APPENDIX 1

OPINION OF SENIOR COUNSEL

for

SCOTTISH BORDERS COUNCIL

Chambers Institution Trust

Introduction

1. I refer to my letter of instruction dated 12 October 2021 and to my telephone discussion with Ms Nuala McKinlay. My advice is sought in relation to questions that have arisen concerning the Chambers Institution Trust. The first two questions concern the possible appointment of trustees who are not councillors ("lay trustees") and I understand that the need for an answer to those is urgent. I deal with those in this opinion. The third and fourth questions, which concern the effect of the Community Empowerment (Scotland) Act 2015, are separate and are less pressing. I will respond to those later.

2. My papers include: (i) the Disposition and Mortification by William Chambers dated 21 January 1859 and a subsequent deed dated 5 August 1859 ("the 1859 deeds"); (ii) the Chambers Institution Peebles Order Confirmation Act 1911 ("the 1911 Act"); and (iii) five opinions of counsel, one from the late Mr Steven Stuart QC, provided in 2006, and four from the late Mr Andrew Hadjucki QC, provided in 2006, 2008, 2010 and 2014. The background and, indeed, the contents of these documents are well-known to those instructing me. Nevertheless, before turning to the questions themselves, it may be helpful to set out the most important features of the history of the status and governance of the Chambers Institution.

Governance – a history

1859 to 1911

3. The starting point is found in the 1859 deeds. The approach taken by William Chambers was to establish, in effect, two bodies, those being the Trust and the Board of Directors. The trustees were office holders in "the present Town Council of the said Burgh and their successors in Office the Members of the Town Council of the said Burgh for the time being". The heritable property was disponed and mortified to the Trust. Clause Third in the first of the 1859 deeds made provision for "the government and management of the affairs of the said Institution" which were "vested in and conducted by a Board of Directors". The Board consisted of seven office holders, starting with the Provost of Peebles for the time being, together with "at least five Directors connected with the town or neighbourhood" with provisions made for elections. Finally, the truster nominated and appointed himself to be a Director for life. Clause Fourth provided that the Directors "shall have the entire management of the Institution" with further quite detailed provision in respect of regulations, subscriptions and admission, among other things.

4. It is not obvious why the truster, Mr Chambers, considered it necessary to set up two distinct but related bodies. It may have been that, whilst he was satisfied that the property should vest in the Town Council, he considered it important that the responsibility for the administration of the Institution should be shared amongst a wider class of people. It is clear, especially from the second of the 1859 deeds that he intended the Directors to have extensive powers, including in relation to the heritable property. It was provided that "the Directors shall also have through the Trustees equal powers in regard to the heritable property as if the same were actually vested in themselves" and they were also "empowered to compound, transact and agree in regard to all questions and disputes arising in their management or concerning the heritable property held in Trust for the Institution" and "empowered to enlarge the Institution by the purchase of heritable property in the neighbourhood." It is interesting to note that those powers were set out in the later deed executed six months or so after the first. Perhaps it was thought that there needed to be greater clarity about the Directors' role in relation to the heritable property. The thinking behind the arrangements is not clear, and involves some speculation, but for

present purposes the main point is that the Directors had effective decision-making responsibility in respect of the heritable property held by the Trust.

1911 to 1973

5. The 1911 Act brought a significant change in the governance of the Institution. The Trust remained in place, notwithstanding the terms of section 4. Section 4 provides:

> "The corporation shall be and are hereby authorised […] to take over from themselves as trustees of the Chambers Institution […] and from the directors […] thereof the administration and management of the Institution and the endowments thereof to be administered and managed by the corporation and the committee under the provisions of the Public Libraries Consolidation (Scotland) Act 1887 and this Order."

Section 5 makes plain the responsibilities of the committee:

> "The Institution shall […] be administered by the committee. The provisions contained in [the 1859 deeds] shall be observed by the committee except in so far as contrary to or inconsistent with the provisions of the Public Libraries Consolidation (Scotland) Act 1887 and this Order […]".

6. The "committee" was "the committee to be appointed by the corporation on the adoption in the burgh of the Public Libraries Consolidation (Scotland) Act 1887 […]". Section 18 of the 1887 Act, which was repealed in 1973, provided this definition of "committee":

> "The magistrates and council of any burgh, or the board of any parish where this Act has been adopted shall, within one month after its adoption, and thereafter from year to year, in the case of a burgh, at the first meeting after the annual election of town councillors or commissioners of police […] appoint a committee, consisting of not less than ten nor more than twenty members, half of whom shall be chosen from amongst the magistrates and council, or board, as the case may be, and the remaining half from amongst the householders of the burgh or parish other than the magistrates and council, or board, and three members of such committee shall form a quorum."

7. The powers of the committee were set out in section 21 of the 1887 Act. That section remains in force, subject to a significant amendment. In the original form, the powers were described thus:

> "The committee shall manage, regulate, and control all libraries and museums established under this Act, or to which this Act applies; and shall have power to do all things necessary for such management, including the following powers: […]"

8. There followed a detailed list of powers, mostly but not exclusively concerned with the purchase and provision of books.

9. In the case of the Chambers Institution, the composition of the committee was qualified in terms of section 6 of the 1911 Act, which extended the class of householders beyond the burgh of Peebles. The corporation was required to

> "choose as members of the committee two members from among the householders in the county of Peebles outwith the burgh and the number of householders of the burgh other than the magistrates and council to be chosen by the corporation shall always be reduced by two accordingly."

10. The 1911 Act also gave the committee powers beyond those which it had under the 1887 Act. In particular, it had the power to cancel, alter or renew the lease between the directors and the corporation: section 7. That its powers went beyond pure library administration is clear from the specific provision in that section that the lease may be

> "with or without modification with the corporation upon such terms and conditions as to the committee may seem just of portions of the Institution premises not required for the purposes of the Institution to be used by the corporation for municipal purposes only."

11. Further, section 8 of the 1911 Act gave the committee powers in relation to the administration and management of the Great Hall, including the power to let and charge for its use.

12. It can be seen, therefore, that from 1911 to 1973, the situation was similar to that which had been in place before 1859, with two bodies, being the Trust (with councillor trustees) in which the property was vested, and the committee (with up to 20 members, of whom half were councillors and half householders) which had responsibility for administration and management. The change in 1911 was to put the administration and management on

a statutory footing, albeit section 5 of the 1911 Act obliged the committee to observe the provisions contained in the 1859 deeds, except insofar as contrary to or inconsistent with the provisions of the 1887 Act.

13. The Public Libraries (Scotland) Act 1955 is not immediately relevant but it is worth noting that within the interpretation section "statutory library authority" is defined as meaning

> "a county council, town council or committee authorised by the Public Libraries (Scotland) Acts 1887 to 1920, or by any other enactment (including any enactment contained in a local Act) to provide library services."

14. I understand that there are no records showing the composition of the committee prior to 1973, but that it is assumed that there was such a committee.

1973 to 1994

15. The Local Government (Scotland) Act 1973 brought significant changes. Under section 163 of the 1973 Act, and Schedule 21, amendments were made to the 1887 Act. The provisions relating to the committee were repealed and the statutory obligation that had rested on the committee was now one for the "library authority". Section 21 of the 1887 Act was amended accordingly. Section 163 of the 1973 Act provided that "The local authority for the purposes of the Public Libraries (Scotland) Acts 1887 to 1955 in their application to libraries shall be an islands or district council, except that within the Highland, Borders and Dumfries and Galloway regions such authority shall be the appropriate regional council." That is the definition of "library authority" given in paragraph 2 of Schedule 21 to the 1973 Act, and "museum and art gallery authority" required to be construed accordingly. Paragraph 4 of Schedule 21 provided that "for any reference to the committee there shall be substituted a reference to the library authority."

1994 to date

16. Section 21 of the 1887 Act still refers to "library authority or museum and art gallery authority, as the case may be", per the amendment made under the 1973 Act. That now has to be read with section 2 of the 1887 Act, which was amended in terms of the Local Government etc (Scotland) Act 1994 and provides:

    > "In this Act, except where the context otherwise requires, "library authority" and "museum and art gallery authority", for the purposes of this Act, mean a council constituted under section 2 of [the 1994 Act] […]".

17. Separately, section 16 of the 1994 Act makes provision in respect of property held in trust by a predecessor council.

18. Leaving aside the developments between 2010 and 2014 when lay trustees were appointed and subsequently resigned, the current situation in law is as follows.

19. The Trust remains and the heritable property vests in the Council. The Council must "nominate a sufficient number ***of their councillors*** to act as trustees of that property and in doing so shall have regard to the terms of the trust deed" (emphasis added). The Council cannot nominate anyone other than a councillor to act as a trustee for the property. Having regard to the terms of the 1859 deeds, insofar as they relate to the Trust, does not add anything. In 1859, the role of the trustees (as opposed to that of the directors) was, essentially, limited to holding the heritable property.

20. The management and administration of the Chambers Institution are the responsibility of the Council. That is so because of the evolution through statute. What had been the remit of the board of directors passed to the committee. The committee's statutory remit was then taken over by the library authority, being first the regional council and now the Council. Whereas previously there were provisions requiring householders (broadly expressed) to serve as directors and then as committee members to the extent of half of the membership of the respective bodies, those provisions were repealed in 1973. After the 1973 Act, there was no requirement for the involvement of non-councillors in management and administration of libraries, museums and art galleries, and, indeed, no

statutory provision permitting them to be appointed to any office for the purposes of management and administration.

21. I turn to the specific questions asked.

What would the decision-making remit be of a lay trustee, since they would be administrative trustees and not vested in the property?

22. The answer to the question depends on considering where the lay trustees would fit into the overall scheme. That necessitates consideration of what the Chambers Institution property is used for.

23. I understand that the Chambers Institution property is used for more than just the library and museum and art gallery. The Great Hall is let for events, the Council use parts of the property for the provision of services and there are other leases, including commercial leases. To what extent is that relevant? In my view, the existence of these other functions does not create a space for a second category of trustees. There are two bodies: the Trust and the Council as library authority and museum and art gallery authority. The trustees of the Trust were never expected to carry out management and administration; those functions were always intended to be carried out by the other body, and the Council has now assumed those functions. The fact that it has done so, and continues to discharge those functions, *qua* library authority and museum and art gallery authority does not mean that it cannot perform the 'non-library' functions. The 1911 Act envisaged that there would be 'non-library' functions, for example letting the Great Hall for public meetings, and it placed those within the powers of the committee: section 8 of the 1911 Act. But even in 1911, that was a committee in terms of the 1887 Act, rather than some separate entity.

24. I note that in 2014 Mr Hadjucki expressed the view that it would be competent to appoint 'management trustees' and that a Trust including such trustees might reflect the provisions in the 1859 deeds, as modified by the 1877 and 1911 Act, to the effect that the membership should be made up of half councillors and half lay representatives. I would agree that, from a technical perspective, that would be possible, although I think that there

is a reasonable, indeed quite strong, counter-argument. The property vests in the Council and the Council must appoint councillors (and only councillors) as property trustees. The Council is not precluded from appointing other trustees. Alternatively, it could be said that the Council's statutory power to appoint trustees is limited to property trustees and that there is no separate category. Nor do the 1859 deeds allow for the assumption of additional trustees. However, assuming it is possible, I am bound to ask what the point of that would be. Doing so would create a new category of trustee to discharge responsibilities which the existing trustees do not currently exercise, i.e. management responsibilities. The reason the trustees do not exercise management responsibilities is that the management and administration are done by the Council. It seems to me that there would be two main problems with such a course.

25. The first problem would be that, within the Trust, there would be two categories of trustee, those who are councillors and are entitled to make decisions about the property, and those who are not councillors and whose decision-making powers are restricted to 'non-property' issues. But that begs the question as to what those issues would be. A decision in respect of a lease might be categorised as administrative but it is also to do with the property. A decision to spend money on repairs might be administrative but a decision to raise funds by selling part of the heritable property could not be taken by administrative trustees, yet both decisions would have budget and accounts implications. Creating a situation, in the circumstances here, where some trustees can exercise some but not all powers seems to me to be potentially fraught with difficulty.

26. The second problem is that, in any event, the scope of the trustees' duties and powers is actually very limited. They hold the property but the great bulk of the work is done by the Council, as the successor to the directors and the committee. There would be a real risk, in my view, of setting up a situation in which two sets of people, the administrative trustees and officers of the Council, found themselves apparently with responsibility for the same decisions. A question might arise, for example, about building repairs. If that is an administrative or management matter (which it almost certainly would be), it is for the Council. If it is strictly a property matter, it is for the trustees. It is difficult to see what the administrative trustees' role would be in practice. In other words, between the Council acting as trustee for the Trust holding the property and the Council acting as successor to the directors and the committee, the ground is covered.

27. Could it be said that the Council acting as successor to the directors and the committee is restricted to its library and museum and art gallery functions? In my view, no. That is so for the reasons given in paragraph 23 above. The original directors' powers were very extensive and the powers of the committee were similarly extensive. They did indeed go beyond what would be required just for the administration of a library and, as Mr Hadjucki noted, the committee was something different from the normal library committee. Even so, the Council has inherited those powers.

28. Could it be said that because the directors and the committee required to have half of their membership drawn from householders, that should mean that the present Trust should also reflect that? I can see the argument that it was thought desirable to constitute the board of directors and the committee in that way and that community involvement is still important and should be reflected. It does not follow, however, that the *Trust* should be changed or expanded to make that possible. The requirement for householder involvement came to an end in 1973. It is not possible to reintroduce the involvement of modern-era non-councillor directors or committee members since there is no longer a board or a committee of which they might be members. That job is now done by the Council. Nor can it be said, in my view, that there is a remaining committee, or possible committee, that retains non-library or non-museum and art gallery functions. All of those have been taken over by the Council.

29. Drawing these observations together, I come to the view that, whilst, as Mr Hadjucki advised, it would be competent to appoint trustees, there is real difficulty in understanding what their role or legal function would be. It appears to me that there is no meaningful separate and distinctive function for them to fulfil. If they were to be active in decision-making that would risk cutting across the decisions that the property trustees are entitled to make in respect of the heritable property and the decisions that Council officers are entitled, indeed obliged, to make in respect of management and administration. I would foresee future difficulties in relation to clarity about respective roles.

30. The short answer to the question is that the decision-making remit of a lay trustee would be extremely limited. There is no obvious space for a remit between property decision-making and administrative and management decision-making.

What is the appropriate decision-making body as to whether to appoint such lay trustees?

31. This raises, again, the alternative view of the competency of appointing lay trustees. The Council would be exercising its statutory power under section 16 of the 1994 Act. That is a power to "nominate a sufficient number of their councillors to act as trustees of that property". By implication that means only their councillors. However, they may also have a power to appoint trustees as management or administrative trustees. Section 16 obliges the Council to have regard to the terms of the trust deed. That would tend to support the idea that there is power to appoint trustees in a different capacity, since the 1859 deeds contemplate the directors "having equal powers in regard to the heritable property as if the same were actually vested in themselves". However, more strictly, the 1859 deeds did not provide for non-councillor trustees as such.

32. As to which body would have the power to make such an appointment, in my view the better argument favours the full Council. The property vests in the Council. The Council must nominate "a sufficient number". It is the appointing body. Moreover, under the 1859 deeds the trustees have no equivalent appointing or assumption power.

Concluding observations

33. I would reiterate the points made above in relation to the status and remit of administrative or lay trustees. I appreciate that, in doing so, I am going a little beyond the questions that were specifically raised with me. However, I think that it would be artificial to answer those in isolation and without articulating the basis on which I have come to the view expressed in relation to the legal status or practical utility of non-councillor trustees. That view is formed having regard to the history of the legislation. I do have substantial reservations about the wisdom of taking that course. Were there to be lay trustees appointed with only very limited powers, it would be hard to see what the

exercise of those powers would add. There would be a risk that decision-making by lay trustees would conflict with decision-making by the Council, exercising powers under section 21 of the 1887 Act. Were such conflicts to arise, it would, in my view, be difficult to resolve them because of the lack of clear demarcations in function.

34. This should not be taken to mean that there can or should be no role at all for non-councillors in relation to the governance of the Chambers Institution. It may be thought that there are good reasons for taking steps to promote the involvement of interested members of the community or those with particular expertise. Consideration might be given to the creation of a consultative committee or similar body which has a role in providing information, advice and views, albeit without trustee status. That would appear to be generally in keeping with the spirit of the 1859 deeds and the 1911 Act, even though the formal, legal role of such householder members disappeared long ago.

35. I will deal with the third and fourth questions in due course. In the meantime, if there are further issues arising in relation to the first and second questions I would be happy to provide additional advice.

THE OPINION OF

MORAG ROSS, QC

Advocates Library
Edinburgh
www.axiomadvocates.com

21 October 2021