" at the meeting that the event should be cancelled.

[156] Ms Aitken took the view that what might be said at the event could not be ascertained beforehand. When Ms Aitken was advised that transcripts of earlier events were available she responded that it could not be ascertained with certainty that something would not have been said at the event which would have been regarded by many people in Glasgow as an attack on their rights and their equality. Ms Aitken was cross-examined at length in relation to the possible reaction to the views expressed by Franklin Graham and that other religious leaders had been allowed to speak in Glasgow. When asked specifically about her personal concerns Ms Aitken said:

> "my overriding concern, and I suppose the factor that ultimately was the most decisive for me in taking the view that the event should be cancelled, was because I thought that – not just the expression of the views, but also the knowledge of, or the expectation that the views may well be expressed or could be expressed, which would have real life consequences for people in Glasgow…"

[157] Ms Aitken agreed that there was no fundamental right not to be offended and that a diversity of views was a fundamental right of freedom of thought, conscience and religion

[158] When pressed in relation to the urgency for a decision, her position was that, operationally, it was better to have certainty and a decision made rather than to consult with, for example, the police on security concerns. Ms Aitken could not recall saying what had been attributed to her by John Watson, namely, her saying "this was not the type of event Glasgow wanted to sponsor". She accepted that her views expressed at the meeting were "fairly impassioned".

Tenth witness for the defender: Deborah McWilliams

[159] Deborah McWilliams has worked for the defender for over 30 years and is currently Director of Live Entertainment. Her role involves overseeing the content and ticketing for live entertainment.

[160] Ms McWilliams was aware that on 8 April 2019 the defender's sales team hosted a site visit for the pursuer. A date was identified for an event on 30 May 2020. She had understood that the event would be a private event by which she understood that tickets would not be available to the public. Private unticketed events are out with the norm for the live entertainment team although they do occur. She had been told that the event would be targeted towards local Christian organisations, not the public at large. Her understanding was that the event was to be a faith based, private event and the attendees would be a discreet group of people. According to her affidavit her understanding changed in response to a letter to the LGBTQ+ community posted by Franklin Graham on his Facebook page on 27 January 2020. In her affidavit she said that the defender was "suddenly" looking at an unticketed, very public event.

[161] Ms McWilliams is not a board member. She had not attended the meeting on 29 January. At paragraphs 28 and 29 of her affidavit Ms Williams dealt with the possibility of a future event. In

principle another event would be accommodated but as for rescheduling the "same BGEA event as before, I cannot envisage us agreeing to book that".

[162] When asked if Peter Duthie took the decision to cancel on 28 January 2020 the response was:

> "I don't know we completely took the decision to cancel. I think that his view at that time was that it was the right thing to cancel, but the final decision would have been taken at the board meeting on the 29th. That's how I understand it"(sic).

[163] Ms McWilliams was asked why her affidavit did not mention email chains from November 2019 nor from January 2020. She was asked why both her affidavit and Mr Duthie's affidavit appeared to omit these issues.

[164] Ms McWilliams explained that she had instructed a colleague to retrieve the emails but that Mr Duthie had asked her to show him emails that supported the defender's claim that the event was intended to be private. In other words only emails favourable to the defender's case had been looked out.

[165] Ms McWilliams was not aware of the correspondence agreeing to a free unticketed event advertised to the public.

Eleventh witness for the defender: Carole Forrest

[166] Carole Forrest is a former Director of Governance and Solicitor to the Council at Glasgow City Council. She was appointed a non-executive director of the defender on 17 May 2013. She had provided an affidavit which explained, in brief terms, that her apologies had been tendered in respect of the board meeting on 29 January 2020 as she was on annual leave at that time.

[167] In cross-examination the questions were directed principally at her understanding of the Equality Act 2010 and the internal workings of Glasgow City Council in relation to the tendering of advice. There was little that this witness could add as she was not privy to discussions at, prior to or immediately after the board meeting on 29 January 2020.

Twelfth witness for the defender: William McFadyen

[168] Mr McFadyen is the Director of Finance and Development and a member of the defender's senior executive team. He has been on the board since October 2008.

[169] Mr McFadyen was not involved in arranging the agreement with the pursuer. In his affidavit he explained that he took the minutes of the board meeting on 29 January 2020 and he was clear that the decision to terminate the event was not taken at that board meeting. In cross-examination Mr McFadyen confirmed that the decision to cancel would be one for the Chief Executive Officer. The decision to cancel was not taken by the board but the views of the board were sought. Mr McFadyen had been aware that other venues were considering cancelling their events. Mr McFadyen explained that he had not been aware of detailed communication between the defender and Glasgow City Council until the papers were received by him from the defender's legal advisors. There had been a number of emails and communications which Mr McFadyen was not aware of.

[170] However, Mr McFadyen was the director who signed the termination letter dated 29 January 2020. Mr McFadyen explained that he had not drafted the letter, lawyers had. He could not recall why the letter had not been signed by Mr Duthie but Mr McFadyen was authorised by Mr Duthie to sign it. Mr McFadyen agreed that there was no reference in the letter to public disorder.

[171] Mr McFadyen was also referred to an email from Mr Duthie dated 6 February 2020 addressed to Carole Forrest at Glasgow City Council within which Mr Duthie appears to suggest a public response both from the defender and from Glasgow City Council. Mr McFadyen explained that he was not involved in the preparation of Mr Duthie's email dated 6 February 2020.

[172] Finally Mr McFadyen confirmed that although he took the minutes of the meeting on 29 January he did not contribute to the discussions. Hence no comments are attributable to him.

[173] In re-examination Mr McFadyen was referred to paragraph 22 of his affidavit. Mr McFadyen was not aware of any specific information or police intelligence on public disorder at this event. His reference at paragraph 22 to police intelligence related to other events in the city.

Decision

[174] I will apply the law to the facts. It is accepted that the event was a lawful evangelical outreach event. I therefore begin with a discrete issue which alone, in my opinion, constitutes a breach of the Equality Act 2010. It is this.

[175] In Mr Duthie's affidavit at paragraph 18 he said that he spoke at the board meeting on 29 January 2020. He focused on four key concerns. The second of those was: "The LBGTQ+ community has strong representation within the international artistic community; I could foresee a scenario where artists would say they would not play our venue."

[176] Additionally, the fourth reason was also redolent of a business case defence: "Our principal sponsor, SSE, had also raised some concerns with us: they felt the event was not compatible with their values and did not want their name associated with it".

[177] Briefly put, if it is correct that the event was evangelistic, based on religion or philosophical belief, then it follows that the decision to cancel was a breach of the Equality Act 2010 in that the event was cancelled as a commercial response to the views of objectors.

[178] In law there is no business case defence.

[179] Accordingly, on this basis alone the defender breached the terms of section 29(2) of the Equality Act 2010 by terminating the provision of the service to the pursuer. I accept that this may not have been the only reason but if commercial considerations such as those outlined at paragraph 18 of Mr Duthie's affidavit related to the objections by others to the religious or philosophical beliefs

of Franklin Graham and/or the pursuer, then that is a breach of the Act. These are, within his affidavit, two of the four reasons he says were provided to the board on 29 January 2020.

[180] Moving on, also within paragraph 18 of Mr Duthie's affidavit Mr Duthie comments: "When your major shareholder expresses concern, you listen". I now examine the influence which Glasgow City Council had on the decision.

[181] Specifically the letter dated 29 January 2020 from the Chief Executive of Glasgow City Council is telling. It was written "as the majority shareholder of SEC Ltd" asking to have the booking cancelled. The reasons are instructive. The letter reads as follows:

> "I write regarding the SEC's proposed hosting of an event featuring Franklin Graham.
>
> On behalf of the council, as the majority shareholder of SEC Ltd, I have to ask you to cancel this booking for the following reasons.
>
> Firstly, as you may be aware, there is potential for Mr Graham to make homophobic and islamophobic comments during his public speaking engagements. Among other concerns, this could raise issues for the council in terms of its duty under the Equality Act 2010 to eliminate discrimination, harassment, and victimisation and to foster good relations between different groups.
>
> Secondly, I have a concern for the city's reputation. Glasgow is well known as a city which is friendly to all people, but particularly including people from the LGBTQ and Muslim communities. I do not want to send a message to those communities that the council is prepared to welcome any person who has the potential to make such comments.
>
> I am available to discuss at any time." (sic)

[182] The concern is expressed that there is the potential for Mr Graham to make homophobic and Islamophobic comments. I found no evidence to that effect. During the proof there was the occasional reference to suggestions that Franklin Graham may have uttered comments interpreted as homophobic or Islamophobic years, sometimes decades, beforehand but before me it was conceded that this event was not to be a platform for such views.

[183] At proof it was accepted that the purpose of the event scheduled for 30 May 2020 was a religious evangelical event at which Mr Franklin Graham would speak. It was accepted that he did

not intend to engage in hate speech. Neither the board nor, it seems, Mr Duthie had been aware that transcripts (and videos) of prior speeches had earlier been offered to the defender, but declined, and would have been available to allay concerns in that regard.

[184] The second paragraph of the letter from Glasgow City Council raises a concern for the city's reputation as a city which is friendly to all people "but particularly including people from the LGBTQ+ and Muslin communities". It goes on to say that "I do not want to send a message to those communities…"

[185] In short, pressure was put on the defender by its majority shareholder to cancel the booking as it may offend others. The effect of writing in such terms was not to protect one group from another but to prefer one opinion over another. For the defender to cancel on the basis of considerations within the letter would again be to breach a protected characteristic. The letter dated 29 January 2020 from Glasgow City Council was received after the board meeting but before the termination letter was issued by the defender.

[186] Also on 29 January 2020 a Member of the Scottish Parliament (MSP) wrote to the defender requesting that the event be cancelled reportedly saying:

> "The idea of allowing the SEC to be used as a platform for such a toxic and dangerous agenda seems so utterly at odds with the values of a civilised society that I was extremely surprised to learn that this booking had been accepted".

The same MSP had been vocal on social media.

[187] It is no part of the defender's case and I heard no evidence to suggest that Franklin Graham had intended to pursue a toxic or dangerous agenda at the event. On the contrary, it is not disputed that the event would have been an evangelical outreach event for up to twelve thousand people. That is not to say that his opinions are not offensive to some whether in Glasgow or elsewhere. However, the pursuer's right to engage a speaker at the evangelical event – in furtherance of a religious or philosophical belief – is protected by law.

[188] On a more general note, the concern of Glasgow City Council for people from the LGBTQ+ and Muslim communities may be understandable. Their rights have been hard won (indeed, arguably they have much further to go in their practical application). However, that misses the point. The lawful opinions of others based here on religious or philosophical belief (whether mainstream or not) are not to be preferred one over another. All are protected.

[189] I now turn to consider the minutes of the meeting of the defender's directors held on 29 January 2020. An excerpt of the minute was produced which commences with the Chief Executive (Peter Duthie) providing the background to the event which "had led to a high level of negative comments about Franklin Graham but also about the venue and its decision to accept the booking". It is observed that Glasgow City Council as the major shareholder will come under pressure on the event.

[190] The minutes record directors stating that "it's about 'doing the right thing' notwithstanding the contractual position"; that Glasgow City Council "may formally request that SEC does not hold the event" as indeed happened (see above); that "there was a scale on the message that was being preached which is darker than seen before" yet there was no enquiry made from the pursuer as to what that message was to be.

[191] Objections to the event had been raised by petition, on social media, by Church of Scotland Ministers and by an MSP which, taken together, may have caused the board to think that the message was "darker than seen before". If so, that is no longer the defender's position.

[192] The minutes also refer to issues of protest and disorder. No mention is made of reaching out to the pursuer either to allay or diffuse – or perhaps confirm - such concerns or to suggest provision (searches/ticketing/fewer numbers/security/assurances as to what might be said, etc.,) for them. Such provision might have been unworkable but they were not considered and the pursuer was not consulted.

[193] If anyone suggested contacting the pursuer to seek assurances then that is not reflected in the minutes. Indeed quite the contrary. Within the parties' agreement there is provision for a breach to be remedied (clause 5.1.2) but in the termination letter the defender blamed the pursuer for the breach (while making no mention whatever to security issues) and concluded by saying that the pursuer's breach was not capable of remedy.

[194] Overall I am left with the impression that the defender was searching for a reason to terminate the agreement. Franklin Graham's Facebook post on 27 January 2020 provided that excuse.

[195] To summarise, I accept that the minutes include a discussion on important issues such as protest and security. But the minutes also focus on an alleged "darker" message which it was said might be conveyed by Mr Graham. However, it is now accepted that the actual message to be conveyed at the event was based on religion or philosophical belief falling within the terms of section 10(2) of the 2010 Act.

[196] Drawing the above strands together, I am satisfied that the decision to cancel the event was taken (at least in part and, had it been necessary for me to determine the issue, in substantial part) on the basis of the religious or philosophical belief of the pursuer and Mr Franklin Graham. But that is not an end to the matter.

[197] If, as is argued, the event was terminated solely because of public disorder, that should have been disclosed to the pursuer. It was not. I was provided with no colourable reason why not.

[198] I therefore turn to consider the termination letter sent by the defender to the pursuer dated 29 January 2020 (the same day as, but after, both the board meeting and the letter from Glasgow City Council had arrived). The letter reads as follows:

> "We refer to the Hire Agreement (Reference F1038).
>
> Regrettably, the Board of Scottish Event Campus Limited ("SEC") have determined that the Hire Agreement is hereby terminated with immediate effect under clause 5.1.2 of SEC's Terms of Business. This is by reference to your material breach of the Hire Agreement pursuant to clause 8.1.6 of SEC's Terms of Business, which sets out your

> obligations not to act, or not to omit to act, in any way reasonably likely to bring SEC into disrepute.
>
> This is on the basis of the recent adverse publicity surrounding your tour, which we have reviewed with our partners and stakeholders, and who are of the view that this brings both SEC and potentially, Glasgow, as a city, into disrepute. This is not capable of remedy.
>
> We shall make arrangements to refund any deposit paid by you within a period of 14 days."

[199] At proof the defender maintained that the decision to terminate the contract arose solely out of security concerns, namely, that protests might take place both inside and outside the venue - I have addressed such matters at paragraphs [45] to [50] above. The obvious omission from the termination letter is any reference to issues of security, disorder or protest as influencing the decision.

[200] Instead the letter says that the pursuer has breached its obligations "not to act, or not to omit to act, in any way reasonably likely to bring SEC into disrepute." There was no attempt at proof to maintain the line that the pursuer had brought the defender into disrepute.

[201] In the penultimate paragraph of the letter the reason given for the decision is on the basis of "adverse publicity".

[202] To conclude on this topic, there is no mention in the letter of either (a) concerns about security or protest at the venue or (b) a concern at what might be said from the podium by Franklin Graham – as was reflected in the minutes of the board meeting.

[203] The tenor of the letter reflects that the defender is responding (for commercial reasons) to the concerns raised by others to the event taking place at all.

[204] The conclusion that the adverse publicity/disrepute is "not capable of remedy" is a conclusion reached unilaterally by the defender some four months prior to the event and without discussion with the pursuer.

[205] Of course, had the defender intimated that it was considering terminating the contract that might have resulted in litigation. However, the decision to terminate the contract itself resulted in this litigation.

[206] On a more general note, much was made of when and by whom the decision was taken. Even at proof there was a difference of opinion as is reflected in my summary of the evidence above. I am satisfied that Mr Duthie took the decision to terminate the contract. However, he did so with the support of the principal shareholder and with the support of the board as is reflected in the termination letter (which refers to a board decision). The court is primarily considering the basis for the decision. The decision to terminate the agreement was taken as a commercial response by the defender to the objections by others to the religious or philosophical beliefs of the pursuer and Franklin Graham.

[207] In my opinion this decision to terminate was taken by Mr Duthie on 28 January 2020. I follow the chronology evidenced in the paperwork. In particular, I refer to an email by Kirsten McAlonan, Head of Public Relations for the defender, dated 28 January 2020 addressed to Colin Edgar, Head of Communications and Strategic Partnerships at Glasgow City Council. The day before the board meeting Kirsty McAlonan wrote: "Probably not surprisingly given the press today we have made a decision not to go ahead with this because of the issues surrounding this escalating" and "Just wanted to give you the heads up" and "Will let you know when we can release but I think Peter would like to bring this up with the Board".

[208] Mr Duthie was at a loss to explain the email dated 28 January from Kirsten McAlonan.

[209] In my judgment Mr Duthie had made his mind up on or about 28 January 2020 subject to the support of the board. He had advised Kirsten McAlonan accordingly the day before the board meeting. She says in her email that the decision had been made and she was letting her counterpart at Glasgow City Council know in advance of that decision being made public. However she was also

aware that Mr Duthie proposed to raise the matter with the board which he did. Accordingly, Mr Duthie's decision was taken on 28 but implemented on 29 January 2020 having secured both the support of the board and the principal shareholder.

[210] Here I refer to the opinion of Judge Claire Evans in *Lancashire Festival of Hope* v *Blackpool Borough Council* dated 1 April 2021 FOOMA 124, Manchester County Court where she opines, at paragraph 133:

> "133. The suggestion that removal on the grounds of the offence caused to the public by the association of the Claimant with Franklin Graham and his religious beliefs would not be 'because of' the religious beliefs but rather because of a response to public opinion or concern seems to me to be a distinction that cannot properly be drawn having regard to the intention behind the Equality Act of eliminating discrimination."

And at paragraphs 134 and 135 she observes:

> "134. There is no defence of justification to direct discrimination. The issues arising from the desire to avoid offence to certain sectors of the community are or may be relevant to the HRA claims, where there is a balancing exercise to be undertaken, but they seem to me not to be relevant to the EA claim in this particular case.
>
> 135. The complaints arose from the objections of members of the public to the religious beliefs. The removal came about because of those complaints. I find it also came about because <u>the Defendants allied themselves on the issue of the religious beliefs with the complainants, and against the Claimant and others holding them."</u> (my emphasis)

[211] The effect of the decision to terminate the agreement was that the defender preferred the opinions of the objectors to those of the pursuer and by terminating the agreement, silenced them.

[212] That is not to say that there were no concerns in relation to disorder and protest. There were. However, tellingly no concerns (security, protest or otherwise) were raised with the pursuer either before or after the termination letter.

[213] Here I will also refer to an email dated 6 February 2020 - after the contract was terminated - from Peter Duthie to Carole Forrest, Director of Governance and Solicitor to the Council, in which he provides suggested responses both from the defender and Glasgow City Council. The email reads:

"In order to allow you to respond (as you suggest, one response might be best) the following statements have been agreed.

From SEC:
'The booking for this event was processed in the same way we would for any religious concert of this nature and as a business we remain impartial to the individual beliefs of both our clients and visitors. However, we are aware of the recent adverse publicity surrounding this tour and have reviewed this with our partners and stakeholders. Following a request from our principal shareholder the matter has been considered and a decision made that we should not host this event.'

From GCC:
'The council was concerned the event would have a detrimental impact on community relations, due to the consistently inflammatory nature of comments made by Franklin Graham.
The council expressed that view to the SEC. However, the decision to cancel or continue with the event was one for the venue.'

I hope this helps."

[214] A number of matters arise from this email. Firstly, even after the termination letter was issued on 29 January 2020, there is no reference in either of these proposed public responses to concerns surrounding public disorder. Secondly, the suggested response from the SEC refers to a "request from our principal shareholder" whereas the suggested response from Glasgow City Council refers to the "consistently inflammatory nature of comments made by Franklin Graham" but also that the decision was "one for the venue". It appears that each attributes the decision to the other yet no mention is made of the reason for termination which the defender now founds on.

[215] Finally, I return to consider the terms and effect of the Facebook post by Franklin Graham dated 28 January 2020. This, it is said, crystallised the defender's concerns over public disorder and protest. I reproduce it in full:

"A letter to the LGBTQ community in the UK –

It is said by some that I am coming to the UK to bring hateful speech to your community. This is just not true. I am coming to share the Gospel, which is the Good News that God loves the people of the UK, and that Jesus Christ came to this earth to save us from our sins.

> The rub, I think, comes in whether God defines homosexuality as sin. The answer is yes. But God goes even further than that, to say that we are all sinners – myself included. The Bible says that every human being is guilty of sin and in need of forgiveness and cleansing. The penalty of sin is spiritual death – separation from God for eternity.
>
> That's why Jesus Christ came. He became sin for us. He didn't come to condemn the world, He came to save the world by giving His life on the Cross as a sacrifice for our sins. And if we're willing to accept Him by faith and turn away from our sins, He will forgive us and give us new life – eternal life – in Him.
>
> My message to all people is that they can be forgiven and they can have a right relationship with God. That's Good News. That is the hope people on every continent around the world are searching for. In the UK as well as in the United States, we have religious freedom and freedom of speech. I'm not coming to the UK to speak against anybody, I'm coming to speak for everybody. The Gospel is inclusive. I'm not coming out of hate, I'm coming out of love.
>
> I invite everyone in the LGBTQ community to come and hear for yourselves the Gospel messages that I will be bringing from God's Word, the Bible. You are absolutely welcome."

[216] The court must be cautious about what can be read into the above message as I did not hear evidence from its author. That said, it appears that Franklin Graham was aware of concerns and sought to diffuse those. It is also apparent that he is rooting his response in religious or philosophical beliefs (irrespective of how others might view those).

[217] It is the final paragraph which the defender founds upon. At proof Mr Duthie explained that he had become concerned at the decision to "invite everyone" in the LGBTQ+ community to the event. The defender was concerned that protests may then take place outside and/or inside the venue, this being a free unticketed event. I can understand those concerns.

[218] However, the event had always been planned to be free and unticketed. Had the event been ticketed, there would have been little to prevent protestors obtaining tickets (whether or not those tickets were free) and entering the hall.

[219] On a plain reading of the post, it is an attempt to recognise and to diffuse angst, not to create it. Whether that was a realistic prospect I cannot say. However, the response by the defender was

not to question the pursuer as to the wisdom of the final paragraph but unilaterally to cancel the event on 29 January 2020, some four months prior to the scheduled date, 30 May 2020 (all while failing to disclose what is now claimed to be the true reason).

[220] I heard evidence that the defender had hosted other religious events - the implication being that the defender does not vet them. That may be true in general terms but this court is dealing with this event.

[221] At the hearing on submissions Mr O'Neill invited me to imply the word "unfortunately" as a synonym for the word "candidly" where the defender refers to the evidence of its witnesses in its written submissions (including at D65, D68, D87 and D90). There is some force in that submission.

[222] Overall I conclude that the true reasons for the decision were (a) the defender's view of the religious and philosophical beliefs of the pursuer and of Franklin Graham and (b) the pressure brought to bear on the defender by its principal shareholder and others including commercial considerations concerning the response by others to the intended religious and philosophical message to be conveyed by the pursuer and Franklin Graham. Concerns over the Facebook post by Franklin Graham on 27 January 2020 provided an excuse to terminate the agreement but that was not the sole reason nor the principal one. It is now suggested that the sole reason for terminating the contract was security. I do not agree. It was not the sole reason. I accept that concerns about security were discussed at board level but that reason, such as it was, went undisclosed to all except board members.

Remedies – declarator, specific implement, apology, damages.

[223] The remedies available to this court are the same as those available in the Court of Session and are to be found within section 119 of the 2010 Act which, in so far as relevant, reads as follows:

"**119 Remedies**

(1) This section applies if the sheriff finds that there has been a contravention of a provision referred to in section 114(1).

(3) The sheriff has power to make any order which could be made by the Court of Session –

(a) in proceedings for reparation;

(b) on a petition for judicial review.

(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

(5) Subsection (6) applies if the sheriff –

(a) finds that a contravention of a provision referred to in section 114(1) is established by virtue of section 19, but

(b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the claimant or pursuer.

(6) The sheriff must not make an award of damages unless it first considers whether to make any other disposal."

[224] I may only consider damages after I have considered other disposals (section 119(6)).

Declarator

[225] In this case the pursuer seeks declarator that the defender, a service provider, has discriminated against the pursuer by terminating the hire agreement dated 31 July 2019 in terms of which the pursuer hired premises at SEC Hydro Arena from 0800 hours on 30 May 2020 to 0200 hours on 31 May 2020 for an event to be known as the "Franklin Graham Event" and that the defender has refused to reschedule the event because of a protected characteristic, namely, religion or philosophical belief in terms of section 10 of the 2010 Act.

[226] The Dean accepted that if a breach of a protected characteristic had been established, there could be no objection to a declaration. I agree. I have framed the declarator to reflect the terms craved.

Specific Implement – an order Ad Factum Praestandum

[227] In its written submissions the defender argues that the contract ended on 27 March 2020 when the pursuer invoked the force majeure provision (covid). Therefore, as the contract ended then, no issue of rescheduling applies. I do not agree. The invocation of the force majeure provision was, as stated in that letter, the defender's fall-back position. The remedies applicable as at the date of the wrongful act apply here. Furthermore, contrary to what the defender says (D118) I doubt if it was the pursuer's intention to prove that the March decision was on the basis of a protected characteristic. Moving on, in relation to specific implement, the Dean's submission, as I understood it, was that a court order for rescheduling would not be warranted for three reasons, (a) that the date for the event had passed, (b) that the defender had offered to negotiate an alternative date but on a different commercial basis and (c) the court could not rule on what factors might be in play at the time of the rescheduled event.

[228] On the other hand Mr O'Neill submitted that the remedies available to the Sheriff in such matters are the same as those in the Court of Session. The Court of Session may make any order whether or not such an order is craved in a petition. That, in his submissions, was what he was inviting me to do.

[229] I was also referred to section 119(3)(b) of the 2010 Act which confers upon the Sheriff the same powers as exist in the Court of Session.

[230] This is a commercial case. I accept, as Mr O'Neill had proposed, that it is possible for me to issue a decision and assign a hearing in terms of Rule 40.14 of the Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 No1956 (S.233) so as to allow parties to liaise in relation to the management of a rescheduled event.

[231] I also accept that an appropriate remedy in this case would be to order a rescheduling of the event.

[232] In theory rescheduling should not pose a difficulty. Comparatively speaking, the identification of a date would be a minor issue. However, from the point of view of a court ordering, directing and supervising a rescheduling, such a task would, from any perspective, be fraught with hazard (leaving aside such an order being made in the teeth of the defender's opposition).

[233] I say this because, assuming that a suitable date could be found, the court could not properly manage/regulate issues such as ticketing (or not) for over 12,000 people: whether and to what extent security personnel should be engaged, by whom and at what cost (with or without police involvement); what, where, when and to whom advertising should take place (leaving aside whether pre-event functions would be required at the venue to promote/organise the rescheduled event as had originally occurred). I doubt if I could confidently leave such matters to the discretion of parties. All of this had previously been agreed.

[234] Furthermore a court-ordered rescheduling might attract those intent on embarrassing the court and perpetrating the very mischief of suggested protest in an effort to vindicate the defender's original (but wrongful) decision.

[235] It was said at the earlier debate ([2021] SLT 803 at page 208L) and repeated in the oral submissions at proof that the defender is willing to consider rescheduling an event for the pursuer but on different commercial terms. It is clear that the event, if any, which the defender is prepared to countenance would be very different to that which it had originally contracted to hold.

[236] In court the defender complained that the pursuer had not asked for a rescheduled event but that is manifestly not the case. Throughout these proceedings and during the questioning of the defender's witnesses, the pursuer repeatedly asked whether the defender would host another event. Indeed, a rescheduling is the primary purpose of this litigation. It has been achieved elsewhere. The pursuer has repeatedly sought, within the confines of this litigation, to reschedule the event.

[237] However, because of the practical and logistical difficulties involved, I am of the opinion that the court could not responsibly order and oversee a rescheduling. I have reached that conclusion even allowing for the potentially severe consequences to a defaulting party were court orders to be ignored. The practicalities in overseeing such an exercise with warring litigants and involving third parties, including the public, are simply too great. I have not reached this decision lightly. I am mindful of the opinion of Lord Drummond Young in *Anwar* v *Secretary of State for Business, Energy and Industrial Strategy* 2020 SC 95 at paragraph 52, including, that:

> "if a legal right exists a remedy must be devised to permit its enforcement; otherwise the right is ineffectual. This extends not merely to the existence of a notional remedy but to ensuring that the remedy produces practical results."

That case had also involved the Equality Act 2010 (The Lord President Carloway dissenting).

[238] Here the defender is entrenched. Objectors, including the defender's major shareholder (Mr Duthie: "When your major shareholder expresses concern, you listen") are appeased. Welcome voices are heard. Others silenced. The Equality Act 2010 is frustrated. Other venues have rescheduled. Not here. No reason was given, merely a dismissive attitude displayed (Mr Duthie: "That is a matter for them" – the other venues).

Apology

[239] From paragraph P10.30 – P10.36 of the pursuer's submissions the pursuer argues that the court should order an apology.

[240] Section 3 of the Apologies (Scotland) Act 2016 defines an apology:

> "An apology means any statement made by or on behalf of a person which indicates that the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing a recurrence".

[241] On reading the Apologies (Scotland) Act 2016 one is left with the impression that its purpose is to encourage an apology so as to avoid litigation. We are beyond that. I observe that I was not referred to a Court of Session case where a defender had been ordered to apologise.

[242] The Dean's objection to the remedy arose from its lateness as well as noting that there has been no case where such an order has been made. There is no crave for such a remedy and the wording has not been addressed (though I accept that that might depend on the nature of the breach established).

[243] However the usual principles of fair notice should apply. Here there is no crave for an apology, simply an aspiration within written submissions that the court should make an order for an apology in terms unspecified.

[244] I refer to the opinion of Judge West dated 20 August 2019 (albeit in relation to a different provision of the Equality Act 2010) which encapsulates considerations relevant to a tribunal/court considering an apology. At paragraph 256 in *Proprietor of Ashdown House School* v *(1) JKL; (2) MNP* [2019] UKUT 259 (AAC) Judge West opines:

> "256. In reaching this conclusion I consider that it is appropriate to set out guidance for future Tribunals in the following sub-paragraphs:
>
> (a) the Tribunal does have the power to make an order for an apology (as to the width of the jurisdiction conferred on the Tribunal by paragraph 5 of Schedule 17 of the 2010 [Equality] Act, see above in relation to Ground 1)
>
> (b) an apology may have a wider purpose than merely preventing further discrimination against the child in question. To the extent that an apology is an assurance as to future conduct, an order that there be an apology gives teeth to a declaration of unlawful discrimination
>
> (c) there can be value in an apology: apologies are very important to many people and may provide solace for the emotional or psychological harm caused by unlawful conduct. An apology might reduce the mental distress, hurt and indignity associated with a permanent exclusion. It might also assist with recovery, forgiveness and reconciliation. An order that there be an apology can be regarded as part of the vindication of the claimant

(d) a tribunal should consider whether the apology should more appropriately be made to the child or to his parents. In the case of very young children the latter may be more appropriate for obvious reasons

(e) an order to make an apology may well be appropriate when there is already an acceptance that there has been discrimination or unlawful conduct or where there is an acceptance and an acknowledgment of the tribunal's findings on responsibility

(f) however, the fact that there has been a contested hearing and that the respondent has strenuously disputed that there has been any discrimination or unlawful conduct is not decisive against ordering an apology

(g) nevertheless, particularly where there has been a dispute or a contested hearing, the tribunal should always consider whether it is appropriate to make an order and bear in mind that it may create resentment on one side and an illusion on the other, do nothing for future relations and may make them even worse

(h) before ordering an apology, a tribunal should always satisfy itself that it will be of some true value

(i) a tribunal should always be aware that there may be problems of supervision if it accepts responsibility for overseeing the terms of the apology which can result in drawn out arguments over wording."

[245] To conclude on this remedy, leaving aside the issue of fair notice, I do not consider it an appropriate remedy here (over and above the declaration which I will make) for the reservations expressed in paragraphs (e) to (i) above. It would be forced, of little value and insincere.

Damages

[246] Having first considered other disposals, I now turn to deal with the issue of damages in terms of sections 119(3), (4) and (6).

[247] I am bound by legislation as enacted. There is no reference in the Equality Act 2010 to vindicatory damages or to just satisfaction. I refer to section 119(3) and (4):

"(3) The sheriff has power to make any order which could be made by the Court of Session—

(a) in proceedings for reparation;

(b) on a petition for judicial review.

(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis)."

[248] This is not an action for reparation. The pursuer is a limited company. It has no feelings to hurt in terms of section 119(4). The proposed event was a free unticketed event open to the public. It is no part of the pursuer's case that this was a fundraising event. Self-evidently there can be no loss of profit or loss of revenue stream.

[249] It is not accepted that the defender is a public authority within the meaning of the Human Rights Act 1998, section 6. Nor is it accepted that the defender is a hybrid public authority. The defender is a limited company distinct from its principal shareholder. It is not wholly owned by the state. It provides services to the public but not on behalf of the state. The cases cited in support of a claim for vindicatory damages by the pursuer involve actions against states: *Kuznetsov* v *Russia* (2009) 49 EHRR 15, *Metropolitan Church of Bessarabia* v *Moldova* (2002) 35 EHRR 13, *Savez Crkava "Rijec Zivota"* v *Croatia* (2012) 54 EHRR, *Moscow Branch of the Salvation Army* v *Russia* (2007) 44 EHRR 46, *Serif* v *Greece* (2001) 31 EHRR 20, *Papageorgiou* v *Greece* (2020) 70 EHRR 36, *Varnava* v *Turkey* (16064/90) and *Ozdep* v *Turkey* (2001) 31 EHRR. 27.

[250] This is not a defamation action where awards might be made for financial harm as the pursuer does not trade for profit. Accordingly the pursuer's submissions in regard to the tarnish to its reputation (which may be true) are in law not relevant. Unlike certain jurisdictions the law of Scotland does not recognise exemplary, punitive or aggravated damages. Although a sheriff has the same powers as a judge in the Court of Session that power does not extend to the creation of a remedy where one does not exist.

[251] At paragraphs P10.49 to P10.56 of the pursuer's submissions, the pursuer refers to cases where awards have been made to religious bodies (*Orthodox Church (Metropolitan Inokentiy) and Others: re just satisfaction* (2011) 52 EHRR SE1) in recognition of the loss to their "adherents" and to political organisations which reflect non pecuniary losses to their membership (*Dicle for the*

Democratic Party (DEP) of Turkey v *Turkey* [2002] ECtHR 25141/94 (Fourth Section, 10 December 2002)).

[252] In my opinion this has no relevance here. The pursuer does not have a membership, a congregation nor "adherents" as such. It is not a church. It is a Christian evangelical organisation reaching out to the public in general – those of faith and of none. It cannot be said that the pursuer is acting on behalf of a membership or a congregation. I accept that it had anticipated that members of the public might attend and that they have been denied that choice, but I cannot agree that that gives the pursuer a right to claim damages (however expressed) on behalf of an unknown number of unnamed persons who might have chosen to attend, still less that any sum awarded might benefit them.

[253] Having regard to the terms of section 119(3) and (4) and having regard to the underlying purpose of the legislation as well as the European jurisprudence referred to by the pursuer, I am of the opinion that the word "damages" within section 119 does not extend beyond pecuniary loss to a recognition that the pursuer has suffered detriment by reason of not being able to hold (and having no real prospect of rescheduling) the event.

[254] However, if this case is taken further and I am wrong in relation to vindicatory damages and/or just satisfaction and/or detriment, it might be helpful if I gave some indication of my view on quantification having heard the evidence at first instance. What I have to say has perhaps more relevance to vindicatory awards than to just satisfaction.

[255] The range of awards quoted by the pursuer are case specific, depend on the gravity of the issue before the court and on the particular view of the court.

[256] The defender terminated the contract in breach of a protected characteristic under the Equality Act 2010 and (it seems) has no real intention of rescheduling the event. Other events of the UK tour planned for 2020 have been rescheduled. The defender has provided no reason why this

event could not be rescheduled other than proposing that fresh commercial terms would have to be negotiated. That sounded like a euphemism for "it will never happen".

[257] Had it been competent to do so, I would have assessed an appropriate award at £50,000. This is not a fine. It is not payable to the state. It would represent damages over and above quantifiable pecuniary losses to reflect the loss (in its widest sense) of the opportunity to host a large evangelical event and the defender's ongoing refusal to reschedule. I would have assessed this award in the following broad manner.

[258] The defender is a substantial institution having an international profile. In law it is a separate legal entity from its majority shareholder, Glasgow City Council, but which (as its largest shareholder) evidently holds considerable sway over its decisions. The defender bowed to that and to other pressures. Secondly, the venue was assessed as being the most appropriate venue for the pursuer's purposes in Scotland. I accept that it would not be easy to find an alternative. Thirdly, this was not a fringe event. In evidence witnesses for the defender described the event as "small". That may be true in purely commercial terms but I would view the event from the perspective of the hirer not the host.

[259] The pursuer is a UK based organisation but it too has an international profile. The pursuer had sought a venue with the capacity of over 12,000 people. Pro rata therefore the sum which I suggest appears conservative. That said, I have not included an allowance for the fact that twelve thousand people were denied their choice/opportunity to attend. Fourthly, the cost to hire the venue was £50,000 being the sum by which the defender would have been enriched had the event proceeded (here I have not allowed for the pursuer having re-let the hall on the one hand nor the intervention of covid on the other). Taking these factors in the round so to speak, the figure of £50,000 would seem an appropriate award of damages to reflect the initial and ongoing breach. Had I been persuaded that it was competent, that is the award I would have made.

[260] I now deal with actual losses incurred by the defender.

[261] The defender maintained in oral submission that no damages should be awarded. This is because the event would not have taken place as a consequence of the covid outbreak. I see nothing in this point.

[262] It is of course correct that the event would not have taken place because of covid. However, the decision to cancel the event preceded covid. The "wrong" from which damages arise was caused by the defender's discrimination in cancelling the event (not covid) and, although it is true that the event would not have taken place, in my opinion the defender cannot avoid the consequences of its unlawful act. To do so would shift liability for the costs incurred by cancelling the event back to the pursuer. As at 29 January 2020 parties were not aware that covid might intervene. Covid is a factor when assessing an end date for such liability. However I take no account of the intervention by covid when assessing liability. That is because of the clear purpose of the 2010 Act – to discourage discrimination - notwithstanding that contractually the pursuer did not accept the termination letter dated 29 January 2020. The issues and the remedies are distinct.

[263] Before dealing with the quantification of loss I wish to address three issues. Firstly, the Dean questioned those items paid directly by the American parent organisation rather than by the pursuer. As I understood his argument, his position was that those payments should form no part of this claim. Those were losses incurred by an organisation which is not party to this action. I see the force in that submission as I think did Mr O'Neill who appeared to concede the point in his re-examination of Mr Herbert. I will therefore not allow the sum of £9,034.00 in respect of the "Artist" fee nor the sums of £2,700 and £810 representing the cost of hotel accommodation and the deposit. The situation may have been different had these sums been paid by the pursuer and subsequently reimbursed by the American Association.

[264] Secondly, items were included in the total losses claimed for which there was no basis (a voluntary donation, a table purchased in October 2020, cost for a dismissal meeting). I was surprised that such items featured at all.

[265] Thirdly, the Dean suggested that if I found the defender liable for losses, such losses should end on 29 January when the agreement was terminated. I do not agree. The pursuer did not accept the termination and instead it raised these proceedings in the hope that the event might proceed. Covid intervened. A second letter (27 March 2020) was sent to the pursuer founding on the force majeure clause. In my opinion by the end of June 2020 at the latest it should have been apparent to the pursuer that the event would not proceed or be rescheduled because (a) the contract had been cancelled by the defender in January, failing which March 2020, (b) the date for the event (30 May 2020) had passed, (c) this litigation was being defended and (d) irrespective of the outcome of this litigation, the event was unlikely to be rescheduled in the then foreseeable future because of covid. The pursuer has claimed for losses far beyond June 2020, into 2021. In Scotland damages are compensatory not penal.

[266] As to the quantification of damages Simon Herbert, the third witness for the pursuer, spoke to the documentation in support of the claim for pecuniary loss.

[267] Taking the items in turn, a deposit of £6,000 was paid but the defender has sought to return and the pursuer has refused to accept. I have included this in the assessment of the losses for the sake of completeness but I record that the defender has offered to return this sum.

[268] The next item related to a prayer meeting/launch event which went ahead in November 2019. It was suggested to Mr Herbert that that money would have been lost in any case as the event could not have taken place because of covid. Mr Herbert accepted that covid had intervened but that was after the contract had been cancelled. I agree. The cost was £6,650.

[269] In relation to office rent, this is claimed at £8,000. Mr Herbert explained that although the entry referred to "Office Rent" these were funds ($15,757.01USD) not paid by the pursuer but transferred by the American Association to Amaris Hospitality in the UK (£11,972.50). I have addressed this above. Moreover Mr Herbert said that he would have to reconcile this sum as he agreed with the proposition that "Amaris Hospitality" did not appear to be an organisation which rented out office space (and the supporting documentation, which referred to hotel suites in May 2020, did not equate to the figure claimed). Again, I have excluded these sums.

[270] By contract dated 16 August 2019 the pursuer had agreed to rent two car park spaces in Glasgow at the cost of £85 per month. The sum claimed by the defender amounted to £3,460 being some forty months. The Dean questioned whether there were other vouchers available to support the total of £3,460 under this heading. I will allow from 1 September 2019 to 1 June 2020 – 10 months @ £85 per month being £850.

[271] In relation to "Production – Prayer/Launch/CLWC" this amounted to £3,001 being a rounded up figure of £3,000.70 in respect of which an invoice dated 8 October 2019 had been produced from FE LIVE which related to audio visual and sound systems for the prayer launch. I will also allow the cost of that event being £6,650 and catering £1,448.

[272] In relation to the "Staff Apartment Rent" this figure showed as £11,000. It was put to Mr Herbert that the lease had commenced in January 2020 but that the contract for the venue was cancelled at the end of January 2020 yet the claim is for ten months' rent at £1,100 per month. Mr Herbert's position was that the property was retained until it became absolutely clear that the event would not go ahead or be rescheduled. I will allow the rent for six months from January 2020 – June 2020 @ £1,100 per month being £6,600.

[273] The pursuer claimed the cost of catering for an event on 5 December 2019. The Dean suggested as that event had gone ahead and the catering had been consumed. Therefore there had

been no loss. The cost catering amounted to £1,448. Again, I will allow this. It was a legitimate sunk cost incurred in good faith in advance of the May event. It is obtuse to say that such costs were not wasted. The pursuer would not have incurred such expense had it anticipated that the event might not go ahead.

[274] The Dean took Mr Herbert through a number of documents in relation to an organisation entitled "Samaritan's Purse" and the relationship between that organisation and the pursuer. Mr Herbert explained that both charities worked closely with each other. They were not in partnership as such but had the same management team. Expenses were divided between organisations and, in this case, further divided in relation to the costs allocated to a particular event. In his affidavit Mr Herbert had explained that he was the Financial Director and Company Secretary of both the pursuer and its sister organisation Samaritan's Purse International.

[275] In particular, in relation to the item entitled "local staff salaries/benefits" (£126,330), the pursuer had received invoices from Samaritan's Purse in relation to a breakdown between the organisations of shared management costs. As was observed by the Dean some of the invoices had included VAT whereas others do not. Mr Herbert was at a loss to explain why that should be. The invoices for staff salaries covered the period from July 2019 to January 2021. Again I will allow this item to June 2020.

[276] Production 5/6(X) is an extract of the salaries from the pursuer's journals broken down per venue per month. On this basis the sum of £59,054.58 is due representing wages and national insurance contributions to the end of June 2020. In addition, the raw data at production 5/4 details the pension contributions which amount to £4,068.92 to June 2020. There are contra-entries in the figures which makes the precise figure difficult to reconcile but I am satisfied that at least this sum is due. This therefore totals: £63,123.50. Where figures are unclear I have erred in favour of the defender. It is for the pursuer to satisfy me of the extent of its losses.

[277] Taking the figures from the productions mentioned in the preceding paragraph avoids the criticism aimed at certain invoices from Samaritan's Purse which had referred to salary "charges", some of which had included VAT (for reasons which were not explained) and where the breakdown between salaries, NI contributions and pensions allocated to Glasgow was opaque.

[278] The Dean criticised the inclusion of an invoice dated 15 October 2019 from "DoubleTree by Hilton" amounting to £9,400 for the rent of a ballroom and the supply of an evening buffet for 400 people. This event had gone ahead as had an event at the St George's Tron Church for £253.12. These costs were legitimately incurred in preparation for and in the expectation that the event would proceed. They were wasted costs as a result of the cancellation. In context the word "damages" extends to such wasted costs. I will allow both.

[279] In relation to the cost of mobile phone and broadband the Dean suggested to Mr Herbert that these costs would apply for the whole tour not simply for the Glasgow event and that, for example, the invoices run to the end of 2020 (the last one was due in January 2021) relating to an event scheduled for May 2020 being almost one year after the event was cancelled. A similar point being made in relation to the cost of broadband cancelled in February 2021. Mr Herbert said that the pursuer had still been anticipating an event in Glasgow. Again I would have allowed to June 2020 but I find that, from the available evidence, it is not possible for me to determine/reconcile costings to June 2020 or the correct figures in relation to telephone/fax, broadband and supplies/refreshments/other event costs and miscellaneous costs. I am unimpressed that invoices are claimed for such an extended period.

[280] Take, for example, an entry which details the cost of a desk and chair. The entry is dated 21 October 2020, long after the event had been cancelled.

[281] By invoice dated 30 September 2019 the pursuer included an entry for £73.20 relating to an unfair dismissal meeting held in Glasgow. Mr Herbert again conceded that that was not part of the losses incurred. I will not allow that.

[282] A voucher dated 4 March 2020 had been produced in relation to the production of the St John's Gospel in Polish, Romanian, Czech and Slovak languages. The cost amounted to £30. The Dean questioned whether this cost was truly "wasted" as the bibles would be available for distribution elsewhere. Mr Herbert conceded that point. I will not allow the £30.

[283] Similarly in relation to a donation to a church charity on 14 November 2019 of £400, the Dean put it to Mr Herbert that a voluntary donation to charity was not a legitimate loss. Mr Herbert's position was that the payment was in the nature of an honorarium or a gift. Mr Herbert conceded that it was not something the pursuer was obliged to pay. I agree. I will not allow that.

[284] The damages (expense and wasted cost) total £97,325.32 as a consequence of the cancellation. As indicated, I have determined this sum on the material referred to during the proof while excluding costs where the information before the court does not permit proper reconciliation and those costs which Mr Herbert accepted were paid by a third party or were not attributable to the defender's alleged wrongful termination of the agreement and I have restricted the defender's liability to the end of June 2020.

Closing observations

[285] The structure of the Equality Act 2010 and, in particular, section 119 in relation to remedies is such as to encourage compliance by considering damages only after other remedies have been considered. If my analysis of the law and of the remedies is correct, to an errant defender intent on flouting the terms of the Equality Act 2010 there is, in Scotland, little disincentive where a defender is prepared to accept a reputational hit and reimburse a corporate pursuer for losses sustained.

Indeed, a defender might think that there is a business case to do just that. The expense of reimbursement to one customer may be outweighed by the prospect of future trade with others. That may be the unintended consequence of this decision where, as here, a pursuer is a charity. Here the remedy does not fit the wrong especially where, as I have concluded, an order for rescheduling is unworkable. Courts in other jurisdictions may have greater latitude in encouraging compliance.

[286] Before closing, I will allude to the following as there was reference to this during the proof: whether, by encouraging the defender to cancel the event, Glasgow City Council was in breach of Section 149 of the Equality Act 2010 (relating to obligations on public authorities) is a question beyond the scope of this decision. That said, it might be helpful if, in light of this decision, the majority shareholder exercised its influence to support a rescheduling. Beyond that, I express no opinion.

Disposal

[287] For the reasons outlined above I will find in favour of the pursuer as I must in light of the evidence. I will make the declaration craved but include the relevant dates and, having considered other remedies, I shall award damages to the extent of £97,325.32.

[288] I have assigned a hearing on expenses to take place on 18 January 2023 at 10am. If it assists parties I shall arrange for that hearing to take place by telephone or Webex. If parties can agree expenses the commercial clerk should be advised and I will discharge the hearing administratively.

APPENDIX

Written submissions on behalf of the pursuer

P1 INTRODUCTION

P1.1 These are the written submissions for the pursuer on the law following the proof before this court at which evidence was led and cross-examined over the course of seven days. The pursuer's suggested findings in fact which can and should be made by the court are contained in a separate document.

P1.2 At the 5 July 2022 diet fixed by this court, these written submissions for the pursuer on the law (and the pursuer's suggested findings in fact) will be spoken to, and the opportunity will be taken to respond to any contrary point in law or on proposed finding in fact made by or on behalf of the defender.

P1.3 The basic facts are not in dispute. On 31 July 2019 the pursuer contracted with the defender to hire the SSE Hydro Arena and the SSE Hydro Box Office for the purposes of holding a religious outreach festival which would open to the public at the SSE Hydro Arena on 30 May 2020. Yet on 29 January 2020, the Defendants decided - without any prior warning to or consultation with the pursuer - to cancel this event and to rescind the booking ("the Decision").

P1.4 Further, subsequent to its purported unilateral rescission of this booking the defender – unlike the operators of other venues who also cancelled events scheduled for the pursuer's 2020 UK tour of Christian public outreach evangelistic events – has refused to enter into any discussions with the pursuer which would have allowed for the rescheduling of the event to be part of the pursuer's "God Loves Your Tour UK 2022", thereby compounding and either continuing their original act of unlawful discrimination or committing a new act of unlawful discrimination against the pursuer because of religion or belief.

P1.5 The pursuer submits that in purporting to rescind the booking for the original January 2020 event and separately in refusing to re-schedule the event the defender has violated and continues to violate the obligations owed by it to the pursuer under the Equality Act 2010 ("EA 2010") as interpreted and applied under reference to the Human Rights Act 1998 ("HRA 1998").

P1.6 This is a very significant case from a legal/constitutional perspective as it raises the important issue of how equality law, informed by human rights law, protects the freedom of Christians publicly to manifest and publicise their religion and beliefs, in worship, teaching, practice and observance. It also centrally and importantly raises the issue of how this court can and should provide properly effective remedies to the pursuer, should the court find the pursuer's complaints in law against the defender to be well-founded.

P2 THE PLEADINGS FOLLOWING THE SHERIFF'S DECISION ON THE DEBATE

P2.1 Following a debate on the pleadings between the parties held in December 2020 the sheriff in a judgment dated 16 February 2021 (reported as *Billy Graham Evangelistic Association v. Scottish Event Campus Ltd.*, 2021 SLT (Sh. Ct.) 185) the court:

- sustained, in part, plea-in-law 1 for the defender;[1]
- dismissed the pursuer's second crave;[2]
- excluded from probation the pursuer's averments in article 4 of condescendence;[3]

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[1] The defender's first plea in law is as follows:
"The pursuer's averments being irrelevant *et separatim* lacking in specification, the action should be dismissed.

[2] The pursuer's second crave is as follows:
"Alternatively for payment by the defender to the pursuer of TWO HUNDRED THOUSAND POUNDS (£200,000) STERLING together with interest at the rate of 8% per annum from 29th January 2020 until the date of payment

[3] Article 4 of Condescendence is as follows:
"COND4. The pursuer's losses have been incurred because of the repudiatory breach of the Contract by the defender with effect from 29 January 2020 as more fully set out below. With reference to the

- excluded from probation the pursuer's averments in article 11 of condescendence;[4]

- repelled the pursuer's third plea in law;[5] and

- repelled the pursuer's fourth plea in law[6].

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defender's averments in answer, admitted that the defender's agent wrote to the pursuer's agent in March 2020 (the "March Letter") which letter is referred to for its full terms, beyond which no admission is made. Quoad ultra denied except insofar as coinciding herewith. Explained and averred that the occurrence of a subsequent event or state of affairs – even if properly to be classified under the parties' contract as a force majeure – does not exculpate the defender from liability for the consequences of its wrongful repudiation of the parties' contract. In any event, subsequent to the defender's wrongful repudiation of the parties' contract and the COVID-19 developments, the pursuer has sought - under the terms of its duties to mitigate its losses - to reach an agreement with the defender to change the date of the Event to allow it to go ahead while accommodating the issues raised by the COVID-19 pandemic. The defender refuses to offer alternative dates and instead expresses a continued unwillingness, regardless of COVID-19 related issues, to host the Event. In the whole circumstances, the defender's now purported attempt to rely on COVID- 19 related issues as if these can ex post facto provide a justification for or defence against its earlier wrongful repudiation is inept and wrong in law."

[4] Article 11 of Condescendence is as follows:

"COND 11. The pursuer is entitled to damages as a result of the defender's breach of contract. This is the order second craved. The pursuer has incurred significant wasted expense as a result of having contracted with third parties as condescended upon above. As a result of non-performance by the defender, the pursuer has suffered loss damage which has been caused by the defender. A schedule of all such expenditure has been prepared by the pursuer. The schedule is produced, adopted and held to be herein incorporated for the sake of brevity. But for the defender's breach of contract, the pursuer would not have suffered any such losses. With reference to the defender's call in relation to this averment, the pursuer's loss was caused as soon as the defender confirmed that the Event could not take place on the agreed date. As at that time, the preparatory expenses which had been incurred were wasted. The COVID-19 pandemic did not cause further loss to the pursuer. As is apparent from the defender's refusal to rearrange a date with the pursuer for the Event, the pursuer's losses would have been caused with or without the COVID-19 pandemic by the actions of the defender. As a supervening event which was unforeseeable at the time the defender breached the Contract, and which causally had no effect on the effect of that breach, it is irrelevant to the question of liability for damages. In any event, *esto* the Event had been cancelled as a result of a force majeure event, a number of the pursuer's losses would have been insured. With reference to the defender's averments in answer, clauses 3.1, 10.5 and 10.4 of the Contract are referred to for their terms beyond which no admission is made. Explained and averred that there is no other comparable venue in Glasgow or in west central Scotland in terms of size, quality of its facilities, transport links and catchment area that could properly stage the Event in the manner and with the impact intended by the pursuer when it chose to make a booking for the Event with the defender. The defender is called upon to state on record what other venues in central Scotland it claims to be comparable to the SEC and which, in its view, could (and/or should) stage the event. The defender's failure to answer this call will be founded upon. *Quoad ultra* the defender's averments in answer are denied except insofar as coinciding herewith."

[5] The pursuer's third plea in law is as follows:

"3. The pursuer having suffered loss as a result of the defender's breach of contract, the pursuer is entitled to reparation therefor."

[6] The pursuer's fourth plea in law is as follows:

"4. The sum second craved being a reasonable estimate of the pursuer's loss, caused by the defender's

P2.2 The effect of this decision after debate can be summarised as being to the effect that the court, after hearing argument on and only on the law, held that the defender had made out its contractual *force majeure* defence as a matter of law (to the effect that Covid had made performance of the contact at the time originally agreed impossible) and so the pursuer would *not* be allowed to proceed to trial on their claim for damages based on claims of the defender's breach of contract.

P2.3 In the present case the court also formally repelled the pursuer's first[7] and second[8] pleas in law, meaning that the court considered, again after hearing argument on and only on the law, that the defenders had set out in their pleadings enough of a defence to be allowed to go to proof on it.

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breach of contract, decree therefor should be granted as craved."

[7] The pursuer's first plea in law is as follows:
"1. The defender's averments being irrelevant *et separatim* lacking in specification, they should not be remitted to probation."

[8] The pursuer's second plea in law is as follows:
"2. The defender's averments being irrelevant *et separatim* lacking in specification, decree should be granted *de plano*."

P2.4 The court allowed the pursuer's fifth[9], sixth[10] and seventh[11] pleas in law to remain in place. The substance of the pursuer's craves 1[12], 3[13] and 4[14] were also allowed to proceed to proof. This means, in effect, that the court considered (again after hearing argument on and only on the law), that a relevant case had been made out to allow the pursuer to go to proof to seek and establish to the satisfaction of the court its claims that:

- the defender discriminated against the pursuer contrary to the provisions of the Equality Act 2010;
- the court should exercise its remedial powers under Part 3 of the Equality Act 2010 to order the defender to arrange with the pursuer for a mutually convenient date to be found to allow the event to be rescheduled and go ahead on the originally-agreed terms;

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[9] The pursuer's fifth plea in law is as follows:
"5. The defender having discriminated against the pursuer contrary to the provisions of the Equality Act 2010, declarator as third craved should be granted."

[10] The pursuer's sixth plea in law is as follows:
"6. The pursuer and the defender having entered into a contractual agreement, the defender having contravened Part 3 of the Equality Act 2010, and it being equitable in all the circumstances of this case that that contractual agreement be enforced, the court should grant the order first craved."

[11] The pursuer's seventh plea in law is as follows:
"7. Alternatively, the sum fourth craved being a reasonable estimate of the pursuer's loss, injury and damage, caused by the defender's discrimination against the pursuer contrary to the Equality Act 2010, decree therefor should be granted as craved."

[12] The Pursuer's first crave is for the court:
"1. To ordain the defender (i) to permit the pursuer to use the Venue and the Related Facilities and (ii) to perform the Core Services and the Box Office Services; and (iii) otherwise perform its contractual obligations as defined and contained in the contract between the pursuer and the defender dated on or around 31st July 2019"

[13] The Pursuer's third crave is for the court:
"3. To find and declare that the defender has discriminated against the pursuer on the basis of a protected characteristic for the purposes of the Equality Act 2010."

[14] The Pursuer's fourth crave is:
"4. For payment by the defender to the pursuer of TWO HUNDRED THOUSAND POUNDS (£200,000) STERLING together with interest thereon at the rate of 8% per annum from the date of citation until the date of payment in accordance with section 119 of the Equality Act 2010."

and

- if and insofar as it can be established that the defender's discriminatory actions resulted in the pursuer suffering loss and damage, this should be compensated for by the court making a monetary award made under and in terms of the Equality Act 2010.

P2.5 Finally, the court separately excluded from probation certain of the pursuer's averments in condescendence 17[15] and, to that extent, sustained the defender's second pleas-in-law.[16] Again, this means that the court determined as a matter of law that any damages which might be awarded under the Equality Act 2010 *cannot* include an amount for injury to the feelings of the pursuer's staff, members and associates.

P2.6 It is against the background that, in the light of the evidence led before the court, that the pursuer now moves the court:

(i) to repel the defender's remaining pleas in law;[17]

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[15] The excluded averments in Condescendence 17 were on lines 20 to 23 and in the following terms:

"The actions of the defender have caused injury to the feelings of the pursuer's staff, members and associates. Therefore,"

and

"a sum for the injured feelings of the pursuer, and, as a representative religious group, its members and its associates as well as"

[16] The defender's second plea in law is as follows:

2. The pursuer's averments being irrelevant et separatim lacking in specification, the action ought not to be remitted to probation.

3.

[17] The defender's remaining substantive and live pleas in law are in the following terms:

3. In the circumstances condescended upon, the defender being entitled to terminate the Contract, the defender should not be ordained (i) to permit the pursuer to use the Venue and the Related Facilities on an unspecified future date and (ii) to perform the Core Services and the Box Office Services on an unspecified future date; and (iii) otherwise perform its contractual obligations as defined and contained in the Contract between the pursuer and the defender on an unspecified future date.

4. *Esto* the defender was not entitled to terminate the Contract for the reasons stated in the letter dated 29 January 2020 (which is denied), the Contract having been validly terminated in terms of the March Letter, which failing having been frustrated, the action should be dismissed.

(ii) to sustain the pursuer's fifth plea in law[18] ***and*** either the pursuer's sixth plea in law[19] ***or***, in the alternative, its seventh plea in law;[20] and

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5. The defender not having breached its contract with the pursuer, decree of absolvitor should be pronounced.

6. The defender not having discriminated against the pursuer in terms of the Equality Act 2010, decree of absolvitor should be pronounced.

7. The pursuer's averments, so far as material, being unfounded in fact, decree of absolvitor should be pronounced in favour of the defender.

8. Esto the pursuer identifies a breach of any legal obligation by the defender, which is denied, any such breach having caused the Pursuer no loss, as the event could not have taken place due to the COVID-19 pandemic, decree of absolvitor should be pronounced.

9. The date of the Event having passed, and it being impossible to compel the defender to comply with its contractual obligation to hold an event on 30 May 2019, the first crave should be refused.

10. The pursuer not having suffered loss, injury or damage as a result of any breach of contract or statutory duty on the part of the defender, decree of absolvitor should be pronounced.

11. In any event, the sums sued for being excessive, decree should not be pronounced as second and fourth craved."

[18] The pursuer's fifth plea in law is as follows:
"5. The defender having discriminated against the pursuer contrary to the provisions of the Equality Act 2010, declarator as third craved should be granted."

[19] The pursuer's sixth plea in law is as follows:
"6. The pursuer and the defender having entered into a contractual agreement, the defender having contravened Part 3 of the Equality Act 2010, and it being equitable in all the circumstances of this case that that contractual agreement be enforced, the court should grant the order first craved."

[20] The pursuer's seventh plea in law is as follows:
"7. Alternatively, the sum fourth craved being a reasonable estimate of the pursuer's loss, injury and damage, caused by the defender's discrimination against the pursuer contrary to the Equality Act 2010, decree therefor should be granted as craved."

(iii) to grant decree of declarator in terms of the third crave[21] ***and*** either an order for specific performance in terms of the first crave[22] (on a date to be fixed by the court if not otherwise agreed between the parties) ***or*** for payment in terms of the pursuer's fourth crave.[23]

(iv) and, in accordance with the pursuer's seventh crave, for the expenses of this action[24], so far as not already otherwise dealt with.

P3 RELEVANT FACTUAL BACKGROUND

P3.1 The background of the pursuer and the background of the Event are set out in the affidavits of the pursuer's witnesses: Joseph Walker Clarke (**JB/3/50-62**); Darren Tosh **JB/4/173-181**; and Simon Paul Herbert (**JB/5/316-324)**. The pursuer is named after the world-famous Christian evangelist Billy Graham KBE, whose son Franklin Graham continues the work started by his father. Franklin Graham has been a prominent Christian evangelist, minister of the Gospel and philanthropist in his own right for decades. He began conducting evangelistic events in 1989 and has since proclaimed the Gospel at events in around 50 countries. Franklin Graham is well-known and popular among many evangelical Christians around the world. He maintains a Facebook following of more than 8

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[21] The Pursuer's third crave is for the court:

"3. To find and declare that the defender has discriminated against the pursuer on the basis of a protected characteristic for the purposes of the Equality Act 2010."

[22] The Pursuer's first crave is for the court:

"to ordain the defender (i) to permit the pursuer to use the Venue and the Related Facilities and (ii) to perform the Core Services and the Box Office Services; and (iii) otherwise perform its contractual obligations as defined and contained in the contract between the pursuer and the defender dated on or around 31st July 2019"

[23] The Pursuer's fourth crave is:

4. For payment by the defender to the pursuer of TWO HUNDRED THOUSAND POUNDS (£200,000) STERLING together with interest thereon at the rate of 8% per annum from the date of citation until the date of payment in accordance with section 119 of the Equality Act 2010.

[24] The Pursuer's seventh crave is

"7. For the expenses of the action."

million people and a Twitter account followed by more than 2 million people. Franklin Graham is now the President and CEO of the pursuer in the US whose purpose is to support and extend the evangelistic calling and ministry of Billy, and now Franklin, Graham. Franklin Graham is also the President and CEO of Samaritan's Purse, a nondenominational Christian organisation which provides spiritual and physical aid to victims of war, natural disaster, disease, famine, poverty, and persecution in more than 100 countries.

P3.2 Formally the pursuer is a private company limited by guarantee, registered with the charity commission for England & Wales as a charity with charity number 233381: **(matter of admission: Joint Minute - §4 JB/2/39).** The pursuer is a religious charity: **(Darren Tosh Affidavit - §§1-2 JB/4/173-174).** The pursuer's principal activity is supporting and extending the worldwide evangelistic mission of the Billy Graham Evangelistic Association in the United States of America, with a focus on the United Kingdom. **(Darren Tosh Affidavit - §5 JB/4/174)**

P3.3 The sole or main purpose of the pursuer is not commercial, but is exclusively religious. The pursuer is an organisation the purpose of which is (a) to practise a religion or belief, (b) to advance a religion or belief, (c) to teach the practice or principles of a religion or belief, (d) to enable persons of a religion or belief to engage in the Christian outreach events the pursuer organises, within the framework of that religion or belief, and (e) to foster or maintain good relations between persons of different religions or beliefs.

P3.4 The Trustees and Directors of the pursuer, as individuals, all share the specifically evangelical Christian religious ethos and values which the pursuer was specifically set up to embody and promote, in particular, through the organising of evangelistic outreach events. In particular, as evangelical Christians, they adhere to a set of Christian religious beliefs which they derive from the Christian Scriptures, and to which they are genuinely and profoundly committed as a matter of Faith.

P3.5 Between 21 to 23 September 2018 a Christian public outreach festival called *Lancashire Festival of Hope with Franklin Graham – Time for Hope* was held in the Winter Gardens, Blackpool (a venue owned by, and run under the auspices of, Blackpool Borough Council) at the Blackpool Winter Gardens. The Court heard evidence on that particular event from Joseph Walker Clarke on the first day of proof. The event attracted a diverse crowd of several thousand people. Franklin Graham delivered addresses on each of its three evenings. Transcripts of the sermons preached by Franklin Graham on each of these evenings were produced and were in principle available to the defender if they had wanted to know precisely the content of the message to be preached by Franklin Graham at the Event: **TE/Day 1/ Joseph Walker Clarke Examination in chief/Printed Page 54/Lines 14-25.** As the transcripts of these addresses show **(JB/20/1164-1190),** Franklin Graham (as planned) delivered religious addresses based around familiar and mainstream Christian themes. He did not, nor was it ever his intention to, speak to this audience about Islam. He did not, nor was it ever his intention to, speak to this audience about the issue of homosexuality. He did not, nor was it ever his intention to, speak to this audience about anti-discrimination laws, whether in the USA or the UK. He did not, nor was it ever his intention to, speak to this audience about the legalisation of same-sex marriage, whether in the USA or the UK. He did, on one night, raise the issue of abortion. A small group of protesters on occasion assembled outside the Festival venue and lawfully and properly exercised their free expression as the pursuer and Franklin Graham fully accepts is their fundamental right.[25] The court was shown an email from an attendee of that event

[25] See *Otto-Preminger-Institut v Austria* [1995] 19 EHRR 34 at § 47:

> "Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. *They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith*. However, the *manner* in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably *its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines*."

(JB/19/1093) which confirms those matters and the accuracy of which account was vouchsafed by the pursuer's witnesses: **TE/Day 1/ Joseph Walker Clarke Examination in chief/Printed Page 18/Lines 11-13.** Peter Duthie's evidence was that he became aware of the Blackpool Lancashire Festival for Hope featuring Franklin Graham of sometime at the end of 2019 when he sought to try to understand better why there would potentially be protests against the pursuer's Event going ahead in Glasgow in May 2020.: **TE/Day 2/Peter Duthie Cross-Examination/Printed 12/Lines 6-10**.

3.6 Following the success of the *Lancashire Festival of Hope,* the pursuer decided to make arrangements to hold similar large-scale Christian evangelical public outreach event at which Franklin Graham would preach the Christian gospel to be held at a multiplicity of venues across Scotland, England and Wales. These events were being held in accordance with the Evangelical Revival tradition (hallowed since at least the First Great Awakening across the United Kingdom and its then thirteen colonies in North America in the 1730s and 1740s) of public evangelical outreach and witness in the context of mass religious event to be held as a means of bringing people together to express, affirm and manifest their religious beliefs as Christians and to proclaim, preach and live the Gospel, the Good News of Jesus Christ.

P3.7 It was planned that, among the other speaker/preachers at these events, would be Franklin Graham himself. It was anticipated that Franklin Graham's presence would result in increased attendance at each event, and maximise the impact of the religious message which the pursuer wished to share in organising the Tour. These events would be religious occasions of prayer and thanksgiving. They would feature musicians, video testimonies, and presentations on, and preaching, of the Christian Gospel. The events were intended to be a means of confirming and strengthening the faith of existing believers and of attracting new believers to the Christian faith.

P3.8 In the course of 2019, the pursuer identified the cities and suitable venues therein at which they could hold these evangelical public outreach events. The pursuer contacted the various

managing entities of the venues they had identified and after finding suitable dates upon which they were available duly entered into contracts with the management of these venues to book the venue for their religious events. During the negotiation and conclusion of these contracts, the venue management were aware of the fact that their venues were going to be used for a Christian evangelical public outreach event. None of the management of these venues raised any objections or concerns at the time of the conclusion of these contracts about the (religious) nature of the events to be held in their venues.

P3.9 It was planned that this Christian outreach tour of Great Britain by and with Franklin Graham would be commence in May 2020 and would continue until later in the year. The Glasgow SSE Hydro was chosen to be the first venue for this Christian outreach tour, with subsequent events to be held in similarly large venues in Newcastle (Utilita Arena), Sheffield (FlyDSA Arena), Milton Keynes (Marshall Arena), Liverpool (M&S Bank Arena), Cardiff (ICC Wales), Birmingham (Arena Birmingham) and, it was hoped, London.

P3.10 The events in each of the venues on the Tour followed the same format. The events were to be held over one day in each city. They would be publicly advertised, with no charge for entry or attendance and would be open to any member of the public who wished to attend (subject to the capacity of each of the venues). That the event in Glasgow was intended to be free and ticketless was known to the defender from the very first contact with the pursuer, during the negotiations of the contract between the pursuer and the defender as one sees in the email from Sue Verlaque to David Orridge on 18 November 2019: **(JB/3/148-149).**

P3.11 The defender's witnesses Peter Duthie and Debbie McWilliams initially suggested in chief - in a line which they appear to have worked on together[26] given the remarkably similarly evidence

[26] **See for example TE/Day 3/ Peter Duthie Cross-Examination /Printed Pages 4-5/Lines 15-**3 "[T]his email of 8th April with the passing reference to 'private'. So, she [Debbie McWilliams] has seen that as significant but it was about an email in which she was not copied in, about a site visit at which she was not present but

between the Peter Duthie affidavit at para 14-15 **JB/13/374-375** and the Debbie McWilliams affidavit at paras 5-7, 14-15 **JB/7/331-332, 333** - that the *defender* had understood that this would be a private event for religious organisations only, and *not* open to the public at large, although Peter Duthie in cross examination accepted that there was no documentation which supported his claim or understanding that the Event in May 2020 was an event exclusively for religious organisations that were invited to it: **TE/Day 2/ Peter Duthie Cross-Examination/Printed Pages 94/Lines 12-15**. Both Duthie and McWilliams then say in their affidavits that the *defender* became aware that it would be open generally to the public only after a Facebook entry had been posted by Franklin Graham on 27 January 2020. Their evidence on this point is simply not credible and is, in any event, contradicted by the contemporaneous documentary evidence which was put to them and before the court in their cross-examination[27] (albeit that this relevant correspondence from November 2019 had been left

somehow you and she both *independently* somehow focus 19 on that particular email as being a significant one to raise in your evidence as evidence for your claim that you had understood that the public would *not* be invited to this event. Both of you are focusing on that email.
- Debbie would probably have highlighted it to me in conversation.

Right, so although you have not seen her affidavit, you will have discussed the evidence that you would be giving, both of you, to this, in this litigation?
- I wouldn't discuss the evidence as such but basically over a period we would discuss this event.

Well, you have discussed the evidence that she has highlighted to you, an email which you were not aware of previously, apparently?
- There was a process of pulling relevant communications together, which Debbie led."
-

[27] **See for example TE/Day 2/ Peter Duthie Cross-Examination / Printed Page 55/Lines 14-22** "[Y]ou were told that there was going to be public advertising associated with it. Did you know that?
- We were told it would be promoted, with some of the leaflets, which ...

Yes, but you were told that there would be public advertising, potentially bus adverts and the like?
- Maybe.

You were told that, SEC were definitely told that.
- I'll accept we were told that.

Sorry?
- I'll accept that we were told that."
-

wholly unmentioned by Duthie and McWilliams in their respective affidavits, for which omission no proper explanation was given by either witness in their cross-examination on this point - Peter Duthie effectively choosing to try to blame Debbie McWilliams[28] and Debbie McWilliams simply having no explanation that she was willing to commit to under oath[29]). Peter Duthie ultimately

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[28] **See for example TE/Day 3/ Peter Duthie Cross-Examination / Printed Pages 13-14/Lines 2- 8**
"Is that an explanation as to why both of you mentioned the April 2019 email but both of you ignored or have no mention of the November 2019 email?
- In trying to help in understanding our possition, yes.
And what is the explanation?
- The explanation is that if Debbie brought an email to me, I would therefore be aware of it and take note of it, and Debbie would also therefore regard that email as important, and it's likely - I'm assuming that she would mention it.
-
You have accepted that the November 2019 email is relevant and it is important because it does not support, in fact it undermines your claim, that you had always understood that this would be an event which was not open to the public and was by invitation only to religious organisations. So, that strikes me - when I read it I thought, "Gosh, that's an important email."
- I have accepted that and I have accepted that now, but that wasn't my knowledge back at the time.

But if you are getting somebody to look for the important emails, that looks to be an important email that should have been brought to your attention?
- I think so.

By somebody doing their job properly. Unless - because the alternative is they have either been incompetent, not doing their job properly, or else they are trying to mislead the court by putting forward only evidence which supports your supposed understanding and suppressing and making no reference to evidence which undermines your claims. So, that is the choice: it is either incompetence or attempts to mislead the court. So, which is it?
- 'Incompetence' is a very strong word and it doesn't represent what happened.

Not doing their job properly?
- Potentially not fully completing the task."
-

[29] **TE/Day 7/ Debbie McWilliams Cross-Examination / Printed Page 23-24/Lines 9-12**
"And did you review the November 2019 emails involving Sue Verlaque?
- Yes.

And, again, they were not mentioned in your affidavit or in Peter Duthie's affidavit?
- They weren't in mine.

And they were not in his. So, you have come here prepared then, having read emails which you did not, I presume - they were not in your affidavit, but why not, 19 why were those emails not mentioned?
- This is the emails relating to the contractual process, is it?

In November 2019, there were specific emails and I will come on to them, but I had understood you knew which ones they were, but they are between Sue Verlaque and the Billy Graham Evangelical Association and

accepted that the **Sue Verlaque's E-mail chain ending 19 November 2019 JB/3/156-7** made it plain that the defender was advised from at least November 2019 that the pursuer would be publicising the Event through various media venues: Social media- Facebook page, Graham tour web- site, maybe bus signs and other printed outlets, as well as be word of mouth and hand out material through churches.[30] The evidence of the pursuer's witnesses was that they always were planning a

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they are about the publicity for the event and the invitations to the public. Why was that not mentioned in your original affidavit?

- I'm not really sure why I didn't mention that. I2 don't know. 3

So, you have no explanation?

- What I do know is that the marketing collateral in those emails - that didn't come to my attention until, I think it was February '20, was the first time I saw those emails.

Yes, but certainly before you drew up the affidavit.

- Yes."

[30] See for example **TE/Day 2/ Peter Duthie Cross-Examination / Printed Pages 56-57/Lines 4-15**

- My understanding was that there would be advertising around the event to promote Franklin Graham generally and his visit to the city, but that it wouldn't necessarily mean that the public would be able to just walk along and come into the event.

How did you get that understanding?

- Through the - effectively, it was our team's understanding through discussions around the event.

I do not think so. I mean, certainly it does not seem to be borne by any of the emails which I am going to take you to. Is this not a wee bit of an *ex post facto* rationalisation on your part?

- Not at all.

So, you are saying you were told by you team - who in particular?

- All my communications would have been with Debbie McWilliams.

And where would Debbie, how would Debbie know about these things?

- She was talking to her team.

And who is in her team who would have been responsible?

- Sue Verlaque, I believe.

Sue Verlaque has not been asked to come as a witness by your legal team. Do you know that?

- Yes.

Yes, because you are the client, you instruct how this defence be run and that is one witness, Sue Verlaque who seems to have been the main contact, who has not been asked to come to speak to some of the material here.

- *I imagine that Debbie would be across all the detail of it.*

The emails are with Sue Verlaque, not with Debbie.

comprehensive public advertising campaign for the Event just as they had for the earlier Liverpool event (which bus advertising campaign had itself been the subject of litigation[31]) **TE/Day 1/ Joseph Walker Clarke Examination in chief/Printed Page 33/Lines 9-24.** The evidence of Peter Duthie and Debbie McWilliams on this point should be rejected. But more generally it is an important point because if they are proved to be unreliable on this crucial point, other claims which they make in support of their case in the absence of any supporting contemporaneous documentation – for example informal unminuted conversations had with various other largely unidentified members of the "team" - should be treated by this court with extreme caution and with very healthy scepticism.[32]

- *I'm sure Debbie will have seen them.*

And you should have seen them, too?
- *Not necessarily.*

Well, certainly in terms of preparation of your statement for this - surely you would review the materials to make sure that you are not misleading and giving inaccurate statements?
- *Yes, as I say, I have reviewed them for this process.*

So, you have seen the emails?
- *I've seen the emails.*

Yes, and did you see them prior to making this affidavit?
- *Yes."*

-

[31] See *Lancashire Festival of Hope v. Blackpool Borough Council* F00MA124 Manchester County Court (Judge Claire Evans) 1 April 2021 at paras 5-6:

> "5. In the spring of 2018 the Claimant contracted with the Second Defendant (through its agent Exterion Media Ltd) to advertise the Festival by way of banner advertisements on the Second Defendant's buses from 2nd to 29th July 2018. The advertisements read "*Lancashire Festival of Hope with Franklin Graham – Time for Hope*" and gave the date and venue of the Festival and the URL for the Festival's website. They contained no overtly religious wording nor imagery.
>
> 6. Upon the Defendants receiving complaints from members of the public about the advertisements, the advertisements were removed from the buses. The complaints related to Franklin Graham and his association with the Festival, and predominantly referred to his views on homosexuality and same-sex marriage as being offensive."
> 7.

[32] **See for example TE/Day 7/ Debbie McWilliams Cross-Examination / Printed Pages 33-34/Lines 8-42; TE/Day 7/ Debbie McWilliams Cross-Examination/Printed Pages 42-45/Lines 1-10**

"[O]n your affidavit, that is the seminal statement which then made the understanding *throughout the SEC that there would be* no general public invitation to this event and that, therefore, on the 27th of January 2020, it was

the first time it became plain *to the SEC* that there was going to be a general public invitation, and that is what changed the position - that is the line which you are putting forward in 15 the affidavit?
- Yes.

And are you holding to that line, because I do not think Peter Duthie did ultimately in cross- examination in the light of the November 2019 emails which we are about to look at?
- Yes. It wasn't just this email, it was communication from the team who were managing this event.

None of whom have given any statements in this case. None of whom you mention as having said this to you in your affidavit. And in relation to which there is no other email specified in your affidavit relating to that matter.
- I haven't mentioned them by name but I think I have - I have said I was told/advised by the team.
-
Generically, without saying who/when/how/in what circumstance?
- Yes, I accept that. Yes.
...
So, you are giving us hearsay evidence as to what you were told by your team as to what they told you they understood as at April 2019?
- Yes, absolutely.

And you have not told us who those people were telling you this, because we have not seen any statements from any of them. So, we just take it on your word, 'Somebody told me in the team. Can't remember when but they thought it was private.' Is that what it comes down to?
- Yes, it would have been part of a conversation with the team about that event, following the site visit.

And when you say, '... including by me personally', you do not have any personal view on it because you did not know about this?
- I believed what the team told me after the site visit.

But when did they tell you this? When did they tell you?
- Following the site visit, I would say, on the 8th of April. The update that I was given at that time, that it was a private event, I believed that personally.

And were you given an update when the questions which were sought, clarification on, in terms of advertising and the like, were you given an update in November after those emails?
- No.
Why not?
- I can only assume because I was phasing back into the business after being out of the business, and my head of programming, who was deputizing for me in my absence, was probably overseeing much of what was happening in live entertainment at that time.

Paragraph 7 of your statement - again, you are just setting out, as you understood it, that, 'Discussions had taken place" - not discussions that you were involved in?
- No.

So, again, you are giving us hearsay evidence about discussions, and you have not identified the individuals involved?
- No, it would be head of programming, James Graham.

So, now you are telling us that there were discussions between James Graham and somebody within the

BGEA?

- James was, as I say, deputizing for me in the business in my absence as the senior member of the team. Sue Verlaque reports into James Graham. Most of the updates that I would get on event-related business would come from James Graham.

Anyway, this is the basis upon which you maintain, not having alluded to the letters, the emails, of 2019, you say, 'They would be sending out invitation letters to local churches, they would be targeting local Christian 21 organisations, *not* the public at large.' '*Not* the public at large': so, a positive assertion to the effect that, when they said, 'We will *not* be targeting the public at large' - what was the basis upon which you made that positive assertion? - On what I was told.

By whom?

- James Graham, head of programming.

So, you are telling us that James Graham, who does not have a statement here, specifically told you that this event is one in which the public at large are specifically *not* being targeted or invited?

- Yes.

He said that to you, did he?

- Yes.

When did he say that?

- It would have been some time following the April site visit.

Indeed. How long after the April site visit?

- It could only have been within a 10 week period because I was then out of the business from June 16th.

So, at some point between April 2019 and June 12 2019 you have a conversation with James Graham about this event forthcoming, and he says to you, specifically, "I can tell you this is *not* an event which the public at large are being invited to"?

- *He would have said, 'It's a private event, not a public event.'*

No, I am sorry, you have said, 'They would be targeting local Christian organisations, *not* the public at large.'

- Yes.

You tell me: did he say that to you?

- As I recall it, yes.

He said specifically, 'They will be targeting local Christian organisations, *not* the public at large'?

- As I recall it, yes.

And you do not recall when that happened?

- Some time after the April site visit, I would have been given that update.

And what was the circumstance in which he gave you this claim, made this claim that this would *not* be an event to which the public at large would be invited?

- It would probably have been a meeting in my office where we talk on a daily basis about events and event-related matters.

And would there be any documentation relating to that?

- *No, I wouldn't have thought so.*"

P3.12 It was always intended by the pursuer that each event on the UK 2020 Tour would be an evangelistic public outreach evening of prayer and thanksgiving which would feature musicians, video testimonies, and presentations on, and preaching of, the Gospel from, in particular, the Reverend Franklin Graham. And there is plenty of evidence to the effect that the defender discussed with these other venues their respective arrangements in relation to their respective Events on the tour.[33]

P3.13 In accordance with the pursuer's long-established practice, as part of its preparations for each event on the Tour, the pursuer organised in co-operation with local churches, representing a whole

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[33] See Kirsten McAlonan e-mail of 22 January 2020 **JB/22/1221-1222**

> *"[T]here have been a lot of discussions between venues on the tour: Glasgow, 30 May, The SSE Hydro; Newcastle, 3 June, Utilita Arena; Sheffield, 6 June, FlyDSA Arena; Milton Keynes, 10 June, Marshall Arena; Liverpool, 12 June, M&S Bank Arena; Cardiff, 14 June, ICC Wales; Birmingham, 17 June, Arena Birmingham; London: 4 October, TBC*

See too Peter Duthie Scottish Event Campus Limited Chief Executive's Report **JB/22/1216 "11. Franklin Graham**

> *10.1. Franklin Graham, a Christian preacher from The Billy Graham Evangelistic Association will take part in a 8 day UK tour later this year with the SSE Hydro opening the tour on 30 May. This will be a non-ticketed event; however our team is working on a scanning solution that will provide accurate reporting on the flow of attendees for the client. The event has garnered some public criticism based on the content of Franklin's message. We are sharing comms with NAA member venues to keep abreast of coverage in the lead up to the event.*
>
> *10.2. Given the potential for objections to this event, Colin Edgar, Head of Communication and Strategic Partnerships at GCC has been briefed."*

See TE/Day 2/ Peter Duthie Cross-Examination /Page 174/lines 3-7 where he makes it plain that NAA is the National Arenas Association which is a trade body made up of the 23 largest (capacity of 5,000 plus) indoor Arenas in the UK and Ireland.

And Peter Duthie sent at 1610 on 29 January 2020 **JB/22/1229** where he says:

> *"My view is that we should cancel the event in the light of all the circumstances. I believe it to be in the best interests of the business.*
>
> *We have been in touch with other venues, Sheffield are poised to cancel and Newcastle will make a call based on what we do."*

host of Christian denominations, Christian Life and Witness training courses for local church members. The purpose of these pre-meeting events and training was to allow those local church members who would attend the event as volunteers to assist in each event's smooth running. All these matters are spoken to in the unchallenged affidavit evidence of the pursuer's witnesses Joseph Walker Clarke (**JB/3/50-62**); Darren Tosh **JB/4/173-181;** and Simon Paul Herbert (**JB/5/316-324**

P3.14 It is neither necessary nor possible to record all of the orthodox Christian beliefs from the Reformed Protestant Tradition which the pursuer, its members and Franklin Graham share and proclaim. However, for present purposes, it suffices to note that their beliefs include the beliefs - in each case based on their understanding of specific passages in the Bible as the inerrant Word of God - that:

(i) They are under a responsibility as Christians to "preach the Good News" and share and proclaim the message of Jesus Christ and to help become (truer) followers of Jesus Christ and to grow up into maturity in their faith as Christians;

(ii) Every human being is a sinner, and the only route to salvation for a human being is repentance of sin and faith in Jesus Christ;

(iii) Human sexuality is only to be expressed within the context of marriage;

(iv) God instituted monogamous marriage between one male and one female as the foundation of the family and the basic structure of human society.

P3.15 These beliefs are henceforth referred to collectively as "the Religious Beliefs". These beliefs are in line with reformed Christian thought and belief as it has existed since at least the 16th century Reformation and, arguably, also reflect mainstream Christian orthodoxy since Christianity was first established more than 2,000 years ago and as it continues to be officially espoused and expressed in the present day by many in mainstream Christian denominations and churches, including in and

by the Roman Catholic Church and by the Church of England.[34] These views represent some of the core religious beliefs of the pursuer, of those individual involved in organising the Tour and of Franklin Graham himself.

P3.16 Franklin Graham has, for some time, attracted opposition and hostility because of some of his religious beliefs and of statements he has made in expression of his beliefs. The Tour events (including that arranged to be held at the Glasgow SSE Hydro) was (and was always intended to be) a forum for the proclamation of the Christian Gospel in accordance with mainstream evangelical Christian teaching. It was to be open to everyone and entry was free of charge. It was never intended to be a platform for politically controversial views or otherwise be a politically contentious event. There is no evidence nor any indication anywhere in the documentation before the Court that any remotely political or other controversial topic was to be discussed during the Tour and, particularly for this case, at the defender's venue. This Event was instead to be a sign of, and a stimulus for, a religious awakening across Scotland, England and Wales and a nationwide return to the Gospel and Gospel values.

P3.17 On or around 31 July 2019 the pursuer and the defender entered into a contract (the "Contract"). The Contract provided among other things that the defender would make available the SSE Hydro Arena and the SSE Hydro Box Office for the period from 8am on 30 May 2020 until 2 am on 31 May 2020. The pursuer entered into the Contract with the defender in order to hold an event in Glasgow (the "Event"). The Event would feature Franklin Graham. The Event was

[34] See, for example, the position of the Church of England as recorded in *Pemberton v. Inwood* [2018] EWCA Civ 564 [2018] ICR 1291 per Asplin LJ at §§ 63, 64:

> "63. …. [T]he Church of England considers marriage to be between one man and one woman. By its very terms it delimits the concept of marriage in accordance with the teachings and doctrine of the Churchin a way which excludes same sex marriage.…64. …. [T]he Church of England does not accept same sex marriage as 'marriage' for its purposes at all. … [M]arrying someone of the same sex would be at variance with the teachings of the Church of England."

scheduled to be the first date of the pursuer's United Kingdom tour. The defender freely and willingly entered into the Contract: **matter of defender's admission at Answer 7.** As set out above, the defender knew from the initial stages of contractual negotiations that the Event would be ticketless and that a dummy barcode would be operated in order to monitor the number of people in the venue at any given time.

P3.18 There was significant social media coverage concerning the pursuer's United Kingdom tour in late 2019 and early 2020. This included a minor "twitter storm" apparently initiated but certainly encouraged by an MSP who described the Event and the pursuer on 27 January 2020, without any foundation, as promoters of "homophobic & transphobic hatred", asking the defender if they were going to follow ACC Liverpool's lead (i.e. to cancel the Event): **JB/22/1243.**

P3.19 On 29 January 2020, Annemarie O'Donnell in her capacity as Chief Executive of Glasgow City Council sent a letter to the defender **(matter of admission: Joint Minute §18 JB/2/41)** which stated, among other things, as follows:

> "I write regarding the SEC's *proposed* [*sic*] hosting of an event featuring Franklin Graham. On behalf of the council, as the majority shareholder of SEC Ltd, I have to ask you to cancel this booking …" **(production 6/3 JB/21/1210)**

P3.20 Glasgow City Council owns more than 90% of the defender's shares. **(matter of admission: Joint Minute- §6 JB/2/39).** And the defender's CEO Peter Duthie considered that "managing" the defender's relationship with its 90% shareholder Glasgow City was "important", because it had a controlling interest over the SEC, could change the defender's Articles of Association, and it could potentially cost him job if that relationship went awry. **TE/Day 3/Peter Duthie Cross-examination/Printed Pages 58-59/Lines 13-26, 1-5**

P3.21 On 29 January 2020, the defender issued a letter to the pursuer purporting to terminate the Contract (the "Termination Letter"): **matter of defender's admission at Answer 7.** Astonishingly in his evidence Peter Duthie claimed that the Termination letter did not in fact set out the defender's

true reasons for cancelling the booking. The tenor of his evidence appeared to be – when pressed on the precise terms of the letter the terms of which he authorized Billy McFadyen to send out and the inconsistences between the letter's account of the reasons for termination and what Peter Duthie, being unable to identify any contractual terms which the pursuer's breached, then claimed were his various "real" reasons for termination - was to seek to disown the letter. Ultimately Duthie appeared to try and characterize the termination letter as something misleadingly cobbled together by the lawyers with a view to avoiding a breach of contract claim.[35] But his swithering evidence on all this rather smacks of bad faith and/or desperation at his inability to reconcile the claims made in his affidavit with the contemporaneous documentation.

P3.22 In any event, as at the date of the Termination Letter, the defender had no actual objective evidence or reliable police or security intelligence that there was likely to be any unmanageable

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[35] **TE/Day 3/Peter Duthie Cross-examination/Printed Page 76-77, 85/Lines 21-26, 1-7, 18-26**

"[A] very odd thing to do, is to terminate for one reason in a formal letter of termination but say, 'Actually, we had other reasons but we're not going to tell you what they are and we're not going to enter into any communication with you or make any explanation after the event, and all we'll try and do is give back the deposit and get this clean break.' Do you not think that is an odd thing to do?

- It could have been handled better.

It could have been handled better. Whose decision was it to handle it in this way?

- It would have been mine.

Yours, and so why did you decide to handle it in this way?

- Probably because of the potential legal implications, as I was aware, when you cancel a contract."

….

- I believed that this event would have created an environment where our own staff and stewards could have been put in a situation of serious risk.

Why not put all of that in the termination letter, then?

- A good question.

It is a good question. So, what is the good answer to it?

- The good answer to is that it *should* have been in there."

-

and/or violent protest at the Event.[36] The G4S assessment lodged with the court by the defender (**JB/22/1205-1209)** was not instructed or obtained by the defender until after the Termination Letter had been sent to the pursuer. **(matter of admission: Joint Minute §29 - JB/2/41)**. It is not an independent expert report but instead a preliminary report made by a G4S employee working for the defender at the SECC venue. It was understood and intended by its author to be used inform subsequent discussions involving the security staff, the defender and the pursuer of possible mitigation measures to put in place to reduce the overall risk while allowing the Event to go ahead: **TE/Day 3/Michael Cooper Cross-examination/Printed Page 146/Lines 6-26.** The G4S risk assessment was prepared by its author on the basis of a verbal request from the defender's employee Mark Laidlaw **TE/Day 3/Michael Cooper Cross-examination/ Printed Page 141/Lines 13-16.** It was prepared in ignorance of the fact that a Christian public outreach evangelistic event of the same sort as the Event to be held at the SECC had been held featuring Franklin Graham in the Winter Gardens in Blackpool 2018 which event had taken place in the place of prior protests and objections, but which had passed peacefully and without any public disorder: **TE/Day 3/Michael Cooper Cross-examination/ Printed Page 453/Lines 17-26, Page 145/Lines 1-3**.

P3.23 The respondent in its draft submissions says this of the Cooper report:

> "The defender does not contend that Mr Cooper's report played *any* part in the decision to terminate the Contract. The existence of the report is part of the *post-termination factual matrix* (sic).
>
> It is *relevant* to the pursuer's allegation that the event was cancelled rather than rescheduled in March 2020 and that there is an 'ongoing' refusal to reschedule.
>
> The Court *might* also consider it *relevant* to any question of the appropriateness of an

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36 TE/Day 3/Peter Duthie Cross-examination/Printed Page 81/Lines 10-15
"You say, 'It is clear that our decision as a board to terminate the contract was based on a risk of public disorder and our accompanying security concerns." Just to be clear, you had no actual factual basis for that evaluation of risk? You had no independent reports or police intelligence or anything of that sort?

- No"

order *ad factum praestandum*.

Mr Cooper's evidence *suggests* that, in *retrospect*, the defender's operational assessment of the event was accurate.

This evidence may assist the Court when it comes to assessing the evidence given by Mr Duthie, Mr McFadyen and the other directors."

P3.24 This is all rather clutching at straws. The tenor of the Cooper report – as spoken to by its author in cross-examination - was that whatever possible protesting there might have been, it was anticipated to be minor, capable of being handled with standard security measures, and was in no way an unusually high threat level. Put short: there is no evidence that any possibility of protesting was sufficiently unusual in the circumstances of this case as to warrant the termination. Instead the real reason for the termination lies elsewhere as discussed below. So this G4S report, even if admitted as evidence, does not support any of the defender's claims for it.

P3.25 As is set out in more detail below in relation to the evidence before this court, it is clear from the reason for the Termination Letter being sent was because the defender bowed to pressure from among others, Glasgow City Council, who objected to what they understood to be Franklin Graham's religious and political beliefs.

P3.25 As we have already noted, the evidence before this court shows that it was always intended that, at the Event, Franklin Graham would deliver religious addresses based around familiar and mainstream Christian themes. It was not his intention to speak to this audience about Islam. He was going to talk about Christianity. It was not his intention to speak to this audience about the issue of homosexuality, nor about the legalisation of same-sex marriage, whether in the USA or the UK. This notwithstanding, the defender chose to deny its service to the pursuer on the basis of a protected characteristic of religion or belief and in breach of the constitutional principle of religious toleration based, it would appear, on nothing more than hyperbolic language from politicians such as an MSP who took it upon themselves to grandstand and advocate for his particular secularist

view point, in terms of which the freedom of expression of traditional Christian groups should be curtailed in the name of avoiding offence to others. (among them, per an MSP, those who identify as members of the LGBTQIA + community).

P4 THE CONSTITUTIONAL PRINCIPLE OF RELIGIOUS TOLERANCE IN THE UK

P4.1 Contrary to the view apparently espoused by such as an MSP, the principle of religious toleration is as a matter of law structurally embedded within all the legal systems within the UK as a fundamental constitutional principle. As such it informs the full corpus of the law, the common law on effective remedy just as much as the proper interpretation and application of statutes passed by all the legislatures within the UK

P4.2 The constitutional principle of religious toleration has formed part of the fundamental constitutional framework in England and Wales and in Scotland since the constitutional changes in these kingdoms associated with and consequent upon the overthrow of the Catholic monarch James II and VII (following the birth of a Catholic male heir to him), and his replacement by his Protestant elder daughter Mary and her Protestant husband (and his nephew), the Dutch Stadtholder, William of Orange who were enthroned under the "Glorious Revolution" settlement of 1688/1689 as the joint monarchs William III and Mary II of England, and William II and Mary II, King and Queen of Scots.[37]

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[37] See *R (Miller) v Secretary of State* [2017] UKSC 5 [2018] 2 AC 61 at §§40, 41:

> "40 Unlike most countries, the United Kingdom does not have a constitution in the sense of a single coherent code of fundamental law which prevails over all other sources of law. Our constitutional arrangements have developed over time in a pragmatic as much as in a principled way, through a combination of statutes, events, conventions, academic writings and judicial decisions. Reflecting its development and its contents, the UK constitution was described by the constitutional scholar, Professor AV Dicey, as 'the most flexible polity in existence': *Introduction to the Study of the Law of the Constitution*, 8th ed (1915), p 87.
>
> 41. … It is possible to identify a number of seminal events in this history, but a series of statutes enacted

P4.3 The Toleration Act 1688 was passed by the English Parliament in the immediate wake of this "Glorious Revolution" as:

> "part of the emphatic testimony borne to the determination of the nation to reap the full fruit of the Revolution Settlement and to *secure* against judges, as well as against the Sovereign, *the liberties of the realm*".[38]

The precise terms of this Toleration Act 1688 were relatively limited.[39] It allowed Protestant Trinitarian dissenters from the Anglican settlement (Nonconformists) - subject only to their avowal of certain oaths of political allegiance - to set up their own places of worship and to maintain their own teachers and preachers, provided that these places of worship were in principle open to the public, rather than held behind closed doors.[40] Yet the broader constitutional impact of the Act was of immense significance in that it introduced the principle of religious pluralism within the post-1689 State and the signaled the illegitimacy of the State's attempts at enforcing uniformity in the

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> in the 20 years between 1688 and 1707 were of particular legal importance. Those statutes were the Bill of Rights 1688 (1 Will & Mary, Sess 2, c 2) and the Act of Settlement 1701 in England and Wales (12&13Will 3, c 2), the Claim of Right 1689 in Scotland, and the Acts of Union 1706 (6 Anne c 11) and 1707 in England and Wales and in Scotland respectively. (Northern Ireland joined the United Kingdom pursuant to the Acts of Union 1800 in Britain and Ireland (39 & 40 Geo 3, c 67))."

[38] *Scott v Scott* [1913] AC 417 per Lord Shaw of Dunfermline at 475.

[39] *Bowman v. National Secular Society* [1917] AC 406 per Lord Parker of Waddington at 448:
The Revolution of 1688 was followed by the Toleration Act of that year, which exempted Protestant dissenters from the penalties imposed by the earlier Acts, but provided that nothing therein contained should afford any protection to Roman Catholics or persons denying the Trinity.

[40] See *Gallagher v Church of Jesus Christ of Latter-Day Saints* [2008] UKHL 56 [2008] 1 WLR 1852 per Lord Scott of Foscote at § 44:

> "[T]he Toleration Act 1688 (1 Will & Mary c 18), which abolished restrictions on the freedom of worship of protestant dissenters provided that the worship did not take place in premises with 'doors locked, barred or bolted'. … [T]he main object of these provisions was to allow religious worship by dissenters without thereby facilitating the convening of seditious assemblies. Restrictions on Roman Catholic worship remained, however, in place until the Roman Catholic Relief Act 1791 (31 Geo 3, c 32) which, while removing the restrictions in general, contained provisions regarding assemblies behind locked doors similar to those which had been contained in the 1688 Act. The Places of Religious Worship Act 1812 (52 Geo 3, c 155) followed the same pattern. It permitted, subject to certain conditions, premises to be used for religious worship but made it an offence to hold any kind of religious meeting with the doors barred so as to prevent members of the public from entering."

practice of religion in requiring universal membership of and subscription to one State-approved and supported church in the Church of England.[41]

P4.4 Although the provisions of the Toleration Act 1688 were not immediately replicated in Scotland by the Scottish Parliament (where the Glorious Revolution marked the triumph of the Presbyterian party in the Church of Scotland and resulted in increased religious persecution and intolerance, notably against Episcopalians) in the immediate aftermath of the 1707 Anglo-Scottish Parliamentary Union, the principle of religious toleration had infiltrated even into Scotland (*James Greenshields* v *Lord Provost of Edinburgh* (1710) Colles 427, 1 ER 356 (UKHL)[42]) and was extended to Ireland by the Toleration (Ireland) Act 1719 in 1719, which recognised, and, to some extent, relieved Protestant Dissenters without distinction of sect, upon taking the several oaths and the declaration therein prescribed. The benefit of that act did not extend to any person who, by preaching or writing, denied the doctrine of the Trinity as it is declared in the Thirty Nine Articles of Faith and Doctrine of the Church of England.

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[41] In *R v Registrar General, Ex p Segerdal* [1970] 2 QB 697 Lord Denning noted at 740E-F:

> "The legislation on this subject goes back to 1688. The Church of England was then the established church of the land. All other denominations were proscribed. But in 1688 a measure of tolerance was extended to Protestants who dissented from the established church. The Toleration Act, 1688, made it lawful for Protestant dissenters to meet together as a congregation or assembly for religious worship, provided always that their place of meeting was certified to the bishop or to quarter sessions and registered; and provided, also, that the place was not locked, barred or bolted but was kept open. The same measure of toleration was afterwards extended to the Roman Catholics by statutes of 1791 and 1812, and to the Jews in 1846. Finally, in the year 1855 it was extended to all denominations."

[42] The Toleration (Scotland) Act 1711 allowed persons of the Episcopal persuasion in Scotland to assemble for divine worship, provided, among other things that the officiating minister had been ordained by some Protestant bishop and had duly registered his letter of orders from this Protestant bishop, that the officiating minster was not the established minister of any church or parish of the (Presbyterian) Church of Scotland, that he taken and subscribe the oaths of allegiance and abjuration of any Jacobite succession, and should, during divine service, pray for Queen Anne and the Royal Family In 1746 and 1748, in the wake of the Jacobite uprising the UK Parliament passed Penal Statutes against the Scottish Episcopal Church which prohibited the exercise of that form of worship in Scotland, except in licensed churches and by clergymen of English or Irish orders. In 1792 the penal laws against the Scottish Episcopal Church were relaxed by the Act of Relief, and the public ministrations and church government of that communion were resumed.

P4.5 Certainly, by the latter half of the eighteenth century, the courts in England could affirm in that an individual's exercise of his religion, according to his sentiments and persuasion, was under the protection of the law and constitution of the United Kingdom. And this constitutional protection of "religious nonconformity" was understood to extend so far as requiring the dismantling (and forbidding the re-imposition) of any legal barriers or obstacles against those (Protestant) religious dissenters from majoritarian State-supported Anglican or Presbyterian orthodoxies from being appointed to, holding and maintaining their appointment to any public office in the United Kingdom.[43] The principle of religious toleration, the right to public worship (and the removal of "religious tests" and requirements for oaths which had the intent and effect of barring religious dissenters from the established church from access to and the exercise of public

[43] *Harrison* v. *Evans* (1767) 3 Brown PC 465 at 475

"The not having received the sacrament does not, nor did in the view of the legislature, fall under the idea of neglect of duty; but was considered as an evidence of a religious principle, which they thought ought not, in a political view, to have any influence in the government of corporations Since the Toleration Act, it cannot in any sense be considered as a duty incumbent on a Protestant Dissenter, to receive the sacrament according to the rites and ceremonies of the church of England; his scruples are, in effect, declared innocent; and the exercise of his religion, according to his sentiments and persuasion, is under the protection of the law."

office in the UK), was gradually extended in the course of the later eighteenth and early nineteenth century first to Unitarians,[44] then to Catholics[45] and then to Jews.[46]

P4.6 It is clear that the principle of religious toleration and the protection and preservation of religious pluralism is a constitutional principle with far deeper historical roots than the subsequent constitutional principles of equality of treatment regardless of sex, (which began to develop only in the first half of the twentieth century) or equality of treatment regardless of race (which is very much a development of the second half of the twentieth century). It is only at the end of twentieth century that the law seeks to outlaw disability discrimination, and we have to wait until the twenty-first century before the principle of equal treatment begins to be extended to encompass sexual orientation and age as specifically protected grounds against unlawful discrimination.

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[44] *Bowman v National Secular Society* [1917] AC 406 per Lord Parker of Waddington at 449:

> "The Unitarian Relief Act, 1813 (as I may call it) (1), repeals so much of the Toleration Act, 1688, as enacts that nothing therein contained should extend to give any ease or benefit to persons denying the Trinity, and also so much of the Blasphemy Act as relates to persons denying the Trinity. As from the passing of this Act trusts for the religious purposes of Unitarians have always been held good charitable trusts."

[45] By the Roman Catholic Charities Act 1832 Catholics were placed in the same position as Protestant nonconformists. See *Bourne v. Keane* [1919] AC 815 per Lord Buckmaster at page 867

> "Roman Catholics were not within the privilege of the Toleration Act, but by 31 Geo. 3, c. 32, the effect of the statute of Elizabeth was modified, by the Catholic Relief Act, 10 Geo. 4, c. 7, civil disabilities were removed, by 2 & 3 Will. 4, c. 115, after reciting the Toleration Act 1 W. & M. c. 18, it was provided that Roman Catholics in respect to schools, places for religious worship, education and charitable purposes and property held therewith and the persons employed in and about the same should in respect thereof be subject to the same laws as the Protestant Dissenters, and by 7 & 8 Vict. c. 102, the penal statute of Elizabeth was repealed, and there remained no illegality in the Roman Catholic faith.

[46] By the Religious Disabilities Act 1846 Jews were placed in the same position as Protestant nonconformists. See *Keren Kayemeth le Jisroel Limited v. Commissioners for Inland Revenue* [1931] 2 KB 465 per Slesser LJ at 494:

> "[T]he word 'Jew' in English law has almost always been confined to persons practising the Jewish religion; the disabilities of Jews have not attached to persons of Jewish race who have become baptized. Thus, they are generally described in Acts of Parliament and in legal documents as persons practising the Jewish religion (see the Toleration Act, 1846), and Jewish religious endowments and trusts are now recognized and executed by the Courts and regarded as charitable purposes."

P4.7 The point about the historical *excursus* on the principle of religious toleration and the preservation of religious pluralism is that what this shows is that this principle has had time to become embedded within, and apply across, the full corpus of the law. As Lord Mansfield confirmed in his judgment in *Harrison* v *Evans* (1767) 3 Bro 465, the constitutional principle of religious toleration is *not* to be understood as being confined by and within the specific words used any particular statute (whether Toleration Act 1689 or the Human Rights Act 1998 or the Equality Act 2010) in which that constitutional principle is currently expressed.[47] Instead, it is to be regarded as a constitutional principle which expresses one of the undoubted fundamental liberties of the post 1689 realm – namely respect for the free exercise of religion

> - the concept of religious pluralism and toleration imbues, among other things, legal principles concerning the interpretation of (and consequences of, and remedies for, breach of) contracts, whether concluded with a public or a private party.[48]

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[47] See on this speech *Bourne v. Keane* [1919] AC 815 per Lord Buckmaster at pages 866-867:

> "Lord Mansfield's speech in *Harrison* v. *Evans* (1767) 3 Brown PC 465 is certainly worthy of a more important place in the law reports than that hitherto assigned. …. *Its importance lies in its strong declaration of the liberty accorded to every man for freedom of religious opinion in this country, except so far as such right has from time to time been limited and invaded by Acts of Parliament*. The Toleration Act had then been passed, and in dealing with its effect upon Dissenters, Lord Mansfield said:
>
> > 'Dissenters, within the description of the Toleration Act, are restored to a legal consideration and capacity; and one hundred consequences will from thence follow, which are not mentioned in the Act. For instance, previous to the Toleration Act, it was unlawful to devise any legacy for the support of dissenting congregations or for the benefit of dissenting ministers; for the law knew no such assemblies, and no such persons; and such a device was absolutely void, being left to what the law called superstitious purposes. But will it be said in any Court in England, that such a device is not a good and valid one now? And yet there is nothing said of this in the Toleration Act.'"

[48] Cf *Cherry and others v Advocate General for Scotland/Miller v. Prime Minister* [2019] UKSC 41, 2020 SC (UKSC) 1 at § 40 (emphases added):

> "40 The legal principles of the constitution are not confined to statutory rules, but include constitutional principles developed by the common law. We have already given two examples of such principles, namely that the law of the land cannot be altered except by or in accordance with an Act of Parliament, and that the Government cannot search private premises without lawful authority. Many more examples could be given. Such principles are not confined to the protection of individual rights, but include principles concerning the conduct of public bodies and the relationships between them. For example, they include the principle that justice must be administered in public (*Scott v Scott* [1913] AC417), and the principle of the separation of powers between the executive, Parliament and the courts: *Ex p Fire Brigades Union* [1995] 2 AC 513, 567—568. In their application to the exercise of governmental powers, constitutional principles do not apply only to powers conferred by statute, but also extend to

P5 **HUMAN RIGHTS ACT 1998**

P5.1 Associations formed for the purposes of proclaiming or teaching religion, are also fundamental to the proper functioning of a pluralist democracy.[49] In *Magyar Keresztény Mennonita Egyház v Hungary* (2017) 64 EHRR 12 the Strasbourg Court observed at § 93:

> "religious associations are not merely instruments for pursuing individual religious ends. In profound ways, *they provide a context for the development of individual self-determination and serve pluralism in society*. The protection granted to freedom of association for believers enables individuals *to follow collective decisions to carry out common projects dictated by shared beliefs*."

P5.2 It is also clear that a church body - or an association with religious and/or philosophical objects - is capable of possessing and exercising the Convention rights contained in Articles 9, 10 and 11 ECHR in its own right (as well in a representative capacity of individuals who are its members or adherents to the beliefs which is espouses and seek to proclaim and protect).[50]

> prerogative powers. For example, they include the principle that the executive cannot exercise prerogative powers so as to deprive people of their property without the payment of compensation: *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75."

[49] *Moscow Branch of the Salvation Army v. Russia* (2007) 44 EHRR 46 (5 October 2006) at § 61

[50] Cf *Beizaras and Levickas v. Lithuania* (2020) 71 EHRR 28 in which the Strasbourg court affirmed that a civil-society organisation (in that case a national gay rights group) might legitimately have and exercise a constitutional role in performing a "public watchdog" function in a pluralist, democratic society, noting (at § 81):

> "[I]t should have been open to the Lithuanian National Lesbian, Gay, Bisexual and Transgender (LGBT) Rights Association, whose members the pursuers were …, and which is a nongovernmental organisation set up for the purpose of assisting people who have suffered discrimination to realise their right to a defence, including in court, to act as a representative of the pursuers' "interests" within the domestic criminal proceedings…. To find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at the national level. Indeed, *the Court has held that in modern-day societies recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to the citizens whereby they can defend their particular interests effectively*. Moreover, the standing of associations to bring legal proceedings in defence of their members' interests is recognised by the legislation of most European countries (see *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, §§ 37-39, ECHR 2004-III, see also, *mutatis mutandis*, *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, §§ 101, 103 and 112, ECHR 2014, and the case-law cited therein). Any other, excessively formalistic, conclusion would make protection of the rights guaranteed by the Convention ineffectual and illusory."

Consistently with this, the Court of Justice of the European Union has also confirmed that the freedom of religion guarantee in the EU Charter on Fundamental Rights applies to religious organisations.[51]

P5.3 It is important to bear in mind that Scots law does *not* have any specific category for ecclesiastical entities or religious organisations which are not part of the national Church of Scotland as given statutory recognition by the Church of Scotland Act 1921. There is no legal procedure, such as exists in many Continental legal systems, for the registration of such bodies as specifically religious entities such as to give them a recognised religious legal personality.[52] Instead, to enable them to own and manage property, enter into contracts, and otherwise conduct their financial and pastoral affairs in a manner which will be recognised in domestic law, non-established church and faith groups have to use existing general forms of the law,[53] whether that be as

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[51] Case C-426/16 *Liga van Moskeeen v Vlaams Gewest* EU:C:2018:335 at § 49.

[52] Compare *Moscow Branch of the Salvation Army v. Russia* (2007) 44 EHRR 46 at § 72:

> "The Court observes that in 1997 the respondent State enacted a new Religions Act which required all the religious organisations that had been previously granted legal entity status to amend their articles of association in conformity with the new Act and to have them "re-registered" within a specific time-period. … The Court considers that in the present circumstances, in which the religious organisation was obliged to amend its articles of association and where registration of such amendments was refused by the state authorities, with the result that it lost its legal entity status, there has been an interference with the organisation's right to freedom of association. As the Religions Act restricts the ability of a religious association without legal entity status to exercise the full range of religious activities, this situation must also be examined in the light of the organisation's right to freedom of religion."

[53] See *Magyar Keresztény Mennonita Egyház v. Hungary* (2017) 64 EHRR 12 at § 90-1:

> ""78. ..*[T]he ability to establish a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of freedom of association*, without which that right would be deprived of any meaning.
>
> …
>
> 79 The state's power to protect its institutions and citizens from associations that might jeopardise them must be used sparingly, *as exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom.*"
>
> …
>
> 90. The Court considers that there is a positive obligation incumbent on the state to put in place a system of recognition which facilitates the acquisition of legal personality by religious communities. This is a valid consideration also in terms of defining the notions of religion and religious activities. In

unincorporated associations with no legal personality, trusts,[54] and/or as registered charities such as the pursuer.[55]

P5.4 The Convention rights most relevant to the circumstances of the present case include:

(1) Article 9 ECHR, which guarantees freedom of religion and freedom, either alone or in community with others and in public or private, to manifest religion or belief in worship, teaching, practice and observance.[56] In *Centre of Societies for Krishna Consciousness v. Russia* [2021] ECtHR

> the Court's view, those definitions have direct repercussions on the individual's exercise of the right to freedom of religion, and are capable of restricting the latter if the individual's activity is not recognised as a religious one. According to the position of the United Nations Human Rights Committee, such definitions cannot be construed to the detriment of non-traditional forms of religion—a view which the Court shares. In this context, it reiterates that the state's duty of neutrality and impartiality, as defined in its case-law, is incompatible with any power on the state's part to assess the legitimacy of religious beliefs. …
>
> 91. The Court further considers that there is no right under art.11 in conjunction with article 9 for religious organisations to have a specific legal status. *Articles 9 and 11 of the Convention only require the state to ensure that religious communities have the possibility of acquiring legal capacity as entities under the civil law; they do not require that a specific public-law status be accorded to them.*"

[54] See for example *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938, [2013] QB 722 *per* Ward LJ at § 8:

> "Since the law of England and Wales does not recognise the Catholic Church as a legal entity in its own right, but sees it as an unincorporated association with no legal personality, the diocese usually establishes a charitable trust to enable it to own and manage property and otherwise conduct its financial affairs in accordance with domestic law."

[55] See e.g. *R (Cornerstone) v. OFSTED* [2021] EWCA Civ 1390 [2022] PTSR 595 confirming that a charity which operated as an independent fostering agency, within the meaning of section 4(4)(a) of the Care Standards Act 2000 and which specialised in offering foster and permanent homes to children in local authority care constituted, by virtue of the terms of its constituting documents a religious organisation able to pray in aid the protection of Article 9 ECHR and the prohibition against discrimination because of its religion or beliefs.

[56] Article 9 ECHR sets out five distinct rights as follows:

> "**Article 9 – Freedom of thought, conscience and religion**
>
> 1. Everyone has the right to
>
> [i] freedom of thought
>
> [ii] [freedom of] conscience and
>
> [iii] [freedom of]

37477/11 (Third Section, 23 November 2021) the Strasbourg Court noted as follows:

> "50. The Court reiterates that the right to freedom of assembly covers *both private meetings and meetings in public places*, and can be exercised by individual participants and by the persons organising the event. Interference with the right to freedom of assembly does not need to amount to an outright ban, legal or *de facto*, but can consist in various other measures taken by the authorities.
>
> The Court has previously found that the refusal of authorisation to hold a religious service in the public space constituted interference with the applicant's rights under Article 11 of the Convention, interpreted in the light of Article 9.
>
> …
>
> 52. The Court notes that the domestic authorities did not have any objections to the planned events being held at a specific location or time, the factual matters in respect of which the Contracting State must be allowed a wider margin of appreciation. Rather, their objections related to the *religious nature* of planned events and accordingly amounted to *content-based restrictions on freedom of assembly* which should be *subjected to the most serious scrutiny by the Court*.
>
> The situations where a gathering may be legitimately banned in relation to the substance of the message which its participants wish to convey are *rare*, and *the domestic authorities are not at liberty to prohibit a public event from being held simply because they consider that its*

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religion; this right includes

[iv] freedom to change his religion or belief

and

[v] freedom, either alone or in community with others and in public or private, to *manifest* his religion or belief, in

[a] worship,

[b] teaching,

[c] practice and

[d] observance.

Article 9(2) ECHR allows for limitations to be placed *only* on the last of these rights, that of *Manifestation* of religion or beliefs by providing as follows:

> "2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

"message" is wrong.

…

56. The Court notes the indisputably peaceful character of the planned religious events. Participants intended to assemble *in support of their religion* … and a particular lifestyle associated with it which in their view offered health benefits. There was no reason to presume a risk of any disturbance of public order or breach of peace *on their part*.

The freedom of assembly as enshrined in Article 11 of the Convention protects a demonstration that may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote.

It would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were it so a minority group's rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention.

57. As to the allegation that a public event for the promotion of Vaishnavism amounted to missionary work, *the Court reiterates that freedom to manifest one's religion includes the right to try to convince one's neighbour, failing which, moreover, "freedom to change one's religion or belief", enshrined in that Article, would be likely to remain a dead letter."*

P5.5 Section 13 of the Human Rights Act 1998 (HRA 1998) provides that:

> "If a court's determination of any question arising under this Act might affect the exercise by a religious organisation…of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right."

And this court is placed under a statutory obligation by Section 3 HRA 1998 to interpret and apply the provisions of the EA 2010 in the circumstances of this case in a Convention-compatible manner: *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 per Lord Rodger of Earlsferry at §§ 106-7; *Lee v Ashers Baking Co Ltd* [2018] UKSC 49 [2018] 3 WLR 1294 per Baroness Hale at § 56.

(2) Article 10 ECHR, which guarantees the freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas without interference.[57] The rights in article 10(1) ECHR have been held to apply equally to legal persons as to natural persons.[58] In *ES v. Austria* (2019) 69 EHRR 4 the Court noted (at paras 42-43):

> "42 ….Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self- fulfilment. Subject to para.2 of art.10, *it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb*.
>
> The Court further notes that there is little scope under art.10(2) of the Convention for restrictions on political speech or on debate on questions of

[57] The importance which the ECtHR attaches to free expression principles appears from its decision in *Annen v Germany* [2015] ECHR 3690/10 (Fifth Section, 26 November 2015). The pursuer was an anti-abortion campaigner who handed out leaflets next to an abortion clinic naming and giving the addresses of doctors who performed abortions at the clinic. The leaflets appeared to draw an analogy with the Holocaust and identified a website named "www.babycaust.de". Despite the personal and what many would consider to be the somewhat extreme nature of Mr Annen's expression, the ECtHR found that an injunction preventing him from disseminating the leaflets violated his article 10 rights.

[58] See e.g. *Markt Intern* v *Germany* (1989) 12 EHRR 161.

> public interest. Those who choose to exercise the freedom to manifest their religion under article 9 of the Convention, irrespective of whether they do so as members of a religious majority or a minority, *therefore cannot expect to be exempt from criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith*.
>
> 43 As para.2 of art.10 recognises, however, *the exercise of the freedom of expression carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, is the general requirement to ensure the peaceful enjoyment of the rights guaranteed under art.9 to the holders of such beliefs including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane.*
>
> Where such expressions go beyond the limits of a critical denial of other people's religious beliefs and are likely to incite religious intolerance, for example in the event of an improper or even abusive attack on an object of religious veneration, a state may legitimately consider them to be incompatible with respect for the freedom of thought, conscience and religion and take proportionate restrictive measures. In addition, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by art.10 of the Convention."

And in *Centre of Societies for Krishna Consciousness v. Russia* [2021] ECtHR 37477/11 (Third Section, 23 November 2021) the Strasbourg Court noted (at para 30):

> "30. The Court has found that in modern-day societies recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to the citizens whereby they can defend their particular interests effectively. The standing of associations to bring legal proceedings in defence of their members' interests has been recognised in the legislation of many member States and upheld by the Court (see *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, §§ 38-39, ECHR 2004-III, and *Beizaras and Levickas v. Lithuania*, no. 41288/15, § 81, 14 January 2020).
>
> The Court has also acknowledged that, even where applicants have not been personally targeted by hostile speech, they may be considered "victims" in the sense of being affected by remarks and expressions disparaging the religious movement or ethnic group to which they belonged."

(3) Article 11 ECHR which guarantees to everyone the right to freedom of peaceful assembly and to freedom of association with others.[59] The Strasbourg Court has

[59] In *Bayev v Russia* (2018) 66 EHRR 10, the ECtHR found that the convictions of three gay activists for

emphasised the importance of the freedom of association protected under Article 11 ECHR in its case law concerning associations for religious purposes, noting that "associations formed for … proclaiming or teaching religion, are also *important to the proper functioning of democracy*".[60] In *Berkman v. Russia* (2021) 73 EHRR 3 the Strasbourg Court set out the following general principles applicable to a proper understanding of the Convention right to free association (at paras 45-49 – internal footnote case references omitted):

> "45 Within the context of Article 11 of the Convention, the Court has often emphasised that pluralism and democracy are built on genuine recognition of, and respect for, diversity. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. Referring to the hallmarks of a "democratic society", the Court has attached particular importance to pluralism, tolerance and broadmindedness.
>
> In that context, it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.
>
> 46 The state must act as the ultimate guarantor of the principles of pluralism, tolerance and broadmindedness. Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the state not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11 of the Convention. This provision sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be. *That positive obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation.*
>
> 47 A peaceful demonstration may annoy or give offence to persons opposed to the ideas or claims that it seeks to promote. The participants must, however, be able, with the state's assistance, to hold the demonstration without having

demonstrating outside schools in favour of gay rights violated their article 10 ECHR rights. In finding that the interference was not justified, the ECtHR emphasised that the pursuers' messages had not been inaccurate, sexually explicit or aggressive and that nothing the pursuers did diminished the rights of parents to enlighten and advise their children in line with their own religious or philosophical convictions (§ 82).

[60] *Moscow Branch of the Salvation Army v. Russia* (2007) 44 EHRR 46 (5 October 2006) at § 61.

> to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.
>
> 48 The right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Accordingly, states must not only safeguard the right to assemble peacefully but must also refrain from applying unreasonable indirect restrictions upon that right. In view of the essential nature of freedom of assembly and its close relationship with democracy, there must be convincing and compelling reasons to justify an interference with this right."

P5.6 Interferences with the Convention rights protected under articles 9, 10 and 11 ECHR can only be justified if they are prescribed by law and are "*necessary in a democratic society*" in order to pursue one of the aims identified at sub-paragraph (2) of each article. The justification analysis is essentially a proportionality analysis and should proceed in four stages: (a) is the objective or aim of the measure or act sufficiently important to justify limiting a fundamental right; (b) are the means used rationally connected to that objective; (c) are they no more than are necessary to accomplish it; and (d) do they strike a fair balance between the rights of the individual and the interests of the community: *Re the Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27 [2018] HRLR 14 at § 265.[61]

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[61] See to similar effect, in the context specifically of EU influenced discrimination law, *R (Z and another) v Hackney London Borough Council* [2020] UKSC 40 [2020] 1 WLR 4327 per Lord Sales at § 40:

> "In *Aster Communities Ltd (formerly Flourish Homes Ltd) v Akerman-Livingstone* [2015] AC 1399 … Baroness Hale DPSC explained that the concept of proportionality as used in domestic anti-discrimination law is derived from EU law. It requires application of a structured approach in relation to the measure in question, involving four stages:
>
> > 'First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?
>
> And, fourth:
>
> > 'As the Court of Justice of the European Communities put it in Case C-331/88 *R v*

P6 THE EQUALITY ACT 2010 (EA 2010)

Basic Legal Framework

P6.1 Part 3 of the EA 2010 prohibits discrimination in respect of defined protected characteristics in the provision of services and separately in the exercise of public functions. The protected characteristics for these purposes include religion and belief: section 10 EA 2010.

P6.2 Under Part 3, any (public or private, corporate or natural) body which is "*concerned with the provision of a service to the public*":

(a) must not discriminate against a person requiring the service by not providing the person with the service: section 29(1) EA 2010; and

(b) must not, in providing the service, discriminate against a person by terminating the provision of the service to that person: section 29(2)(b) EA 2010.

P6.3 The EA 2010 confers rights against discrimination on "*persons*". This has authoritatively been interpreted as meaning that its protection can be claimed by legal persons just as much as by natural persons.[62] In any event a Convention-compatible reading

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> *Minister for Agriculture, Fisheries and Food, Ex p Fedesa* [1990] ECR 1-4023, § 13, "the disadvantages caused must not be disproportionate to the aims pursued": or as Lord Reed JSC … put it in [*Bank Mellat v HM Treasury (No 2)*] [2014] AC 700, 791, § 74,
>
> > "In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.""

[62] See *EAD Solicitors v Abrams* [2016] ICR 380 per Langstaff J's judgment at §§ 25-26:

> "25 As a general conclusion, therefore, there is no obvious reason implicit in the wording of the Equality Act 2010 taken as a whole to restrict the wording of 'person' to an individual, nor is there, as it seems to me, any particular reason for thinking that the general definition provision, which section 13 amounts to, should be so read. There is a reference in section 45 to 'person' in a context in which, as I have pointed out, it was well understood by the time the Equality Act 2010 came to be enacted that an LLP could have a corporate body as one of its members.

and application of the relevant provisions of the EA 2010 relied upon in this case would require that in order to ensure that the rights which the Strasbourg case has confirmed have been conferred on religious *bodies and associations* – whether under and in terms of Article 9 ECHR (freedom to practise and manifest religion), Article 10 ECHR (freedom of expression) and Article 11 ECR (freedom of association) – would have mandated such a reading in the circumstances of the present case.[63] Accordingly, there can be no valid objection to the competency of the pursuer relying on, and alleging a breach by the defender of, the provisions of the EA 2010 in relation to the protected characteristic of religion or belief.

P6.4 Further the discrimination prohibited by section 29 EA includes direct discrimination and indirect discrimination. On the pursuer's analysis, however, the present case raises only the issue of *direct* discrimination. And, if direct discrimination is established, the court is obliged to make a finding of breach of the EA 2010 since, as a matter of law, an act of direct discrimination cannot be justified.

Religion and belief

P6.5 Case law confirms - consistently with the Section 3 HRA obligation – that there is no material difference between the scope of the religious and other beliefs which are protected

> 26 Accordingly, in company with the employment judge I reject the argument that a corporation cannot complain of discrimination."

[63] See *Forstater v. CGD Europe* [2022] ICR 1, EAT per Choudhury J at §§ 25-26 for an example of the EA 2010 provisions being interpreted in line with the relevant Convention rights as required by virtue of Section 3 of the Human Rights Act 1998

under the EA 2010 from those which are protected under article 9 ECHR: *Harron v Chief Constable of Dorset Police* [2016] IRLR 481 at per Langstaff J at § 33.

P6.6 Any religious belief which is genuinely held and which meets certain modest minimum requirements attracts the protection of article 9 ECHR and of the EA 2010. It is not for the court to embark on any inquiry, theological or otherwise, into the "validity" of the belief or the extent to which other professed followers of the same religion share the belief: *R (Amicus) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin) [2007] ICR 1176 per Richards J at §§ 36-39. Similarly, religiously based beliefs are protected however supposedly irrational, apparently inconsistent or otherwise surprising they might seem to others: *R (Williamson) v Secretary of State for Education* [2005] 2 AC 246 at § 22.

P6.7 As with article 9 ECHR, it is clear the protection against discrimination on grounds of "religion and belief" under the EA 2010 protects not only the holding of religious beliefs but also manifestations of those beliefs. Manifestation of a belief includes conduct which is "*intimately linked to the religion or belief*": *Eweida v United Kingdom* (2013) 57 EHRR 8 at § 82. The European Court of Human Rights has held that the freedom to manifest one's religion individually or collectively in public or in private, since it may take various forms such as the teaching, practice and performance of rites, includes also the right to attempt to convince other persons, for example by means of preaching.[64]

[64] See *Kokkinakis v Greece* (1993) 17 EHRR 397, § 52 and *Perry v Latvia* [2007] ECtHR 30273/03 (Third Section, 8 November 2007) § 52 which concerned withdrawal by the Latvian authorities in when renewing the Latvian residence permit of a US national evangelical preacher law, of his authorisation to organise public activities of a religious nature. This prevented him from lawfully exercising his preaching ministry within the Church and so constituted a breach of his Article 9 ECHR rights.

P6.8 And because of the obligation to interpret and apply the provisions of the EA 2010 in the circumstances of this case a Convention compatible way[65] - it is necessary to read section 10 EA 2010 as protecting against discrimination because of the religion and beliefs held and made manifest by the pursuer in its religious activities, specifically in organising and publicising its event at the Glasgow SSE Hydro.

P6.9 R (Ngole) v University of Sheffield [2019] EWCA Civ 1127 [2019] ELR 443 concerned a challenge to the decision by the university authorities to remove a student from a social work course because the university decision-maker considered that a student's Facebook posts expressing his religious belief that homosexuality was sinful might bring the profession of social worker (for which the claimant was training) into disrepute on the basis of the risk of public perception that Mr Ngole's beliefs might cause him to discriminate against homosexuals were he permitted to qualify and practice as a social worker. The Court of Appeal condemned the approach of the university decision-maker as unlawful, on the basis that (as it noted at para 5(10)) the university had "wrongly confused the expression of religious views with the notion of discrimination. The mere expression of views on theological grounds (e.g. that 'homosexuality is a sin') does ***not*** necessarily connote that the person expressing such views will discriminate on such grounds". The Court of Appeal made the following further general observations (at paras 124-127, 129):

> "124. …[W]hat is apparent from the records of the disciplinary proceedings: namely, that the University told the claimant that whilst he was entitled to hold his views about homosexuality being a sin, *he was never entitled to express such views on social media or in any public forum*.

[65] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 per Lord Rodger of Earlsferry at §§ 106-7. See, too, *Lee v Ashers Baking Co Ltd* [2018] UKSC 49 [2018] 3 WLR 1294 per Baroness Hale at § 56

125. …Aside from expressing views online or in social media, or such old-fashioned modes of expression such as writing in a local newspaper or speaking or preaching on a street corner: even expressing these views in a church, at least in a community small enough for these views to be known and associated with the speaker, would, it is said, be sufficient to cross the line.

126. The breadth of the proposition became clear in another way, conveniently referenced from the ambit of the HCPC regulations in question here. If social workers and social work students must not express such views, then what of art therapists, occupational therapists, paramedics, psychologists, radiographers, speech and language therapists: all professions whose students and practitioners work under the rubric of the same general regulations? What of teachers and student teachers, not covered by the HCPC regulations, but by a similar regulatory regime? For present purposes it is not easy to see a rational distinction between these groups. All are usually engaged with service users who often have no opportunity to select the individual professional concerned. Very many of these professions deal on a day-to-day basis with personal problems of a particular nature, where the social, family and sexual relationships of the client or service user are relevant, sometimes central.

127. In our view the implication of the University's submission is that such religious views as these, *held by Christians in professional occupations, who hold to the literal truth of the Bible, can never be expressed in circumstances where they might be traced back to the professional concerned. In practice, this would seem to mean expressed other than in the privacy of the home. And if that proposition holds true for Christians with traditional beliefs about the literal truth of the Bible, it must arise also in respect of many Muslims, Hindus, Buddhists and members of other faiths with similar teachings.*

In practice, if such were a proper interpretation of professional regulation supported by law, no such believing Christian would be secure in such a profession, unless they resolved never to express their views on this issue other than in private. Even then, what if a private expression of views was overheard and reported? The postings in question here were found following a positive internet search by the anonymous complainant. What if such statements had been revealed by a person who had attended a church service or Bible class?
…
129. In our view, such a blanket ban on the freedom of expression of those who may be called 'traditional believers' cannot be proportionate. In any event, the HCPC guidance does not go so far. The specific guidance prohibits 'comments…[which] were offensive, for example if they were racist or sexually explicit': see para [27] above.

No doubt if the appellant's comments were abusive, used inflammatory

> language of his own, or were condemnatory of any individual, they would fall to be regarded in the same way as would racist views, or inappropriate sexually explicit language. But in our judgment, there is no equation here demonstrated between what is rightly condemned by the guidance, and the fundamental position now advanced on behalf of the University. What is here formulated represents a much greater incursion into the Article 10 ECHR rights of the appellant, and by obvious implication, those of many others, than has hitherto been clear. *In our judgment this is not the law*."

What does it mean to do something "because of" a protected characteristic

P6.10 Section 13 EA 2010 defines direct discrimination as follows:

> "(1) A person (A) discriminates against another (B) if, *because of* a protected characteristic, A treats B less favourably than A treats or would treat others."

P6.11 The basic question in a direct discrimination case is: what does it means to say that an action has been taken "because of" another's protected characteristic?[66] In the case law a distinction is sometimes made when considering this question between what it is that the alleged discriminator is hoping to achieve by the impugned action (sometimes referred to in the case law as "the motive" or "intention") from the question as to whether the protected

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[66] See *Page v. NHS Trust Development Authority* [2021] EWCA Civ 255 [2021] ICR 941 per Underhill LJ at § 29:

> "29 Section 13 EA 2010 is headed 'Direct discrimination'. The only relevant subsection for our purposes is (1), which reads:
>
> 'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.'

There is a good deal of case law about the effect of the term 'because' (and the terminology of the pre-2010 legislation, which referred to 'grounds' or 'reason' but which connotes the same test). What it refers to is 'the reason *why*' the putative discriminator or victimiser acted in the way complained of, in the sense (in a case of the present kind) of the 'mental processes' that caused them to act. The line of cases begins with the speech of Lord Nicholls of Birkenhead in *Nagarajan v London Regional Transport* [2000] 1 AC 501 and includes the reasoning of the majority in the Supreme Court in *R (E) v Governing Body of JFS (United Synagogue intervening)* [2010] 2 AC 728 ('the Jewish Free School case'). The cases make it clear that although the relevant mental processes are sometimes referred to as what 'motivates' the putative discriminator they do not include their 'motive', which it has been clear since *James v Eastleigh Borough Council* [1990] ICR 554; [1990] 2 AC 751 is an irrelevant consideration

characteristic was in fact taken into account in deciding upon the action impugned as discriminatory (which some case law refers to as "the motivation"). As has been noted "'a benign *motive* for detrimental treatment is no defence to a claim for direct discrimination".[67]

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[67] In *Page v. Lord Chancellor* [2021] EWCA Civ 254 [2021] ICR 912 Underhill LJ make the following observations (at § 69-70):

> "69 … It is indeed well established that … 'a benign motive for detrimental treatment is no defence to a claim for direct discrimination or victimisation': the *locus classicus* is the decision of the House of Lords in *James v Eastleigh Borough Council* [1990] 2 AC 751. But the case law also makes clear that in this context 'motivation' may be used in a different sense from 'motive' and connotes the relevant 'mental processes of the alleged discriminator' (*Nagarajan v London Regional Transport* [1999] ICR 877, 884F). I need only refer to two cases:
>
> (1) The first is, again, *Martin v Devonshires Solicitors* [2011] ICR 352. There was in that case a distinct issue relating to the nature of the causation inquiry involved in a victimisation claim. At § 35 I said:
>
> > "It was well established long before the decision in the *JFS* case that it is necessary to make a distinction between two kinds of 'mental process' (to use Lord Nicholls' phrase in *Nagarajan v London Regional Transport* [1999] ICR 877, 884F)_one of which may be relevant in considering the 'grounds of', or reason for, an allegedly discriminatory act, and the other of which is not.'
>
> I then quoted §§ 61—64 from the judgment of Baroness Hale of Richmond JSC in the *Jewish Free School* case and continued, at § 36:
>
> > 'The distinction is real, but it has proved difficult to find an unambiguous way of expressing it. … At one point in *Nagarajan v London Regional Transport* [1999] ICR 877, 885E—F, Lord Nicholls described the mental processes which were, in the relevant sense, the reason why the putative discriminator acted in the way complained of as his 'motivation'. We adopted that term in *Amnesty International v Ahmed* [2009] ICR 1450, explicitly contrasting it with 'motive': see § 35. Lord Clarke uses it in the same sense in his judgment in the *JFS* case [2010] 2 AC 728, §§ 137—138 and 145. But we note that Lord Kerr uses 'motivation' as synonymous with 'motive' (see § 113) and Lord Mance uses it in what may be a different sense again at the end of § 78. It is evident that the contrasting use of 'motive' and 'motivation' may not reliably convey the distinctions involved - though we must confess that we still find it useful and will continue to employ it in this judgment
> > …'
>
> (2) The second case is *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010. At § 11 of my judgment I said:
>
> > 'As regards direct discrimination, it is now well established that a person may be less favourably treated 'on the grounds of' a protected characteristic either if the act complained of is inherently discriminatory (e g the imposition of an age limit) or if

P6.12 In *Gould v St John's Downshire Hill* [2021] ICR 1 Linden J, sitting in the EAT, recognised and identified the following approaches from the UKHL and UKSC authorities:

- first, *James v Eastleigh Borough Council* [1990] 2 AC 751 where the grounds or reason for the treatment complained of is inherent in the act itself; and

- secondly *Nagarajan v London Regional Transport* [2000] 1 AC 501 where the act complained of is not discriminatory, but it is rendered so by discriminatory *motivation, being the mental processes (whether conscious or subconscious) which led the alleged discriminator to act in the way that he or she did*.

- thirdly, as the UKSC confirmed in *R (on the application of E) v Governing Body of the Jewish Free School and another* [2009] UKSC 15, once a conscious or subconscious *motivation* because of a protected characteristic has been established to the court's satisfaction, the actor's (otherwise potentially benign) *motive or intention* in acting as it did is *wholly irrelevant* because such direct discrimination cannot be justified.[68]

> the characteristic in question influenced the 'mental processes' of the putative discriminator, whether consciously or unconsciously, to any significant extent: … The classic exposition of the second kind of direct discrimination is in the speech of Lord Nicholls of Birkenhead in *Nagarajan v London Regional Transport* [1999] ICR 877, which was endorsed by the majority in the Supreme Court in *R (E) v Governing Body of JFS* [2010] 2 AC 728. Terminology can be tricky in this area. At p 885E Lord Nicholls uses the terminology of the discriminator being 'motivated' by the protected characteristic, and with some hesitation (because of the risk of confusion between 'motivation' and 'motive'), I will for want of a satisfactory alternative sometimes do the same.'
>
> 70 As I acknowledge in both those cases, it is not ideal that two such similar words are used in such different senses…"

[68] See too *R (Birmingham City Council) v. EOC* [1989] AC 1155 Lord Goff of Chieveley noted at 1194:

> "There is discrimination under the statute if there is less favourable treatment on the ground of sex, in other words if the relevant girl or girls would have received the same treatment as the boys but for their sex. *The intention or motive of the defendant to discriminate*, though it may be relevant so far as remedies are concerned (see section 66(3) of the Act of 1975), is not a necessary condition for liability; *it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the ground of sex*.
>
> Indeed, as Mr. Lester pointed out in the course of his argument, if the council's submission

P6.13 Linden J summarised the relevant law on this in *Gould* as follows:

"62. The question whether an alleged discriminator acted *"because of"* a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the 'reason why' question and the test is *subjective*. This point was made by Lord Nicholls in *Nagarajan v London Regional Transport* [2000] 501, 511C-D and again in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 at paragraph 29 where he distinguished the nature of the 'reason why' question from the determination of "causation":

> "29…..Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach…The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? *What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test*. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."

63. For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a *"significant influence"* on the decision to act in the manner complained of. *It need not be the sole ground for the decision*: per Lord Nicholls in *Nagarajan* [2000] 1 AC 501 at 513A–B.

64. Moreover, as the passage from *Khan* quoted above makes clear, *the influence of the protected characteristic may be conscious or subconscious*."

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were correct it would be a good defence for an employer to show that he discriminated against women not because he intended to do so *but (for example) because of customer preference, or to save money, or even to avoid controversy*. In the present case, *whatever may have been the intention or motive of the council, nevertheless it is because of their sex* that the girls in question receive less favourable treatment than the boys, and so are the subject of discrimination under the Act of 1975. This is well established in a long line of authority: see, in particular, *Jenkins v. Kingsgate (Clothing Productions) Ltd.* [1981] 1 W.L.R. 1485, 1494, *per* Browne-Wilkinson J., and *Ex parte Keating, per* Taylor J., at p. 475; see also *Ministry of Defence v. Jeremiah* [1980] QB 87, 98, *per* Lord Denning
M.R. I can see no reason to depart from this established view."

Subconscious bias and direct discrimination

P6.14 In *Nagarajan v London Regional Transport* [2000] 1 AC 501 Lord Nicholls stated at 511-H-512C

> "I turn to the question of *subconscious motivation*. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make- up. Moreover, we do not always recognise our own prejudices. Many people are unable, or *unwilling, to admit even to themselves* that actions of theirs may be racially motivated.
>
> An employer may genuinely believe that the *reason why* he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, *whether the employer realised it at the time or not,* race was the reason why he acted as he did.
>
> It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn. Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of [what is now section 13 EA 2010] … Such conduct also falls within the purpose of the legislation. Members of racial groups need protection fr*om conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination.'*

P6.15 And in *Cary v Commissioner of Police of the Metropolis* [2014] EWCA Civ 987 [2015] ICR 71 Clarke LJ giving the judgment of the court noted at para 51:

> "51. .. [T]hose who in fact discriminate on any grounds (e g sex, race, religion, disability, same sex orientation) *often say that they would have acted in exactly the same way if the protected characteristic had been absent*.
>
> An ability to discern whether people are *deceiving the court or, sometimes as likely, themselves*, when they say that they would have behaved no differently if there was no question of sex, race etc playing any part, is thus an advantage in an assessor, as is *experience of the sort of masks, pretences and protests that those who discriminate often put forward and of the way in which unconscious bias or stereotyping can operate.*
>
> This is a skill in evaluation and analysis which can be honed by the experience of dealing with complaints of discrimination in, for instance, the workplace, and/or listening to and adjudicating on tribunal cases in which discrimination is alleged and disputed."

P6.16 Accordingly, in assessing the evidence from the defender in the present case, this court has to be alive to the question of subconscious motivation and a failure on the part of individuals either to recognise their own prejudices or to be unable, or unwilling, to admit even to themselves that actions of theirs may be done because of others' religion or beliefs.

P6.17 The court should draw appropriate inferences from the conduct of the defender and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions referred to further below) – as explained in the Court of Appeal case of *Anya v University of Oxford* [2001] EWCA Civ 405 [2001] ICR 847.

P6.18 The pursuer submits that a careful and thorough consideration of the evidence of the defender's witnesses will necessarily lead this court to make the proper inference from this evidence is that - whether or not the defender's witnesses were willing to admit it (whether to themselves or to the court) - the "reason why" the booking was cancelled by the defender was because of the religion or beliefs of the pursuer and/or of Franklin Graham with whom the pursuer is associated.

P6.19 It is of interest in this regard that Peter Duthie as the Chief Executive Officer of the defender made the ultimate decision to cancel the event, stated that he himself considered that the religious view or claim that homosexuality or homosexual activity is sinful was homophobic, in the sense of anti-gay: **TE/Day 2/Peter Duthie Cross-Examination/ Printed Page 23/Lines 16-26**. He also stated that he considered that Franklin Graham was "certainly anti-Islam and anti-Muslim" and in that sense Islamophobic: **TE/Day 2/Peter Duthie Cross-Examination/ Printed Page 48/Lines 4-16**. He also stated that it was not the defender' place to form judgments on the content of what might or might not be stated in the SEC Hydro venue by those such as the pursuer hiring it and accepted that the contract

concluded between the pursuer and the defender contained no term to the effect/requirement that those hiring it are not to give expression to views that the Peter Duthie or an MSP would describe as homophobic: **TE/Day 2/Peter Duthie Cross-Examination/ Printed Pages 24025/Lines 22-26, 1-4.** And he accepted that at the SEC event for May 2020, Franklin Graham was not going to be speaking on any issues around homosexuality and/or Islam: **TE/Day 2/Peter Duthie Cross-Examination/ Printed Page 60/Lines 23-26**.

P6.20 The reference to the beliefs attributed to Franklin's Graham personally is relevant because, as the defender accepts, Section 13 EA 2010 also prohibits "associative discrimination" that is to say, where for example the defender treats the pursuer less favourably because of the individual religion or beliefs of Franklin Graham with whom the

pursuer is associated.[69] Direct associative discrimination, is in any event, also caught and prohibited by the anti-discrimination prohibitions of EU law[70] and under article 14 ECHR.[71]

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[69] See *EAD Solicitors v Abrams* [2016] ICR 380 per Langstaff J's judgment at §§ 11, 14-6.

> "11. …[T]he Equality Act does not deal with individuals on the basis of their protected characteristics but identifies discrimination as being detrimental treatment caused by the protected characteristic or related to it. Detrimental treatment can be given to any person, whether that person is natural or legal. There is no reason to restrict the class of those who can suffer a detriment if what is being complained of, and that which the statute seeks to avoid, is a detriment being suffered because of an individual's protected characteristic.
> …
> 14. … [O]n a clear wording of section 13(1) the protected characteristic does not have to be enjoyed by the person who is subject to the detrimental treatment. The treatment has to be detrimental to the claimant - but it is not the treatment itself but the reason for the treatment that is relevant to this discussion. The wording is 'because of a protected characteristic', and the Equality Act does not specify that it has to be the protected characteristic of the person suffering the detriment. It is thus entirely open within the wording of the Equality Act that the protected characteristic may be that of an individual who is not the claimant, and it would equally appear to be open … that the claimant suffering the detriment need not be capable of having a protected characteristic. Whether the claimant is capable or incapable of having the protected characteristic relied on for the claim is irrelevant to the cause of action.".

[70] See e.g. Case C-303/06 *Coleman v Attridge Law* [2008] ICR 1128.

[71] *Guberina v Croatia* (2018) 66 EHRR 11 at §§ 77-79:

> "77. The present case concerns a situation in which the pursuer did not allege discriminatory treatment related to his own disability but rather his alleged unfavourable treatment on the basis of the disability of his child, with whom he lives and for whom he provides care. In other words, in the present case *the question arises to what extent the pursuer, who does not himself belong to a disadvantaged group, nevertheless suffers less favourable treatment on grounds relating to the disability of his child.*
>
> 78 In this connection the Court reiterates that the words "other status" have generally been given a wide meaning in its case-law and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent. For example, a discrimination issue arose in cases where the pursuers' status, which served as the alleged basis for discriminatory treatment, was determined in relation to their family situation, such as their children's place of residence of. It thus follows, in the light of its objective and nature of the rights which it seeks to safeguard, that *art.14 of the Convention also covers instances in which an individual is treated less favourably on the basis of another person's status or protected characteristics.*
>
> *79 The Court therefore finds that the alleged discriminatory treatment of the pursuer on account of the disability of his child, with whom he has close personal links and for whom he provides care, is a form of disability-based discrimination covered by art.14 of the Convention.*"

80

P6.21 Given that the EA 2010 protects both the holding and the manifestation of religious beliefs, it follows that direct discrimination occurs wherever a person suffers a detriment because of religion or belief because of *conduct* which manifests a religious belief. Thus if the court finds that the defender denied or withdrew access to the SSE Hydro premises, or refused to provide such services associated with the hire of these premises (which it otherwise provides to the public), from the pursuer because of *others'* objection to the religious beliefs and political positions understood to be held and professed by those with whom the pursuer is associated (in this case Franklin Graham) the defender must still be found to have acted unlawfully in breach of the EA 2010.[72]

Substantial, *not* the only or main, reason

P6.22 In *Owen and Briggs v Jones* [1981] ICR 618 it was held that the protected characteristic would suffice for a discrimination claim to be upheld if it was a "substantial reason" for the decision.

P6.23 In *O'Neill v Governors of Thomas More School* [1997] ICR 33 it was held that the protected characteristic needed to be *a cause* of the decision, but did *not* need to be the only or a *main* cause.

P6.24 In *Igen Ltd v. Wong* [2005] EWCA Civ 142 [2005] ICR 931 the test was refined further such that it part of the reasoning that was more than a trivial part of it could suffice in this context. After referring to the following quotation from Lord Nicholls judgment in *Nagarajan* [2000] 1 AC 501

> "Decisions are frequently reached *for more than one reason*. Discrimination may be on racial grounds even though it is not the *sole* ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain

[72] *Saini v All Saints Haque Centre* [2009] 1 CMLR 38, EAT per Lady Smith at §§ 28-29

how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

the Court of Appeal concluded in *Igen* (at para 37) as follows:
A 'significant' influence *is an influence which is* <u>*more than trivial*</u>. We find it hard to believe that the principle of equal treatment would be breached by the *merely trivial*. We would therefore support the original para. (10) of the guidance set out in *Barton v Investec Securities Ltd.* [2003] ICR 1205 and, consistently therewith, a minor change suggested by Mr. Allen to para. (11) so that the latter part reads 'it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question'."

P6.25 The law was later summarised in *JP Morgan Europe Limited v Chweidan* [2011] EWCA Civ 648 [2012] ICR 268 in which Elias LJ said the following (in a case which concerned the protected characteristic of disability):

"5. Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment – *not necessarily the only reason but one which is* <u>*significant in the sense of more than trivial*</u> – must be the claimant's disability.

In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focusing on the *reason for* the treatment.

If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic: see the observations of Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 paragraphs 8–12.

That is how the tribunal approached the issue of direct discrimination in this case.

In practice a tribunal is unlikely to find unambiguous evidence of direct

discrimination. It is often a matter of inference from the primary facts found.

The burden of proof operates so that if the employee can establish a *prima facie case*, i.e. if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason then *the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason*".

The burden of proof under the EA 2010

P6.26 As was repeatedly highlighted and emphasised on the part of the pursuer during the proof, there is a statutory onus of proof resting on both the defender in this case (sic). This is set out in Section 136 EA 2010 which provides, so far as relevant, as follows:

> "136 Burden of proof
> (1) This section applies to any proceedings relating to a contravention of this Act.
> (2) If there are facts from which the court could decide, *in the absence of any other explanation*, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

P6.27 As noted above in *Igen Ltd v. Wong* [2005] EWCA Civ 142 [2005] ICR 931 the Court of Appeal approved the following modified *Barton* criteria to be applied in discrimination cases generally in relation to the burden of proof:

(1) Pursuant to section 136 EA 2010, it is for the pursuer who complains of unlawful discrimination because of a protected characteristic to prove on the balance of probabilities facts from which the court or tribunal <u>could</u> conclude, *in the absence of an adequate explanation*, that the defender has committed such an unlawful act of discrimination against the pursuer

(2) If the pursuer does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the pursuer has proved such facts that it is unusual to find direct evidence of discrimination because of a protected characteristic. Few persons would be prepared to admit such discrimination, even to themselves. In some cases, the discrimination will not be the result of an *intention* but merely based on an *assumption*.

(4) In deciding whether the pursuer has proved such facts, it is important to remember that the outcome at this stage of the analysis by the court or tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by that court or tribunal.

(5) It is important to note the word is '*could*'. At this stage the court or tribunal does not have to reach a definitive determination that such facts *would* lead it to the conclusion that there was an act of unlawful discrimination. At this stage, a court or tribunal is looking at the primary facts proved by the pursuer to see what inferences of secondary fact could be drawn from them.

(6) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance from an evasive or equivocal reply on the part of the defender to a question.

(7) Likewise, the court or tribunal must decide whether any provision of any relevant code of practice (or other established common standard of good practice in the sector) is relevant and, if so, take such standards of good practice into account in determining such facts. This means that inferences may also be drawn from any failure on the part of the defender to comply with any relevant code of practice, or other established common standard of good practice in the sector.

(8) Where the pursuer has proved facts from which inferences could be drawn that the defender has treated the pursuer less favourably because of a protected characteristic, then the burden of proof moves to the defender.

(9) It is then for the defender to prove that it did not commit, or, as the case may be, is not to be treated as having committed, that act.

(10) *To discharge that burden it is necessary for the defender to prove, on the balance of probabilities, that the treatment was **in no sense whatsoever** because of a protected characteristic.*

(11) That requires a court or tribunal to assess not merely whether the defender has proved *an* explanation for the facts from which such inferences can be drawn, but further that this explanation is *adequate* to discharge the defender's burden of proof on the balance of probabilities *that the identified protected characteristic was not a ground for the treatment in question*

(12) Since the facts necessary to prove an explanation would normally be in the possession of the defender, a court or tribunal would normally expect *cogent evidence* to discharge that burden of proof. In particular, the court or tribunal will need to examine carefully explanations for failure to comply with any applicable code of practice, or other established common standard of good practice in the sector.

P6.28 Subsequently in *Efobi v Royal Mail Group Ltd* [2019] EWCA Civ 19 [2019] ICR 750 Sir Patrick Elias noted at para 10:

> "10 The authorities demonstrate that there is a two-stage process. First, the burden is on the employee to establish facts from which a tribunal *could* conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred. At that stage the tribunal *must leave out of account the employer's explanation for the treatment.*
>
> If that burden is discharged, the *onus* shifts to the employer to give an explanation for the alleged discriminatory treatment and to satisfy the tribunal that *it was not tainted by a relevant proscribed characteristic.* If he does not discharge

that burden, the tribunal ***must*** find the case proved."

P6.29 In its decision in *Efobi v Royal Mail Group* [2021] UKSC 33 [2021] ICR 1263 (at §§14 and 34) the UK Supreme Court confirmed that the burden of proof where there is an allegation of conduct contrary to the EA 2010 is the same as it had been under previous anti-discrimination legislation. It is therefore a two-stage process for the court as follows:

(1) Has the pursuer satisfied the court that, on the balance of probabilities, there are facts which would permit this court to conclude, in the absence of any satisfactory explanation, that an unlawful act of discrimination had occurred?

(2) If yes, the burden then shifts to the defender to explain the reasons for the discriminatory treatment and it is for the defender to satisfy the court that the protected characteristic played ***no part*** in its reasoning.

P6.30 The defender in this case proceeds on an erroneous interpretation of the test to be applied by the court on this matter. The defender asks only whether the decision to terminate was "significantly influenced by the religion or belief of the pursuer, its members or associates". That is an incorrect test (albeit one that the defender would also fail in the circumstances of this case). The defender must show that the decision was made in a manner in which the pursuer's protected characteristic played "no part". It cannot do so.

P6.31 It is clear that the evidence which this court has heard is that there *are* facts from which the court *could* decide, *in the absence of any other explanation*, that the defender's unilateral decision without prior warning to or discussion with the pursuer to cancel the event and rescind the booking constituted direct discrimination against the defendant. There are undoubtedly facts from which this court can properly conclude that it was because of the pursuer's and Franklin Graham's religious beliefs that the defender made this decision. This court has seen the tweet from an MSP, sent shortly before the termination,

encouraging the defender to terminate the Contract on the grounds that the MSP and his followers find the (entirely concocted) message of the pursuer to be offensive: **JB/22/1243**. The court has seen the email correspondence between the head of PR for the defender and the head of PR for GCC, discussing the press coverage of the tour **JB/22/1221-1222,** (**JB/18/1025),** discussing the cancellations by other venues, and ultimately confirming that the decision to terminate had been taken *before* the board meeting: **JB/18/1030.** This court will remember the emails in reply from GCC, noting that the leader of the council was receiving difficult questions from the public: (**JB/18/1026** and (**JB/18/1029-1030**) The tenor of the evidence is not that public disorder was the concern on the minds of the defender's employees (which, in any event is not a defence for the reasons set out below) but, rather, that the defender was concerned that offence might be caused to groups that the defender saw fit to seek to "protect" from such offence (despite the potential offence being founded on an entirely false premise of what would be discussed at the Event – which was capable of being determined by the defender with the most cursory attempts at diligence).

P6.32 And in purporting unilaterally to cancel the event, the defender treated the pursuer less favourably than it treats or would treat others who did not share the religious beliefs of the pursuer outlined above and/or who held and wished to evangelise for different/opposing religious or other beliefs to those of the pursuer, and/or who did not have the protected characteristic of religion or belief. There is no reasonable alternative explanation contained in the defender's pleadings or which can be taken from the evidence which was taken from the defender's witnesses.

P6.33 The defender now seeks to suggest that the only suitable comparators are those whose event gave rise to the defender's concerns about public disorder. But the difficulty

with that suggestion by the defender is that, on their own evidence, there was no factual foundation for the claims (particularly from Susan Aitken) that there would be *any* public disorder. And even the defender's *ex post facto* G4S report on the matter suggests nothing more than an entirely manageable level of risk (even though the risk assessment was carried out entirely unscientifically and premised on an entirely flawed understanding of the Event).

P6.34 The reality is that the defender has sought to prevent the pursuer and its associates from expressing and manifesting their religious beliefs in an attempt to "protect" other groups from offence. But the defender makes no attempt to do the same when the tables are turned. Reference is made by the pursuer to the evidence in relation to Bianca del Rio, a drag insult- comic. The defender was only too happy to let highly insulting material to be delivered from its stage when it emanated *from* the LGBTQ+ community but saw it as its duty to protect that same community in the face of entirely fabricated comments as to the message to be preached at the Event. The only possible reason for that distinction is that the defender sought to silence the religious views and beliefs of the pursuer by cancelling the booking and thereafter refusing to re-schedule any date for the event. That is all evidence of direct discrimination because of religion or belief.

P6.35 That being the case, the defender is required to satisfy this court that, on the balance of probabilities, it was *not* materially influenced by a protected characteristic. As set out in *Efobi,* the defender is required to demonstrate that the pursuer's protected characteristic played *no part in its reasoning*. The defender's pleadings contained no offers to prove any such explanation, and none has been provided in the evidence from the defenders.

No justification for direct discrimination

P6.36 Further, as we have noted above, such direct discrimination because of religion or belief *cannot* as a matter of law be justified: see e.g. *R (E) v Governing Body of JFS* [2010] 2 AC 728.

P6.37 In his evidence Peter Duthie said that the issue of concern which led him to decide to cancel the Event was that of protestors objecting to the religious views of Franklin Graham coming to protest and those protests turning violent **TE/Day 2/Peter Duthie Cross- Examination/ Printed Page 30/Lines 15-18.**

P6.38 But the defender cannot escape a finding of direct discrimination by saying that it was forced by circumstances beyond its control to act to avoid unrest or violence from third parties who objected to the pursuer and/or Franklin Graham's religion or beliefs[73]. As Browne-Wilkinson J (as he then was) noted when sitting in the EAT in *Din (Ghulam) v Carrington Viyella Ltd (Jersey Kapwood Ltd)* [1982] ICR 256 at 260F-J:

> "In our view, if an act of racial discrimination gives rise to actual or potential industrial unrest, an employer will or may be liable for unlawful discrimination if he simply seeks to remove that unrest by getting rid of, or not re-employing, the person against whom racial discrimination has been shown. That that is the law seems to us to be supported by another passage in the *Seide* case where this

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[73] In *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55 [2005] 2 AC 1 Baroness Hale notes at § 88:

> "If a person acts on racial grounds, the reason why he does so is irrelevant: see Lord Nicholls of Birkenhead in *Nagarajan* [2000] 1 AC 501 at p 511. The law reports are full of examples of obviously discriminatory treatment *which was in no way motivated by racism or sexism and often brought about by pressures beyond the discriminators' control*:
>
> - the council which sacked a black road sweeper to whom the union objected in order to avoid industrial action (*R v Commission for Racial Equality, Ex p Westminster City Council* [1985] ICR 827);
>
> - the council which for historical reasons provided fewer selective school places for girls than for boys : *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1155)."
>
> -

appeal tribunal says, at p. 430:

'[Counsel for the employers] accepts that if what had happened here was that the company had moved Mr. Seide because they were anti-Semitic, and also if the company had transferred him because another employee was anti-Semitic and the company was not willing to move the latter, that would amount to racial discrimination within the meaning of the Act. *It would be the same as the situation which has arisen from time to time where a company has either refused to appoint or promote or has demoted someone because of racial attitudes on the part of, not the employers, but their employees*."

P6.39 Similarly in *R v Commission for Racial Equality, Ex p Westminster City Council* [1984] ICR 770 Woolf J (as he then was) noted at 780 C-E:

"The CRE were entitled to take the view that Mr. Rolfe was taking a different course in respect of someone who was black, albeit with the greatest of reluctance, which he would not have taken if he was white because *he knew that if he did not do so the result would be industrial action which could have serious consequences for the staff agreement.*

As I interpret the Race Relations Act 1976, it is not a justification for what would otherwise be an unlawful discrimination to rely on the fact that the alternative would be possible industrial unrest.

If the position were otherwise it would always be possible to frustrate the objects of the Act by threatening industrial action."

P6.40 And in *James v Eastleigh Borough Council* [1990] 2 AC 751 Lord Lowry noted at 779:

"If a men's hairdresser dismisses the only woman on his staff *because the customers prefer to have their hair cut by a man*, he may regret losing her but he treats her less favourably because she is a woman, that is, on the ground of her sex, having made a deliberate decision to do so.

If the foreman dismisses an efficient and co-operative black road sweeper in order to avoid industrial action by the remaining (white) members of the squad, he treats him less favourably on racial grounds.

If a decision is taken, for reasons which may seem in other respects valid and sensible, not to employ a girl in a group otherwise consisting entirely of men, the employer has treated that girl less favourably than he would treat a man and he has done so consciously on the ground (which *he considers* to be a proper ground) that she is a woman.

In *none* of these cases is a defence provided by an excusable or even by a worthy

motive."

P6.41 In *Amnesty International v Ahmed* [2009] ICR 1450, Underhill J (as the then EAT President) stated (at para 58):

> "The legislature - both here and in Brussels - has deliberately set its face against allowing any defence of justification in cases of direct discrimination. No doubt a principled case can be made that concerns about racial prejudice displayed by third parties overseas should no more afford a defence to an employer than the equivalent fears about discriminatory conduct by third parties in this country".

P6.42 And most recently and most directly on point with the situation of the present case in *Lancashire Festival of Hope v. Blackpool Borough Council* F00MA124 Manchester County Court (1 April 2021) Judge Claire Evans noted at paras 133-135:

> "133. The suggestion that removal on the grounds of the offence caused to the public by the association of the Claimant with Franklin Graham and his religious beliefs would not be "because of" the religious beliefs but rather because of a response to public opinion or concern seems to me to be a distinction that cannot properly be drawn having regard to the intention behind the Equality Act of eliminating discrimination.
>
> If mainstream societal opinion were to change consequent on, say, a white supremacist rising, should we allow a situation where the Defendants may, without fear of an EA claim, cancel advertisements for companies which are known to promote an anti-racist message because of pressure and complaint made by white supremacist groups?
>
> Should a hotelier be able to refuse a double room to a same-sex couple not because he objects to their sexual orientation but because all of the other guests in his hotel object to it and find it offensive?
>
> Rather than eliminate discrimination, to allow that reading of "because of" would be to give free rein to discrimination.
>
> "Because of" refers to the factual basis for the decision rather than motive or intention (see Lord Goff in *R v Birmingham City Council ex parte EOC* [1989] AC1155 at p 1194: if motive or intention was a necessary condition of liability, "*it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy.*").

134. There is no defence of justification to direct discrimination. The issues arising from the desire to avoid offence to certain sectors of the community are or may be relevant to the HRA claims, where there is a balancing exercise to be undertaken, but they seem to me not to be relevant to the EA claim in this particular case.

135. The complaints arose from the objections of members of the public to the religious beliefs. The removal came about because of those complaints. I find it also came about because the Defendants allied themselves on the issue of the religious beliefs with the complainants, and against the Claimant and others holding them. If there were any doubt about that it is made explicit by the content of the press statement issued on behalf of the Second Defendant when the advertisements were removed. "

P7 **APPLICATION OF THE LAW TO THE FACTS OF THE CASE**

P7.1 It appears not to be disputed by the defender that section 29 EA 2010 applies in the circumstances of the present case such as to require the defender not to discriminate when offering or refusing their services or hire of their SEC premises. Section 29 EA 2010 plainly required the defender not to discriminate when making its decision on bookings or terminations.

P7.2 The first branch of section 13 EA 2010 is plainly met: a decision unilaterally to terminate the pursuer's booking constituted detrimental and less favourable treatment of the pursuer. The Termination Letter deprived the pursuer of the opportunity (which it had acquired and paid for in good faith) to hold its event in its chosen venue. And the continued refusal by the defender to agree to re-schedule the event constitutes either a new or a continuing act of discrimination against the pursuer.

P7.3 The key question is as to the other branch of section 13 EA 2010. The Court must ask whether, in taking the decision unilaterally to cancel the pursuer's booking for the event -

and thereafter in refusing to re-schedule the event for another mutually convenient date - the defender was and is being influenced, in more than a trivial way by:

(1) The religious and political beliefs attributed to the pursuer and/or to Franklin Graham (with whom the pursuer is manifestly associated).

(2) The manifestations of the religious beliefs by the pursuer and/or Franklin Graham.

P7.4 As we have noted there is no doubt that the pursuer and Franklin Graham hold and proclaim the religious beliefs of evangelical Protestantism. These beliefs relate to profound aspects of Christian theology, ranging from belief in an obligation to proclaim the message of Jesus Christ to a conviction that sexual activity is something only to be expressed by opposite sex partners in a monogamous marriage.

P7.5 There is no doubt that the pursuer in organising the events and Franklin Graham in his preaching and in his public speaking have each manifested these religious beliefs in accordance with this religious obligation and duty to proclaim the Gospel and bring the Good News of Jesus Christ to all.

P7.6 And it is plain that there are people and organisation who are *opposed* to the beliefs held to and proclaimed by the pursuer and by Franklin Graham and who lobby or request or put pressure on the defender to cancel the Event because of their objections to the pursuer and Franklin's Graham's religious beliefs (as well as certainly political views imputed to them)

P7.7 Some such as Reverend A (**JB/22/1223-1224 and JB/19/1150)** and the Reverend B (**JB/22/1225 and JB/19/1156)** have objections which are apparently theologically based.

P7.8 Others, such as an MSP, have objections which are ideologically and politically based (**JB/22/1243 and JB/19/1115, 1154).**

P7.9 And others such as Glasgow City Council have objections which appear to be based on a misunderstanding of the law (in their case the Public Sector Equality Duty under Section 149 EA 2010) and - on the evidence of Peter Duthie himself **TE/Day 3/Peter Duthie Cross- examination/ Printed Page 67/Lines 5-16** - on a misunderstanding of the facts (in in asserting that the Event might be used as would be used as a platform for Franklin Graham to make homophobic and Islamophobic comments): **JB/21/1210.**

P7.10 What unites these objectors – whatever the various bases or motivation for their objections – is that they do not want the Event to go ahead. And it is in response to these objections to the pursuer's and Franklin's actual religious and imputed political beliefs, that the defender cancels the booking for the event, notwithstanding Peter Duthie's claim in his oral evidence before this court that he considered these objectors simply to be factually wrong in their claims. In his cross-examination, Peter Duthie gave the following evidence TE/Day 2/Peter Duthie Cross-examination/ Printed Page 41-42/Lines 17-26, 1-4

> "[W]hat are your views on that characterisation of the BGEA event as being a platform for homophobic and transphobic hatred? Is that an accurate statement as far as you are concerned?
> - No.
>
> In which sense would you deny its accuracy?
> - I don't believe that - I don't actually believe that Franklin Graham was going to be preaching hatred.
>
> So, this event was never going to be a platform for homophobic and transphobic hatred as far as you were concerned?
> - Not as far as I was concerned, but as far as others were concerned, clearly it was.
>
> I am sorry?
> - As far as others were concerned, it clearly was.

Yes, well, [the MSP] has said it, but you say he is wrong?
- Yes.

P7.11 But whether any less favourable treatment is *"because"* of a protected characteristic is answered by posing an objective question: *Preddy v Bull* [2013] UKSC 73 [2013] 1 WLR 3741 at §§30, 66 and 71. In this case, that question is: would the pursuer have received the same treatment as any other booking but for the religious views and beliefs attributed to Franklin Graham?

P7.12 It is an irrelevance to this case if the court determines that, subjectively, the defender intended to do something other than cause the pursuer to be treated less favourably. Provided that it can be inferred from the evidence that a more than trivial cause of the decision to treat the pursuer less favourably was its protected characteristic of religion or belief. And as we have seen, it is entirely possible for a party to discriminate contrary to equality law as a result of unconscious bias: *Nagarajan v London Regional Transport* [2000] 1 AC 501 at 511-519; *Cary v Commissioner of the Police of the Metropolis* [2014] EWCA Civ 987 [2015] ICR 71 at §51.

P7.13 On the evidence before this court and the pleadings settled by the defender, it is absolutely clear beyond peradventure that the defender's conduct in cancelling the booking for the event was materially influenced by its understanding of the beliefs of the pursuer and Franklin Graham and the pursuer and Franklin Graham's desire and intent to manifest those beliefs. Consistently with this, the complaints that the defender's own pleadings narrate as leading to the Termination Letter relate exclusively to the religious beliefs of Franklin Graham.

P7.14 The fact that the defender seeks now to paint the decision to terminate as a White Knight attempt to save the public at large – and particularly the LGBTQIA+ and separately the Muslim communities – from *offence* is not the *defence* the defender appears to believe it to be. The motivating factor behind the decision to terminate the Contract, however one paints it, was the religious belief of the pursuer and those with whom it is associated and the manifestation of those beliefs. But for those beliefs, the Termination Letter would not have been issued. For the purposes of section 29 EA 2010, the Termination Letter was issued *because* of the religious belief of the pursuer and those with whom it is associated.

P7.15 Aspects of the religious beliefs of the pursuer and of Franklin Graham may well now perhaps be regarded in some sections of UK society as controversial. Some members of society strongly oppose them and, indeed, it may be that not all who call themselves Christians adhere to them. But many do. Those beliefs remain genuinely-held and legitimate Christian beliefs, founded in Christian scripture and still proclaimed within individual Christian churches and preached by Christian Ministers including those of the evangelical wing of the Church of England. The beliefs are not unique to Franklin Graham, nor to the evangelical Christian tradition. Previous decisions make clear that beliefs effectively identical to the Religious Beliefs do fall within the protection of article 9 ECHR and the EA 2010: see e.g. *Lee v Ashers Baking Co* [2018] UKSC 49 [2018] 3 WLR 1294 at § 56; *Eweida v United Kingdom* (2013) 57 EHRR 8 at §§ 103, 108. Sales J (as he then was) in *Catholic Care v Charity Commission (No 2)* [2012] UKUT 395 (TCC) [2013] 1 WLR 2105 (at § 44):

> "[W]here third party donors are motivated by sincerely held religious beliefs in line with a major tradition in European society such as that represented by the doctrine of the Roman Catholic Church (and particularly where, as here, their activities do not dominate the public sphere in relation to the activity in question - provision of adoption services - which are otherwise widely available to homosexuals and same sex couples), the position is rather different.

> *In my opinion, donors motivated by respect for Roman Catholic doctrine to have a preference to support adoption within a traditional family structure cannot be equated with racist bigots, as Ms Dixon sought to suggest.* Such views have a legitimate place in a pluralist, tolerant and broadminded society, as judgments of the European Court of Human Rights indicate."

P7.16 Neither the common law nor the EA 2010 as interpreted in line with the HRA 1998 guarantees any right not to be confronted with opinions that are opposed to one's own convictions. To the contrary, freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of everyone. It is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As has been judicially noted:

> "89. … The United Kingdom has a long tradition of religious tolerance. Section 13 of the 1998 Act formalises and fortifies that tradition by compelling the courts to have "particular regard" to the importance of art.9, ECHR in any adjudication that "might affect" the exercise of that right by a religious organisation or its members. Article 9 ECHR protects both the right to hold a religion or belief (which is absolute) and the right to 'manifest' that religion or belief (which is qualified).
> …
> 95. … History is replete with grim memorials to the wreckage caused by religious intolerance. Intolerance of that peculiarly malignant nature is toxic and corrosive to social cohesion and harmony. It destroys community life. It is inimical to the pluralistic objectives of the ECHR."[74]

[74] *Apprentice Boys of Derry, Bridgeton v Glasgow City Council*, 2019 SLT (Sh. Ct.) 317 per Sheriff S Reid at §§ 89, 95

P7.17 There is perhaps a current *social* (*i.e.* *not* *legal*) trend to consider that one should be protected from the expressions of others which cause one to feel uncomfortable or offended. It has led to the phenomenon commonly referred to as "cancel culture" where one side of an argument is simply silenced by the other. Such a trend is anathema to the freedoms that are protected in this country by the law. It is also anathema to healthy public debate. It has no basis in law, and it has no place in a modern democratic society.

P7.18 The courts of England and Wales very recently summarised the position as regards the domestic law on freedom of expression (which cannot reasonably be said to differ between Scotland and England & Wales): *R (Miller) v College of Policing* [2020] EWHC 225 (Admin) [2020] HRLR 10 per Julian Knowles J at §§1-6.[75] Freedom of expression is *not* restricted to matters that are uncontroversial or inoffensive. There is no protected right on the part of any individual not to be offended: *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34 at §49. Indeed that is a central and recurring theme in freedom of expression case law: cf *Dojan v Germany* (2011) 53 EHRR SE24 at §68.

[75] In *R (Miller) v College of Policing* [2020] EWHC 225 (Admin) [2020] HRLR 10 per Julian Knowles J at first instance, Julian Knowles J held that that the decision of Humberside police (to record the claimant's expression on Twitter of his views on transgender issues as a "hate incident", and subsequently to visit the claimant's workplace and to contact him by phone to tell him that the matter had been so and advise him that, although his behaviour did not yet amount to criminal behaviour, if it escalated then it could become criminal, and that the police would then need to deal with it appropriately) had breached the claimant's right to freedom of expression under Article 10 ECHR. The claimant's further claim that Humberside Police Hate Crime Operational Guidance was in itself unlawful was dismissed by Julian Knowles J., but on appeal the Court of Appeal held that the Guidance was indeed unlawful on the basis that it was capable of unfairly stigmatising those against whom a complaint was made and constituted a disproportionate incursion into freedom of expression that was more than is strictly necessary: *R (Miller) v. College of Policing* [2021] EWCA Civ 1926 [2022] HRLR 6

P7.19 There will always be, in a pluralist society, strongly held beliefs that cannot be reconciled with one another. That does not mean that one or the other of those views should be prevented from being expressed.

P8 THE DEFENDER'S DEFENCE

P8.1 The parties are not in dispute that the pursuer and the defender contracted with one another (**Article 3/Answer 3**). That Contract is incorporated into the pleadings and the court can see for itself what was agreed therein.

P8.2 It is also not in dispute that the defender was aware of Franklin Graham's association with the pursuer and that the defender nonetheless freely and willingly entered into the Contract (**Article 7/Answer 7**).

P8.3 It is also not in dispute that the defender presented the pursuer with the Termination Letter on 29 January 2020 (**Article 7/Answer 7**). The Termination Letter is also incorporated into the pleadings.

P8.4 As noted at the outset, given the terms of the court's judgment following debate, the court is no longer dealing with this case as a breach of contract case.

P8.5 The first question for this court in this case is whether the Termination Letter represents a denial of service to the pursuer because of religion or belief contrary to the obligations contained in the EA 2010.

P8.6 The second question is whether the defender's refusal to countenance the re-scheduling of the Event at a date to be mutually agreed represents a further denial of service to the pursuer because of religion or belief contrary to the obligations contained in the Equality Act 2010.

P8.7 The pursuer respectfully submits that the answer to each of these questions is, undoubtedly, yes, for the reasons more fully set out below.

The Defender's explanation for cancelling the booking and refusing thereafter to reschedule

The G4S report explanation

P8.8 The defender's Termination Letter must be viewed only in the context in which it was sent and any attempt at formulating *ex post facto* reasoning – such as the now-professed G4S report – is wholly *irrelevant* to the determination of whether or not the decision to send the Termination Letter was tainted by considerations relative to unlawful discrimination. On this point – which is the only point now before the court - the G4S report sheds no light and can be afforded no evidential weight whatsoever.

P8.9 It is a matter of agreement (per the joint minute) that the report was not even instructed until after the termination letter had been sent. The court simply cannot admit – far less rely on - evidence such as the G4S report which purports to indicate that the real reason for a decision was different from the reasons given in the termination letter, particularly in a case where the defender admits that this "new" evidence supposedly contain in or constituted by the G4S report and now sought to be relied upon did not even exist at the time the decision was taken. This is instead a textbook example of an illicit attempt to construct a new justification *ex post facto* for a decision impugned on equality law grounds. Nothing in the EA 2010 - or the principle of equality law - more generally allows for any such procedure or process.

P8.10 In any event, in cross-examination **TE/Day 4/Michael Cooper Cross- examination/ Printed Pages 134-153**, the defender's witness, Mr Cooper of G4S candidly admitted that (i) he had no particular qualifications that permitted him to carry out risk assessments; (ii) the risk assessments are, in any event, based on no objective methodology but, rather, on an entirely subjective and arbitrary allocation of figures; (iii) the extent of the research into the Event that had been carried out was a telephone call with a friend at the O2 in London and a google search; (iv) whether an event was ticketed or unticketed made little difference to the security at an event and, in fact, the only difference it made at all was that the customer would need to visit the box office (where they would not be screened) at some point prior to entry (where their bags would be searched whether or not it was a ticketed event), (v) the profile of the Event included in the assessment was one- sided in its treatment of how the pursuer and Franklin Graham might be perceived; (vi) he was entirely unaware that an event had taken place in Blackpool at which there were no violent incidents; (vii) it was usual for the clients to be involved in the risk assessment but the pursuer had not been involved in this risk assessment; (viii) in a worst-case scenario, the protests in question were likely to involve someone shouting and the venue was not looking at anything like protests akin to rioting or bodies being carried out on stretchers; and (ix) any increased risk of protesting could have been dealt with through an increased level of security personnel at the venue but that was never discussed with the pursuer.

P8.11 Therefore, far from being any kind of explanation for the defender's treatment of the pursuer, what it demonstrates is that the defender sought to rationalise its behaviour after having already cancelled the Event. But even the defender's relied-upon position of there being a risk of protesting (bearing in mind that is now what it says in the Termination

Letter) could have been readily mitigated through discussion with the pursuer. The reality is that the defender had already made up its mind to terminate the Contract as a result of the religious beliefs of the pursuer and those with whom it associates. This is clear from among other things the following passage from the evidence of Peter Duthie **TE/Day 2/Peter Duthie Cross-Examination/ Printed Pages 36-37/Lines 13-26, 1-25:**

> "[Y]ou have public events all the time, presumably, do you not?
> - We do.
>
> And people can come in, if they get a ticket, and they can go to the event, can they?
> - They can.
>
> And you have security arrangements to deal with matters about potential disruption and the like, do you not?
> - We do.
>
> And you can enter into increased or decreased levels of security depending on the risk profile of any event?
> - We can.
>
> So, all those are potential remedies for any issue which you might consider, are they not?
> - But this reaches a stage where I don't believe it could be remedied.
>
> Yes, but you have not said any of this, you have not told anybody - this is all in your head. BGEA are told nothing of this. You have become, one might say, judge and jury, and said, 'This cannot be remedied no matter what.' That you have gone through every possible option of perhaps limiting the numbers, limiting that invitations, checking on security measures, checking about ticketing issues and you have thought about all those, and you have not discussed any of this with BGEA, but you have come to the conclusion that there is nothing which could remedy the issue. Is that what you are telling us?
> - Yes.
>
> That is all that happened between the 27th of January with the Facebook post and the decision of the board on the 29th of January - you did all those things?
> - Yes.
>
> Did you? Where is the evidence for that? Where is the paperwork which shows you did all of those things ?
> - Did all of what things? Considered the situation?

Considered the issues of contacting the BGEA to see if one could have a non, or a ticketed event in some way, to check on entrance
- I didn't believe that was the right solution.

But you did not contact the BGEA about it?
- No.

About the possibility of more security?
- I didn't believe that was the solution"

Defender being "brought into disrepute" explanation

P8.12 The basis of the Termination Letter – as is clear on its face – is that the defender stated that the pursuer's presence at its venue would bring it (and Glasgow as a city) into disrepute. That is the sole basis of termination. There was no suggestion of security concerns at that time. There was no suggestion that the pursuer should be prevented from hosting the Event so as to avoid Islamophobia or homophobia.

P8.13 It has never been explained by the defender either in its pleadings or its evidence what is said to have given rise to the possibility of damage to the defender's reputation nor how the pursuer was responsible for it. We have this from Peter Duthie **TE/Day 2/Peter Duthie Cross-Examination/ Printed Pages 32, 35/Lines 10-23, 5-8:**

"[T]he BGEA are being blamed for the fact that there are other people protesting in social media and the like - this is the adverse publicity that you are talking about it, is it not?
- It is.

So, they are to blame for the fact that people are protesting against their religious views online?
- They certainly didn't help the situation.

Yes, but that is not what this [Termination letter] says. This says, 'The adverse publicity
...' So, 'Because people are protesting online about your religious views, that is your fault, that brings SEC into disrepute, we are cancelling this contract, this cannot be remedied, it's finished.
- As I said earlier, the letter doesn't state it as clearly as I would like it to

do, but that is why we are cancelling the event.
…
Did SEC consider that the recent adverse publicity was a matter which constituted a breach of contract such as could be blamed on BGEA as bringing SEC into disrepute?
- Not specifically, no."

P8.14 The truth is, however, clear: having been whipped up on social media, certain members of the public had contacted the defender – the Court has seen those emails – and the defender, despite having no reason to suspect that the pursuer or any attendee at the Event had any intention to speak about anything controversial, sought to silence the pursuer to placate those people, and terminated the Contract because of the pursuer's religious beliefs. Mr Duthie described the LGBTQIA+ community as "highly motivated and well organised", demonstrating that his thought process was to prevent the expression of the defender's message (as framed by the MSP and others) in case that community were to be offended. As Peter Duthie conceded in cross examination **TE/Day 1/Peter Duthie Cross-examination/ Printed Pages 38, 39/Lines 23-26, 13-16**

- "we have seen before that the LGBTQI community is well organised, very, very motivated, they campaign strongly and, in terms of physical protests, they organise themselves very well.

…

It is the protests organised by a well organised community which you say is the reason why you have to cancel this event?

- Ultimately."

P8.15 And then at TE/Day 2/Peter Duthie Cross-examination/ Printed Pages 69- 70/Lines 22-26, 1-19

"[T]he petition states, and it is a quotation from the petition - that if you, SEC, ' …are unwilling to take the decision on moral and ethical grounds, then SEC ought to consider carefully the impact alienating the LGBTQI+ communities in Scotland, as well as faith and religious groups, will have on their business' -

what do you understand by that?
- It seems as if it's a veiled threat, that people in our community might ...

Boycott you
- Potentially.

So, because of their objections to Franklin Graham's religious views, they are threatening, as you understand it, an adverse commercial impact on your business

- Potentially."

A private event became public

P8.16 A further excuse was subsequently given in relation to a mistaken assumption that the Event would be "private", although no explanation is given of what is meant by that nor on what basis the mistake was made. The defender appears in its witnesses affidavits to place enormous weight on this explanation. But the whole evidence before the court does not support such a mistaken assumption: it is clear that the defender knew that the event was to be unticketed and had discussed arrangements with the pursuer whereby the numbers of people attending would be monitored by way of scanning equipment (**Darren Tosh at §15 JB/4/177; Debbie McWilliams at §6 B/7/331; Peter Duthie at §13 JB/13/374; CEO's report JB/22/1216**). It is demonstrably false to claim, as the defender now seeks to do, that they had no idea that the event would not be a ticketed event until they saw a Facebook post from Franklin Graham. Any such suggestion to this court should be roundly rejected. And, in any event, as was explained by Mr Cooper to the court, whether the Event was ticketed or non-ticketed made no difference. Someone buying a ticket would not be asked "are you here to protest?" and everyone entering the building would have their bag searched anyway.

P8.17 It should also be noted that, upon this alleged revelation, having seen a Facebook post, there does not appear to have been any attempt to discuss with the pursuer what was intended. There does not appear to have been any attempt to determine whether the alleged reading of the Facebook post was accurate. The evidence before the court (**Peter Duthie at §§15-16 JB/13/375; Susan Aitken at §26 JB/12/369)** is that the defender was made aware of the Facebook post and then leapt to hysterical conclusions of rioting within the SEC and bodies being carried out without any attempt made to speak to the pursuer. It would appear that, had they spoken to Mr Cooper at that point rather than only after termination, Mr Cooper would have told the defender's board (as he told this court) that their concerns were unfounded. The explanation offered to this court by the defender is not just incredible and unreliable – it is nonsense.

True reason for the termination decision

P8.18 What is clear from the defender's pleadings at Answer 10 and from the evidence before this court is that the true reason for the decision to issue the Termination Letter was that the defender came under pressure from Glasgow City Council, at least one MSP, and (at least on Peter Duthie's account to the Board) the SSE as a sponsor[76] and potential clients

[76] See **TE/Day 2/Peter Duthie Cross-examination/ Printed Page 33/Lines 9-16**
"So, this recent adverse publicity bit seems to have been caused, or the basis upon which you say BGEA have acted in disrepute, you say you have, "...reviewed it with our partners and stakeholders." Who is that, who are your 12 partners and stakeholders?
- Our sponsors.

Could you name them, please?
- Glasgow City Council, SSE.

Sorry?
- SSE ...

(among others) to refuse to permit the pursuer to host the Event because of certain comments attributed to Franklin Graham, made in the expression of his faith. One need only look at the letter from the Chief Executive of Glasgow City Council **(production 6/3 JB/21/1210)** to see that: "I write regarding the SEC's proposed hosting of an event featuring Franklin Graham. On behalf of the council, as the majority shareholder of SEC Ltd, I have to ask you to cancel this booking …". The defender pleads that Glasgow City Council asked it to cancel the event on 29th January 2020, the very same day that the Termination Letter was issued. There was, on the defender's own pleadings no independent or objective determination of the defender's obligations under the Contract.

P8.19 Indeed, the defender pleads that the defender's Chief Executive, Peter Duthie, posed the question to the defender's board about "whether the Event should be allowed to proceed". Billy McFadyen's contemporaneous Minutes of the Board meeting **JB/Tab 19/page 1003** record Peter Duthie's presentation to the Board thus:

> "299.32 PD asked that the Board consider if we should run the event.
>
> 299.33 GCC as major shareholder will come under pressure on the event.
> 299.34 MMcN noted that contractually we may be in breach.
> 299.35 PL stated it's about 'doing the right thing' notwithstanding the contractual position.
> 299.36 PD suggested a way forward. GCC having considered the matter may formally request that SEC does not hold the event."

P8.20 There was, on the defender's own pleadings, no consideration of what the defender was obliged to do as a matter of equality law, under reference to the EA 2010 provisions. There was a decision taken to get out of the contract by any means – even if in breach of

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Are there any others?
- Not that I can think of."
-

contractual or statutory obligation – in order to avoid upsetting Glasgow City Council and to deal with the consequences of doing so thereafter **(Email of Will Whitehorn at JB/19/1009; Board Minute at §299.35 at JB/19/1003).** This action represents those consequences.

P8.21 Mr Whitehorn, the author of the email **JB/19/1009**, gave evidence to this court. That evidence was given in an evasive (and occasionally argumentative) manner where, throughout cross-examination, Mr Whitehorn sought to avoid answering difficult questions. In particular, he sought to rely in his affidavit on the G4S report having vindicated his position at the board meeting and, when it was pointed out that the G4S evidence to the court did not support his position, he then sought to suggest (i) that he did not need a risk assessment, (ii) it would have taken too long to get a risk assessment, and (iii) the decision to cancel was not a risk assessment of the risk of protesting. The reality is that he and his fellow board members were sold a story about the pursuer and Franklin Graham, and they leapt to assumptions without any foundation and, instead of investigating the matter – or even attempting to speak to the pursuer – they opted instead to terminate the Contract in an attempt to prevent the pursuer and those with whom it is associated expressing and manifesting their religious views. The court heard, in particular, that transcripts of the speeches from the Blackpool event were available. If the defender had any real interest in discovering the truth about what the Event was likely to cover in terms of topics, they could easily have done so. That they did not even attempt to do so demonstrates to this court the reality of the circumstance: the defender wanted to get out of the Contract because of pressure placed on them from Glasgow City Council and in a virtue signalling attempt to look like the White Knight.

P8.22 There is no basis or foundation for any suggestion that there was any intention at the Event for any comment to be made in relation to either Islam or homosexuality. The court has heard no evidence that any such comments were intended or even reasonably likely. But this appears to have been a pre-occupation on the part of the defender's Chief Executive. His evidence to this court was that, if Franklin Graham was allowed to speak, the defender would be boycotted by the LGBTQIA+ community. The basis for that concern appears to have been that there are lots of LGBTQIA+ people in the artistic community (**Peter Duthie affidavit at §18.2 JB/13/375**) and nothing any more substantive than that.

P8.23 Indeed, Franklin Graham issued a public statement on 27 January 2020 to the effect that he had no intention of bringing hateful speech to the UK and, addressing directly the LGBTQIA+ community, noting that they would be made welcome at the Event. That matter aside, however, the defender and Glasgow City Council evidently attributed those views to Franklin Graham and, by association, to the pursuer. That, as one readily sees from the GCC letter and from the public correspondence campaign which caused the matter to be brought before the board, is the primary – indeed the only – reason for the decision to issue the Termination letter. Everything else is subsidiary to the fact that the defender unilaterally determined that, when balancing the pursuer's constitutionally-protected right to hold and express religious views against the non-existent right of certain individuals not to be offended, the non-existent right should trump the constitution. That is the heart of this case and is fatal to the purported defence offered by the defender.

P8.24 The defender's position on all of this seems to be borne out in the evidence of Peter Duthie. He was shown the email at **JB/22/1221** between the Heads of PR at the defender and Glasgow City Council and into which he was copied. That email reads:

> "… Not sure if you are aware but we have Franklin Graham the evangelist playing the Hydro here at the end of May. The event organizer is planning a launch event this weekend in the main SEC (which is why I am letting you know now).
>
> There has been a lot of controversy especially around reports that he arguably endorses homophobic views and there have been a lot of discussions between venues on the tour. Off the record it looks like the O2 is cancelling the event which may have repercussions for the rest of us."

P8.25 So, contrary to the affidavits lodged with this court by the defender, the views of Franklin Graham are at the very centre of the defender's concerns about the Event. Indeed, in another email between the Heads of PR **(JB/18/1030)** it is stated as follows:

> "… Probably not surprisingly given the press today we have made a decision not to go ahead with this because of the issues surrounding this escalating.
>
> Just wanted to give you the heads up."

P8.26 That email is sent on **28 January 2020 at 10.22**, prior to the board meeting. It is plain on its face that the decision had been taken by that time to cancel the Event. The decision was not taken by the defender's board. It was taken by the defender's CEO, Peter Duthie. This court heard director after director accept that that is what this email shows and that they were just being informed of it "for their views".

P8.27 Mr Duthie accepted in cross examination that the reason he regarded Franklin Graham to be controversial was because of his views on same sex relationships and homosexuality being a sin and he accepted that they are religious views on Mr Graham's part.

P8.28 Mr Duthie's expressed position was that the SEC should have no view in relation to the content of what is said from the stage, provided that it is lawful. His actions, however, tell a different story. As is recorded in the email from Kirsten McAlonan at **JB/18/1030**, Mr Duthie has determined by 28 January 2020 that the Event will not go ahead because there

was a "twitter storm" about the views of Franklin Graham and Mr Duthie was receiving questions from the press as a result. Mr Duthie then takes the matter as a *fait accompli* to the board of directors.

P8.29 The minutes of the board meeting on 29 January 2020 are at **JB/22/1217**. In those minutes, despite it being clear from the email a day earlier, Mr Duthie appears to pose the question to the board: consider if we should run the Event. As set out above, the board members leap to all sorts of conclusions – Frank McAveety describes "the message" as on a darker scale than has been seen before **JB/22/1218;** Susan Aitken describes it as an event where people are being directed about how to behave **JB/22/1218** – and goes further in her **affidavit at §26 JB/12/369** and suggests there was a possibility of bodies being carried out of the Hydro (something borne of no foundation whatsoever, entirely a figment of her imagination, and expressly disavowed by G4S subsequently). Morag McNeill and John Watson suggest (sensibly) that there are contractual issues to be considered and that the board should look at how any potential public disorder could be mitigated rather than leaping straight to termination. In the face of a disagreement between Ms McNeill and Ms Lafferty as to whether contract law should be followed in this case, Mr Duthie suggests "a way forward" by providing cover for the board by asking GCC to request that the Event be cancelled. It is unclear whether the board are at all aware that GCC have already been informed by this stage that the decision to cancel the Event has already been taken.

P8.30 It is of particular note that, despite the fact that it is clear from the documentation that in the week prior to the sending of the termination letter, Peter Duthie had had discussions with the Glasgow City Council Chief Executive Annemarie O'Donnell (whom the defender chose not to call as a witness nor to provide any witness statement from her)

concerning the Event (see **TE/Day 2/Peter Duthie Cross-examination/Printed Pages 19-20/Lines 26, 1-9**), he was apparently wholly unable to recall (or perhaps more accurately wholly unwilling to divulge to the court) any details of their discussions of which no notes or records or minutes or contemporaneous file records have been produced by the defender in relation to these discussions between Peter Duthie and Annemarie O'Donnell: (**TE/Day 3/Peter Duthie Cross-examination/ Printed Pages 34-38).**

P8.31 Ultimately, no final decision was reached at the board meeting. The GCC directors are then excluded from further discussion (for a reason that is not wholly clear). A letter is then procured (on the very same day) from GCC's Annemarie O'Donnell (who, as we have said the defender chose not to bring to court to give evidence in support of their case). And the circumstances under which the letter of 28 January 2020 to the defender from Annemarie O'Donnell in her capacity as chief Executive of Glasgow City Council are left wholly unexplained by Peter Duthie who was particularly evasive on this point in denying that he had requested or suggested that such a letter be sent: (**TE/Day 3/Peter Duthie Cross- examination/ Printed Page 64/Lines 9-26; TE/Day 3/Peter Duthie Cross-examination/Printed Page 65/Lines 1-26; Printed Page 66/Lines 1-3)**.

The letter from Glasgow City Council requesting termination

P8.32 The terms of the Annemarie O'Donnell letter are, however, interesting. It makes a request that the Event be cancelled on two bases: (i) Franklin Graham might "make homophobic and Islamophobic comments during his public speaking engagements"; and (ii) the council does not want to welcome any person who has the potential to upset the LGBTQ and Muslim communities.

P8.33 So the express and undoubted position of the council is that the pursuer is not welcome because of the potential that it might express its religious views and others may be offended by them. There is no mention whatsoever of public order concerns, and no mention of a belated realisation that the event was unticketed.

When was the decision to terminate made?

P8.34 Mr Duthie sought to stress over and over that he did not know why the email of 28 January 2020 suggested the decision had already been made by him. But there is a very simple explanation for it: the decision had already been made. The directors accepted it was a decision within his authority, and decisions such as that would not usually be taken to the board. Respectfully, it is entirely clear what happened: on 28 January 2020 Peter Duthie took the decision to cancel the Event because of his interpretation of the religious views of the pursuer and Glasgow City Council officers were advised accordingly. Peter Duthie realised that it was likely to be a decision with repercussions, so he sought cover both by having the board expressly consider it,[77] and by procuring a letter from GCC expressly asking for the termination of the contract.

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[77] See TE/Day 3/Peter Duthie Cross-examination/Page 386/Lines 16-19

> - I would not have made a decision to cancel the contract without their [the Board's] support.
>
> Because you would not have cover, because you would be exposed?
> - Potentially, yes."

Each spoke to his or her *reason for supporting Mr Duthie's recommendation* to terminate the Contract.

The Court also heard evidence from four non-executive directors with links to GCC, Ms Aitken, Mr McAveety, Mr Gillespie and Ms Forrest (the "GCC directors"). With the exception of Ms Forrest, who was not present, *the GGC directors spoke to the discussion at the board meeting on 29 January 2020*.

…

It is not disputed that no decision regarding the event was taken at the meeting. The relevance of this evidence, from the defender's perspective at least, is that it provides *context* to the decision-making

P8.35 The decision to terminate the contract was at all times within Peter Duthie's remit as the defender's CEO without reference to the Board of the defender. The board members were asked by Peter Duthie to consider and provide their "thoughts", but the question of whether the contract should be terminated by the defender did not go to a vote of the Board and was not the subject of any formal board decision: **Peter Duthie Affidavit §20 JB/13/377**. No decision to terminate the contract was made by the Board. The decision to terminate the contract was made by Peter Duthie in his capacity as the defender's CEO. (**TE/Day 3/Peter Duthie Cross-examination/ Printed Page 59/Lines 6-18 and TE/Day 3/ Printed Page 60/Lines 3-10; see too TE/Day 7/Bill McFadyen Cross- examination/ Printed Page 113/Lines 4-7).**

P8.36 What this means, of course, is that the evidence of the vast bulk of the witnesses led by the defender was entirely irrelevant. None of the board members could speak to the reasons for the decision to cancel the contract because there was no board decision to cancel the contract. All that the board members who were not part of the executive team - Ms Susan Aitken, Mr George Gillespie, Mr Frank McAveety, Mr Will Whitehorn, Ms Morag McNeill, Mr John Watson and Ms Pauline Lafferty - could and did give evidence on was their various reasons as to why they individually supported the decision to terminate. But

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process (*sic*) which *followed* the meeting …

…

The defender is a commercial organisation. Mr Duthie as its Chief Executive decided that the potential termination of the Contract was a matter of sufficient seriousness that the decision about the appropriate course of action should be *considered* (sic) at board level. In doing so, Mr Duthie sought the *input* of experienced business people for a purpose. Whether Mr Duthie was seeking the "support," "views" or "thoughts" of these individuals is nothing to the point. It all amounts to the same thing. *Mr Duthie* desired the input of an experienced board of directors before taking an operational decision with significant commercial implications."

they could not and did not tell us anything as to reason why the actual decision-maker, Peter Duthie – took the decision. Not even Billy MacFadyen – in whose name the decision letter was sent – was privy to that matter and gave no relevant evidence on it. The defender indeed in its draft Written Submission as shared with the pursuer accepts this in noting (emphases added):

> *The decision to terminate the Contract was taken by Mr Duthie* with the *support* of Mr McFadyen, the defender's other executive director and four of its non-executive directors, Mr Whitehorn, Ms McNeill, Ms Lafferty and Mr Watson.

P8.37 It appears from the evidence that the board members were effectively bounced into agreeing with Peter Duthie's prior decision - which had been reached by him in consultation with Glasgow City Council's Annemarie O'Donnell - to cancel the Event,[78] with Annemarie O'Donnell agreeing to provide the cover he was looking for by setting out a formal request from Glasgow City Council to cancel the booking. But the decision-maker was and only was Peter Duthie. The views given by various other individual of what they would have done and why had they been the decision-maker are accordingly wholly irrelevant to the matter at issue before the court – namely whether decision to terminate the

[78] See **TE/Day 3/Peter Duthie Cross-examination/Page 388-398/Lines 20-26, 1-7**
"So despite those concerns about the legality of what was being done, which were being expressed by a number of board members, you say you would be grateful for an early response, 'I would like to complete this tonight if possible by getting notification to the client, followed by advising the media.' And that is not putting pressure on people, according to you?
- When you say putting pressure on people, what sort of pressure are you alluding to?

Well, you are saying, 'Look, it's out there, we're being contacted, we're being, people are wanting a decision from us - come up with a decision.' Is that not putting pressure?
- From a timescale point of view?

Yes.
- Yes."

booking for the pursuer's religious Event and thereafter to refuse to countenance any re-scheduling of the pursuer's religious event were made because of religion or belief.

P8.38 The board – or at least certain members of it – recognised that there would be "legal issues" flowing from that decision: (**JB/19/1009**). Peter Duthie refers to legal proceedings as "expected": (**JB/10/1035**). These proceedings represent those legal consequences.

No intention by the defender to breach the EA 2010?

P8.38 Whether any individual board members appreciated that the decision to terminate the booking meant that the defender knew was breaching equality law or not, is irrelevant. The test is an objective one. Their ignorance of equality law is no defence. The court's attention is drawn, however, to the evidence of Francis McAveety at §9 **JB/6/327**. His evidence to this court is that, not only was the Equality Act 2010 known to him, but the principle of equality was "at the forefront of [his] mind". The problem for Mr McAveety is that, respectfully, he appears to have no understanding of what the principle of equality means and appears (at §8) to think it is engaged because someone was "animated and agitated" because they disagreed with the views and beliefs of Franklin Graham. As is set out above, that is simply incorrect in law.

Refusal to reschedule

P8.39 Finally the court heard evidence that the Utilita Arena Sheffield, the International Convention Centre Wales, and ACC Liverpool which were all venues which had previously cancelled have all now agreed to re-schedule and re-host in 2022 a Christian public outreach evangelistic tour organised by the pursuer and featuring Franklin Graham.

ExCeL London have also agreed to host one of the events on this tour. **TE/Day 1/ Joseph Walker Clarke Examination in chief/Page 51/Lines 12-24.**

P8.40 By contrast we have the remarkable passage from the cross-examination of Peter Duthie in which he states as the CEO of the defender that he will not re-schedule or allow in the future any Christian public outreach event organised by the pursuer to be held at the SECC **TE/Day 3/Peter Duthie Cross-examination/ Printed Page 89-91/Lines 5-26, 1- 26, 1-13**

> "Now, we know that, notwithstanding Twitter's existence, that the venues in Sheffield, Liverpool and Cardiff have, following litigation, agreed to reschedule these events which were for the Billy Graham Evangelistic Tour of 2022.
> - They have.
>
> So, they seem to have - they are in a similar position to you, are they not, in terms of being arenas, responsible for securing safety, being concerned about protests and counter- protests - but they seem to have managed to resolve those issues? - It's up to them to sort out their own affairs.
> - Yes. And make their own judgments.
>
> But given that you say you are in similar situations to arenas like that, and you accept that you are in terms of physically and the like, as large spaces where people congregate?
> - Yes.
> Those venues have not found that the fears of violence and insecurity that you have said are the bases why both you cancelled this event and would not want to reschedule another one, they have not found that to be an insuperable obstacle?
> - Obviously not.
>
> So, why is it that you say it is an insuperable obstacle for SEC to hold a similar event?
> - Because we assessed the risks specifically.
>
> You had not assessed the risks.
> - I am sorry ...
>
> You had not assessed the risks.
> - Yes, we had.
>
> No.
> - I discussed the matter with my Operations Director at length. We had discussed the risks involved of staging the event.

SHERIFF McCORMICK: Just hang on a second. Your question went from the future to the past.

MR O'NEILL: Yes.

SHERIFF McCORMICK: So, you are inviting the witness, as I understand it, when saying those venues have not found fears of violence or lack of security, etc., they are not an insuperable obstacle - so, is your question looking forward?

MR O'NEILL: Yes, my question was looking forward. It was answered in the past, that was all, but my question was looking forward.

Why is it that you, apparently, maintain that it is an insuperable obstacle for Glasgow SEC to hold this event?
- The circumstances pertaining to this specific event I still believe pertain.

You have not explained why it is that other venues are able to reschedule this event and that you cannot?
- That's not for me to explain. That's for them to explain.

So, why is it that you cannot reschedule this event or are unwilling to do so?
- Because the same circumstances still pertain to this particular event, the profile that this event has obtained and achieved means that, regardless of a rescheduled date, the same issues will arise.

But that applies to every event with those other venues as well because they are precisely the same, it is part of a rescheduled Tour?
- They are entitled to assess their own security risks, in the same way that I am.

But when you say that you have assessed security risks, all that you have done is come up with a view after discussions with numbers of your staff and you have come to a conclusion?
- Correct.

So, that is not an assessment, that is a prejudgment?
- It's an assessment.

P8.41 What this passage in fact shows is a prejudgment – prejudice – against the pursuer ever holding its Event at Glasgow. An implacable decision, regardless of circumstances, except that the pursuer would be manifesting its religious beliefs which others apparently find unacceptable. Although this is not a position which appears to be shared by all

member of the defender's Board – see for example John Watson[79] - the question of whose bookings are or are not taken for the SEC is an operational one for the management team headed by the CEO Peter Duthie and not a strategic issue for the Board to decide upon.

Conclusion

P8.42 The truth of the matter is, as Peter Duthie implies at §18 of his affidavit **JB/13/376,** that the defender formed the following views:

(1) The pursuer is associated with Franklin Graham.

(2) Franklin Graham holds (or is at least attributed as holding) certain religious beliefs that are regarded as controversial by certain sections of society.

(3) Because he *held* views which the defender judged (that others found) objectionable (not because the defender had any reasonable or proper basis for supposing that any of these views would be *expressed* at the booked event), the defender no longer wished to provide the services which it was contractually bound to supply to the pursuer.

P8.43 It is clear that - whatever its witnesses *say* (or indeed may have convinced themselves) - the defender has unlawfully discriminated against the pursuer on the basis of a protected characteristic or religion or belief and it has proven no relevant defence to the

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[79] **TE/Day 4/John Watson Cross-examination/Page 582/Lines 5-12**

> "So, it seems that some venues who had previously expressed reservations and indeed cancelled the contracts have realised better of it and now see it as being practical and commercial for them to reschedule an event. And there is no basis upon which Glasgow should not do the same as these other venues and reschedule the event?
>
> - My view is that the SEC, as in the statement, the SEC could do likewise.

contrary. The discrimination is *direct* discrimination and therefore is not capable as a matter of law of being justified.

P9 **RELIABILITY AND CREDIBILITY OF THE WITNESSES HEARD BY THE COURT**

P9.1 *Henderson v Benarty Medical Practice* [2022] CSOH 28 the Lord Ordinary, Lady Wise made the following observations (at paras 48-49) which are pertinent to this court's task in assessing the credibility and reliability of the oral evidence led in the present case.

> "Decision
> 48. The matter that I have been asked to determine in this case involves the difficult issue of the approach to take to evidence based on recollection. Issues of credibility and reliability are part of the assessment. As Lord Pearce put it in *Onassis* v *Vergottis* [1968] Lloyd's LR 403 at 431, the issue of credibility includes not just issues of whether a witness is truthful or untruthful but whether the memory of a generally truthful witness has correctly retained information. 'Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. *Therefore, contemporary documents are always of the utmost importance*."
>
> 49. Counsel were agreed that the most useful judicial observations about evidence based on recollection are those of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Another* [2020] 1 CLC 428; [2013] EWHC 3560 (Comm) at paragraphs 16-
> 20. While the whole section is of considerable interest, the following excerpts are particularly pertinent in the present case:
> '16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eye witness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another

person is in their recollection, the more likely their recollection is to be accurate.
…
19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the person is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often … when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness' memory has been "refreshed" by reading documents.'

These observations have been cited with approval in a number of cases in this court and beyond - *Prescott* v *University St Andrews* [2016] CSOH 3 at paragraph 42; *Johnstone* v *Grampian Health Board* [2019] CSOH 90 at paragraph 127 and *Sheard* v *Tri Do* [2021] EWHC 2166 (QB). While it continues to be acceptable to take the demeanour of a witness into account in appropriate circumstances, it is the consistency of a witness' evidence, both internally and taken with other evidence, that tends to provide the best guide to reliability."

P9.2 And in *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Another* [2020] 1 CLC 428

[2013] EWHC 3560 (Comm) Leggatt J (as he then was) concluded as follows (at para 22):

"[T]he best approach for a judge to adopt in the trial of a commercial case is, in my view, to *place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts*.

This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

P9.3 In the light of those judicial observations, the pursuer's primary position on reliability and credibility is that, ultimately, the documents speak for themselves and, therefore, the truth of the matter is discernible from the contemporary documents so the reliability and credibility of individual witnesses may not matter as much as it might without those documents. However, the pursuer makes the following brief comments in relation to each of the witnesses.

The pursuer's witnesses

P9.4 Mr Clarke gave evidence first on behalf of the pursuer. He is both credible and reliable as a witness. He candidly admitted to the court when a matter lay outwith his knowledge and gave clear and unambiguous evidence as to the effort that went into organising the tour, and the effect of the defender's cancelation – not least because it was the first date of the tour.

P9.5 Mr Herbert gave detailed and credible evidence about the expenditure incurred in arranging the tour and, specifically, the apportionment of the expenses which was attributable to the Glasgow leg of the tour and which, as a result of the cancelation by the defender, had been rendered as wasted expenditure.

P9.6 Mr Tosh gave credible and reliable evidence. He is the Executive Director of the pursuer and spoke to the nature of the event, how the venues were chosen, and how the contractual negotiations were carried out and, ultimately terminated. He also gave very clear evidence that the defender could simply have asked for more information about the Event if it had doubts, the transcripts from Blackpool would have been made available and the defender would have seen that Blackpool passed off without incident and, indeed, the

protestors who were there ended up coming inside for tea and coffee with the attendees. He also gave examples, which went unchallenged, where objectively offensive acts have been accepted by the defender without comment, highlighting a hypocrisy on the defender's part whereby it is content that certain parts of society are offended but not others, acting in a sense as a moral guardian.

The defender's (lack of relevant) witnesses

P9.7 Perhaps the most significant part of the defender's case is who we did *not* hear from. Peter Duthie accepted that he was, in effect, the individual who instructed the defender's solicitors as the client and agreed with them the strategy on which witnesses of the defender to call and provide statements from, and which *not* to call and provide no statements from: **TE/Day 2/Peter Duthie Cross-Examination/ Printed Page 8/Lines 16-20.**

P9.8 A decision was clearly taken that Jacqueline Elder, Sue Verlaque, Kirsten McAlonan, and Annemarie O'Donnell would not be called by the defender as witnesses, despite the fact that they had authored significant documents on which other witnesses (notably Peter Duthie and Debbie McWilliams) purported to rely and speak to. No explanation has been given for the absence of evidence from these seemingly relevant witnesses, and the court is invited to draw adverse inferences from that choice on the part of the defender.

P9.9 Further in the course of Debbie McWilliams cross-examination (matters which were not raised in her affidavit) she claimed to have had crucial conversations on the private nature of the Event with the defender's head of programming, James Graham. His name does not appear in any significant documentation which was produced, and he was

not called as a witness and no statement was lodged for him. Yet accordingly to Debbie McWilliams his evidence was of central importance.

P9.10 We then have the fact that the affidavits of Debbie McWilliams and Peter Duthie contained almost identical content, highlighting the same e-mails, making the same claims in the same words. And yet each claimed – implausibly – not to have seen or known of the content of the other's affidavit. And then when it came to Debbie McWilliam's own cross- examination she was *incredibly* (in the literal sense) well-prepared in her responses with reference prepared to chapter and verse, as if she had had discussions either with other who had already given evidence or with those who had witnessed that evidence, a matter which she denied. It is of course for the court itself to reach its own judgment on those issues of possible collusion and contamination of their evidence, which were put directly to both of these witnesses.

P9.11 Otherwise, Peter Duthie's evidence is best characterised as him seeking to suggest that anything that went wrong must be someone else's fault. Kirsten McAlonan's email of 28 January 2020 was said to be a mistake despite it being set in a context of a chain of emails and subsequently the members of the board not being surprised that Mr Duthie had taken the decision to cancel the Event. Mr Duthie's reluctance to accept that documents say and are what they plainly bear to say and be and his inability to take responsibility for a decision which was clearly led by him makes his whole evidence inherently unreliable and incredible. Insofar as unsupported by separate and contemporary documentation, his evidence should be treated by this court with considerable caution.

P9.12 Mr Gillespie gave evidence next. He is one of the GCC directors. The pursuer accepts that he was doing his best to be truthful and of assistance to the court. He was

genuinely surprised to see the content of the email of 28 January 2020 and was willing to accept that it bears to show that the decision had already been taken in advance of the board meeting but that that had not been intimated to the board – or at least to him. He had only been to one or two board meetings prior to the one on 29 January 2020 so he was relatively new to the board and he candidly accepted that he sees himself as GCC's "man on the board". He also accepted that the position taken by the defender and by GCC was as a result of a perceived "political controversy" if the pursuer's Event were allowed to proceed.

P9.13 Mr Cooper gave evidence next and he very candidly accepted the shortcomings in his report, its methodology, his research, and his understanding of the pursuer. His evidence has been commented upon above and that commentary is not repeated here.

P9.14 Pauline Lafferty gave evidence next. Again, the pursuer accepts that she was doing her best to be truthful and of assistance to the court. She took her role as non-executive director seriously and understood that she had certain duties incumbent upon her in that role. She showed a reluctance to accept that the emails from Kirsten McAlonan to Colin Edgar said what they plainly say but she did accept that the decision was – at least in part – an executive decision rather than a board decision and what the board was doing was "ratifying" something.

P9.15 John Watson's evidence did not add to the evidence already adduced from Ms Lafferty. He was, however, trying to be accurate and helpful to the court although his memory on a number of matters was a little vague and amounted to not much more than that he supported the reasons for supporting the cancelation that had been put forward by others. In particular, he was keen for the court to know that he had been intending to raise

"the freedom of expression point" but Morag McNeill had been called upon to speak before him. He was in full agreement with what Ms McNeill had said on that matter and he is recorded in the minutes of the meeting as suggesting that they could seek information on how much additional security would cost rather than cancelling.

P9.16 Mr Whitehorn's evidence was relatively ill tempered, and he seemed reluctant to answer the questions that were put to him. He seemed determined to bring up sectarianism as often as possible during his questioning. He spoke to having got caught up in Susan Aitken's rather over-the-top fantasies of rioting and fatalities if the event had gone ahead. He was particularly reluctant to enter into discussions about the distinction between a board decision and the board simply being asked for its view on something that had already been decided. His answers were often monosyllabic and evasive and that ought to be borne in mind when determining how much weight to attribute to his evidence. One particular example of this tendency is demonstrated by the exchange with the pursuer's senior counsel at 11.32 am on 5 April 2022, **the fifth day of evidence. Mr Whitehorn was being shown the board minute at JB/19/1003.** He was content to agree that he recalled Morag McNeill warning against being judge and jury. He was then asked about Frank McAveety's comments about the message having taken on a darker scale and that what was being referred to there was the message that was anticipated would be preached. At that stage, Mr Whitehorn's demeanour changed and he just repeated "I don't recall those actual words" and his responses become noticeably more evasive. The pursuer respectfully submits that this should be borne in mind when determining what, if any, weight to give to Mr Whitehorn's evidence insofar as it is not corroborated by documentary evidence.

P9.17 Mr McNeill's evidence was credible and reliable and corresponds with the contemporary documentation. No issues arise from her evidence but nor does she add to the narrative already established by others. She accepted that the assumptions about the message to be spoken about at the Event were based on no evidence, no investigation and were just speculation. She noted in particular that, if an executive came to her with a health and safety concern, she would find it very difficult to overrule him or her on that matter.

P9.18 Mr McAveety gave evidence next. His evidence may be characterised mostly as candid and frank. He spoke to the "typical heated language" being used by an MSP, describing him as having a history of making hyperbolic remarks. Mr McAveety reminded the court that Glasgow has a history of religious figures being invited to the city and people taking the opportunity to express their differing views by way of protesting. He described Glasgow as "a very tolerant city. We put up with each other". He said the board meeting had not involved a particularly detailed discussion of the Event, he noted that comments from "certain politicians" (i.e. the MSP) were unhelpful. He was very clear that, even on the defender's now-adopted position of the decision to terminate being founded on concerns about public safety, the potential protests in question were protests about the message that it was anticipated may be preached at the Event. Mr McAveety accepted that, if the religious content were not there, nor would be the potential protests – and the protests/ public order concerns are entirely and indistinguishably connected with the religious beliefs (or perceived religious beliefs) of the pursuer and those with whom it associated. He made it clear that his view was that people should be allowed to express their views and that there was no evidence of any potential public order issues presented at the board meeting

or any time thereafter. Mr McAveety was seeking to be truthful and to be of assistance to the court. No issues of reliability and credibility arise in relation to his evidence.

P9.19 The court then heard from Susan Aitken, the leader of Glasgow City Council. Ms Aitken was particularly argumentative in her evidence. She was very keen to answer questions that she wanted to be asked, whether or not they were the questions that had been asked. When discussing the CEO's report which was sent out to the board members on 22 January ahead of the board meeting, Ms Aitken accepted that the difficulty with the Event is with the message attributed to Franklin Graham. Ms Aitken spoke to her personal dislike of the message attributed to Franklin Graham. She noted that: "What did emerge was that we all had unanimity around our personal opinion of our understanding of the content of the event on the basis of the reporting of FG's views in previous utterances" before going on to seek to suggest that, in fact, the real reason was something else. What she is not able to say is that those personal opinions about the message attributed to Franklin Graham played no part in the thinking of the board. Indeed, when it was suggested that, if she had really wanted to do so, she could have found out what people would be speaking about at the Event, her response was:

> "Not with any certainty. We couldn't know that something wouldn't be said at that event which would be an attack on their rights and on their equality."

P9.20 And in that moment, the court sees the true reason for the cancelation. There was a perception about what would be spoken about – borne of no foundation and no attempt was made to verify or investigate it – and Ms Aitken saw herself as a self-appointed White Knight for or saviour of certain sections of society (the Muslim and LGBTQIA+ communities), taking it upon herself to silence one party's freedom of expression, an empty and unlawful exercise purely of virtue signalling. She was apparently wholly swayed by

the reaction on Twitter, arising at least to an extent as a result of an MSP's hyperbolic language. She supplemented his hyperbolic language with hyperbole of her own, talking of "bodies being carried out" of the Hydro. There is no evidence of anything approaching that. Even the defender's own Mr Cooper said that such things were "not at all" on the radar. Ultimately, Ms Aitken's position was stated by her as follows:

> "… my personal view and the thing for me was, my overriding concern, and I suppose the factor that ultimately was the most decisive for me in taking the view that the event should be cancelled, was because I thought that - not just the expression of the views, *but also the knowledge of, or the expectation that the views may well be expressed or could be expressed, which would have real life consequences for people in Glasgow, specifically the Muslim community, also potentially the LGBT community, but also as a consequence of that the reputation of the city and of the SEC as a venue.*"

P9.21 Whatever that means, it is clear that preventing the pursuer and its associates from expressing and manifesting their religious beliefs certainly played a part – indeed a key part – in the decision to terminate the Contract. Ms Aitken accepted in any event that the email of 28 January between the Heads of PR looked to suggest that the decision to cancel had already been taken and that the board and GCC were being asked to provide cover for that decision. Ms Aitken's evidence was argumentative and self-serving but, ultimately, in seeking to paint herself as a champion of certain communities, she showed that the pursuer's case is entirely correct in asserting that the reason for the termination of the Contract was to prevent the pursuer from exercising its fundamental rights – that is direct discrimination on the basis of a protected characteristic.

P9.22 Debbie McWilliams gave evidence next. Ms McWilliams was not at the board meeting but was copied into the email exchange of 28 January 2020 where it is stated that the decision to terminate the Contract had already been taken. She was essentially

brought to give evidence to lend support to what had been said by Peter Duthie. She had, at the time, only just returned to work after a period of absence in November 2019 when the initial stages of the negotiation of the Contract were taking place. Ms McWilliams claimed not to have discussed the case with anyone in advance of giving her evidence but she had, somewhat remarkably, spent some time reviewing the emails of 28 January 2020, despite them appearing nowhere in her statement. She had no answer for why she had only made reference to correspondence she regarded as helpful in her statement and had remained silent on the other emails. She also had no answer for why she and Peter Duthie had given remarkably similar statements – in that they had both highlighted the same emails whilst making no reference to others. She described it as "absolutely coincidental". That is simply not a credible position. She sought to pick and choose certain items from the draft advertisements for the Event to lend support to her "understanding" that the event would be a closed invitation-only event, despite what the contemporary emails involving the defender's employees bear to say. Ms McWilliams was keen to give evidence that would assist her employer. She was happy to read in implications to correspondence that would allow her to do that but was remarkably hesitant in doing so when the effect was the reverse. Her evidence – like that of Peter Duthie which it uncannily echoes and mirrors in surprising detail - should be treated with extreme caution by this court.

P9.23 Carole Forrest gave evidence next. She was frank and candid in her evidence. She denied what Susan Aitken had said about the two of them discussing equality law matters, noting that Ms Forrest would have been unlikely to be involved in such discussions because of her dual role as GCC solicitor and director of SEC. She had been on holiday at the time of the board meeting so was not able to assist with that. In relation to the GCC

letter, her position was that it could have emanated originally from either the leader of GCC (i.e. Susan Aitken) or from the Chief Executive (Annemarie O'Donnell) and she could not be certain of which in this particular case. Ms Forrest's evidence raises no issues of credibility or reliability.

P9.24 The final witness was William McFadyen. Mr McFadyen had only limited involvement with the Event and its cancellation. He did, however, sign the Termination Letter on behalf of the defender (**JB/17/429)**. He had also been asked by Peter Duthie to procure the letter from GCC (**production 6/3 JB/21/1210**). When asked whether the decision to cancel was taken by (i) Peter Duthie, (ii) Mr McFadyen, or (iii) the board, Mr McFadyen answered "It wasn't taken by me. I believe it was taken by Peter Duthie." Mr McFadyen was trying to be honest with the court and was trying to be helpful. He is reliable in relation to the matters with which he was involved – which are relatively narrow in compass – but is not able to assist and cannot be relied upon at all beyond those matters.

P9.25 Overall, in relation to the evidence heard by this court, and with reference to the *Barton* criteria set out above at paragraph 6.27, the pursuer makes the following submissions:

(1) There is undoubtedly evidence before this court, as set out above, from which this court could conclude in the absence of an adequate explanation, that the defender has committed an act of unlawful discrimination against the pursuer. Reference is made in particular to, among others:

(i) the matters raised by GCC in its letter to the pursuer (**production 6/3 JB/21/1210**),

(ii) The email from Kirsten McAlonan to Colin Edgar of 27 January 2020, forwarding press coverage of the pursuer's tour (**JB/18/1026),**

(iii) The email from Kirsten McAlonan to Colin Edgar of 28 January 2020,

confirming that a decision has been taken to cancel the Event and including a draft press release that refers to matters of religious freedom, a decision to terminate nonetheless, and does not contain reference to any other explanation (**JB/18/1030),**

(iv) The email from Peter Duthie to Carole Forrest of 6 February 2020, including 2 draft press releases (it is unclear why Peter Duthie was drafting a press release for GCC) both of which make no reference to any explanation other than the perceived offence that might be caused by permitting the Event to go ahead because of the perceived views of the pursuer and its associates (**JB/18/1035),**

(2) The burden has then shifted to the defender. The defender must prove that the decision to terminate the Contract was *in no sense whatsoever* because of a protected characteristic.

(3) The defender has not led evidence which brings it close to satisfying that burden. Taken at its highest, the defender's position is that there was a danger of protest and counter protest at the Hydro. When pressed on that, it was accepted that the protests were anticipated to be in relation to those that found the religious views of the pursuer and those with whom it associates to be offensive. Absent those religious views, there would be no reason to anticipate protests. Therefore, even on the professed narrative of the defender, they have still directly discriminated against the pursuer under equality law. There is simply no basis on which this court could find that the protected characteristic of religion or belief played no part in the termination of the Contract.

(4) The documents referred to at point (1) above, however, demonstrate that "public unrest" played no role in the decision making. The termination of the Contract was a thinly veiled exercise in virtue signalling by the defender. The defender bowed to public pressure, spurred on and whipped up by political leaders online, and terminated the Contract because it regarded the (perceived)

religious views and beliefs of the pursuer to be controversial.

P9.26 In sum, the defender's attempts at *ex post facto* explanation for its action are in any event simply not credible. In particular, the suggestion that the Event was cancelled because the defender was unaware that it was to be unticketed or open to the public is plainly untrue because directly contradicted by the contemporaneous documentary evidence of e-mails. In any event this claim is wholly inconsistent with the termination letter drafted by the defender's lawyers, which claimed that the basis for the cancellation was unspecified but irremediable action on the part of the pursuer which brought the defender into disrepute. And the suggestion that the Facebook post of 27 January 2020 by Franklin Graham brought the defender into disrepute constituted an irremediable breach of contract is again wholly unsustainable, particularly against the fact that the defender made no attempt to discuss this matter with the pursuer prior to purporting to terminate the contract. Finally, the claims made in particular by Susan Aitken that the defender required to terminate the event because of well-founded concerns that, if the event went ahead, it would be the focus for violent protests against the event and counter-protests in favour of it leading to trigger a breakdown in public order and threat to life and limb simply has no basis in any actual facts. And it speaks volumes that this matter was never raised by the defender with the police nor with G4S before the decision to terminate and is not even supported by the preliminary (and entirely academic) G4S Security Assessment dated 11 March 2020 which was instructed after the Termination Letter had been sent to the pursuer.

P9.27 The simple and unavoidable conclusion may be expressed thus: absent the religious views and beliefs of the pursuer and those associated with it, the Event would not have been cancelled. A party without the religious views and beliefs of the pursuer would not

have been subjected to the same treatment. The defender has therefore directly discriminated against the pursuer.

P10 **REMEDIES**

The constitutional principle of the provision of effective remedies for the due and proper protection of fundamental constitutional rights

P10.1 The principle of religious toleration and the preservation of religious pluralism are constitutional principles of law which are enforceable by the courts in the same way as other legal principles.

P10.2 In giving them effect, the courts have the responsibility of upholding the values and principles of the UK constitution and making them effective. The courts cannot shirk that responsibility merely on the ground that (the expression of) the religious views in question are considered by some to be political or problematic or controversial.[80]

P10.3 What this means is that the remedies which the court has to make available in respect of any contravention (whether by public or private parties) of the constitutional principle of religious toleration have to accord with the principle of effectiveness. That is to

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[80] Cf *Cherry and others v Advocate General for Scotland/Miller v. Prime Minister* [2019] UKSC 41 [2020] AC 373, 2020 SC (UKSC) 1 at § 39 (emphases added):

> "39 Although the United Kingdom does not have a single document entitled 'The Constitution', it nevertheless possesses a constitution, established over the course of our history by common law, statutes, conventions and practice. Since it has not been codified, it has developed pragmatically, and remains sufficiently flexible to be capable of further development. Nevertheless, it includes numerous *principles of law, which are enforceable by the courts in the same way as other legal principles. In giving them effect, the courts have the responsibility of upholding the values and principles of our constitution and making them effective*. It is their particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits. The courts cannot shirk that responsibility merely on the ground that the question raised is political in tone or context."

say that the available remedies must be (made to be) effective, proportionate and dissuasive (in the sense of having of a real deterrent effect such as to guarantee real and effective judicial protection against continued or repeated breach of this fundamental constitutional principle).

P10.4 It will not be in accord with the requirements of effectiveness for the court simply pronounce what, in all the circumstances, amounts to nothing more than a theoretical or token or illusory or derisory sanction.[81] As Lord Drummond Young noted in *Lothian Health Board v HMRC* [2020] CSIH 14 2020 SC 351 at paras 19, 39:

> "[T]he principle of effectiveness can be regarded as an application of the well-known dictum *ubi jus ibi remedium* (wherever there is a right there is a remedy). As a matter of elementary common sense, it is obvious that if the law accords a right to any person that person should have a remedy that can make that right effective in practice.

[81] *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [2020] AC 869 per Lord Reed at §§ 71, 75-76:

> 71. … People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable.
> …
> 75 The significance of that guarantee was emphasised by Sir Edward Coke in Part 2 of his *Institutes of the Laws of England* (written in the 1620s, but published posthumously in 1642). Citing chapter 29 of the 1297 version of Magna Carta, he commented:
> 'And therefore, every Subject of this Realme, for injury done to him in *bonis, terris, vel persona* [in goods, in lands, or in person], by any other Subject … may take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay. Hereby it appeareth, that Justice must have three qualities, it must be *Libera, quia nihil iniquius venali Justitia; Plena, quia Justitia non debet claudicare; & Celeris, quia dilatio est quaedam negatio* [Free, because nothing is more iniquitous than saleable justice; full, because justice ought not to limp; and speedy, because delay is in effect a denial]; and then it is both Justice and Right." (1809 ed, pp 55-56.)

More than a century later, Blackstone cited Coke in his *Commentaries on the Laws of England* (1765—1769), and stated:

> 'A … right of every [man] is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein.' (Book I, Chapter 1, 'Absolute Rights of Individuals', p 141.)"

> …
> The fundamental point rather appears to us to be that the effectiveness principle, and indeed so far as domestic Scots law is concerned the principle *ubi jus ibi remedium*, require that the court should take a flexible attitude to the question of remedies, ensuring so far as possible that the parties' substantive rights are given effect."[82]

P10.5 Importantly in *Environment Secretary v Meier* [2009] UKSC 11 [2010] PTSR 321 Baroness Hale emphasised (at para 25) the obligation on the part of the courts, if need be, to *develop* the law to ensure that a *fitting* remedy was indeed available in respect of a breach of a particular right, noting

> "The underlying principle is ubi ius, ibi remedium: where there is a right, *there should be a remedy to fit the right*. *The fact that 'this has never been done before' is no deterrent to the principled development of the remedy to fit the right*, provided that there is proper procedural protection for those against whom the remedy may be granted. So the questions are: what is the right to be protected? And what is the appropriate remedy to fit it?"

P10.6 Among the possible "fitting" remedies which may in principle be open to the courts if and to the extent that it finds a violation by the various venue managements of principles of religious toleration and the preservation of religious pluralism with respect to the pursuer would be at least the following:

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[82] See, too, *Anwar v Secretary of State for Business, Energy and Industrial Strategy* [2019] CSIH 43, 2020 SC 95 per Lord President Carloway (dissenting) at § 9:

> "[9] In *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [2020] AC 869 Lord Reed said (at (§ 106): 'EU law has long recognised the principle of effectiveness: that is to say, that the procedural requirements for domestic actions must not be ''liable to render practically impossible or excessively difficult'' the exercise of rights conferred by EU law: see, for example Case C-268/06 Impact v Minister for Agriculture and Food EU:C:2008:223 [2008] ECR I-2483, § 46.' Lord Reed acknowledged the principle that a person whose rights require protection must have an effective remedy before a tribunal (§§ 106, 107, citing the Charter of Fundamental Rights of the European Union (2012/C 326/391), Article 47).
>
> Although this case is focused on EU law, domestic law enshrines the same idea in its requirement of access to justice. That common law principle would be breached if, despite a court or tribunal ruling, the system was such that securing a remedy would be 'practically impossible or excessively difficult'. In short, there is no need to invoke EU law in this area. The remedies available in the courts and tribunal systems must be effective."

- pronounce a declarator;
- order specific performance and/or require some other form of mandatory action such an apology;
- award damages.

Declarator

P10.7 The ECtHR has held that a person who considers himself or herself a discrimination 'victim', within the meaning of Article 34 ECHR,[83] and who seeks reparation for this in the form of compensation loses his or her victim status only if two conditions are fulfilled. Not only must that person receive the compensation sought, but the national authorities must also have acknowledged the alleged breach of the ECHR: see, *inter alia*, inadmissibility decision of the ECtHR *Nardone v. Italy* [2004] ECtHR 34368/02 (Third Section, 25 November 2004) at § 1 of the Section, 'Law'), and judgment of the ECtHR of, *Centro Europa 7.S.R.L and Di Stefano v. Italy* [2012] ECtHR 3843309 (Grand Chamber, 7 June 2012) at § 81 and the case-law cited, as well as §§ 87 and 88. Application of that case-law of the ECtHR to the present case would mean that at the very least this court should pronounce a formal declarator to the effect that the defender has unlawfully discriminated against the pursuer because of its and Franklin Graham religious beliefs.

P10.8 In line with this approach Advocate General Saugmandsgaard Øe noted in his Opinion of 14 May 2020 in Case C-30/19 *Braathens Regional Aviation AB* EU:C:2020:374 as a matter of EU law an individual who complained of unlawful discrimination on a protected

[83] Under Article 34 ECHR, the ECtHR may receive applications from any person claiming to be the victim of a violation by one of the 'High Contracting Parties of the rights set forth in the Convention or the protocols thereto'.

ground (in this case race) in the provision of commercial services by another private party had a right to maintain a court action to obtain a finding and declaration of discrimination even where the defendant airline in that case had agreed to pay the compensation sought, but would not admit any form of discrimination, it having (as the AG notes at para 37)

> "declared that it is willing to pay and indeed has paid the compensation sought, though only to demonstrate 'it's good will' and avoid potentially lengthy and costly proceedings requiring it to defend itself against the allegation of discrimination".

P10.9 In upholding the conclusion of the Advocate General, the Court of Justice of the European Union (CJEU) noted as follows (at §§ 84-94, 128-130, with its original footnotes):

> "40 In the present case it is clear from the order for reference that, under national law transposing, inter alia, Directive 2000/43, any person who considers that he or she is a victim of discrimination on the grounds of racial or ethnic origin may bring an action for enforcement of the sanction constituted by "compensation for discrimination". The national law at issue in the main proceedings provides that, where the defendant acquiesces to the claimant's claim for compensation, the court hearing that action orders the defendant to pay the sum claimed by the pursuer by way of compensation.
>
> 41 It is, nevertheless, also clear from the order for reference that such acquiescence — which under that national law, is legally binding on the court and results in the termination of the proceedings — may be given where the defendant does not however recognise the existence of the alleged discrimination, or even, as in the case in the main proceedings, where he or she explicitly contests it. In such a situation, the national court delivers a judgment on the basis of that acquiescence without, however, it's being possible for any conclusion to be drawn from that judgment as to the existence of the discrimination alleged.
>
> 42 It follows that, in such a situation, the defendant's acquiescence has the effect that the obligation for the latter to pay the compensation claimed by the claimant is not linked to recognition, by the defendant, of the existence of the alleged discrimination or to a finding thereof by the competent court. In addition, and in particular, such acquiescence has the consequence of preventing the court hearing the action from ruling on the reality of the

discrimination alleged, even though that was the cause on which the claim for compensation was based and is, for that reason, an integral element of that action.

43 As regards the declaratory action provided for in the national law at issue in the main proceedings, it is clear from the order for reference that it does not ensure, for the person who considers himself or herself to have been a victim of discrimination prohibited by Directive 2000/43, the right to have the existence of the alleged discrimination examined and, if appropriate, upheld by a court. In accordance with that law, the action for a declaration cannot address purely factual elements, and its admissibility is subject to the court hearing the case deciding that it is appropriate to proceed, which depends on the balance of interests at issue, namely, inter alia, the claimant's interest in bringing proceedings and the inconvenience that the action might cause to the defendant.

44 It follows that, under the national law at issue in the main proceedings, in the event of the defendant's acquiescing to pay the compensation claimed by the claimant, without however recognising the discrimination alleged, the claimant is unable to obtain a ruling by a civil court on the existence of that discrimination.

45 It must be held that such a national law infringes the requirements imposed by arts 7 and 15 of Directive 2000/43, read in the light of art.47 of the Charter.

46 In the first place, as is clear from [33]–[35] of this judgment, the procedures referred to in art.7 of that directive have the aim of permitting the enforcement of rights derived from the principle of equal treatment of any person who considers himself or herself to be the victim of discrimination based on racial or ethnic origin and to ensure compliance. It therefore follows necessarily that *where the defendant does not recognise the discrimination alleged that person must be able to obtain from the court a ruling on the possible breach of the rights that such procedures are intended to enforce.*

47 Consequently, *the payment of a sum of money alone, even where it is the sum claimed by the claimant, is not such as to ensure effective judicial protection for a person who requests a finding that there was a breach of his or her right to equal treatment derived from that directive,* in particular where the primary interest of that person is not economic but rather to obtain a ruling on the reality of the facts alleged against the defendant and their legal classification.

48 In the second place, a national law such as that at issue in the main proceedings is contrary to *both the compensatory function and the dissuasive function of sanctions* laid down by the Member States in accordance with art.15 of

> Directive 2000/43 where there is a breach of national provisions transposing that directive.
>
> 49 In that regard, as the Advocate General observed, in essence, at AG83 and AG84 of his Opinion, *the payment of a sum of money is insufficient to meet the claims of a person who seeks primarily to obtain recognition, by way of compensation for the non-material damage suffered, of the fact that he or she has been the victim of discrimination, meaning that the payment cannot, for that purpose, be regarded as having a satisfactory compensatory function.*
>
> Similarly, *the requirement to pay a sum of money cannot ensure a truly deterrent effect as regards the author of the discrimination by inducing him or her not to repeat the discriminatory behaviour and thereby preventing further discrimination on his or her part where, as in the present case, he or she contests the existence of any discrimination but considers it more advantageous, in terms of cost and reputation, to pay the compensation claimed by the claimant, while also thereby avoiding a finding by a national court that there had been discrimination."*

P10.10 Although as the decision in *Braathens* makes clear the prohibition against discrimination because of race or ethnic origin in the provision of services to the public falls within the ambit of EU law,[84] it is only work-related discrimination because of religion or belief (or sexual orientation) which was at time the UK ceased to be a Member State covered by EU law.[85] Nonetheless in *Anwar v. Secretary of State for Business Energy and Industrial Strategy* [2019] CSIH 43 2020 SC 95 the First Division made it plain that the effective remedy principle prayed in aid by the CJEU in *Braathens* applied equally in wholly domestic circumstances. Lord President Carloway noted (at para 9):

> "9. In *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 [2020] AC 869 (para 106), Lord Reed said:
>
> 'EU law has long recognised the principle of effectiveness: that is to say, that the procedural requirements for domestic actions must not be ''liable to

[84] Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

[85] Employment Equality Directive 2000/78/EC

> render practically impossible or excessively difficult'' the exercise of rights conferred by EU law: see, for example Case C-268/06 *Impact v Minister for Agriculture and Food* ECLI:EU:C:2008:223 [2008] ECR I-2483, para 46.'
>
> Lord Reed acknowledged the principle that a person whose rights require protection must have an effective remedy before a tribunal (paras 106, 107, citing the Charter of Fundamental Rights of the European Union (2012/C 326/391), Art 47).
>
> Although this case is focused on EU law, domestic law enshrines the same idea in its requirement of access to justice. That common law principle would be breached if, despite a court or tribunal ruling, the system was such that securing a remedy would be 'practically impossible or excessively difficult'. In short, there is no need to invoke EU law in this area. The remedies available in the courts and tribunal systems must be effective."

P10.11 And in *Wightman v. Secretary of State for Exiting the European Union* [2018] CSIH 62, 2019 SC 111 Lord President Carloway in confirming the jurisdiction of the courts in Scotland, whether in matter of private law or public law, to grant advisory declarators noted as follows (at para 21):

> 21. The courts exist as one of the three pillars of the state to provide rulings on what the law is and how it should be applied. That is their fundamental function. The principle of access to justice dictates that, as a generality, anyone, who wishes to do so, can apply to the court to determine what the law is in a given situation. The court must issue that determination publicly.
>
> As Bankton (Institute IV, xxiii, 18) puts it:
>
> '[A]ll persons may pursue, for the law ought to be open to all people, to make their claims effectual; since for every right there must be a remedy, and want of right and want of remedy are the same thing'.
>
> The traditional method of securing an answer to a legal question posed is by action of declarator.
>
> '[T]he general rule is, that any right may be ascertained by a declarator' (*Barbour v Grierson* (1827) 5 S 603, Lord Glenlee (with whom the other members of the court agreed), p 604; *Gifford v Trail* (1829) 7 S 854, Full Bench, pp 867, 868; see also *Earl of Mansfield v Stewart* (1846) 5 Bell's App 139, Lord Brougham, p 160)

P10.12 It is therefore clear that Scots law, EU law and ECHR law are as one on this point. In cases alleging unlawful discrimination, where the claimed discrimination is established, the victim has a right to have this wrong-doing publicly recognised by court pronouncing a declarator to this effect, even in the absence of any pecuniary damage following therefrom. This is because public declarations of the law in this area themselves can serve a vindicatory function and contribute towards a form of just satisfaction for the wronged victim of discrimination.

P10.13 While a declarator at common law – or indeed a declaration made under reference to the remedies confirmed by Section 119(7) EA 2010 as being available Sheriff Court in respect of breaches of the provisions of the 2010 Act - may serve a useful purpose in generally clarifying the relevant law, it has no mandatory force of itself. A declaration or declarator therefore cannot be used to require any action from another party, whether payment of damages or any form of specific performance and failure by a party to comply with a declaration will not constitute contempt of court.[86] In that sense it may not be

[86] See the discussion of declarator in *Craig v. HM Advocate* [2022] UKSC 6, 2022 SLT 323 per Lord Reed at §§ 44-46:

> "44. … [S]ome general observations about the use of declaratory orders in public law may be helpful. It has been firmly established since the case of *M v Home Office* [1994] 1 AC 377 that there is a clear expectation that the executive will comply with a declaratory order, and that it is in reliance on that expectation that the courts usually refrain from making coercive orders against the executive and grant declaratory orders instead. In that case, the House of Lords held that a mandatory interim injunction had been properly granted against the Home Secretary, and that, following his department's breach of the injunction, he could properly be found in contempt of court (although no punishment was considered necessary beyond the payment of costs). Lord Woolf, with whom the other members of their Lordships' House agreed, observed at p 397 that the fact that these issues had only arisen for the first time in that case was confirmation that in ordinary circumstances ministers of the Crown and government departments scrupulously observed decisions of the courts. He continued:
>
> > '*Because of this*, it is normally unnecessary for the courts to make an executory order against a minister or a government department since they will comply with any declaratory judgment made by the courts and pending the decision of the courts will not take any precipitous action." (Emphasis added)

regarded to be – not least in circumstances where a wrongful action has actually resulted in loss - an effective remedy.

He added at pp 422-423:

> 'The fact that, in my view, the court should be regarded as having jurisdiction to grant interim and final injunctions against officers of the Crown does not mean that that jurisdiction should be exercised except in the most limited circumstances. In the majority of situations so far as final relief is concerned, a declaration will continue to be the appropriate remedy on an application for judicial review involving officers of the Crown. As has been the position in the past, the Crown can be relied upon to co-operate fully with such declarations."
>
> 45. The Government, for their part, have always accepted that they can be relied upon to comply with declarations: see, for example, the recent case of *Vince v Advocate General for Scotland* [2019] CSIH 51 2020 SC 90, where the court accepted the Government's submission that it was unnecessary to make a coercive order against the Prime Minister, since members of the Government could be expected to respect a declaratory order. It is to be hoped that the the submissions made on behalf of the Government in the present case do not represent a fully considered departure from that longstanding approach.
>
> 46. The Government's compliance with court orders, including declaratory orders, is one of the core principles of our constitution, and is vital to the mutual trust which underpins the relationship between the Government and the courts. The courts' willingness to forbear from making coercive orders against the Government, and to make declaratory orders instead, reflects that trust. But trust depends on the Government's compliance with declaratory orders in the absence of coercion. In other words, it is because ours is a society governed by the rule of law, where the Government can be trusted to comply with court orders without having to be coerced, that declaratory orders can provide an effective remedy. Although cases have occurred from time to time in which ministers have failed to comply with court orders (such as *M v Home Office* and the recent case of *R (Majera (formerly SM (Rwanda)) v Secretary of State for the Home Department* [2021] UKSC 46 [2021] 3 WLR 1075), they are exceptional, and can generally be attributed to mistakes and misunderstandings rather than deliberate disregard. However, where a legally enforceable duty to act, or to refrain from acting, can be established, the court is capable of making a coercive order, as *M v Home Office* and *Davidson v Scottish Ministers* [2005] UKHL 74, 2006 SC (HL) 41 demonstrate. Furthermore, a declaratory order itself has important legal consequences. First, the legal issue which forms the subject matter of the declaration is determined and is res judicata as a result of the order being granted: *St George's Healthcare NHS Trust v S* [1999] Fam 26, 59-60. In addition, a minister who acts in disregard of the law as declared by the courts will normally be acting outside his authority as a minister, and may consequently expose himself to a personal liability for wrongdoing: *Dicey, Introduction to the Study of the Law of the Constitution*, 10th ed (1959), pp 193-194."

Order specific performance or require some other form of mandatory action

P10.14 The courts undoubtedly have power at common law to order a person positively to do some action or actions as specified in the court order. In general, too, the courts can only exercise their powers to pronounce mandatory orders for the purpose of making a legal or natural person do something that that person already has it within his powers and duty to do, and which should have done, but has not been.[87] Such positive order may be orders for specific performance of existing contractual or of statutory obligations.[88]

[87] *R (OWD Ltd (trading as Birmingham Cash & Carry) v. HMRC* [2019] UKSC 30 [2019] 1 WLR 4020 per Lady Black at § 71:

> "Generally the High Court's power to order a person to do something by mandatory injunction is exercisable for the purpose of making that person do something that he has it within his powers to do and should have done, but has failed to do. Here, the court has concluded, and HMRC agree, that there is in fact nothing which HMRC can properly do in the exercise of their statutory functions. They may fairly be said to have no relevant power which they could legitimately exercise in this context without straying outside the purpose for which the power was given. In such circumstances, a conclusion that the High Court could none the less solve the problem by granting an injunction looks worryingly like endorsing the exercise of some sort of inherent authority to override an Act of Parliament, on the basis that the end justifies the means. It would take a lot of persuading for me to conclude that this would be a proper exercise of the High Court's undoubtedly wide power to grant injunctive relief."

[88] See for example Section 45(b) of the Court of Session Act 1988 which provide that

> "The Court may, on application by summary petition– …(b) order the specific performance of any statutory duty, under such conditions and penalties (including fine and imprisonment, where consistent with the enactment concerned) in the event of the order not being implemented, as to the Court seem proper.'

In *Vince & ors v Prime Minister* [2019] CSOH 77 2020 SC 78 Lord Pentland observed as follows (at § 24:

> "[T]he boundaries of any order under Section 45(b) of the Court of Session Act 1988 must be fenced by clear and precise reference to the statutory duty, performance of which is sought. Secondly, the court is given a discretionary power to determine whether, in the particular circumstances of the case before it, an order for specific performance of the statutory duty should be made. Thirdly, the procedure for obtaining such an order is to be summary in nature; this suggests that the issue will usually be capable of being determined on the basis of the averments made by the parties in their pleadings; elaborate inquiry into the facts is not what is envisaged by this statutory provision."

P10.15 In *Retail Parks Investments Ltd v Royal Bank of Scotland (No. 2)*, 1996 SC 227 (Extra Division, comprising Lord McCluskey, Lord Cullen and Lord Kirkwood) Lord Cullen (at page 244) noted a conceptual distinction taken as between Scots law and English law in relation to the courts use of their powers to order specific performance in a contractual context. He notes:

> "[I]t is clear that in the law of Scotland where a party to a contract has acted or threatened to act in breach, the other party has a legal right to seek specific implement of the contractual obligation. In this respect there is a difference from English law under which the only legal right is to claim damages, and the granting of an order for specific performance is purely an equitable remedy (see *Stewart v Kennedy* (1890) 17 R (HL) 1, per Lord Watson at pp 9-10). At the same time it is recognised in Scotland that the court has a residual discretion to withhold the remedy of specific implement on grounds of equity *Grahame v Magistrates of Kirkcaldy* (1882) 9 R (HL) 91 and *Salaried Staff London Loan Co v Swears and Wells Ltd* 1985 SC 189"

P10.16 So the clear position at common law is that an order for specific performance in the face of breach of contract is the primary remedy in Scots law (with damages fulfilling the role of a secondary role in the event of a non-performance of contractual obligations) in contrast to the position in English law where the primary remedy in the face of contractual breach is considered to be damages, with orders for performance or implementation of contractual obligations an exceptional equitable remedy where damages alone is thought to be insufficient.[89]

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[89] Section 50 of the Senior Courts Act 1981 provides as follows:
50. Power to award damages as well as, or in substitution for, injunction or specific performance.
Where the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance."

This provision had its origins in section 2 of the Chancery Amendment Act 1858 (commonly known as Lord Cairns' Act). In *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20 [2019] AC 649, Lord Reed said this in relation to the quantification of damages under this head (at § 95(3)-(5)):

> "(3) Damages can be awarded under Lord Cairns' Act in *substitution* for specific performance or an injunction, where the court had jurisdiction to entertain an application for such relief at

P10.17 The remedies available in respect of discrimination claim are specified in Section 119 EA 2010 as follows:

> "119 Remedies
> (1) This section applies if the county court or the sheriff finds that there has been a contravention of a provision referred to in section 114(1).
> (2) The county court has power *to grant* any *remedy* which could be granted by the High Court—
> (a) in proceedings in tort;
> (b) on a claim for judicial review.
>
> (3) The sheriff has power to make any order which could be made by the Court of Session—
> (a) in proceedings for reparation;
> (b) on a petition for judicial review.
>
> (4) An award of damages may include compensation for injured feelings (*whether or not it includes compensation on any other basis*).
>
> (5) Subsection (6) applies if the county court or sheriff—
> (a) finds that a contravention of a provision referred to in section 114(1) is established by virtue of section 19 [indirect discrimination], but (b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the claimant or pursuer.
>
> (6) The county court or sheriff must *not* make an award of damages unless it first considers whether to make *any other disposal*.
>
> (7) The county court or sheriff must not grant *a remedy <u>other than</u> an award of damages or the making of a declaration* unless satisfied that no criminal matter would be prejudiced by doing so.

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the time when the proceedings were commenced. Such damages are a monetary substitute for what is lost by the withholding of such relief.

(4) One possible method of quantifying damages under this head is on the basis of the economic value of the right which the court has declined to enforce, and which it has consequently rendered worthless. Such a valuation can be arrived at by reference to the amount which the claimant might reasonably have demanded as a *quid pro quo* for the relaxation of the obligation in question. The rationale is that, since the withholding of specific relief has the same practical effect as requiring the claimant to permit the infringement of his rights, his loss can be measured by reference to the economic value of such permission.
(5) That is not, however, the only approach to assessing damages under Lord Cairns' Act. It is for the court to judge what method of quantification, in the circumstances of the case before it, will give a fair equivalent for what is lost by the refusal of the injunction."

P10.18 Under reference to Section 119(3)(b) EA 2010 it is clear that the Court of Session when exercising its equitable inherent supervisory judicial review jurisdiction has access to the full range of remedies which will in the particular case when taken together and on the basis of the general principle *ubi ius ibi remedium* constitute in all the circumstances effective remediation for the wrong. This includes, but is not restricted to, orders for specific performance (including court ordered apologies), interdicts, declarators and damages. In respect of identifying an appropriate remedy or remedies, this court accordingly has a very wide discretion to grant a remedy that it finds to be fully and properly effective in the circumstances of the case to properly remedy the defender's breach. As Lord President Rodger noted in *Highland and Universal Properties Ltd v Safeway Properties Ltd.*, 2000 SC 297 at 302:

> "Unquestionably, there are indeed happier circumstances in which to run a business, but it must also be recalled that the decree simply requires the party in question to perform the commercial obligation which it deliberately undertook in a formal contract, presumably for good reasons. Moreover, *ex hypothesi* it is an obligation *which the party can perform*."

P10.19 This court correctly found, after debate (at §61), that it is entirely within this court's discretion to grant an order *ad factum praestandum*, requiring the defender to permit the pursuer to reschedule the Event. This court refused the invitation of the defender to strike that as a potential remedy.

P10.20 As is noted above, the available remedies must be (made to be) effective, proportionate and dissuasive (in the sense of having of a real deterrent effect such as to guarantee real and effective judicial protection against continued or repeated breach of this fundamental constitutional principle). It is insufficient for the court to grant nothing more

than a theoretical or token remedy: *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [2020] AC 869 per Lord Reed at §§71, 75-76. Instead, where a person, such as the pursuer, has been afforded a right under the law and a party, such as the defender, breaches that right, the law must provide to the pursuer a remedy that makes the right effective in practice: *Lothian Health Board v HMRC* [2020] CSIH 14, 2020 SC 351 per Lord Drummond Young at §§19 and 39. There is a positive obligation on the courts to *develop* the law in order to provide a fitting and effective remedy: *Environment Secretary v Meier* [2010] PTSR 321 per Lady Hale at §25. As Lord Drummond Young has also noted, "if a legal right exists a remedy *must* be *devised* to permit its *enforcement*".[90]

P10.21 A 2019 decision of the Upper Tribunal, *JKL v Ashdown School* [2019] ELR 530, established that the education first-tier tribunal has power under the EA 2010 to order the reinstatement of an independent school pupil (which is akin to an "order for specific performance"). That decision is specifically based on the statutory provisions in Schedule 17 EA 2010, but it is clear that the concerns which animate the decision of the Upper Tribunal are that Tribunal should be presumed to have been given the power by Parliament to pronounce appropriate effective remedies and were not rendered toothless by having the

[90] See *Anwar v Secretary of State for Business, Energy and Industrial Strategy* [2019] CSIH 43, 2020 SC 95 per Lord Drummond Young at § 52:

> "… the main purpose of the principle of effectiveness is to ensure the proper enforcement of rights that arise under Community law. That is not an objective that is confined to the law of the European Union. It is encapsulated in the maxim *ubi jus ibi remedium*, which has been adopted in Scots law, English law and many other legal systems. It is obvious that *if a legal right exists a remedy must be devised to permit its enforcement*; otherwise the right is ineffectual. This extends not merely to the existence of a notional remedy but to ensuring that the remedy produces practical results. The principle of effectiveness is accordingly one that is not peculiar to EU law but is close to principle that are an integral part of most rational legal systems, and are in particular an integral part of Scots law."

power to make only "pious exhortations" in the form of recommendations which were not even cast in mandatory terms.

P10.22 Given the breadth of wording used in section 119(2) EA 2010 the same "effective remedy" logic which appealed to the Upper Tribunal in *JKL* can be applied in the circumstances of the present case to bolster the submission that the County Court and Sheriff Court also has power under Section 119(2) EA 2010 to make an order for specific performance of a contract notwithstanding that the date originally agreed for the event has since passed. Obviously these kinds of remedies are always discretionary and so a Court would take into account a wide range of factors, such as workability, impossibility of compliance, the need for excessive supervision, the pursuer's own conduct and so on. In very broad terms "mandatory" orders tend to be used sparingly and in general require particular justification to persuade the court to exercise its jurisdiction, but the competency of the court making such orders is not in doubt.

P10.23 In sum, there may be circumstances in which the injured party has an interest in the enforcement of the primary obligation which is not satisfied by the recovery of compensatory damages (i.e. the court conceives of circumstances in which the injured party – or the public generally - has an interest that goes beyond mere monetary compensation and the court should recognise this and fashion an appropriate remedy). In principle it might then be argued that the proper effective remedy in respect of a finding of religious discrimination would be- just as with race discrimination – not an award of damages but of performance which purges the original act of discrimination.

P10.24 The pursuer has included a crave (crave 1) for a form of order *ad factum praestandum* which would require the defender to permit the pursuer to hold the Event at its venue once

such events are able to be held there again. It is a matter of agreement in the joint minute between the parties that other events which were postponed due to the pandemic have now been rescheduled at the defender's venues and are now taking place.

P10.25 Notwithstanding the defender's ability to allow those events to be rescheduled, the defender refuses to enter any such discussions with the pursuer, saying only that the pursuer is free to try to make a new booking. The pursuer is entitled to the remedy sought as a result of the defender's breach of the EA 2010. That is quite different from trying to make a new booking as this court properly recognised in the decision after debate. The pursuer is entitled to host the Event at the defender's venue on the terms that were agreed – not on as-yet-to-be-negotiated terms as the defender now suggests. The submissions to the effect that the defender will be put in difficulties if this court were to ordain it to reschedule and host the Event should be given very little weight by this court. If this court determines that the effective remedy for the defender's discrimination is to ordain the defender to reschedule the Event, purported difficulties or inconveniences are no answer and the defender must find a way to comply: *X v Glasgow City Council* 2022 SLT 554 at §§45-47:

> "[45]. Counsel for the respondent submitted that specific performance was an equitable remedy and should not be granted in the circumstances of this case. It would be impossible for the respondent to comply with the order for the reasons set out in Mr Fulton's affidavit: …
>
> [46]. It is fundamental to the rule of law that public authorities obey the law and obey the courts. If a court decides that public authority is in breach of a statutory duty, the public authority must comply with the duty. The authority cannot just say that it chooses not to do so because, in its view, it is impossible to do so. It must find a way to comply with its duty. The duty must be discharged: the authority has no choice. It is not up to the court to decide the precise way in which an authority complies with its statutory duty. The authority must find a way and must allocate appropriate resources to do so. If the authority's usual third-party providers cannot provide it with the means to comply with the duty, then the authority must find other providers who can, or find another way to comply with the decision of the court.

> [47]. Having said all that, I appreciate that there may be practical issues for the respondent in complying with an order for specific performance immediately upon the issue of this opinion. I shall put this case out by order for discussion of the appropriate interlocutor in the light of my decision. At the by order, I will expect to be addressed by the respondent in detail as to how it proposes to comply with its statutory duty within a reasonably short timescale. It will not be acceptable for the local authority to say that it does not intend to comply."

P10.26 Further on the question of a specific performance remedy it is also helpful for the court to have regard to the EU law principle of effective remedy in discrimination law cases which requires that observance of the principle of equality can be ensured only by granting to persons who have been unlawfully discriminated against the same advantages as those enjoyed by persons within the favoured category. Disadvantaged persons must therefore be placed in the same position as persons who have not been the subject of unlawful discrimination, even where the discrimination derives from contracts between individuals. This principle applies directly in UK law as a matter of retained EU law in cases involving workplace related or employment discrimination because of religion or belief. Thus in Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi* ECLI:EU:C:2019:43 (Grand Chamber, 22 January 2019) [2019] 2 CMLR 20 the European Court of Justice stated as follows (at §§ 58, 76-77, 79) that:

> "58 … [F]reedom of religion is one of the fundamental rights and freedoms recognised by EU law and that the term 'religion' must be understood, in that regard, as covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public.
> …
> 76 The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the EU Charter of Fundamental Rights , is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law: Case C-414/16 *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* EU:C:2018:257; [2019] 1 CMLR 9 *Egenberger* [2019] 1 CMLR 9 at [76]).

> 77 As regards its mandatory effect, art.21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, *even where the discrimination derives from contracts between individuals* (*Egenberger* [2019] 1 CMLR 9 at §77).
> …
> 79 …. [I]t should be noted that, according to settled case law of the Court, where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, *observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. Disadvantaged persons must therefore be placed in the same position as persons enjoying the advantage concerned* (Case C-406/15 *Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control* EU:C:2017:198 at §66 and the case law cited).

P10.27 In *Preddy v Bull* [2013] UKSC 73 [2013] 1 WLR 3741 Baroness Hall noted in relation to a case concerning a claim of discrimination on grounds of sexual orientation in the provision of services to the public (i.e., like the present case and *not* directly covered by EU law) at § 22;

> "We do not have to construe these Regulations in accordance with the jurisprudence of the Court of Justice, *because they are not implementing a right which is (as yet) recognised in EU law*.
>
> But as the same concepts and principles are applied in the Equality Act 2010 both to rights which are and rights which are not recognised in EU law, it is highly desirable that they should receive interpretations which are both internally consistent and consistent with EU law."

P10.28 By the same token although the present claim of discrimination on grounds of religion or belief in the provision of services to the public does *not* fall within the ambit of EU law (albeit that workplace discrimination because of religion or belief *does* fall within the ambit of EU law) and against the background that – as the Inner House confirmed in *Anwar v Secretary of State for Business, Energy and Industrial Strategy* [2019] CSIH 43, 2020 SC 95, the EU law principle of effective remedy is simply reflective of the Scots law principle *ubi ius*

ibi remedium – then the same principle of effective remedy should be applied in this case by the court making the order for specific performance sought in crave 1. In this way the law – regardless of whether it falls directly within the ambit of EU law retains clarity and coherence and avoids needless complexity and arbitrary differences as to available remedies varying simply depending on whether the substantive equality right at issue can or cannot be said to have a foundation in (retained) EU law.

P10.29 Such an order for specific performance does not require the court to form the view that the original Contract remains active. It is open to the court to fashion the order at crave 1 in any manner the court deems to represent an effective remedy for the defender's breach of the Equality Act.

Apology to the pursuer from the defender

P10.30 Further, in anticipation of the court finding the defender to be guilty of unlawful discrimination on grounds of religion or belief against the pursuer, the Court is invited also to order the defender to apologise for their wrongdoing and to publish their apology on appropriate online and other fora. Just in case the defender might argue that the concept of an apology is too vague to be the subject of a court order, Section 3 of the Apologies (Scotland) Act 2016 usefully defines the term thus:

> "an apology means any statement made by or on behalf of a person which indicates that the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing a recurrence."

P10.31 Though the issue has not often been addressed in many reported cases from the UK, there is no reason in principle why the Court cannot make order the defender to make an

apology for its wrongdoing in suitable court-approved terms.[91] Because this court in this case is effectively given the same remedial jurisdiction that is available to the Court of

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[91] See for a general discussion from a common law perspective see Robyn Carroll "You Can't Order Sorriness, so Is There any Value in an Ordered Apology? An Analysis of Apology Orders in Anti-Discrimination Cases" (2010) 32 *University of New South Wales Law Journal* 360 and See too Robyn Carroll *"Apologies as a Legal Remedy"* (2013) 35 *Sydney Law Review* 317 which notes at 318 at 332:
"The article draws upon the author's published research relating to apology orders, provides an extended analysis of the remedial role of apologies and discusses recent developments. In work to date, the following propositions have been advanced, (sometimes with co-authors):

A court exercising equitable jurisdiction has the power to order a person to make an apology, spoken or in writing, in private or in public and to publish the apology in some manner. The order will be one for specific relief. In most cases it would be in the form of a mandatory injunction; if the purpose is to enforce a promise to apologise it will be an order akin to specific performance;
- When a plaintiff seeks an apology from the defendant a court should give consideration to the plaintiff's remedial choice in exercising its discretion and determining the appropriate remedial response to the defendant's wrongdoing;
- It is not appropriate for a court to order a defendant to apologise unless this is a remedy sought by the plaintiff;
- Aside from the usual discretionary factors that a court considers when deciding whether to grant specific relief, it needs to consider the remedial 'fit' between the aims and purposes of the cause of action and the remedy. Where the relief sought is statutory, a court will also be guided by statutory goals;
- An ordered apology, and other forms of specific relief, have the potential to strengthen the vindicatory function of the law and to meet the psychological needs of plaintiffs;
- An ordered apology has the potential to be 'good enough' to satisfy the purposes of a plaintiff and the law if an apology is understood as having multiple components that need not all be present in all circumstances.

…

In *Burns No 2*, [2005] NSWADT 24 (16 February 2005), the second respondents, two radio presenters, made comments during a morning broadcast that were held to be unlawful vilification pursuant to the *Anti-Discrimination Act 1977* (NSW) s 49ZT(1) because they were capable of inciting severe ridicule of gay men. The complainant proposed that the presenters 'each read an apology, in specified terms, on air for seven consecutive days at specified times, and that Radio 2UE publish a written apology in four specified newspapers in specified terms' (at para 26) The Tribunal ordered the various respondents to publish or cause to be read and broadcast apologies as directed: (at para 47) In so doing it stated that in these circumstances (at para 29):
'The apology is acknowledgement of the wrongdoing and, seen as fulfilment of a legal requirement rather than as a statement of genuinely held feelings, it can properly be compelled by way of order. There would be a welcome extra dimension to the apology if it reflected that the person actually regrets the conduct".

See, too, from a Roman and ECHR law based legal system's perspective Andrea Zwart-Hink, Arno Akkermans and Kiliaan van Wees "Compelled Apologies as a Legal Remedy: Some Thoughts from a Civil Law Jurisdiction" (2014) *University of Western Australia Law Review* 100 at page 113
"*Compelled Apologies, Freedom of Expression and the European Court of Human Rights*
In the case law of the European Court of Human Rights (ECHR), several rulings can be found that

Session in applications to the supervisory jurisdiction for judicial review, the broad and general terms of section 119 EA 2010 (also as read in the light of the HRA 1998) empowers and obliges the Court to make such orders as it considers just and appropriate within its powers are amply wide enough to accommodate a compelled apology order of this nature. In *Maestriv. Italy* (2004) 39 EHRR 38 the Strasbourg Grand Chamber noted as follows (at para 47):

> "47. .. [I]n the context of the execution of judgments in accordance with Art.46 of the Convention, a judgment in which it finds a breach imposes on the respondent State a legal obligation under that provision to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.
>
> If, on the other hand, national law does not allow—or allows only partial—reparation to be made for the consequences of the breach, Art.41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate.
>
> It follows, *inter alia*, that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation *not just to pay those concerned the sums awarded by way of just satisfaction*, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court *and to redress so far as possible the effects*.
> …
> In the instant case, it is for the Italian Government to take appropriate measures to redress the effects of any past or future damage to the pursuer's career as a result of the disciplinary sanction against him which the Court has found to be in breach of the Convention."

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concern the relation between the right to freedom of expression and compelled apologies. Claims to receive an apology have been awarded in several contracting states, such as Slovakia, Russia, Turkey, Ukraine and Poland. In none of the cases brought before the ECHR, the court has taken the position that the national courts' authority to grant an order to apologise *as such* constituted a breach of the right to freedom of expression. The ECHR considered that the national court's decision constituted an interference with the right to freedom of expression, and subsequently examined whether that interference was justified under Article 10 (2) of the Convention. The ECHR considers compelled apologies to be a restriction of the right of freedom of expression that can be permitted provided that the interference with this right is prescribed by law and 'necessary in a democratic society'."

P10.32 The European Court of Human Rights has in a number of cases made orders requiring States to take specific actions in addition to the payment of compensation by way of "just satisfaction" to a pursuer. For example:

- In *Aleksayan v Russia* (App No. 46468/06, judgment of 5 June 2009) the Court ordered the defendant state to discontinue the pursuer's detention on remand and use a different, reasonable and less stringent measure of restraint against the pursuer compliant with Russian law: §240.

- In *Volkov v Ukraine* (2013) 57 EHRR 1 the Court ordered the defendant state to reinstate the pursuer in his position as a judge of the Supreme Court at the earliest possible date: §208.

P10.33 Consistently with this, the Inter-American Court of Human Rights has in some instances made orders requiring states to *apologise* for violations of human rights: see for example the decision of the Inter-American Court of Human Rights in *Cantoral Benavides v Peru. Reparations and Costs. Judgment of December 3, 2001. Series C No. 88 §81.*

P10.34 Under Section 119(3) EA 2010, this Court can only order remedies which the Court of Session has the power to order in proceedings in proceedings for reparation or on a petition for judicial review in delict. There is at least one context in which the courts in Scotland has a power to determine the terms of an apology, namely in the context of the acceptance and enforcement of an offer to make amends in the context of a reparation action seeking damages for the civil wrong of defamation: see section 14 of the Defamation and Malicious Publications (Scotland) Act 2021.[92] As such the requirements of section 119(1) appear to allow for the Court to order an apology in EA 2010 claims of this nature.

[92] Under subsection 14(4) of the Defamation and Malicious Publications (Scotland) Act 2021 where an

P10.35 The issue of ordering an apology in discrimination claims has arisen in a number of decisions of the Upper Tribunal (Administrative Appeals Chamber), in the context of disability discrimination claims brought on behalf of students under the EA 2010, culminating in the decision in *The Proprietor of Ashdown House School v JKL* [2019] ELR 530 (albeit in the context of a different part of the EA 2010). In *JKL* the Upper Tribunal affirmed that the First-Tier Tribunal has the power to order apologies to be made in disability discrimination claims in the education context and offered guidance on the circumstances in which they may or may not be appropriate.

P10.36 For these reasons the pursuer submits that this court has the power to order the defender to apologise and should do so. This will play an important role in vindicating the pursuer's rights and helping to redress the damage caused to the pursuer and those associated with it as a result of the defender's unlawful decision to cancel this event.

Submissions on EA 2010 damages

P10.37 As we have noted at common law in Scotland (in contrast to what appears to be the situation under English law) the primary approach to remedy in the face of a civil wrong is to make an order of specific implement, restoring the position of the parties to the position

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offer of amends is accepted in principle but the parties cannot reach agreement as to the steps to be taken by way of correction, apology, and publication, then the person making the offer may make the correction and apology in open court, *in such terms as are approved by the court* and give an undertaking to the court as to the manner in which the correction and apology will be published subsequently. In effect, the person making the offer is, in this situation, asking the court to fill gaps left in the offer of amends process by lack of consensus between the parties. Under subsections 14(5) and 14(6) where the parties do not agree on the amount to be paid by way of compensation, it then falls to the court to determine the amount of compensation payable, taking in to account among other things what the curt makes of the sufficiency of the apology and whether the manner of the publication of the correction and apology was reasonable in the circumstances.

ab ante. Damages is very much a secondary remedy coming into play only where the court considers that it is not possible to make relevant orders *ad factum praestandum*, or any such orders of specific implement would not be sufficient to result in full reparation to the party injured by the other's civil wrong. The pursuer submits that in this case an award of damages is necessary in this case to afford full and proper reparation to the pursuer, having regard to the seriousness of the defender action in discriminating against it on ground of religion or belief. A declarator alone would not suffice to reflect the seriousness of the Defendant's violations.

Damages at common law

P10.38 It is a prerequisite to any award of other than purely nominal damages –for it to be established both that there was a wrongful act (*iniuria*) and that that act has resulted in what the law recognises as damage (*damnum*). For example, simple distress, upset, injured feelings, indignation or annoyance at the wrong done will not, of themselves and without something more, be regarded as sufficient basis which to award damages at least in a private law action based on the common law tort/quasi-delict of negligence[93] (or on breach of contract[94]). But where inured feelings/distress are associated with what the law recognises

[93] See *Wong v Parkside Health NHS Trust* [2003] 3 All ER 932

[94] In *Johnson v Gore Wood & Co* [2002] 2 AC 1 by Lord Bingham (at 27):

> "The general rule laid down in *Addis v Gramophone Co Ltd* [1909] AC 488 was that damages for breach of contract could not include damages for mental distress. Cases decided over the last century established some inroads into that general rule: see, generally, *McGregor on Damages*, 16th ed (1997), §§ 98-104. But the inroads have been limited … It is undoubtedly true that many breaches of contract cause intense frustration and anxiety to the innocent party. I am not, however, persuaded on the argument presented on this appeal that the general applicability of *Addis v Gramophone* Co *Ltd* should be further restricted. I would strike out Mr Johnson's claim for damages for mental distress and anxiety."

to be other "material damage", the law will allow for an award to be made under this head, commonly referred to in Scots law as *solatium* (although *solatium* most commonly associated with personal injury claims, can arise in relation to any wrongdoing[95]) and in England as general damages.

P10.39 In English law compensation is also sometimes awarded in tort claims under the head of "aggravated damages".[96] Aggravated damages are damages awarded as compensation for the claimant's mental distress, where the manner in which the defendant has committed the wrongdoing, or his motives in so doing, or his conduct subsequent to the tort, has upset or outraged the claimant.[97] Such conduct or motive aggravates the injury done to the claimant, and therefore warrants a greater or additional compensatory sum.[98]

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[95] See *Stair Memorial Encyclopaedia* vol 15 § 922 and *McLelland v Greater Glasgow Health Board,* 1999 SC 305 in which the Inner House held that a father was entitled to damages by way of solatium to compensate him for the severe shock and distress on his discovering only on birth that his child had Down's syndrome and increased stress and wear and tear on him in bringing up and caring for a child with Down's syndrome. See too the early 19th century case of *Hughes v Gordon* (1819) 1 Bli. 287 at 295 4 E.R. 109 a decision of the Appellate Committee of House of Lords in an appeal from the Court of Session at 113 in which the summons sought payment to the, pursuer of the sum of £500 sterling, in name of damages, and by way of recompense for the loss sustained by the pursuer through the said eviction, and "as *solatium* of the detriment arising from the loss of the pursuer's vote and right of electing at the said election meeting."

[96] See *Rookes v Barnard* [1964] AC 1129 per Lord Devlin at 1221:

> "[I]t is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant *where they aggravate the injury done to the plaintiff*. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate *compensation*."

[97] In *Thompson v Commissioner of the Police for the Metropolis* [1998] QB 498 where Lord Woolf MR made clear that although there could be a penal element in the award of aggravated damages, these were primarily to be awarded to compensate the plaintiff for injury to his proper pride and dignity and the consequences of his being humiliated or where those responsible had acted in a high handed insulting or malicious manner.

[98] See *Phonographic Performance Ltd v Ellis (trading as Bla Bar)* [2018] EWCA Civ 2812 [2019] Bus.L.R. 542 per Lewison LJ at § 11

P10.40 Damages are, of course, available to compensate as much as money can for non-economic losses. Returning to Lord Reed's judgment in *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20 [2019] AC 649. He notes (in the context of damages for breach of contract):

> "39 There are also many breaches of contract where the loss suffered by the claimant is not economic. At one time, this was thought to present a problem for the award of damages, unless it was possible to identify some form of physical detriment, on the view that placing a person in the same situation, so far as money can do it, as if the contract had been performed meant placing him in as good a situation financially.
> A wider view was however taken by the Court of Appeal in *Jarvis v Swans Tours Ltd* [1973] QB 233, and was confirmed by the House of Lords in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, where the defendant's loss was the difference to him, in terms of satisfaction and pleasure, between the swimming pool for which he had contracted and the one which he received, and it was therefore necessary to place a reasonable monetary value on that difference. Lord Mustill stated, at pp 360— 361:
>
> > 'the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure. This excess … is usually incapable of precise valuation in terms of money, exactly because it represents a personal, subjective and non- monetary gain. Nevertheless where it exists the law should recognise it and compensate the promisee if the misperformance takes it away … in several fields the judges are well accustomed to putting figures to intangibles, and I see no reason why the imprecision of the exercise should be a barrier, if that is what fairness demands.'
>
> 40 That approach is consistent with the logic of damages for breach of contract: they are a substitute for the end-result of performance, not for the economic end-result of performance. It is therefore necessary in cases of non-economic loss, as in cases of economic loss, to identify the difference in the claimant's situation resulting from the non-performance of the obligation in question, and then to place a reasonable monetary value on that difference, provided that the loss or damage in question is of a kind for which the law provides monetary compensation."

Pecuniary damage

P10.41 The pursuer's pleadings and vouching as to the pecuniary damage suffered by it as a result of the defender's breach are substantial. The evidence of Simon Herbert is thorough and consistent. The evidence is to the effect that the pursuer expended a "sunk" (i.e. irrecoverable) figure just short of £200,000 in relation to the Glasgow "leg" of the UK Tour and that, as a result of the unlawful termination, in breach of the Equality Act 2010, that expenditure was wasted.

P10.42 Wasted expenditure is a competent head of damages in a reparation action: *Anglia Television Ltd v Reed* [1972] 1 QB 60. It is therefore, per section 119(3)(a) of the 2010 Act a competent remedy for this court to award in relation to a breach of that Act. It appears that the defender suggests that, because the pursuer (in terms of its UK charitable objectives) receives support from its parent US-based charity, it could not be said ultimately to have suffered a loss. That is, of course, incorrect as a matter of law. It is the very nature of a charity that its funding is sought and raised from elsewhere in order to be expended on the furtherance of its charitable objectives. That such expenditure is rendered wasted as a result of the actions of a third party in no way reduces or mitigates that the pursuer has still suffered loss – it expended funds in the expectation that the defender would not behave unlawfully. The defender having behaved unlawfully, has caused that expenditure to become wasted and therefore a recoverable head of damages.

Moral/non-pecuniary damage

P10.43 In *Gulati v Mirror Group Newspapers Ltd* [2015] EWCA Civ 1291 [2017] QB 149 Arden LJ observed at para 48: "Damages in consequence of a breach of a person's private rights

are *not* the same as vindicatory damages to vindicate some constitutional right."[99] The pursuer seeks an award of damages by way of reparation to compensate for, among other things the reputational harm and non-pecuniary which the pursuer suffered as a result of the defender's actions in unlawfully discriminating against it. The damages sought in the present case – whether under reference to the common law or under reference to Section 119(4) EA 2010 - are, like the pecuniary remedies available for breach of other fundamental common law constitutional rights, essentially vindicatory in character: cf *Attorney-General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15 [2006] 1 AC 328, per Lord Nicholls at §§ 18-19; *R (Lumba) v Home Secretary* [2012] 1 AC 245.

P10.44 As Lady Hale observed in *Lumba* [2012] 1 AC 245 which concerned a claim for damages based on the tort of false imprisonment:

> "213 But suppose there is no such harm. The claimant has nevertheless been done wrong. Let us also assume, as is the case here, that *the circumstances are not such as to attract punitive or exemplary damages*. Is our law not capable of finding some way of vindicating the claimant's rights and the importance of the principles involved? *A way which does not purport to compensate him for harm or to punish the defendant for wrongdoing but simply to mark the law's recognition that a*

[99] See to similar effect *Docherty v. Scottish Ministers* [2011] CSIH 58, 2012 SC 150 at § 54:

> "[D]amages payable in reparation are in Scotland fundamentally compensatory in character (Walker, *The Law of Damages in Scotland*, p 4; Stewart, *Reparation: Liability for Delict*, §§ A.28.002, A.28.003).
>
> There is English support for the view that compensatory damage may in some (probably limited) circumstances include a vindicatory purpose (*Ashley v. Chief Constable of Sussex Police* [2008] 1 AC 962, especially per Lord Scott of Foscote, § 22, Lord Rodger, § 60); but it is far from certain that that purpose would be legitimate in respect of an award of damages in reparation in Scotland.
>
> *Damages awarded for an infringement of the Scotland Act, like remedies under other constitutional statutes, appear to be essentially vindicatory in character* (*Attorney-General of Trinidad and Tobago v Ramanoop* [2006] AC 328, per Lord Nicholls, §§ 18, 19; *Simpson v Attorney-General (Baigent's Case)*, [1994] 3 NZLR 667 (NZ Court of Appeal Wellington), especially per Cooke P, p 678; Beatson et al, § 7.169–7.172), albeit restitution may be an important element in quantifying the award."

wrong has been done?

214 As Lord Collins of Mapesbury JSC explains, the concept of vindicatory damages has been developed in some Commonwealth countries with written constitutions enshrining certain fundamental rights and principles and containing broadly worded powers to afford constitutional redress (and also in New Zealand, which has no written Constitution but does have a Bill of Rights: *Taunoa v Attorney General* [2008] 1 NZLR 429).

In an early article on the Canadian Charter, 'Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms' (1984) 62 *Canadian Bar Review* 517, Marilyn L Pilkington argued that an award of damages under section 24(1) of the Charter should not be limited by the common law principles of compensation. *In a proper case it might be designed to deter repetition of the breach*, or to punish those responsible or to reward those who expose it.

In *Attorney General of St Christopher, Nevis and Anguilla v Reynolds* [1980] AC 637, the Privy Council upheld a modest award of exemplary damages for breach of a constitutional right. *But there can be a middle course between compensatory and exemplary damages*.

In *Jorsingh v Attorney General* (1997) 52 WIR 501, de la Bastide CJ and Sharma JA in the Court of Appeal of Trinidad and Tobago both said, albeit *obiter*, that the remedies available under section 14(2) of the constitution were *not* limited by common law principles. Sharma JA said, at p 512, that:

> 'The court is mandated to do whatever it thinks appropriate for the purpose of enforcing or securing the enforcement of any of the provisions dealing with the fundamental rights … *Not only can the court enlarge old remedies; it can invent new ones as well, if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached.*'

215 Since then, the concept of vindicatory damages for breach of constitutional rights has been recognised by the Judicial Committee of the Privy Council, in *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 and *Merson v Cartwright* [2005] UKPC 38 (Bahamas); applied to breach of constitutional provisions other than the fundamental rights and freedoms, in *Fraser v Judicial and Legal Services Commission* [2008] UKPC 25 (St Lucia) and *Inniss v St Christopher and Nevis* [2008] UKPC 42 (St Kitts), which involved the dismissal of respectively a magistrate and a High Court registrar in breach of the procedures laid down in the Constitution; and applied to the breach of fundamental rights in *Takitota v Attorney General* (2009) 26 BHRC 578 (Bahamas), where the Board quoted from Lord Nicholls of Birkenhead in *Ramanoop*, at para 19:

> 'An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the

> circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter future breaches …. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided …'
>
> 216 We are not here concerned with a written constitution with a broadly drawn power to grant constitutional redress. But neither are we concerned with a statutory provision, such as section 8(3)(4) of the Human Rights Act 1998, *with a narrowly drawn power to award damages.*
>
> We are concerned with a decision taken at the highest level of Government to detain certain people irrespective of the statutory purpose of the power to detain.
>
> The common law has shown itself capable of growing and adapting to meet new situations. It has recently invented the concept of a conventional sum to mark the invasion of important rights even though no compensatory damages are payable."

P10.45 Thus, in addition to compensating the pursuer's pecuniary *losses*, the award of vindicatory damages sought also seeks to vindicate the fundamental common law constitutional rights associated with the free exercise of religion which have been infringed by the defender's action in cancelling the pursuer's booking of its venue. As to the seriousness of the violations, the defender demonstrated a one-sided aversion and opposition to the pursuer religious beliefs, "*taking a side*" on a contentious and highly sensitive set of issues, and their behaviour may be said to be the antithesis of how a responsible body should behave in a democratic society.

Just satisfaction damages under the HRA 1998

P10.46 Section 7(1)(a) HRA 1998 allows an individual victim who claims that a public authority has acted in a way which is incompatible with his Convention rights to bring proceedings against the authority under the HRA and, in principle, to seek damages by way of "just satisfaction" of his claim: Section 8(2) HRA. In relation to such claims, Lord Brown noted in *Van Colle v. Chief Constable of Hertfordshire Police* [2009] 1 AC 225 at para 138:

> "[w]here civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather *to uphold minimum human rights standards and to vindicate rights*."

P10.47 It is clear that the Strasbourg Court, in making just satisfaction damages award (which are in principle wholly compensatory), has awarded compensation for non-financial loss suffered by businesses. Indeed in with *Abbey Forwarding Ltd (in liquidation) and another v Hone and others (No 3)* [2014] EWCA Civ 711 [2015] Ch 309 the Court of Appeal held that (even if not available at common law by way of damages for breach of contract) a sum by way of general damages could be awarded (on the basis of a party's cross-undertaking) in respect of an inappropriately obtained freezing order for the upset, stress, loss of reputation, general loss of business opportunities, and general business and other disruption caused to individual engaged in business Such damages should be realistic compensation for what has occurred. Arden LJ (as she then was) relied also on Strasbourg case law in which damages under this general head were awarded even directly to limited companies noting (at para 155-7):

> "155. … The fact is that they were undoubtedly restricted in what business they could do by the mere existence of the wrongfully obtained freezing injunction. It was not simply that the injunction was emotionally distressing as the judge thought: it also put their business careers on hold and prevented them making any business plans for the future. This was likely to be a further cause of distress, the pleaded case for general damages. The fact that Abbey had entered provisional liquidation or begun misfeasance proceedings against them did not

prevent them from starting up a new business as, on the evidence of the appellants, the freezing injunction did.

156 I agree with Vos LJ that a further allowance should be made for that additional element of distress: to do so has the great merit that it is consistent with common sense and ordinary experience, and therefore, as McCombe and Vos LJJ describe it, realistic. The judge did not include it in his award. *Furthermore, the court is not prevented from reaching this conclusion by the absence of authority*.

The Strasbourg case law awarding *just satisfaction to companies for non-pecuniary loss where the state had wrongly searched their premises and stopped them carrying on business* (see *Société Colas Est v France* (2002) 39 EHRR 373) provides support: the Strasbourg court cited *Comingersoll SA v Portugal* (2000) 31 EHRR 772, where the non-pecuniary loss included damage to reputation and uncertainty in decision-planning.

There cannot be any logical difference here between a person who trades in his own name and a person who trades through a company.

157 HMRC rightly submits that the appellants did not rely on article 8 ECHR, even though the freezing injunction could without doubt engage their article 8 ECHR rights. However, contrary to Mr Nathan's submission, the court is entitled to take the Strasbourg case law into account in this case just as it can take any other comparative law into account where it provides inspiration for a point on which there is no direct authority in our own law.

As one comparative lawyer put it, 'no-one would bother to fetch a thing from afar when he has good or better at home, but only a fool would refuse quinine because it didn't grow in his own garden': Rudolf von Jhering, cited in Zweigert & Kotz, *An Introduction to Comparative Law*, 3rd ed (1998), p 17."

P10.48 In *Boyadzhieva and Gloria International Limited EOOD v. Bulgaria* [2018] 41299/09 and 11132/10 (Fifth Section, 5 July 2018) the Strasbourg Court observed as follows:

"58. The second pursuer also claimed EUR 20,000 in respect of non-pecuniary damage, relying on earlier cases in which the Court had awarded such damage to legal persons or organisations (*Markass Car Hire Ltd v. Cyprus*, no. 51591/99, § 50, 2 July 2002; *Supreme Holy Council of the Muslim Community v. Bulgaria*, no. 39023/97, §§ 114-16, 16 December 2004; and *Paykar Yev Haghtanak Ltd v. Armenia*, no. 21638/03, § 56, 20 December 2007). It contended that the events complained of had caused distress and frustration to its sole owner and manager.

> 59. The Government contested the claims. They urged the Court to dismiss them or to make an award "significantly lower" than that requested.
> …
> 62. As regards non-pecuniary damage, the Court reiterates that it may, in principle, award compensation to a commercial company. Non-pecuniary damage suffered by such companies may take the form of damage to their reputation, uncertainty in decision- planning, disruption in the management of the company and lastly, albeit to a lesser degree, anxiety and inconvenience caused to the members of the management team (see *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 35, ECHR 2000-IV, and *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 221, ECHR 2012). In the present case, the Court accepts the pursuer's assertion that its manager and sole owner suffered anxiety and inconvenience as a result of the breach of its rights. Judging on an equitable basis, it awards EUR 3,000 under this head."

P10.49 Importantly from the point of view of the pursuer's EA 2010 damages claim, there is precedent in Strasbourg decision in the *Metropolitan Church of Bessarabia v Moldova, Supreme Holy Council of the Muslim Community v. Bulgaria* and *Moscow Branch of the Salvation Army v. Russia* for the European Court of Human Rights awarding just satisfaction damages to an ecclesiastical bodies for negative damages to their reputations caused by negative publicity[100] and unlawful interference in Article 9 ECHR rights.[101] It is respectfully

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[100] *Moscow Branch of the Salvation Army v. Russia* (2007) 44 EHRR 46 (5 October 2006) at §§ 103-105:

> *A. Damage*
>
> 103. The pursuer claimed 50,000 Euros in respect of compensation for non-pecuniary damage resulting from arbitrary refusal of re-registration *and the negative publicity linked to its designation as a "paramilitary organisation"*.
>
> 104. The Government considered the claim excessive and vague. They also claimed that the pursuer had failed to seek redress for the alleged non-pecuniary damage before domestic courts.
>
> 105. The Court considers that the violation it has found must have caused the pursuer non- pecuniary damage for which it awards, on an equitable basis, 10,000 Euros, plus any tax that may be chargeable."

[101] *Supreme Holy Council of the Muslim Community v. Bulgaria* (2005) 41 EHRR 3 at §§ 114-117:

> "114. The pursuer organisation claimed 25,000 Euros for the alleged damage to the reputation of Mr Gendzhev and the leadership presided over by him and the consequences of the state interference in the internal affairs of the Muslim community.

submitted that the court should also when considering whether and how much to award under the head of EA 2010 damages should have in mind the authorities relating to "just satisfaction" damages for breaches of Convention rights.

P10.50 In this context, it may be noted from the Strasbourg case law that damages awards can be made to compensate for many kinds of non-pecuniary loss and damage. In *Varnava v Turkey* (2010) 50 EHRR 21, the Court explained that:

> "224… (T)here is no express provision for non-pecuniary or moral damage. Evolving case by case, the Court's approach in awarding just satisfaction has distinguished situations where the pursuer has suffered evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity… and those situations where the public vindication of the wrong suffered by the pursuer, in a judgment binding on the Contracting State, is a powerful form of redress in itself. In many cases where a law, procedure or practice has been found to fall short of Convention standards this is enough to put matters right… In some situations, however, the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the pursuer as to require something further. Such elements do not lend themselves to a process of calculation or precise quantification. Nor is it the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and

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115. The Government considered that the amount claimed was excessive and that the finding of a violation of the Convention would be sufficient just satisfaction.

116. Having regard to the circumstances of the present case and its case law concerning claims for non-pecuniary damage made on behalf of legal persons or organisations, the Court considers that an award under this head is appropriate. (See App. No.23885/94, *Freedom and Democracy Party (ÖZDEP) v Turkey* [GC], December 8, 1999 at [57]; *Comingersoll SA v Portugal* [GC]: (2001) 31 EHRR 31 at [35]; App. Nos 29221/95 and 29225/95, *Stankov and the United Macedonian Organisation Ilinden v Bulgaria*, October 2, 2001, at [121]; and *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13 at [146]

117. The unjustified State interference with the organisation of the religious community must have caused non-pecuniary damage to the pursuer organisation. Deciding on an equitable basis, the Court awards 5,000 Euros in respect of non-pecuniary damage, to be paid to Mr N Gendzhev as the representative of the pursuer organisation."

reasonable in all the circumstances of the case…"

P10.51 Thus in *Dicle for the Democratic Party (DEP) of Turkey v Turkey* [2002] ECtHR 25141/94 (Fourth Section, 10 December 2002) the court awarded €200,000 under the head of non-pecuniary damage to acknowledge reflect and compensate for the sense of frustration experienced by the members of the unjustly dissolved political party. The judgment is available only in French but as translated by the pursuer the relevant passage notes as follows (at para 78):

> "78. The Court considers that, unlike the Freedom and Democracy Party democracy (see *ÖZDEP (Freedom and Democracy Party) v. Turkey* (2001) 31 EHRR 27 §§ 55-57), the DEP was able to participate actively in Turkey's political life, even at the legislative level (having 13 deputies in the Turkish Grand National Assembly at the time of its dissolution). It represented the main political movement which favoured the expectations of a certain part of the population in Turkey. Its dissolution deprived these expectations from being articulated and taken into account first in the Turkish parliament and later on the national political scene. As a result, the dissolution of the DEP must have caused deep feelings of frustration among its members, its leaders at all levels, both national and local.
>
> Ruling on an equitable basis, the Court awards the sum of €200,000 (two hundred thousand euros) for non-pecuniary damage to the members and leaders of the leaders of the pursuer party. This sum will be paid to Mr. Hatip Dicle, who represents the DEP and who will be responsible for making it available to the members and leaders of the party."[102]

[102] The relevant passage from the judgment in French is as follows:

> "78. La Cour estime qu'à la différence du Parti de la liberté et de la démocratie (*ÖZDEP c. Turquie* précité, §§ 55-57), le DEP a pouvoir activement participé à la vie politique de la Turquie, même au niveau du législatif (13 députés à la Grande Assemblée nationale de Turquie au moment de sa dissolution). Il représentait le mouvement politique principal qui privilégiait les attentes d'une certaine partie de la population en Turquie. Sa dissolution a privé ces attentes d'être articulées et prises en compte en premier lieu dans l'enceinte du parlement turc et par la suite sur la scene politique nationale. Il en résulte que la dissolution du DEP a dû causer de profonds sentiments de frustration dans le chef de ses membres, de ses dirigeants de tous les niveaux, tant nationaux que locaux. Statuant en équité, la Cour accorde la somme de 200 000 EUR (deux cent milles euros) au titre du préjudice moral, aux membres et aux dirigeants du parti requérant. Cette somme sera versée à M. Hatip Dicle, qui représente le DEP et qui sera chargé de la mettre à la disposition des membres et dirigeants du parti."

P10.52 In a number of cases dealing specifically with religious freedoms the Strasbourg Court has awarded just satisfaction damages in respect of non-pecuniary damage directly to religious organisation in recognition of and by way of compensation for the feelings of distress, anxiety and injustice in individual members of the organisation. The court then orders these sums to be paid directly to the religious organisation, for the benefit of the whole religious community which it represents. Thus in *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others: re just satisfaction* (2011) 52 EHRR SE1 in awarding €50,000 in respect of non-pecuniary damage

> "34. … [H]aving regard to the fact that it is not possible to restore the situation that obtained prior to the violation of the Convention found in the present case (see [24]–[29] above), the Court considers that the pursuer organisation, as the leadership of all those who were affected, must be paid compensation in respect of non-pecuniary damage.
>
> 35 The absence of legal personality of the pursuer organisation is not an obstacle in this respect (see, in particular, *Supreme Holy Council of the Muslim Community v Bulgaria* (2005) 41 EHRR 3 at [116]; *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13 at [146]; and *Biserica Adevărat Ortodoxă din Moldova v Moldova* (2009) 48 EHRR 20 at [61]).
> …
> 37. In determining the award, the Court also has regard to the fact that the pursuer organisation's claims are made on behalf of the religious community it leads (see [7] above). An ecclesiastical or religious body may, as such, exercise on behalf of its adherents the rights guaranteed by art.9 of the Convention (see *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (27417/95) June 27, 2000 at [72]).
> …
> 39 Deciding on an equitable basis, the Court awards the pursuer organisation €50,000 in respect of non-pecuniary damage, to be paid to Metropolitan Inokentiy, its leader at the relevant time, for the benefit of the religious community. …
>
> 50 In view of these findings, in order to assist the respondent Government in the execution of its duty under art.46 of the Convention, the Court expresses the view that the general measures in execution of its judgments in this case should

include such amendment to the Religious Denominations Act 2002 as to ensure that leadership conflicts in religious communities are left to be resolved by the religious community concerned and that disputes about the civil consequences of such conflicts are decided by the courts.

P10.53 And in *Kuznetsov v Russia* (2009) 49 EHRR 15, which concerned the disruption and enforced closing down by a government Commissioner, accompanied by police officers, of a Bible meeting of a special needs group, comprised primarily of deaf participants, the court observed at paras 89-91 in awarding a global figure of €30,000 by way of compensation for non-pecuniary damage resulting:

> *"A. Damage*
> *The pursuers claimed €750 for each victim of the alleged violations, or an overall amount of €75,000, in respect of non-pecuniary damage, representing the suffering resulting from the premeditated violation of their rights by a prejudiced state official advancing her own political ends to the detriment of a disadvantaged minority, namely the deaf Jehovah's Witnesses. They authorised Mr Kuznetsov (the 47th pursuer and the community elder) to receive the sum awarded and to apply it to the benefit of all the pursuers.*
>
> *The Government claimed that the amount was excessive and 'not proved by the circumstances of the case'. The Court has found that the pursuers' religious meeting was disrupted through unlawful interference by the state officials and that the pursuers did not benefit from a fair hearing. These events affected a significant number of individuals, many of whom suffered from a physical disability. The Court considers that the finding of violations would not constitute sufficient compensation for the distress and frustration the pursuers must have endured. However, it finds the particular amount claimed excessive. Making its assessment on an equitable basis, it awards the pursuers a global amount of €30,000, plus any tax that may be chargeable on that amount, to be paid into the bank account of Mr Konstantin Kuznetsov on behalf of all the pursuers."*

P10.54 Other cases involving awards of non-pecuniary damages to churches/religious organisation include *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13 at para 146 where the Court granted €20,000 for non-pecuniary damage in respect of a refusal to give legal recognition to the church.

P10.55 In *Savez Crkava "Rijec Zivota" v Croatia* (2012) 54 EHRR the Court awarded €9,000 damages under that head (plus any tax that may be chargeable on that amount) to each of the pursuer churches who had been found by the court to have been discriminated against *vis à vis* other established religious bodies by the Croatian government.

P10.56 In *Moscow Branch of the Salvation Army v Russia* (2007) 44 EHRR 46, the Court found that a refusal to grant legal-entity status to the pursuer religious association violated its rights under Article 11, read with Article 9 (freedom of religion). The pursuer sought compensation for non-pecuniary damages "resulting from arbitrary refusal of re-registration and the negative publicity linked to its designation as a "paramilitary organisation". The Court upheld the claim for non-pecuniary damages, awarding €10,000 on its usual "equitable basis".

P10.57 In terms of awards of just satisfaction damages to individuals in *Serif v. Greece* (2001) 31 EHRR 20, which concerned an individual's conviction of usurping the function of a religious minister and for unlawfully publicly wearing the uniform of such a minister, the Strasbourg court awarded the sum of 700,000 Greek drachma (then approximately £7,000) to cover the repayment of the fine he had paid as a result of his conviction and in addition awarded the pursuer a sum of 2,000,000 Greek drachma (then approximately **£20,000**) by way of just satisfaction damages to cover the non-pecuniary aspect associated with the court's finding of a breach of his rights under of Article 9 ECHR.

P10.58 And in *Papageorgiou v Greece* (2020) 70 EHRR 36 in which the court found that the requirement under Greek law that a parent submit a solemn declaration to the school declaring that their children were not Orthodox Christians, in order for the children to be exempted from the otherwise compulsory religious education course. The school principal

had the responsibility to check the documentation in support of the grounds relied on by the parents and draw their attention to the seriousness of the solemn declaration they have filed. The school principal was obliged to alert the public prosecutor if he considered that a false solemn declaration may have been submitted by the parents, since that would constitute a criminal offence under Greek law. The court considers that such a system of exemption of children from the religious education course was capable of placing an undue burden on parents with a risk of exposure of sensitive aspects of their private life and that the potential for conflict is likely to deter them from making such a request and as such was Convention incompatible. In considering the just satisfaction damages to be awarded the court noted as follows:

> *A. Damage*
>
> 92 The pursuers in both applications each claimed €8,000 in respect of non-pecuniary damage.
>
> 93 The Government contended that the claim had been made without setting out any specific arguments or indicating the damage personally suffered by the pursuers as a consequence of the matters complained of. The Government considered that the finding of a violation would constitute sufficient just satisfaction under art.41.
>
> 94 The Court considers that the pursuers sustained, owing to the violation as found, non- pecuniary damage which cannot be redressed by the mere finding of a violation. Making its assessment on an equitable basis, as required by art.41 of the Convention, the Court awards jointly to the three pursuers [parents and school-child] in Application No.4762/18 the sum of **€8,000** and jointly to the two pursuers [mother and school- child] in Application No.6140/18 the sum of **€8,000** under this head.

P10.59 As a further example of the level of awards made by the Strasbourg Court to individuals in religion related cases is *Barankevich v Russia* (2008) 47 EHRR 8 in which the European Court awarded €6,000 to compensate a pastor who suffered a violation of his

Article 11 ECHR rights when a state authority refused to grant him permission to hold a service of worship in a public park. In *Varnava v Turkey* (16064/90) it is established that courts are able to make awards for lots of different kinds of damage, in particular the statement at §224 that compensation could be awarded for "*evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity*". That is, as the court will appreciate, aligned with section 119(4) of the 2010 Act. Of particular interest is *Moscow Branch of the Salvation Army v Russia* (at §105) where the claimant there was awarded non-pecuniary damages for damages "resulting from the arbitrary refusal of re-registration and the negative publicity linked to its designation as a paramilitary organisation" (judgment, at [105]).

P10.60 Indeed, similarly in *Ozdep v Turkey* (2001) 31 EHRR. 27 at §57, the Court awarded damages to the pursuer political party to compensate for frustration "sustained by the founders and members of the pursuer party" and not just the party itself. The point of all of this is to demonstrate that the defender's suggestion that the nature of the pursuer necessarily restricts its ability to claim such damages. That is incorrect. Damages under these heads are not a purely restitutionary damages as the defender seems incorrectly to believe. They are vindicatory damages – designed to provide just satisfaction for the defender's unlawful breach of its statutory duty. To subject them to pure private law concepts of reparation is simply wrong.

P10.61 It is at this stage that the defender says that its breach should be treated with impunity because, subsequent to its breach, the COVID-19 pandemic happened and, on the

defender's hypothesis, it was absolved of any wrongdoing prior to that point. That line or argument is wholly incorrect.

P10.62 It would be one thing if the pursuer were seeking to claim damages for an ongoing income stream interrupted by the defender. In such circumstances, the pursuer accepts that subsequent post-breach events may have been relevant. Here, however, as is entirely clear to the defender from the schedule of loss that has been lodged in this action, the pursuer's losses were caused by the defender as soon as it took the position that it would refuse to permit the Event to go ahead come what may.

P10.63 The fact that the defender was (and remains) unwilling to reconsider alternative dates for the Event is clear and unchallenged evidence that the defender's true problem with the pursuer arises as a result of the religious views of Franklin Graham, which it has sought to categorise by wrenching selected comments made in the past whilst conveniently ignoring contrary comments also made by Franklin Graham.

P10.64 For that reason, all of the preparatory and front-loaded expense incurred in holding the Event was wasted and represents the loss suffered by the pursuer as a result of the defender having unilaterally opted to resile from the Contract. It is not future losses for which the pursuer is seeking to claim damages; it is already-incurred expenditure that was wasted as a result of, and immediately at the time of, the defender's anticipatory breach. Nor is it expense that would "necessarily have been wasted anyway". Had the defender treated the pursuer in the manner that it has treated its other bookings, the Event would have been suspended but rescheduled. That is what has happened with the defender's other bookings as it acknowledges in the joint minute. The expenditure is wasted because the defender refuses to reschedule the Event.

P10.65 But for the actions on the part of the defender to refuse to fulfil its obligations as a result of the view it has formed about the religious views of Franklin Graham in order to please Glasgow City Council, it is clear that the Event would have been able to go ahead albeit on a different date. However, the defender refuses to countenance that as a suggestion (no doubt because it would cause concern at Glasgow City Council. The losses suffered by the pursuer are, therefore, caused by the actions of the defender and not by any subsequent pandemic. The losses are, therefore, recoverable by way of an award of damages.

P10.66 The decision caused reputational damage to the pursuer. Its effect was to paint the pursuer and its leadership as bigoted and malicious people. By its action the defender appeared to indicate that the pursuer's religious beliefs were unacceptable in society. They lent credence to the hyperbole being published online. There are also a number of aggravating factors which ought properly to be reflected in the award made to the pursuer. The way in which the defender handled the decision and the aftermath of the decision – in particular, failing to contact or consult the pursuer in relation to the decision (in advance or at all) and failing to engage with correspondence subsequently sent by the pursuer – added to the frustration, distress and shock experienced by those associated with the pursuer. The defender defended these proceedings on spurious grounds, including by introducing "*red herring*" references to Islamophobia which had nothing to do with the decisions taken.

P11 **CONCLUSION**

P11.1 The pursuer is a religious organisation and belongs to and represents a religious group, the religiously based views of which are entitled to the law's protection within a democratic and properly society governed by the rule of law. The rights which the pursuer

enjoys under domestic law mean that the defender's treatment of the pursuer was unlawful, both as a matter of common law and under and in terms of equalities legislation.

P11.2 There is no doubt whatsoever on the evidence before this court that, but for the (attributed) religious beliefs of Franklin Graham, the defender would not have issued the Termination Letter. The defender has treated the pursuer differently, in seeking to prevent the expression of the beliefs and opinions of its members on the ground of the religion professed by the pursuer and its members, than would have been the case if the pursuer and its members did not hold those beliefs and opinions.

P11.3 The law cannot endorse an outcome whereby a mainstream Christian religious gathering cannot be held because some members of the community, however vehemently, disagree with religiously based beliefs to which they take objection. Such objectors in a democratic society undoubtedly have a right to freedom of expression and of assembly to protest against other's religious views. What they do not have is a right to silence them or to stop religious assemblies from being held and from making welcome all who would come and hear the Good News preached by Franklin Graham at the Glasgow SSE Hydro Event.[103]

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[103] See for example *Zhdanov v. Russia* [2019] ECHR 12200/08 (Former Third Section, 16 July 2019) in which the European Court of Human Rights notes, among other things, as follows (emphasis added):

> "162. The Court reiterates in this connection that genuine and effective respect for freedom of association cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 or with that of the Convention in general. *There may thus be positive obligations to secure the effective enjoyment of the right to freedom of association even in the sphere of relations between individuals. Accordingly, it is incumbent upon public authorities to guarantee the proper functioning of associations or political parties, even when they annoy or give offence to persons opposed to the lawful ideas or claims that they are seeking to promote. Their members must be able to hold meetings without having to fear that they will be subjected to physical violence by their opponents.* Such a fear would be liable to deter other associations or political parties from openly expressing their opinions on highly controversial issues affecting the community. *In a democracy the right to counter-demonstrate cannot extend to*

P11.4 Neither can the law endorse a situation whereby clear acts of discrimination can be "priced in" in a wrong-doer being obliged only to pay simply a nominal or minimal amount in damages in the event that a breach of the EA 2010 is established.

P11.5 Instead on the basis of the submissions contained herein and in light of the evidence led before the court, this court accordingly can and should:

- repel the defender's pleas in law;

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inhibiting the exercise of the right of association (see *Ouranio Toxo and Others v. Greece*, no. 74989/01, § 37, ECHR 2005-X (extracts), with further references).

163. The positive obligation to secure the effective enjoyment of the right to freedom of association and assembly is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation (see *Bączkowski and Others*, cited above, § 64). The Court considers that reference to the consciousness of belonging to a minority, the preservation and development of a minority's culture or the defence of a minority's rights cannot be said to constitute a threat to "democratic society", even though it may provoke tensions. *The emergence of tensions is one of the unavoidable consequences of pluralism, that is to say the free discussion of all political ideas. Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other* (see, *mutatis mutandis*, *Ouranio Toxo and Others*, cited above, § 40; see also *Serif v. Greece*, no. 38178/97, § 53, ECHR 1999-IX, and *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 107, ECHR 2005-XI).

164. It follows that it was the duty of the Russian authorities to take reasonable and appropriate measures to enable the pursuer organisations to carry out their activities without having to fear that they would be subjected to physical violence by their opponents. The Court observes that the domestic authorities had a wide discretion in the choice of means which would have enabled the pursuer organisations to function without disturbance, such as for instance making public statements to advocate, without any ambiguity, a tolerant, conciliatory stance, as well as to warn potential aggressors of possible sanctions (see, for similar reasoning, *Identoba and Others v. Georgia*, no. 73235/12, § 99, 12 May 2015). There is no evidence that the Russian authorities considered taking any such measures. Instead, they decided to remove the cause of tension and avert a risk of disorder by restricting the pursuer's freedom of association. In such circumstances the Court cannot accept that the refusal to register the pursuer organisations was "necessary in a democratic society.

165. There has therefore been a violation of Article 11 of the Convention in respect of all the pursuers."

- sustain the pursuer's fifth plea in law and **either** the pursuer's sixth or seventh pleas in law; and
- grant decree in terms of the third crave and **either** the first crave (on a date to be agreed) or the fourth crave.

Written submissions on behalf of the defender

Motion and outline

D1 This action relates to a contract for hire of the SEC Hydro Arena for an event which was due to take place on 30 May 2020 (the "Contract"). The pursuer contends that the defender acted unlawfully when it terminated the Contract on 29 January 2020 and when it cancelled rather than rescheduled the event following the onset of the COVID- 19 pandemic. The action was originally based on (i) a private law claim for breach of contract and (ii) alleged breaches of the Equality Act 2010.

D2 Following a debate in December 2020, the private law claim for breach of contract was dismissed. The Court repelled pleas-in-law 1, 2, 3 and 4 for the pursuer and dismissed crave 2. The claim based on the Equality Act 2010 remains, although the Court excluded from probation the pursuer's claim for damages for hurt feelings.

D3 For the reasons set out below, the defender invites the Court to reject the contention that the defender breached the Equality Act 2010 in its dealings with the pursuer. The defender invites the Court to sustain the defender's sixth and seventh pleas-in-law and to pronounce decree of absolvitor.

D4 If the Court determines that a breach occurred, the parties require a determination in relation to the appropriate remedy. In that event, the defender invites the Court to sustain its eighth, ninth and tenth pleas-in-law.

D5 This submission consists of the following parts:

1.2. Part 1: Executive summary

1.3. Part 2: The Equality Act 2010 – general principles

1.4. Part 3: Witnesses and findings in fact

1.5. Part 4: The termination of the Contract on 29 January 2020

1.6. Part 5: The 'refusal' to reschedule the event

1.7. Part 6: Remedies

1.8. Appendix: Proposed findings in fact

Part 1: Executive summary

D6 In relation to discrimination, the Court is asked to determine two issues:

(i) did the defender terminate the Contract on 29 January 2020 because of the religion or belief of the pursuer, its members or associates?; and

(ii) did the defender cancel rather than reschedule the event following the onset of the COVID-19 pandemic, as a result of the religion or belief of the pursuer, its members or associates?

D7 The defender does not dispute that, as a private limited company, the pursuer is protected from associative discrimination.

D8 The defender submits that the decision to terminate the Contract was taken on 29 January 2020 by Mr Peter Duthie after he received the approval of the board to do so.

D9 The evidence demonstrates that the decision was taken on the basis of the potential practical consequences of the event proceeding. The criteria for the decision were (i) a risk of public disorder; (ii) a risk to the safety of the defender's employees; (iii) a risk to the safety of the public; and (iv) the jeopardy to the defender's reputation should the foregoing risks materialise. The defender submits that the Contract was terminated for reasons other than the religion or belief of the pursuer, its members or associates.

D10 The defender invoked the *force majeure* provisions of the Contract on 27 March 2020 (the "March letter") in circumstances where the termination of the Contract was under challenge and the event could not possibly proceed due to the COVID-19 pandemic.

D11 The defender did not reschedule the event in March 2020 because, in its view, the Contract was at an end. Further, the defender's concerns about the safety of the event the consequential impact upon its reputation persisted.

D12 If the Court finds that the defender acted contrary to the Equality Act 2010, there are a number of difficulties with the remedies sought by the pursuer:

a. it is premature for the Court to attempt to craft an order to compel the defender to host an event for the pursuer. The defender is willing to discuss hosting another event for the pursuer; however, fresh commercial terms would require negotiation;

b. practical and commercial uncertainties mean that an order compelling the defender to host an event for the pursuer would not be of sufficient precision to be enforceable;

c. there is no causal link between the actions of the defender and any patrimonial loss suffered by the pursuer. But for the defender's actions, the pursuer would be in exactly the same position as it now finds itself, as a result of the COVID- 19 pandemic; and

d. on the evidence, the pursuer has not established that it suffered the losses claimed.

Part 2: The Equality Act 2010 – general principles

D13 From the defender's perspective, this claims turn on its facts. For the purposes of this submission, the defender proposes to set out the general legal principles applying to a claim of this nature before moving on to examine the evidence.

D14 The pursuer's claim is founded on sections 13 and 29 of the Equality Act 2010 (articles 12 and 16 of condescendence). The pursuer alleges that the defender, a service provider, discriminated against it directly on the basis of its religion or belief (or that of its members and associates).

D15 Section 13 provides that direct discrimination occurs

where:

> "***13 Direct discrimination***
>
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others…"*

D16 Section 4 provides that protected characteristics include "religion or belief", concepts which are further defined in section 10:

> "**10. Religion or belief**
>
> 10. *Religion means any religion…*
> 11. *Belief means any religious or philosophical belief…*
> 12. *In relation to the protected characteristic of religion or belief-*
>
> 12.1. *a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;*
> 12.2. *a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief."*

D17 Section 23 provides that in undertaking the comparison required by section 13, "*…there must be no material difference between the circumstances relating to each case*".

D18 Finally, section 29 relates specifically to service providers who, in providing a service to the public "…*must not discriminate against a person requiring the service by not providing the person with the service*". The defender accepts that it is service provider in terms of section 29.

D19 In determining whether there has been a breach of the Equality Act 2010, the Court must be satisfied that all of the elements of direct discrimination are present: (i) the pursuer is protected from discrimination; (ii) the pursuer has been treated differently from another person or from the way in which another person would be treated; (iii) the treatment was less favourable than that afforded to the other person; and (iv) the reason for the less favourable treatment is a protected characteristic.

D20 The pursuer claims that it *"is protected from discrimination on the grounds of the religion or beliefs of the pursuer, its members and those with whom it associates"*. Particular reference is made to the pursuer's association with Mr Franklin Graham. The defender does not dispute that a private limited company is protected from discrimination arising from its association with a person possessing a protected characteristic (*EAD Solicitors LLP v Abrams* [2015] BCC 882, at para. 14). It is not, however, enough to show that the third party possesses a protected characteristic; the protected characteristic must be the factual criteria behind the treatment complained of (*Thompson v London Central Bus Company* [2016] IRLR 9, at para. 24).

D21 In so far as it is necessary for the Court to consider whether the pursuer itself possesses a protected characteristic, the defender submits this question turns on the facts and circumstances of the case. The pursuer must establish on the evidence that, as a private limited company, it belongs to a religion or possesses a belief.

D22 An essential element of section 13 is that as a matter of fact the reason for the less favourable treatment complained of is a protected characteristic. In the defender's submission, this is the central issue in this case. The relevant principle was summarised by Lord Phillips in *R (E) v Governing Body of JFS and Another* [2009] UKSC 15; [2010] 2 AC 728 ("*JFS*") (under reference to the pre-cursor provisions of the Race Relations Act 1976):

> *"In the phrase "grounds for discrimination", the word "grounds" is ambiguous. It can mean the motive for taking the decision or the factual criteria applied by the discriminator in reaching his decision. In the context of the 1976 Act "grounds" has the latter meaning. In deciding what were the grounds for discrimination it is necessary to address simply the question of the factual criteria that determined the decision made by the discriminator"* (at para. 13, emphasis added).

D23 In circumstances where the evidence suggests multiple possible reasons for a decision, a breach will be established only if a protected characteristic has a 'significant influence' on that decision. In *Nagarajan v London Regional Transport* [2000] 1 AC 501 ("*Nagarajan*"), the House of Lords considered the appropriate approach in such cases. Lord Nicholls observed:

> *"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases…No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out"* (at p512H, emphasis added).

D24 The Equality Act 2010 makes specific provision for the burden of proof in proceedings relating to its contravention. Section 136 provides:

> **"136 Burden of proof**
>
> 6. *This section applies to any proceedings relating to a contravention of this Act.*

> *7. If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *8. But subsection (2) does not apply if A shows that A did not contravene the provision.*
>
> *9. The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule…"*

D25 The effect of this provision is that the burden of proof shifts to the defender only if the pursuer first proves facts from which it might be presumed that discrimination occurred, absent any explanation. If the pursuer discharges that burden, the onus shifts to the defender to provide an explanation for the alleged discriminatory treatment. In *Efobi v Royal Mail Group Ltd* [2021] UKSC 33; [2021] 1 WLR ("*Efobi*") the Court held unanimously that section 136(2) requires a two stage analysis. In handing down the Court's judgment, Lord Leggat observed:

> *"…it follows from the application of this basic rule of evidence that an employment tribunal may only find that "there are facts" for the purpose of section 136(2) of the 2010 Act if the tribunal concludes that it is more likely than not that the relevant assertions are true. This means that the claimant has the burden of proving, on the balance of probabilities, those matters which he or she wishes the tribunal to find as facts from which the inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed. This is not the whole picture since, as discussed, along with those facts which the claimant proves, the tribunal must also take account of any facts proved by the respondent which would prevent the necessary inference from being drawn. But that does not alter the position that, under section 136(2) of the 2010 Act just as under the old provisions, the initial burden of proof is on the claimant to prove facts which are sufficient to shift the burden of proof to the respondent"* (at para. 30, emphasis added).

D26 However, the significance of the burden of proof diminishes once evidence has been led. As Lord Leggat emphasised:

> *"…it is worth repeating Lord Hope DPSC's reminder in Hewage v Grampian Health Board [2012] ICR 1054 that is important not to make too much of the role of the burden of proof provisions. As he said at para 32*:

> "*They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way of the other*" (para. 38).

Indirect Discrimination

D27 In article 10 of condescendence, the pursuer avers that the defender operates "*…an unpublished policy – which is not contained in any contractual provisions – to the effect that the defender will only facilitate the conveying of views which the defender does agree, or to which it takes no objection*" and "*a policy of discrimination against groups or individuals in that only those with views of religious positions which the defender deems to be acceptable will be permitted to hire its premises*".

D28 These averments are potentially suggestive of a claim of indirect discrimination under section 19 of the Equality Act 2010, although there is no pleaded reliance on that section. Section 19 strikes at practices which on their face are neutral as to a person's protected characteristic but which have a disproportionate adverse effect on individuals possessing a particular protected characteristic. The pursuer clarifies in its written submission that its claim is based solely on direct discrimination. Nevertheless, the provisions relating to indirect discrimination are relevant to an analysis of the available remedies under section 119 of the Equality Act 2010. Section 19 provides:

> **"19 Indirect discrimination**
>
> (v) *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> (vi) *For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if —*
> - *A applies, or would apply, it to persons with whom B does not share the characteristic,*

- *it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
- *it puts, or would put, B at that disadvantage, and*
- *A cannot show it to be a proportionate means of achieving a legitimate aim."*

D29 This submission proceeds on the (now confirmed) basis that the pursuer's claim is founded only on direct discrimination.

Remedies

D30 The remedies available to the Court in the event of a contravention are contained in section 119:

> **"119 Remedies**
> …
> (vii) *The Sheriff has power to make any order which could be made by the Court of Session –*
>
> - *in proceedings for reparation;*
> - *on a petition for judicial review."*

D31 If indirect discrimination under section 19 is established "*(6) The…sheriff must not make an award of damages unless it first considers whether to make any other disposal."* The implication is that in cases of direct discrimination, there is no restriction on the availability of damages as the appropriate remedy.

Part 3: Witnesses and findings in fact

D32 The defender appreciates that it is for the Court to determine the relevant facts and to assess the credibility and reliability of the witnesses. However, to assist the Court, the defender has included, at the appendix to these submissions, draft findings in fact which it invites the Court to make (in addition to those agreed in the parties' joint minute).

D33 In the defender's submission, there is a short factual dispute at the core of this case: what was the reason for the defender's decision to terminate the Contract? Within that, it is necessary to consider by whom the decision was made, when it was made and on what basis. In the examination of the facts which follows, it is proposed to look at the evidence through that lens.

The pursuer's witnesses

D34 The pursuer led evidence from three witnesses, Mr Joseph Walker Clarke Jr, Mr Simon Herbert and Mr Darren Tosh. The defender submits that the evidence of the pursuer's witnesses is of limited assistance to the Court in determining the core factual dispute. These witnesses played no part in the decision making process and, as each accepted in cross-examination, could only to speculate about the reason for termination of the Contract. The evidence of Mr Herbert on matters relating to quantum is considered further below.

The defender's witnesses

D35 The defender's witnesses provided affidavits which were adopted and sometimes amplified in examination in chief. A number of the defender's witnesses were subject to lengthy and robust cross-examination. The defender submits that they answered questions put to them in a clear and direct manner and did their best to assist the Court. The defender invites the Court to find the following witnesses credible and reliable.

a. Mr Peter Duthie, Chief Executive, SEC
b. Mr William McFadyen, Executive Director, SEC
c. Mr William Whitehorn, Chair and Non-executive Director, SEC
d. Ms Morag McNeill, Non-executive Director, SEC
e. Ms Pauline Lafferty, Non-executive Director, SEC

f. Mr John Watson, Non-executive Director, SEC
g. Ms Susan Aitken, Non-executive Director, SEC and Leader, Glasgow City Council ("GCC")
h. Mr Francis McAveety, Non-executive Director, SEC, and Councillor, GCC
i. Mr George Gillespie, Non-executive Director, SEC and Executive Director, GCC
j. Ms Carole Forrest, Non-executive Director, SEC and formerly Solicitor to GCC
k. Ms Debbie McWilliams, Director of Live Entertainment, SEC
l. Mr Francis Cooper, author of G4S report dated 11 March 2020

D36 The Court heard evidence from six witnesses who, in the defender's submission, were directly involved in the decision making process. The decision to terminate the Contract was taken by Mr Duthie with the support of Mr McFadyen, the defender's other executive director and four of its non-executive directors, Mr Whitehorn, Ms McNeill, Ms Lafferty and Mr Watson. Each spoke to his or her reason for supporting Mr Duthie's recommendation to terminate the Contract. The Court also heard evidence from four non-executive directors with links to GCC, Ms Aitken, Mr McAveety, Mr Gillespie and Ms Forrest (the "GCC directors"). With the exception of Ms Forrest, who was not present, the GGC directors spoke to the discussion at the board meeting on 29 January 2020.

D37 Ms McWilliams spoke to the nature of the defender's business and the events running up to the board meeting on 29 January 2020. Although she was asked to speculate about the reason behind the decision to terminate the Contract, Ms McWilliams was careful not to stray beyond the bounds of her own knowledge.

Objections to evidence

D38 Mr Cooper's evidence was heard under reservation subject to the pursuer's objection. The defender submits that Mr Cooper's evidence is relevant and of assistance to the Court in relation to the issues for determination. He was not tendered as an expert witness, but rather in order to show what would have happened if the booking had not been cancelled. On that basis it should be admitted, subject to whatever weight the Court ascribes to it.

D39 Mr Cooper is the author of the G4S risk assessment report dated 11 March 2020 (production 6/2; joint bundle p1204). The defender does not contend that Mr Cooper's report played any part in the decision to terminate the Contract. The existence of the report is part of the post-termination factual matrix. It is relevant to the pursuer's allegation that the event was cancelled rather than rescheduled in March 2020 and that there is an 'ongoing' refusal to reschedule. The Court might also consider it relevant to any question of the appropriateness of an order *ad factum praestandum*.

D40 Mr Cooper's evidence suggests that, in retrospect, the defender's operational assessment of the event was accurate. This evidence may assist the Court when it comes to assessing the evidence given by Mr Duthie, Mr McFadyen and the other directors.

Part 4: The termination of the Contract on 29 January 2020

<u>The facts</u>

D41 The defender submits that the decision to terminate the Contract was taken on 29 January 2020 by Mr Duthie after he received the approval of the non-GCC members of the board. The decision was based on concerns about public disorder, safety and the consequential risk of damage to the defender's reputation as an international conference venue. Even if the Court is satisfied that the decision was taken by Mr Duthie on another date,

or regardless of the board's approval, the evidence demonstrates that the reasons for the decision were the same. In the defender's submission, this conclusion is supported by the evidence of the defender's witnesses as well as the contemporaneous documentary evidence.

D42 The latter is of particular importance. Many cases can be cited showing the importance of contemporaneous documentary evidence where available, but for present purposes it should suffice to refer to the decision of the Court of Appeal in *Simetra Global Assets Ltd & Anor v Ikon Finance Ltd & Ors* [2019] 4 WLR 112, where Males LJ said (at [48]):

> *"In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence. The classic statement of Robert Goff LJ in The Ocean Frost [1985] 1 Lloyd's Rep 1 at p.57 is frequently, indeed routinely, cited:*
>
> *'Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the*

truth. I have been driven to the conclusion that the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case.'"

D43 In the present case, there is a wealth of contemporaneous documents that assist in identifying the grounds for cancellation. Those documents carry more weight than recollections arrived at some time after the relevant events.

Nature of the defender's business

D44 The defender led evidence that its reputation as a venue able to host events safely and securely is critical to its business. Mr Duthie spoke to the commercial nature of the defender's business. It operates for profit and benefits from commercial sponsorship. It hosts high profile events and conferences at an international level. Mr Duthie provided cogent evidence of the jeopardy to the defender's reputation should safety and security risks manifest (affidavit, para. 16; joint bundle p375). These concerns were rendered more acute by the fact that the defender was due to host the COP 26 UN Climate Change Conference at its campus later in 2020 (affidavit, paras. 15 and 34; joint bundle pp375 and 380). The clear tenor of the evidence was that the defender's reputation, and commercial success, could be seriously damaged by public disorder at an event hosted on its campus. Evidence in a similar vein was heard from Mr McFadyen, Mr Whitehorn, Mr Watson and Ms McWilliams. The defender does not understand that proposition to be seriously challenged.

The practicalities of the event

D45 A considerable amount of the evidence at proof related to the defender's understanding of the practical arrangements for the event. There is no dispute that the defender was aware from an early stage that the event was non-ticketed and free of charge. Where the parties differ is on Mr Duthie's knowledge that the pursuer intended the event to be open to the public at large. On this issue, Mr Duthie's evidence remained firm; until 27 January 2020, his understanding was that the event was not open to the public at large.

D46 Mr Duthie's evidence was that the event first appeared on his radar in late 2019 when he became aware of public unrest and social media attention from those supporting the event and against it (affidavit, para. 4; joint bundle p372). Mr Duthie knew the event was non-ticketed and free of charge but understood it to be targeted at local churches (affidavit, para. 14; joint bundle p374). This was consistent with Mr Duthie's experience that non-ticketed events tended to be for an invited audience (Day 2, p112).

D47 Mr Duthie confirmed that his understanding in late 2019 was consistent with the description of the event in the internal SEC email dated 8 April 2019 (affidavit para. 14; joint bundle p374). Ms McWilliams had a similar understanding (affidavit, paras. 5-7; joint bundle p331). This was the tenor of discussions that Ms McWilliams had with her team, before and after she was absent from the business due to illness (Day 7, p27, line 1). Support for the reasonableness this understanding is found in the evidence of the pursuer's witnesses. Although Mr Herbert and Mr Clarke spoke of the pursuer's intention that the event would be open to the public, both gave evidence that the event was targeted at church communities (affidavit of Mr Clarke paras. 16 -17; joint bundle p53; affidavit of Mr Herbert, para. 20; joint bundle p320).

D48 Mr Duthie and Ms McWilliams were challenged robustly on the reasonableness of their respective understandings under particular reference to an email dated 19 November 2019 which mentions, among other things, the pursuer's intended advertising of the event (joint bundle p156). Neither witness was copied to the email or recalled seeing it prior to termination of the Contract (evidence of Mr Duthie, Day 2, p137, line 4); evidence of Ms McWilliams, Day 7, p24).

D49 The email clearly references word of mouth advertising through the church network. It also refers briefly to advertising through other "*media avenues*" and "*maybe bus signs and other printed media outlets*". Proposed advertising material is attached to the email (joint bundle p182). Ms McWilliams recalled clearly that she did not see this material until February 2020 (Day 7, p24, line 25). Her consistent evidence was that even with hindsight, this material did not alter her understanding that the event was targeted at church communities; rather, it reinforced it (Day 7, pp38 – 50; 61; 70 and 80).

D50 As Mr Duthie accepted, with hindsight, the information contained in the November 2019 email could be read as an indication of advertising to a wider audience. The defender submits that is the height of the significance of this email. Mr Duthie was not aware of the email, but even if he had been aware of the information it contained, his understanding of the event would not necessarily have altered. The email and the attached advertising material are equally consistent with an understanding of an event targeted at church communities. Even if the Court finds that Mr Duthie could, or even should, have been aware that the pursuer intended the event to be open to all, his unwavering evidence was that he did not gain that awareness until 27 January 2020 (Day 3, pp 114-116).

Emergence of concerns relating to the risk of public disorder

D51 Mr Duthie recalled that the intensity of the public interest in the event grew through January 2020 (affidavit, paras. 5-6; joint bundle pp372 – 373). The defender received emails calling for the event to be cancelled and in its support (Day 2, p13). Mr Duthie recognised the need to consider the management of the increasing interest at an operational level and from the perspective of the defender's stakeholders. Mr Duthie included the event as an agenda item for the board meeting on 29 January and raised the issue in the Chief Executive's Report dated 22 January 2020 (production 6/5; joint bundle p1216).

D52 Mr Duthie was aware that GCC was coming under pressure in relation to the event. For that reason, GCC were kept appraised of developments. Mr Duthie was clear that in his contact with GCC's Chief Executive, Annemarie O'Donnell in the week prior to the board meeting, there was no request from GCC to cancel the event nor did he propose that GCC formally request cancellation (Day 3, pp38-39). The clear tenor of Mr Duthie's evidence was that GCC was an important stakeholder, who had to be managed; not, as was put to him, that GCC was driving the decision making or being asked to provide "cover" to the defender.

D53 Mr Duthie provided cogent evidence that his understanding of the risks associated with the event changed on 27 January 2020. Mr Duthie was already aware that a solution was required to manage the non-ticketed aspect of the event. However, Mr Graham's invitation (issued via Facebook) not only to the public at large but, expressly, to those who opposed his views escalated Mr Duthie's concerns about the risk of public disorder (affidavit, para. 15; joint bundle p375). Adding to those concerns was Mr Duthie's own awareness of the growth of the far right movement, not only globally and nationally, but in Glasgow

specifically. To Mr Duthie's mind this enhanced the risk of protest and counter-protest (affidavit para. 15; joint bundle p375; Day 2, pp62 – 65).

The board meeting on 29 January 2020

D54 The defender led evidence from each board member who was present at the board meeting on 29 January 2020. It is not disputed that no decision regarding the event was taken at the meeting. The relevance of this evidence, from the defender's perspective at least, is that it provides context to the decision making process which followed the meeting, particularly in relation to Mr Duthie, Mr McFadyen and the four non-GCC directors, Mr Whitehorn, Ms McNeill, Mr Watson and Ms Lafferty.

D55 The Court has before it an extract of the minute of the board meeting (production 6/6; joint bundle p1217). The minute was considered accurate by the witnesses although as is common to documents of this nature, it was described as a non-verbatim summary of the discussion (see, for example, Day 3, p44, line 17); Day 5, p42, line 23). Each attendee of the meeting amplified his or her recollection of the meeting in their respective affidavits and in oral evidence.

D56 In his affidavit, Mr Duthie recounted the discussion at the board meeting in detail (affidavit, paras. 17-22; joint bundle pp376 – 377). In his verbal report to the board he set out four concerns relating to the event: the risk of public disorder, the risk that artists would choose not to perform at the defender's venue, that GCC as major shareholder had concerns about the event and that the defender's principal sponsor, SSE had concerns about being associated with the event. Support for Mr Duthie's account is found in the evidence of the other directors. Ms McNeill, for example, recalled that Mr Duthie was

"*exceptionally concerned about public safety*" at the meeting (Day 5, p95, line 11). Mr Whitehorn recalled Mr Duthie giving a detailed report and describing particular instances of public disorder within Glasgow over the past year, including in particular, incitement by the extreme right (Day 5, p21, line 22; and p78, line 14).

D57 Mr Duthie explained clearly the context for his concerns. The defender is a commercial business which recognises its role is not to restrict free speech (affidavit para. 50, joint bundle p383; Day 2, p77, line 19). It hosts religious events. It hosts events at which controversial views are expressed (affidavit, paras. 35 and 36; joint bundle p379). It hosts events which do not align with the social objectives of GCC (affidavit of Ms Aitken, para. 9; joint bundle p366). In Mr Duthie's mind, what set this event apart was a concern about public disorder, safety and the consequential risk to the defender's reputation.

D58 Mr Duthie described a wide ranging discussion in which proceeding with the event was examined from a number of perspectives (Day 3, p33, line 11). The other board members described a similarly robust and varied discussion.

D59 Mr McFadyen's evidence was that the discussion comprised arguments for and against terminating the Contract (affidavit, para. 11; joint bundle p351). He recalled that concerns relating to security formed a substantial part of the discussion and were aired by a number of board members (Day 7, pp121-125). A risk of public disorder was at the forefront of Mr McFadyen's mind. He was, personally, aware of protests and counter-protests in Glasgow the weekend prior to the meeting (affidavit, para. 13; joint bundle p352). Mr McFadyen formed the view that it would be unsafe for the event to proceed (affidavit, para. 18; joint bundle p353).

D60 Mr Whitehorn provided clear and direct evidence about the discussion at the board meeting and about his own concerns. Mr Whitehorn explained that he is a believer in free speech (affidavit, para. 7; joint bundle p357). The religion or belief of the pursuer or Mr Graham were not relevant to his concerns about the event. The defender does not take principled objections to those seeking to hire its venues. Mr Whitehorn's concerns were focussed on the risk of public disorder.

D61 Mr Whitehorn recalled Mr Duthie emphasising his concerns about public disorder (affidavit, para 11; joint bundle p359). Mr Whitehorn informed the meeting of his own concerns about the risk of protest inside and outside the venue, particularly in light of Mr Graham's invitation to those with views opposed to his own. Mr Whitehorn gave cogent evidence about the social context of Glasgow and its particular vulnerability to protest and disturbance at that time. He did not want to see a repeat of the disorder seen in the city over recent months (affidavit, para 13; joint bundle p359). If there was a risk of clashing protestors, Mr Whitehorn considered that he had a duty to prevent that happening irrespective of the subject matter of the protest (Day 5, p80, line 4). Mr Whitehorn spoke of his safety concerns relating in particular to the internal layout of the Hydro Arena with its steep 'colosseum-style' seating. A brawl or fight could lead to 'loss of life' (Day 5, p10, line 2).

D62 Mr Whitehorn was also particularly concerned about jeopardy to the defender's reputation and to its prospects of hosting the forthcoming COP 26 Conference, should public disorder manifest (Day 5, p48, line 1; p82). This was a matter which he raised at the meeting (and in the email discussion following it) (Day 5, p84, line 22).

D63 Ms McNeill had a similar recollection of the range of issues discussed at the board meeting. Ms McNeill, a former solicitor, approached the issue from a legal perspective. She informed the board that cancelling the event might place the defender in breach of its contractual obligations, although she did not at that time have knowledge of the terms of the Contract (affidavit, para. 7; joint bundle p393). Ms McNeill had no knowledge at that time of Mr Graham's or the pursuer's views but, mindful of the right to free speech, she cautioned the board that it must not act as "*judge and jury if the law hasn't been broken*" (affidavit, para. 11; joint bundle p394). She also recalled clearly a discussion relating to public disorder. Ms McNeill advised the board to reach a view on the event quickly because of its proximity.

D64 Ms Lafferty's evidence was consistent with that of the other attendees; a range of issues was discussed relating to the event (affidavit para. 5; joint bundle p387). Ms Lafferty provided context to her statement that "…*it's about 'doing the right thing' notwithstanding the contractual position*". This observation followed Ms McNeill's contribution in relation to the contractual position. Ms Lafferty wished to emphasise that the board should make a decision taking account of all of the board's responsibilities, not just with a narrow focus on the contractual position. If there was a safety risk to the public or employees, then in her view that had to be set against the risk of breaching a contract (Day 4, p 33 line 1).

D65 Ms Lafferty also provided context for her comment that "*the nature around the event is darker…*". Ms Lafferty explained that her concern related to the potential for unrest, protest, safety, media attention and whether all of that would leave the SEC in a situation where safety was compromised (Day 4, p50). She accepted candidly that she had a concern about the reaction to the message of Mr Graham but was clear that her concern did not relate to the message itself or even to a "*one sided adverse reaction*" (Day 4, p53). Ms

Lafferty's concern related to a "*cocktail for unrest*" and associated safety issues (Day 5, p55, line 5). The defender submits that it was plain from Ms Lafferty's evidence that her primary concern related to the health and safety of the public and the defender's employees. This is unsurprising given Ms Lafferty's role as board representative for the defender's Health & Safety Group.

D66 Mr Watson had a clear recollection of the board meeting (affidavit para. 7; joint bundle p341). He described clearly that the defender's concerns related to "*its ability to operate the event*". Mr Watson's description was of a growing sense of concern among the board members as Mr Duthie explained the ticketless nature of the event. These concerns were amplified by Mr Graham's invitation to everyone to attend particularly those with opposing views to his own. To Mr Watson's mind, this created a risk of conflict. Mr Watson explained that it was not "*reaction to the religious views*" of the pursuer or Mr Graham that was the cause of his concern; rather it was the risk of protest and counter-protest combined with the fact it was ticketless event. Properly understood, it was the risk of public disorder in the round (Day 4, p89).

D67 From Mr Watson's perspective these safety concerns raised questions about the commercial viability of the Contract, a matter he raised at the board meeting (affidavit para. 12; joint bundle p343). He had particular concerns related to the cost of extra security and property damage repair (Day 4, p123). These matters raised another concern: potential damage to the defender's reputation. The defender's reputation for being able to operate an event safely and securely is 'key' to its business. This was especially important with COP 26 on the horizon (affidavit paras. 13 and 14; joint bundle 343).

D68 Ms Aitken was able to speak only to the discussion at the board meeting. She too described a discussion at which a number of perspectives were considered (Day 6, p42, line 10). Ms Aitken explained candidly that she expressed her own views that the event should not go ahead. In part, her concerns related to the impact of the event on certain communities within Glasgow. Ms Aitken did not shy away from that. But, she also described a discussion in which the board acknowledged the right to free speech and actively considered which views were relevant to consideration of whether the Contract should be terminated (Day 6, p45).

D69 Although Ms Aitken's evidence is valuable in understanding the multi-faceted nature of the discussion at the board meeting, it does not assist the Court on the core issue in this case. Ms Aitken was not involved with the defender at an operational level and was not asked to approve the termination of the Contract. Ms Aitken was not involved in taking the decision to terminate the Contract, whenever and by whomever it was made.

D70 Those present at the board meeting recalled another, more significant, aspect to Ms Aitken's contribution to the discussion. Ms Aitken expressed her views about the febrile situation in the city of Glasgow at that time, a subject on which Ms Aitken is well placed to express a view. In her very recent memory protests and counter-protests within the city had turned violent (Day 6, pp98-99). There was a confluence of factors in the city which meant that the potential harm was on an unknown scale (Day 6, pp55 and 106). In Ms Aitken's view there was a risk that the emerging far right presence in Glasgow would latch on to the event and use it as an opportunity to cause trouble. Despite lengthy cross-examination in which the sincerity of Ms Aitken's concern was questioned, she did not

stray from her evidence that she had a genuinely held concern about a risk of public disorder.

D71 Mr McAveety did not have a detailed recollection of the board meeting. What he did recall aligned in material respects with the evidence of the other directors. Mr McAveety was personally unfamiliar with the views of Mr Graham or the content of the event (Day 5, p110, line 16; p130, line 2). He recalled the focus of the discussion at the meeting being the risk of public disorder at the event, rather than its content (Day 5, pp28 – 130). Mr McAveety's personal concern was the unpredictability of spontaneous protests and the risk of rapid escalation (Day 5, p127).

D72 Mr Gillespie also recounted a wide ranging discussion. Concerns about public order and the risk of protestors being inside and outside the Hydro Arena prompted a discussion about security and reputational concerns (Day 3, p110, line 1). Mr Gillespie recalled the other GCC directors (Ms Aitken and Mr McAveety) expressing their views about the impact on Glasgow's reputation and GCC's desire to adhere to its equalities framework. However, in Mr Gillespie's view it was appropriate to let the non-GCC directors make the decision under the exclusion of the GCC directors (affidavit, para. 8; joint bundle p401; Day 3, p124, line 21).

D73 As set out in her affidavit, Ms Forrest had no knowledge of the events in question; she confirmed that position in cross-examination.

Exclusion of the GCC directors from decision making

D74 Mr Whitehorn was challenged at length about his proposal that the GCC directors be excluded from the discussions following the board meeting. The relevance of this

challenge is unclear; the *vires* of the decision to terminate the Contract is not in issue. Nevertheless, Mr Whitehorn gave clear evidence that in his opinion it was preferable for the GCC directors not to be further involved in discussions; this would enable the non-GCC directors to take an independent view (Day 5, p62, line 23; pp67 – 68). The GCC directors took no issue with this and did not participate further. Indeed, it was matter of practice that the GCC directors did not vote in matters where there might be a perceived conflict of interest (evidence of Ms McNeill, Day 5, p91, line 22).

Confirmation of GCC's position

D75 In cross-examination, Mr Duthie further explained his suggestion to the board that the views of GCC as shareholder should be obtained. This was a means of managing the relationship with GCC and enabling GCC to say that it made a request to cancel, regardless of what the defender decided to do (Day 3; pp47 – 48); and evidence of Mr Whitehorn, Day 5, p65, line 9). That would in turn allow the board to move on and consider the issue under reference to matters relevant to the business and not political pressure (Day 3, p49, line 16).

D76 When the letter from GCC (production 6/3; joint bundle p1210) arrived on the afternoon of 29 January 2020, it was reasonable for Mr Duthie to share it with those board members who were continuing consideration of the issue (Day 3, p69, line 23). Mr Duthie consistently refuted the suggestion put to him in cross-examination that he requested a letter from GCC to provide "cover" to the defender and that it was used to influence the other board members (Day 3, p70, line 19;(p 73, line 19). The suggestion put to Mr Duthie that individuals such as Mr Whitehorn, Ms McNeill, Mr Watson and Ms Lafferty would be so easily pressured as to abandon their duties to act independently as directors strains credibility.

D77 In any event, the clear evidence from the non-GCC board members was that their reasons for supporting Mr Duthie's recommendation related to concerns about public disorder, safety risks and the consequential jeopardy to the defender's reputation, not the wishes of GCC (for example, evidence of Mr Whitehorn, Day 5, p12).

The board's support for Mr Duthie's recommendation

D78 In his affidavit, Mr Duthie explained clearly the circumstances in which he sought the approval of the non-GCC directors to terminate the Contract. He rightly acknowledged that he could not speak to the reasoning of the other directors but he could speak to the tenor of the discussions which took place on 29 January (affidavit, para.26; joint bundle p378). He described a reluctance to terminate the Contract and the express acknowledgement of the right to free speech. Cancelling an event was not something which he or the board took lightly; it was a rare occurrence. Mr Duthie was clear that the defender would not be driven to cancellation simply because a stakeholder (such as SSE or GCC) sought it (affidavit, paras. 24-25, 32; joint bundle p378-379).

D79 The defender is an independent organisation which makes decisions for commercial and operational reasons. Ultimately, it was those reasons which founded Mr Duthie's recommendation to cancel the event and the board's subsequent approval of that recommendation (affidavit, paras 26 and 32; joint bundle pp378 and 379). Mr Duthie's cogent and consistent evidence was that his recommendation was not made on the basis of the religion or belief of the pursuer or Mr Graham (affidavit, para. 26; joint bundle p378). It was driven by concerns about public disorder, safety and the consequential risk to the defender's reputation.

D80 The evidence of Mr McFadyen was that he discussed the event with Mr Duthie after the board meeting and before the letter from GCC was received (affidavit, para 21, joint bundle 354). Mr McFadyen agreed that the Contract should be terminated on the basis of his genuine belief that the event presented foreseeable and unmanageable risks of public disorder. He was not prepared to put his employees or the public in danger. Allied to this was the jeopardy to the defender's reputation as an international event host should public disorder manifest.

D81 In his email timed [16:10] to Mr Whitehorn, Mr Duthie expressly sought the "*approval (or otherwise) to proceed to cancel the event*" (emphasis added) (production 6/13; joint bundle p1229). This is consistent with Mr Duthie's evidence that decision to cancel had not been taken prior to (or at) the board meeting and that although he made a recommendation to terminate the Contract; it was only that.

D82 Each of the non-GCC directors provided evidence of the reasons why he or she approved Mr Duthie's recommendation that the Contract be terminated. The evidence of each of those individuals is consistent with the contemporaneous documentary record of what occurred as set out in the email chain beginning at [16:10] on 29 January 2020 (productions 6/13 – 18; joint bundle pp1229 to 1238). The non-GCC directors were reluctant to agree to the recommendation. Mr Graham's right to free speech was expressly acknowledged. However, the approval of Mr Duthie's recommendation was founded on the executive's "grave concerns" about security, the elevated risk of public disorder and the risk to the defender's reputation.

The circumstances of the decision to terminate the Contract

D83 Mr Duthie did not waiver in his evidence regarding the circumstances of the decision to terminate the Contract. It was made by him, on 29 January 2020, after he received the approval of the non-GCC board members, and, on the basis of that approval.

D84 As with the other board members, Mr Duthie faced robust cross-examination in relation to the decision making process. Mr Duthie was clear that as Chief Executive, he had authority to terminate the Contract without reference to the board. He was equally clear that, rather than exercise his delegated authority, in this instance, he opted to take the matter to the board (Day 2, p5, line 26). Having decided to take the matter to the board, Mr Duthie would not have terminated the Contract without the board's support (Day 2, p6 line 4); (Day 3; pp 61 and 79).

D85 From the perspective of the other board members, the fact that Mr Duthie brought the issue to the board for discussion and then, expressly, for approval by the non-GCC members, indicated that he would not make the decision unilaterally. He sought the board's endorsement (or otherwise) (evidence of Mr Whitehorn, Day 5, p19-20). Once a matter is brought to the board, the board can direct what happens in relation to that issue (evidence of Mr Whitehorn; Day 5, p20, line 13). If need be, the board has the ultimate authority to remove Mr Duthie's delegated authority and could countermand a unilateral decision. From a practical perspective, the evidence was that, had the board not approved the recommendation on 29 January 2020, there would have had to be a continued discussion (evidence of Mr Watson, Day 4, p121).

D86 The clear tenor of the evidence is that the decision was one which Mr Duthie was willing to take only with the approval of the board; that is what he did on 29 January 2020.

Email dated 28 January 2020

D87 Mr Duthie was challenged forcefully in relation to the email of 28 January 2020 (production 5/7; joint bundle p1029) in which the author of the email, Kirsten McAlonan, referenced a decision having been taken on 28 January 2020 (although in her subsequent email timed [11:07] she noted that the situation was merely under review). Mr Duthie's evidence was that, if that was indeed Ms McAlonan's understanding, she was mistaken. As at 28 January 2020 Mr Duthie had discussed the event with his Operations Director due to concerns about safety and security; as he put it, he was "well on his way" to a recommendation to the board that the Contract be terminated, but he was not there yet (Day 3, p94 line 19). Mr Duthie accepted candidly that he did not pick up on the email at the time and was clear that had he done so he would have corrected it.

D88 The suggestion that a decision was made on 28 January 2020 is inconsistent with the contemporaneous evidence. The Chief Executive's report shows that on 22 January 2020, Mr Duthie had already decided to bring the event to the board on 29 January 2020. At [16:10] on 29 January 2020, Mr Duthie expressly sought approval of the non- GCC board members to terminate the Contract. If Mr Dr Duthie had already made the decision, or indeed intended to take it regardless of the board's approval, it would have been a risky proposition to seek approval from the non-GCC directors in writing. Mr Duthie could not have had an expectation that experienced business people such as the non-GCC directors would simply agree without applying independent scrutiny to the recommendation. The clear inference is that Mr Duthie took the decision on 29 January 2020, only after he had received the approval of the non-GCC directors.

D89 Even if the Court is satisfied that a decision was made on 28 January 2020, the reference in the email of that date to "escalating" concerns is consistent with Mr Duthie's evidence as

to the reason for cancellation. It is not evidence that religion or belief featured in the decision.

Letter of termination

D90 Mr Duthie accepted candidly that the termination letter (production 5/2; joint bundle p429) does not explain the reason for termination as fully as it could have done (Day 2, p32, line 21); (Day 3, p74). Nevertheless, Mr Duthie's evidence was clear; the pursuer had created a situation where the risk of public disorder could in turn damage the defender's reputation (Day 2, p26). Read in this light, the termination letter is consistent with the evidence given by Mr Duthie of his reason for recommending termination of the Contract, and evidence of the non-GCC board members as to their approval of that recommendation.

D91 When pushed on why it was a breach not capable of remedy, Mr Duthie gave clear evidence that in his view the risks were of a scale that could not be safely managed (Day 2; p36). Mr Duthie is an experienced Chief Executive, having worked for the defender in different capacities for over 37 years; in the defender's submission, his experience in matters such as this should not be overlooked (Day 2, p38).

Draft press releases

D92 The pursuer seeks to infer the reason for the decision to terminate the Contract from press releases drafted by the defender in early February 2020. As Mr Duthie explained under cross examination, the content of press releases is framed carefully to manage the interest of the defender's stakeholders. Mr Duthie explained that his preference was to avoid reference to matters of security in communications within the public domain (Day 3, p75).

Was the decision to cancel the event in January 2020 a breach of the Equality Act 2010?

D93 In the defender's submission, the evidence demonstrates that the decision to terminate the Contract was based on genuinely held concerns about public disorder, safety and the consequential jeopardy to the defender's reputation; it was not significantly influenced by the religion or belief of the pursuer, its members or associates.

The appropriate comparator?

D94 Section 23 of the Equality Act 2010 requires there to be no material difference between the circumstances relating to the pursuer and the comparator identified by the pursuer for the purposes of section 13. In article 16 of condescendence, the pursuer identifies as comparators "*individuals and entities who have received adverse publicity*", naming Bianca Del Rio whose controversial views were spoken to by Mr Tosh (affidavit, para. 11; joint bundle p176).

D95 The defender submits that individuals and entities who receive adverse publicity are not a suitable comparator in this case. A suitable comparator would be an individual or entity whose event gave rise to concerns about public disorder, safety and reputational risk and which was due to take place in Glasgow within a similar timeframe as the pursuer (given the particular volatilities present in Glasgow at that time). The pursuer led no evidence that an appropriate comparator would have been treated differently. On the contrary, the evidence as a whole shows that any such individual or entity would have had a booking cancelled for the same reasons and in the same way.

Reason for the decision

D96 The critical issue in determining whether there is a breach of the Equality Act 2010 is whether the religion or belief of the pursuer or Mr Graham significantly influenced the decision to terminate the Contract (*Nagarajan*, *supra*). In the defender's submission, the evidence shows that the decision, whenever and by whomever it was taken, was not so influenced.

D97 The clear import of the evidence is that the decision to terminate the Contract was taken on 29 January 2020, by Mr Duthie, with the approval of the non-GCC directors. Any other interpretation of the decision making process strains credibility. Mr Duthie's unwavering evidence was that, having asked the non-GCC directors to approve his recommendation to terminate the Contract, the decision depended upon that approval. Without it, he would not have terminated the Contract unilaterally. The approval (or otherwise) of the non-GCC directors was a critical aspect of the decision.

D98 The pursuer may contend that even if the Court holds that the decision was made on 29 January 2020, it can ignore the discussion at the board meeting and the subsequent seeking and granting of approval, all because, ultimately, Mr Duthie had delegated authority to make the decision. Such a contention would completely ignore the reality of what happened on 29 January 2020.

D99 The defender is a commercial organisation. Mr Duthie as its Chief Executive decided that the potential termination of the Contract was a matter of sufficient seriousness that the decision about the appropriate course of action should be considered at board level. In doing so, Mr Duthie sought the input of experienced business people for a purpose. Whether Mr Duthie was seeking the "support," "views" or "thoughts" of these individuals is nothing to the point. It all amounts to the same thing. Mr Duthie desired the input of an

experienced board of directors before taking an operational decision with significant commercial implications.

D100 In the defender's submission, any suggestion that, having taken those steps, Mr Duthie cast that input aside and made a decision of his own, for reasons unconnected to those approved by the non-GCC directors, is not credible. Mr Duthie did not make the decision in a vacuum.

D101 It follows that the events of 29 January 2020 are relevant to understanding the reason for the decision to terminate the Contract. Mr Duthie's evidence was that he reported to the board on a number of concerns relating to the event, including the risk of public disorder. A robust and multi-faceted discussion followed. The defender does not shy away from the fact that the discussion included reference to comments made by Mr Graham or that Ms Aitken expressed her view that the defender should not host the event. However, in the defender's submission, the evidence shows that these views did not significantly influence the decision to terminate the Contract. The pursuer's and Mr Graham's right to "free speech" were expressly acknowledged both during the board meeting and in the email dialogue which followed it.

D102 Mr Duthie's evidence was that his recommendation to terminate the Contract was founded on concerns about public disorder, risks to the safety of employees and the public and the jeopardy to the defender's reputation should these risks manifest. Mr McFadyen's evidence was to the same effect. The non-GCC directors who were asked to approve the recommendation each gave evidence that they approved the recommendation for the same reasons.

D103 In the defender's submission, the evidence given by each of the individuals involved in the decision making process represented their respective views at 29 January 2020 when the decision was taken. The religion or belief of the pursuer or Mr Graham did not form part of the factual criteria underlying the decision. Those matters were expressly set aside by those involved in the decision making process in their acknowledgement of the right to free speech.

D104 In the defender's submission, for the Court to be satisfied that there has been a breach of section 13, it would have to be satisfied that each of these six individuals attempted to mislead the Court in their sworn affidavits and oral evidence and that the contemporaneous documentation from 29 January 2020 was somehow contemporaneously manipulated.

D105 Even if the Court is satisfied that the decision was taken by Mr Duthie alone, on 28 or 29 January 2020, there is no evidential basis to conclude that his decision was significantly influenced by the religion or belief of the pursuer or Mr Graham. The evidence about Mr Duthie's mindset and views on terminating the Contract was consistent.

D106 The pursuer seeks to rely on Mr Duthie's acceptance of the proposition put to him on cross examination that Mr Graham's views are controversial. The defender submits that this acceptance does not assist the pursuer. That some of Mr Graham's views are controversial is a matter of objective fact, acknowledged by both Mr Clarke and Mr Tosh (Day 1, pp 58, 68, 140). An acknowledgement that a view is controversial is very far removed from an indication of religious intolerance. The acknowledgment in the present case is entirely consistent with the defender's case – that concerns at the repercussions of public reaction to the admittedly controversial views of Mr Graham lay behind the

cancellation. Indeed, standing the basis for the cancellation the concession that those views are controversial could hardly be withheld.

Witnesses not called

D107 During the proof, the pursuer sought to draw adverse inferences from the fact that certain individuals were not called, in particular, Ms McAlonan and Ms O'Donnell. The defender submits there is no adverse inference to be drawn. Neither individual was involved in the decision making process on 29 January 2020. The court heard from every individual involved in that process and who could speak reliably to the reason for the decision to terminate the Contract. In *Efobi*, Lord Leggatt observed:

> *"So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules"* (at para. 41, emphasis added).

Other matters

D108 The pursuer led evidence about other matters which it was suggested to the defender's witnesses could have formed part of the decision making process. For example, it was suggested that the defender could have sought out the transcripts from the pursuer's Festival of Light in Blackpool to inform itself as to the likely content of the event. The fact that the defender did not do so does not assist the pursuer; it is consistent with the

evidence of the defender's witnesses that the content of pursuer's event was irrelevant to it. When Mr Duthie was asked why he did not inform himself about it, his response was indicative of his mindset: "*Because it's not the venue's decision as to what is said or not from the stage*" (Day 2, p51).

D109 It was suggested that the defender could have investigated whether there was public disorder at the Blackpool event. However, that would have been equally unhelpful to the defender who was looking at the risks associated with the event through the prism of the situation pertaining to the city of Glasgow in January 2020.

D110 It was also suggested that the defender could have looked to the launch event on 25 January to ascertain the risk of public disorder. If anything, the launch event supports the defender's evidence that it cancelled the event on the basis of operational and reputational concerns specific to the event. Why would the defender have permitted the launch event if it was fundamentally opposed to the religious views of the pursuer?

D111 Finally, it was suggested that the defender could have obtained a formal risk assessment. The defender acknowledges that it did not obtain a formal risk assessment in January 2020. The defender's executive team considered the risks posed by the event on the basis of their considerable experience of hosting events and concluded that the risks associated with the event were unpredictable and unmanageable. It is doubtful that a formal risk assessment could have added anything to that assessment. In any event, the risks of protest and counter-protest presented a level of risk that individual directors were not prepared to agree (for example, evidence of Ms McNeill, Day 5, pp98 - 99; affidavit of Mr McFadyen, para. 13).

D112 Even if the Court concludes that the defender could have done more to investigate the risks associated with the event, the Court is not required to carry out a qualitative assessment of the decision. In this respect, the case law is clear: the Court is tasked only with establishing the factual criteria for the decision (*JFS, supra*). The Court is not asked to assess the reasonableness of the decision. This is not a Judicial Review on *Wednesbury* grounds, nor is it a claim in negligence. The Court is not asked to consider whether the decision was rational in the sense that it took account of irrelevant reasons or failed to take account of relevant reasons. It is not tasked with determining whether adequate reasons were given for the cancellation. It is tasked only with determining what was, as a matter of fact, the reason for termination of the Contract.

D113 The defender accepts that the Court must look at the circumstances of the decision to ascertain the true reason behind it. But, if it is satisfied that the reason is other than the religion of belief of the pursuer, its members or associates, the Court need look no further.

D114 In the defender's submission, the totality of the witness evidence and contemporaneous documentation demonstrates that the decision to terminate the Contract was taken for reasons other than the religion or belief of the pursuer or Mr Graham. The reasons for termination were the risk of public disorder, the risk posed to the safety of the public and the defender's employees and the consequential jeopardy to the defender's reputation.

D115 The defender submits that there is plainly a distinction between basing a decision on the content of an event or public opposition to that content; and basing a decision on the potential practical risks associated with an event proceeding. These are different factual criteria. To put it another way, in this case, had there been no security, safety or reputational

concerns, the evidence shows that the decision would have been different. If the Court is satisfied that religion or belief did not significantly influence the decision to terminate the Contract, this arm of the pursuer's claim fails.

Part 5: The 'refusal' to reschedule the event

The allegation against the defender

D116 The defender understands there to be a second arm to the pursuer's claim. The pursuer avers that "*…the defender has discriminated – and in its refusal to reschedule the Event continues to discriminate – against the pursuer because of a protected characteristic…*" (article 12 of condescendence). Further, the pursuer avers that it: "*…has…sought to agree with [SEC] an alternative date for the event, but the defender refuses to enter into discussions or negotiations for a re-scheduling of the Event at the Scottish Event Campus site*" (article 5 of condescendence). It also avers that the SEC: "*…has refused to discuss or seek to agree an alternative date for the Event*" (article 10 of condescendence).

D117 Although there is little specification of this claim, the defender takes the allegation to be that when it invoked the *force majeure* provision of the Contract in March 2020, it cancelled rather than rescheduled the event as a result of the religion or belief of the pursuer, its members or associates. Thus, as the pursuer would have it, this constituted a separate discriminatory act.

D118 The defender submits that the pursuer has not come close to proving the facts necessary to create an inference that in March 2020, the reason for cancellation was a protected characteristic. But, even if such an inference is created, the evidence demonstrates otherwise.

The facts

D119 Mr Duthie provided evidence regarding the defender's reasons for issuing the March letter (production 6/1; joint bundle p1203). The termination of the Contract was under challenge. Due to the national lockdown there was no prospect of the defender hosting events at its venues in the foreseeable future, and certainly not on 30 May 2020. Given the possibility of a successful challenge to the termination, the prudent course was to invoke the *force majeure* provisions of the Contract. This was not a second decision; the decision to terminate the Contract had already been made on 29 January 2020 (affidavit paras. 46 - 47; joint bundle p382).

D120 Mr Duthie and Ms McWilliams gave cogent evidence about the reasons why the defender did not propose rescheduling the event at that time. The Contract had already been terminated and the reasons for the cancellation persisted (affidavit of Mr Duthie, para. 48; joint bundle p382). As at the date of the March letter, the defender held a risk assessment report from G4S (production 6/2; joint bundle p1205). There was nothing in that report which caused the defender to alter its view of those risks.

D121 Thereafter the defender was unable to host any events at its venues until September 2021 (Day 2, p7 line 25). Rescheduling events was a particular problem when events were part of a tour. This was especially true of events with an international element given ongoing travel restrictions (affidavit of Ms McWilliams, para. 27).

D122 Mr Duthie's clear evidence was that the defender would consider hosting a different event for the pursuer in the future subject to commercial negotiation and discussion of dates, venue, format, ticketing and risk profile (affidavit, para. 53; joint bundle p383). If the

concerns about safety are capable of being addressed, Mr Duthie would be minded to accept a booking (Day 3, p9). The defender's other directors were similarly open to the prospect of hosting an event for the pursuer.

D123 The defender's willingness to discuss hosting an event for the pursuer is borne out by its handling of a booking enquiry made by the pursuer in March 2021. The enquiry was progressed in the usual way by the defender but ultimately was not advanced by the pursuer (affidavit of Ms McWilliams, para. 29).

Was the cancellation of the event in March 2020 a breach of the Equality Act 2010?

D124 The defender submits that there is clear and compelling evidence that event was not rescheduled in March 2020 because: (i) the defender understood there to be no existing contractual arrangement between parties against which the event could be rescheduled; (ii) the defender's assessment of the risks associated with the event persisted (and were confirmed by a formal risk assessment); and (iii) the COVID-19 pandemic had struck, upending the defender's usual commercial activities. The religion or belief of the pursuer, its members or associates played no part in this rationale.

D125 The pursuer put to a number of the defender's witnesses the fact that some venues on the pursuer's UK tour are hosting events on its rearranged tour. The defender submits that evidence does not assist the Court in determining whether cancellation in March 2020 was a discriminatory act. These are matters between the pursuer and each individual venue. Mr Duthie quite properly informed the Court that he could not speak for the other venues and the management of their affairs. In the defender's submission, it is tolerably clear that there could be a multitude of factors relevant to each individual venue's decision

to host an event on the pursuer's tour. No inference as to the reason for the defender's actions can properly be drawn from those arrangements.

D126 In its pleadings, the pursuer makes a number of references to an ongoing 'refusal' to reschedule the event. No legal basis for a duty to unilaterally reschedule is advanced. No facts are averred as to the circumstances of a 'refusal'. If an 'ongoing refusal' forms part of the pursuer's case, the defender has not been given fair notice of the legal or factual basis for it.

D127 The defender's position on this is straightforward. There was no evidence led that the pursuer contacted the defender with a view to arranging a similar event on another date. Absent evidence of such an approach, there can be no 'refusal'; any complaint of 'refusal' is premature. If the pursuer wishes the defender to host an event, it should contact the defender to begin those discussions. As the evidence made clear, the defender's response to any such approach will depend on the particular circumstances then obtaining.

D128 In all of these circumstances, the defender submits that the second arm of the pursuer's claim under the Equality Act 2010 also fails.

Part 6: Remedies

D129 If the Court is satisfied that direct discrimination is established, section 119 of the Equality Act 2010 confers authority to make an order which could be made by the Court of Session in proceedings for reparation or on a petition for judicial review. The pursuer seeks (i) specific implement or (ii) an award of damages.

<u>Specific implement</u>

D130 Crave 1 is in three parts. The pursuer asks the Court to ordain the defender to (i) permit the pursuer to use the Venue and the Related Facilities; (ii) to perform the Core Services and the Box Office Services; and (iii) otherwise perform its contractual obligations as defined and contained in the contract between the pursuer and the defender dated on or around 31 July 2019.

D131 Each of the three parts of Crave 1 links back to the Contract, which the Court has already determined is at an end. The defender invites the Court to find that, in the absence of any contractual obligations between the parties, there is no basis to grant specific implement in the terms sought in Crave 1.

D132 A decree of specific implement cannot be granted if performance is impossible (*McArthur v Lawson* (1877) 4 R 1134; *Bell Bros. (HP) Ltd v Reynolds* 1945 SC 213 at p216). The pursuer accepts that the event could not have taken place on the date specified in the Contract as a result of the COVID-19 pandemic. In these circumstances the pursuer seeks to compel the impossible.

D133 The difficulty is not merely that the date of performance has passed; the Court determined at debate that the Contract has been (validly) terminated. By insisting in the claim for specific implement the pursuer is, in practical terms, inviting the Court to compel the defender to enter into a new contractual obligation with the pursuer to host an event on a different date.

D134 The defender invites the Court to find that it is premature to make an order for specific implement. The pursuer led no evidence that it attempted to arrange a similar event on a different date. The clear evidence of the defender's witnesses was that the defender is willing to discuss hosting such an event for the pursuer in the future. The

precise commercial terms of, and practical arrangements for, that event would require discussion. But, in the absence of evidence that the defender refuses to enter into those discussions and where there is positive evidence that it is willing to do so, the pursuer has not demonstrated a need for specific implement.

D135 If the Court is considering compelling the defender to host an event for the pursuer on a different date, there are a number of obstacles which render formulation of an order for specific implement impractical. For example:

3 the pursuer has already rearranged part of its UK tour and presumably has limited dates on which the new event could be held in Glasgow;

4 the defender has an existing timetable of events, which may make rearranging the event on a date suitable to the pursuer difficult;

5 there has been no discussion about the management of security risks for a future event;

6 there has been no discussion between the pursuer and defender about the cost of hosting a different event (including, for example, additional security or insurance costs); and

7 in the circumstances, it would be very difficult – indeed, impossible – for the Court to formulate in advance the terms and conditions on which parties would be bound to treat.

D136 The resulting order would thus not be 'specific'. The defender submits that the Court should not pronounce an order for specific implement if it is not in a position to do

so with a high degree of precision. In *Munro v Liquidator of Balnagown Estates Co Ltd* 1949 SC 49, Lord President Cooper observed:

> "*It is impossible for us with propriety to pronounce any decree ad factum praestandum which is not absolutely precise in every particular, both as to time and as to place, and we are not yet in a position to give such particularity to any order in this case*" (at p55).

D137 The defender submits that where it is impractical to frame an order for specific implement of sufficient specificity, the Court should not do so at all. There is no difficulty in this: the pursuer is free to approach the defender, and the defender has confirmed in evidence that it is happy to discuss with the pursuer terms and conditions for a new event. Were the defender to decline to accept such a fresh booking on unlawful grounds, remedies would be available to the pursuer.

D138 In its written submission, the pursuer seek a further order *ad factum praestandum* in the form of a published apology made by the defender to the pursuer. There is no crave for such an order and it is not otherwise foreshadowed in the pursuer's pleadings. The defender has been given no prior notice of the pursuer's intention to seek such an order. The defender submits that the Court should not countenance the attempt to obtain an order not craved at this late stage in the proceedings, and after evidence has been heard.

D139 As the pursuer identifies, the circumstances in which a Scottish Court has the power to order an apology to be made are very limited. It is not a remedy available in judicial review or reparation proceedings. No Scottish case has been produced in which a Court has ordered an apology, whether in defamation proceedings or in relation to a discrimination claim. The defender's representatives are unaware of any Scottish precedent for such an order.

D140 The pursuer refers to the decision in *The Proprietor of Ashdown House School v JKL* [2019] ELR 530 as authority for the circumstances in which it might be appropriate to order an apology. However, that case does not assist the pursuer. The Upper Tribunal found the power to order an apology in the wording of paragraph 5 of Schedule 17 to the 2010 Act, which does not apply in the present circumstances. Moreover, in submitting that such an order was available the Claimant relied upon (para [249]) "the best known use of an ordered apology as a legal remedy [being] in defamation cases: ss. 8 and 9 of the Defamation Act 1996". Section 8 and 9 of the 1996 Act do not apply under the law of Scotland, and the Scottish courts have no power to order an apology even in defamation cases. In any event, at paragraph [256], the Upper Tribunal sets out guidance on the circumstances in which an apology might be appropriate. It is plain that the guiding principles do not support an ordered apology in the circumstances pertaining to this case. An apology should only be ordered when it offers 'true value'. True value might be found when an apology would offer solace to an individual who has suffered emotional or psychological harm as result of the conduct complained of. The pursuer in the present case is a private limited company; the Court has already determined that it cannot suffer from hurt feelings. In these circumstances an apology would have no 'true value.' This is all the more so when there has been a contested hearing; ordering an apology at this stage is unlikely to hold real meaning for either party. In truth, the belated and unpled suggestion that an apology might be ordered is a plain attempt by the pursuer to rescue some sort of remedy for the case, following the collapse of its case on loss (as discussed below).

Entitlement to non-pecuniary damages

D141 In its written submissions, the pursuer makes detailed submissions about its entitlement to non-pecuniary damages. The Court has already determined that the pursuer itself is not entitled to damages for hurt feelings. It has also determined that the pursuer is not entitled to recover compensation for the alleged hurt feelings of third parties (specifically, its staff, members and associates).

D142 As to the nature of damages recoverable under the Equality Act 2010, the Court determined at debate that damages are compensatory in nature, not penal.

D143 Insofar as the pursuer now seeks, in its written submission, to advance a claim for damage to its reputation, there was, simply, no evidence led which would support such a claim (nor was the claim foreshadowed in the pursuer's pleadings). Equally, there was no evidence led of feelings of hurt, distress, anxiety, frustration or injustice experienced by individual members of the pursuer. The reason for that is plain; objections taken to the relevance of any such evidence would have been successful on the basis of the Court's decision at debate.

D144 The pursuer advances an argument that it should be entitled to a separate category of vindicatory damages. The Equality Act 2010 sets out the remedies which are available in the event of its breach. If there had been an intention to permit another category of damages, whether vindicatory damages or just satisfaction, such a provision would have been included in the legislation.

D145 Vindicatory damages are not available as a separate category of damage (*McGregor on Damages*, 21st ed (2021), Chapter 17, paras. 17-013 to 17-016). The pursuer refers to *R (on the application of Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245; [2011] UKSC 12 in support of its claim for vindicatory damages. In *Lumba*, the Supreme Court held by a

majority that infringement of a right in itself does not lead to an entitlement to vindicatory damages. In the leading majority speech on damages, Lord Dyson rejected the concept of vindicatory damages, inherent in claims based on the European Convention of Human Rights, into damages awarded in respect of the commission of a tort (or delict), as would be the case here if the pursuer were to succeed. He observed:

> *"100. It is one thing to say that the award of compensatory damages, whether substantial or nominal, serves a vindicatory purpose: in addition to compensating a claimant's loss, it vindicates the right that has been infringed.* ***It is another to award a claimant an additional award, not in order to punish the wrongdoer, but to reflect the special nature of the wrong****. As Lord Nicholls made clear in Ramanoop, discretionary vindicatory damages may be awarded for breach of the Constitution of Trinidad and Tobago in order to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach and deter further breaches. It is a big leap to apply this reasoning to any private claim against the executive. McGregor on Damages, 18th ed (2009) states, at para 42-009, that "It cannot be said to be established that the infringement of a right can in our law lead to an award of vindicatory damages". After referring in particular to the appeals to the Privy Council from Caribbean countries, the paragraph continues: "the cases are therefore far removed from tortious claims at home under the common law." I agree with these observations. I should add that the reference by Lord Nicholls to reflecting public outrage shows how closely linked vindicatory damages are to punitive and exemplary damages."*

Pausing there, it will be recalled that concepts of punitive and exemplary damages, whilst familiar to English lawyers, are unknown in the law of Scotland. Lord Dyson continued:

> *"101. The implications of awarding vindicatory damages in the present case would be far reaching. Undesirable uncertainty would result. If they were awarded here, then they could in principle be awarded in any case involving a battery or false imprisonment by an arm of the state. Indeed, why limit it to such torts? And why limit it to torts committed by the state? I see no justification for letting such an unruly horse loose on our law."*

Similarly here, the Court should decline to unloose such an unruly horse, particularly in the absence of any pleadings or evidence on which to base such an award.

D146 The decision in *Lumba* was confirmed by the Supreme Court in *R(O) v Home Secretary* [2016] 1 WLR 1717; [2016] UKSC 19 in which the Court held that the judgment of the Court would, in principle, be sufficient vindication of the claimant's rights (Lord Wilson at para. 50)

D147 In these circumstances, the defender submits that the Court's consideration of damages should be restricted to pecuniary damages in line with the ordinary principles attaching to a claim for reparation. That is consistent with the power in s.119 of the 2010 Act, which empowers the Sheriff, if a breach of the Act is made out, to make any order which could be made by the Court of Session — (a) in proceedings for reparation; (b) on a petition for judicial review". There is no authority before the Court, or known to the defender, that would support an award of indicatory damages in proceedings for reparation. Such an award can only be made in a Judicial Review where the cause of action is very different from the delictual basis here advanced, as explained in *Lumba*.

Entitlement to pecuniary damages

D148 It is accepted that the remedy of damages is available. However, before making such an award the court must be satisfied that the pursuer has been caused a loss, that it has vouched its loss and that it has taken steps to mitigate its loss.

Causation

D149 Under reference to its claim for damages in terms of section 119, the pursuer avers that:

> *"…In a case such as this… where one party would be detrimentally affected by the other party resiling from that contract, it is open to this court to grant such an order as would equitably place parties into the position as if both parties had performed the Contract in*

the manner that they had agreed" (article 17 of condescendence).

D150 This averment reveals the flaw in the pursuer's position. The pursuer asks the Court to assess what position it would have been in had the defender "*performed the Contract*". The answer to that question has already been determined by the debate: *esto* the original contract remained in place (because the original cancellation was a nullity) the contract was in any event lawfully terminated as a result of the COVID-19 pandemic. Accordingly, on the pursuer's own pleaded formulation there is no difference between what happened and what would have happened absent cancellation in January 2020. There is no basis for the Court to make an order which proceeds on the basis that the defender could have performed the Contract; performance was a practical impossibility.

D151 If what the pursuer really contends for is an order that returns the pursuer to the position it would have been in but for the defender's breach of the Equality Act 2010, the same difficulty arises. In straightforward causation terms, but for the defender's breach, the event would not have proceeded and the pursuer would be in exactly the same position it is in now. The defender's actions are not the factual cause of the pursuer's loss. Any costs that were rendered futile as a result of the event not proceeding were always going to be rendered futile. There is therefore no link between the alleged breach and the loss claimed.

Quantum

D152 If the Court finds a causal link established, the defender submits that the pursuer has failed to establish a loss which it is entitled to recover from the defender. The pursuer's averments of loss relative to the Equality Act 2010 claim are contained at article 17 of

condescendence. The losses claimed are summarised at Tables 2 and 3 of production 5/4 and are said to be vouched by documents contained at productions 5/5 and 5/6.

D153 The pursuer led Mr Herbert to speak to its alleged losses. Mr Herbert did not have a good knowledge of the losses claimed and accepted that the Tables were in some respects inaccurate (Day 1, p119). He was unable to provide a convincing explanation of the basis for the majority of the losses claimed. In the defender's submission, the costs claimed in Tables 2 and 3 extend far beyond those which could properly be described as having been wasted as a result of a one day event not proceeding. Before considering the individual claims, some overarching points can be made.

D154 Mr Herbert's evidence was that all of the funding for the UK tour came from BGEA (Day 1, p120). Certain costs claimed by the pursuer in the present litigation were incurred directly by the US association ("BGEA") and the Samaritan's Purse, both of which are separate US-based entities. The pursuer led no evidence of any legal basis upon which it is entitled to recover costs incurred by either of those entities.

D155 The pursuer claims costs associated with its UK Tour which comprised eight venues in total. As Mr Herbert confirmed in cross-examination, the UK Tour could not proceed as a result of the Covid-19 pandemic (Day 1, p81 line 26). In so far as any costs were wasted, they were wasted as a result of the pandemic, not the actions of the defender.

D156 The losses claimed by the pursuer in relation to the cancellation of the event extend for a period of nineteen months before and after the date of the event. In the defender's submission, the costs claimed over this period reach far beyond those which could be said to arise from staging a one day event; properly understood they form part of a programme of evangelistic outreach over an extended period. This was the thrust of Mr Tosh's evidence

(Day 1, p123, line 15). Mr Herbert's evidence was that the costs expended by the pursuer had a value as part of its overall evangelical outreach programme and that bringing the Gospel to the people of Glasgow was not a wasted expense (Day 1, p114, line 1).

D157 The pursuer seeks numerous costs which post-date not only the date of termination of the Contract and the invocation of the *force majeure* provisions, but date of the event itself. These are costs which the pursuer chose to incur at its own risk in the midst of a pandemic. The pursuer was not obliged to incur these costs as a result of any action on the defender's part. In any event, these were operational costs incurred in the course of the pursuer's business and, presumably, conferred a benefit on it.

D158 In the defender's submission, expenditure which confers a value on the pursuer does not constitute a recoverable loss. Losses and gains should be balanced. In *British Westinghouse Electric and Manufacturing Company Limited v Underground Electric Railways Company of London Limited [1912] AC 673 ("British Westinghouse")*, Viscount Haldane observed that:

> "*… when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act*" (at p689, emphasis added).

D159 The defender submits that in this case the pursuer had a duty to take reasonable steps to mitigate its loss and that by continuing to incur costs after the date on which the Contract was terminated and certainly after the date of the March letter, it failed to do so. In these circumstances, the defender submits that the pursuer failed to mitigate its loss and is not entitled to recover these costs from the defender. In *British Westinghouse*, Viscount Haldane further observed:

> *"The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps"* (at p689).

D160 In any case, it remains open to the pursuer to attempt to re-book a similar event on another date. It is premature for it to seek to recover the losses claimed until it has done so. There are three potential outcomes: the venue is already booked; the booking is accepted; or the booking is refused. Only on refusal would the claim for wasted expenditure crystallise.

D161 In fact, the Court heard evidence that as at March 2021 the pursuer was planning to host an evangelism event in Glasgow in October 2021 (affidavit of Ms McWilliams, para 29). The costs expended by the pursuer in connection with the May 2020 event presumably had some benefit relative to this event.

Table 2 – non-refundable deposits and sunk costs

D162 The defender submits that the costs claimed in Table 2 are not recoverable from the defender for a variety of reasons. Some costs were entirely unvouched or were paid by BGEA. Others conferred a benefit on the pursuer or were incurred by the pursuer at its own risk after the termination of the Contract and after the date of the event.

D163 Mr Herbert accepted that the claim for £9,844 contained in Table 2 does not form part of the pursuer's claim.

D164 In the defender's submission, no order is required for repayment of the pursuer's deposit. Mr Herbert accepted that the pursuer is aware that the deposit has been offered and will be repaid (Day 1, p83).

D165 The pursuer claims the following amounts for events which went ahead:

a. £6,650 in respect of the hire of venues and catering for the launch event on 25 January 2020 and two prayer meetings (Day 1, p83);

b. £1,448 in respect of catering for an event which proceeded on 5 December 2019 (Day 1, p95, line 14); and

c. £3,001 in respect of the audio visual services associated with the prayer launch event (Day 1, p92).

D166 In the defender's submission, the pursuer benefitted from the provision of these services; they enabled the pursuer to host evangelical outreach events. The sums claimed were not wasted (Day 1, p113). If the Court considers that they were 'wasted' in any sense, they were wasted because the event could not proceed as a result of the Covid-19 pandemic (Day1, p83, line 18).

D167 The pursuer seeks £8,000 in respect of "Office rent". This claim is entirely unvouched. The vouching produced relates to a payment, in another amount, made to hotel booking agents, by BGEA, not the pursuer (Day 1, pp 88-89). In the defender's submission, the pursuer established no loss associated with office rent.

D168 In respect of the claim for parking costs, Mr Herbert could not reconcile the amount claimed (£3,460) with the vouched monthly license charge of £85 beginning on 1 September 2019. In the defender's submission, the pursuer has not vouched its claim for parking costs, nor provided any evidence as to why such significant costs were necessitated by a one day hire of the SEC Hydro, cancelled on 29 January 2020.

D169 The pursuer claims £11,000 for the lease of an apartment in Glasgow between January and October 2020. The lease commenced on 1 January 2020, had no minimum term and was terminable on one month's notice (BT Day 1, p93, line 8). The defender submits

that the sum claimed is excessive in circumstances where the pursuer knew, by 27 March 2020, at the latest, that the event would not proceed. Beyond that date, the pursuer chose to continue to rent the apartment at its own risk. In any event, as with the others costs, these would have been incurred in any event and any lack of benefit stems from the COVID-19 pandemic.

Table 3 – Additional Overheads

D170 The defender submits that similar challenges can be made to the costs claimed in Table 3. The nature and extent of the costs claimed in Table 3 are in themselves suggestive of a sustained programme of evangelical outreach, the costs of which were not wasted.

D171 At £126,370, the claim for staff salaries, national insurance and pension contributions is by far the most significant aspect of the pursuer's claim. Curiously, these staff costs are claimed from July 2019 to February 2021, seven months prior to and twelve months after the termination of the Contract. The defender is asked to bankroll the pursuer's entire workforce in Glasgow for nineteen months. In the context of the hire of the SEC Hydro for a one day event, this claim is grossly excessive. The defender submits that the pursuer's staff were engaged on a sustained programme of evangelical outreach, the costs of which were not wasted.

D172 The pursuer does not disclose what activities were being undertaken by its Glasgow workforce after the March 2020 letter through to February 2021. If its staff continued to work on its behalf, in any capacity, that enterprise conferred a benefit on the pursuer and the staff costs do not constitute a loss to it. If the pursuer did not utilise its staff in some capacity, it failed to mitigate its loss. The pursuer does not disclose whether any of its staff were furloughed during 2020 or if it benefited from the Government's Coronavirus Job

Retention Scheme. In these circumstances, the defender submits that the Court cannot be satisfied that staff costs represent a loss to the pursuer.

D173 There is a further aspect to this uncertainty. Certain staff costs were not in fact incurred by the pursuer; they were incurred by BGEA. The Assistant Tour Director's salary was paid by BGEA rather than the pursuer (Day 1, p99, line 18). Other staff costs were incurred by the Samaritan's Purse, a separate US-based organisation (Day 1, p101). Mr Herbert explained that there is a licence agreement between the Samaritan's Purse and BGEA regarding the secondment of staff, although it is not before the Court. It is unclear from Mr Herbert's evidence or the documents produced whether the pursuer in this case in fact paid any staff costs. Mr Herbert was equally unable to explain why some of the pursuer's invoices attract VAT and other do not (Day 1, p103); joint bundle pp. 606 to 613). In these circumstances, the defender submits that the pursuer failed to demonstrate that the staff costs claimed were in fact incurred by the pursuer.

D174 Finally, Mr Herbert accepted these individuals were working towards an event which could not possibly go ahead due to the Covid-19 pandemic (Day 1, p98, line 14). The defender submits that any loss associated with staff costs was caused by the Covid-19 pandemic, not the actions of the defender.

D175 The pursuer also claims for milage costs, mobile phone contracts, a broadband contract, office supplies and staff sustenance between June 2019 and February 2021. These are standard operational costs which are part and parcel of the pursuer's business. The costs claimed are excessive and conferred a benefit on the pursuer.

D176 The claim for "other event costs" comprises a series of costs associated with events which proceeded. These costs conferred a benefit on the pursuer and are not recoverable

from the defender. There are some curiosities among the costs claimed: charitable donations to other churches, the price of a gift for a church leader and even the cost of room hire for an unfair dismissal hearing. Mr Herbert accepted that the latter claim, at least, could not possibly form part of the pursuer's claim. The remaining "miscellaneous costs" are entirely unvouched.

Conclusion

D177 The defender invites the Court to find that it did not discriminate against the pursuer and to grant decree of absolvitor.