OUTER HOUSE, COURT OF SESSION

[2022] CSOH 52

CA85/21

OPINION OF LORD BRAID

In the cause

OIL STATES INDUSTRIES (UK) LIMITED

Pursuer

against

(FIRST) "S" LIMITED; (SECOND) LAGAN BUILDING CONTRACTORS LIMITED (IN ADMINISTRATION); JOHN HANSEN and STUART IRWIN, the joint administrators thereof

Defenders

Pursuer: Dean of Faculty; McAndrew Brodies LLP
First Defender: G Walker QC, Byrne; DAC Beachcroft Scotland LLP

4 August 2022

Introduction

[1] In 2013, the pursuer wished to develop new office and production facilities at Heartlands Business Park, Whitburn. It appointed the first defender to provide project management services, including the provision of advice as to the most appropriate means of procuring the project and the subsequent administration of the procurement process. In the course of delivering these services, the first defender, on the pursuer's behalf, appointed the second defender as building contractor. The project was eventually completed, but has

given rise to a number of disputes. The pursuer contends that the first defender failed in its duties in a number of respects and sues for damages of just under £12 million.

[2] Although there are other grounds of action, a material part of the pursuer's claim (reflected in its first conclusion seeking payment of, in round terms, £10.5 million), is founded on an allegation that the award of the building contract to the second defender was procured by bribery; specifically, by the giving of bribes in the form of cash, and the provision of free building services, to Paul Galbraith, a project manager employed by the first defender, who ran the procurement process and whose decision it was to appoint the second defender. The first defender's position is that it knows nothing of any bribes given to Mr Galbraith, who is now a former employee.

[3] A proof before answer has been fixed for 2 November 2022 (but see paragraph [96] below). However, for a variety of reasons (including the involvement in the action, at that time, of Michael Lagan, who had been convened by the first defender as a third party being the eponymous individual within the second defender who had allegedly paid the bribes), I considered it expedient to fix a preliminary proof to resolve the issue of whether bribes were given. If not, the bulk of the pursuer's claim would fall away; and if bribes were given for which it is liable, it is advantageous that the first defender learn that sooner rather than later.

[4] Perhaps not surprisingly given the nature of the allegation which was the subject of the preliminary proof, parties found the co-operation of some witnesses to be elusive. Not all of the potential witnesses who were contacted chose to give witness statements, and some, I was told, were evading citation, including Tom O'Hare, who was employed by the second defender at the material time and who features heavily in this opinion. The witnesses who did co-operate, for the pursuer, were: Garry Stephen, the pursuer's

managing director; Kenneth Scott, chartered surveyor, who at the relevant time was a partner in EPPS Consulting LLP, the pursuer's agent and quantity surveyor on the project; Police Sergeant David Porter, who as a detective constable at the time had been the lead investigator into the allegations of bribery (the outcome of which was that no charges were brought against any person); and Mark Fegan, a Contract Manager employed by Apple Orchard Construction Ltd. They all provided witness statements which they adopted as their evidence in chief, supplemented by oral evidence which was given in most cases in person although Mr Fegan gave his evidence by video link to the court. Lynsey Cole, Mr Galbraith's sister, also provided a witness statement which was agreed to constitute her entire evidence. Evidence for the first defender (insofar as relevant to the issues which are still live) was given by video link by Stephen Parr, who had not provided a witness statement. In fairness to Mr Lagan, who at that time was a party to the action, he did provide a witness statement (in which he denied knowledge of any bribes) but, though available, he was not called to give evidence, nor were any of the other alleged principal actors in the payment and receipt of bribes. This is a topic to which I will return since one of the issues between the parties is what inferences (if any) fall to be drawn from the failure to call those witnesses.

[5] After the pursuer had closed its case, the third party claim against Mr Lagan was dismissed by agreement on a no expenses due to or by basis, and I need not refer to it again.

The pleadings

[6] The pursuer's bribery case appears at articles 12 and 13 of condescendence. In article 12, the pursuer avers that cash bribes were paid to Mr Galbraith by or at the behest of Mr Lagan at two meetings. The first was at Morton's Club in London on or around

12 December 2013, when no-one else was said to have attended. The second meeting was attended by Mr Galbraith, Mr Lagan and others at the Witchery Restaurant in Edinburgh on 5 May 2014. In article 13, the pursuer avers that a further part of the bribe took the form of the carrying out of building works worth £70,000 to £80,000 to a property in Gourock owned by Mr Galbraith's sister, Lynsey Cole, in 2014; and that the work was carried out on the second defender's instructions by Apple Orchard Construction, who invoiced the second defender but who did not at any time seek payment from Mr Galbraith. Subject to an admission that the meetings mentioned took place, those averments are not known and not admitted by the first defender.

The pursuer's case

[7] There is no direct first-hand evidence of any cash bribes having been paid (although there is direct evidence of the building works at an address in Gourock having been carried out and paid for by the second defender). The pursuer invites the court to hold the allegations of bribery proved on a combination of (a) circumstantial evidence surrounding the appointment of the second defender as building contractor, (b) the evidence of the building work and (c) hearsay evidence that bribes were paid (some, although not all, of which was from an anonymous source).

The issues

[8] There are two main issues. First, did Mr Galbraith receive a bribe? To decide that, it is necessary to explore (a) what precisely is a bribe in our law, (b) whether, on the evidence, it has been established that Mr Galbraith received benefits from the second defender and (c) if so, whether such benefits amounted in law to bribery. The second issue is whether, if

Mr Galbraith did receive a bribe or bribes, the first defender is vicariously liable to the pursuer for any damages to which it may be entitled. A further issue which arose after this opinion was prepared is whether, following resolution of the dispute by parties after the proof had concluded, publication of this opinion remains appropriate. I will consider each of these areas in turn.

The law

What is a bribe?

[9] In law, a bribe is a gift to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent's principal, and that gift is secret as between the donor and the agent, that is to say, without the knowledge and consent of the principal: *Hovenden & Sons* v *Millhoff* [1900-3] All ER Rep 848, Romer LJ at 851.

[10] The essential ingredients of a bribe have more recently been described as (1) receipt of money or a valuable benefit (2) by a person who owes a fiduciary duty of loyalty to a principal with whom the donor wishes to transact business (3) which is kept secret from the principal and (4) which places the recipient in a position where his interest may potentially conflict with the fiduciary duty owed to his principal: *Airbus Operations Ltd* v *Withey* [2014] EWHC 1126 (QB) at [88].

[11] A bribe is, then, a form of secret commission or secret profit paid to an agent, (although not all secret commissions are bribes: *Airbus*, 82; *cf Trans Barwil Agencies (UK) Ltd* v *John S Braid & Co Ltd* 1988 SC 222 at 227).

[12] *Gloag on Contract (2nd Ed)* at page 522, in a passage dealing with secret commissions, states that to give a commission to an agent in the knowledge that he is taking it without the

principal's consent, amounts to a fraud on the part of the person who gives it, for which he is liable in damages. *Gloag* goes on to quote from the English case of *Grant* v *Gold Exploration and Development Syndicate Ltd* [1900] 1 QB 233. It is clear that what *Gloag* is discussing in this passage is bribery.

English law

[13] In English law, it has long been established that bribery is a cause of action in itself: *Grant and Mumford, Civil Fraud (1st Ed)*, at 7-013. Proof of fraud is not required: *Clark and Lindsell on Torts, (23rd Ed)*, at 17.58. Certain consequences follow, of which two are relevant for present purposes. The court will not inquire into motive; and the court will irrebuttably presume that the agent was influenced by the bribe: *Hovenden*, above, Romer LJ at 851.

[14] The principles underpinning the English law of bribery are (i) the existence of a fiduciary relationship between the recipient of the bribe and his principal such that there is a relationship of trust and confidence; and (ii) the equitable principal that an agent must not make a profit out of his trust and must not place himself in a position where his duty to his principal and his own interests may conflict, without the informed consent of his principal: Civil Fraud, above, 7-006.

[15] Dealing with each of those in turn, the person bribed must be someone who was acting on behalf of a principal to whom he owed a fiduciary duty of loyalty and good faith; and, in the context of a bribery claim, the term fiduciary relationship should be understood in a wide and loose sense: *Reading* v *Attorney General* [1951] AC 507 at 516. Whether a fiduciary relationship was owed is a fact-specific inquiry: see, generally, the discussion in *Airbus* at [95] to [101]. The essential element of a fiduciary relationship is one in which one person – the fiduciary – has undertaken to act for another in a particular manner in

circumstances which give rise to a relationship of trust and confidence: *Airbus*, [96] quoting Millet LJ in *Bristol and West Building Society* v *Mothew* [1998] Ch 1 18.

[16] However, the conflict of interest point is also an important one, particularly in the context of the current case. An apposite hypothetical example is given in *Airbus* at 92, of a supplier needing help in preparing a complicated tender, who pays a reasonable fee to the agent of the principal who invited the bids to help him prepare the tender, that arrangement not being disclosed to the principal. Even such a payment would be a bribe or secret commission. Three reasons were given as to why this is so. First, the court should not have to make nice judgments as to whether the fee paid was fair remuneration or was over generous. Second, the court cannot be expected to engage in speculation as to what would have happened if the agent had not helped the supplier to complete his tender. That would be an "investigative minefield" in many cases and for policy reasons the courts decline to investigate hypothetical situations in this area. Third the principal was entitled to expect that his agent would not (without disclosing what he was doing) help one bidder in preference to another and risk distorting the level playing field of the tender process. The principal was entitled to the disinterested loyalty of his agent when assisting him in organising the tender. I note in passing that this example is *a fortiori* of what is said to be the position in the present case in that it postulates the payment of a reasonable fee to the agent for a service rendered rather than any corrupt motive.

Scots law

[17] The foregoing description of English law is not in dispute (the first defender quibbles that *Airbus* is not authoritative, but it contains an extensive and useful discussion of the case law) but the parties diverge on the extent to which, if at all, the above principles form part of

Scots law. The pursuer submits that there is no good reason why Scots law should not develop along English lines, having regard to the similar approach taken in both jurisdictions to the circumstances in which a fiduciary duty is held to exist; the reliance by *Gloag* and other writers (and by the courts) on English authority; and the absence of any good policy reason as to why bribery should be treated differently in the two jurisdictions. While *Gloag* used the term "fraud", that resonated with the nomenclature adopted in England at that time, but *Gloag*'s approach was fundamentally in tune with that taken in English law and it was significant that he founded on English authority. The first defender submits that *Gloag*'s reference to fraud makes clear that bribery, in Scots law, is simply a species of fraud and therefore that the essential ingredients of fraud, in particular *mens rea*, must be proved, as must the fact that the payment of the bribe induced Mr Galbraith to award the contract to the second defender.

[18] In deciding this issue, the starting point is to observe that *Gloag* referred to and relied upon English authority in his passage dealing with secret profits and that the remedies in both Scots and English law were the same at that time. If he had thought that there were differences in the law of bribery, he might be expected to have said so. Further, the rule against secret profits, including bribes, plainly derives from the existence of a fiduciary duty: McGregor, *The Law of Agency in Scotland*, 6-31 where it is also stated that:

> "In common with other cases of breach of fiduciary duty, the breach occurs not because the agent has caused a loss to his principal, but rather because the agent has placed himself in a situation where he may be *tempted* to favour his own interests over those of the principal."

[19] Thus, in Scots law, just as in English law, we see an underpinning of the rule against secret profits – including bribery – by the concepts of fiduciary duty and the notion that the

recipient may be placed in a position of temptation to favour his interests over those of his principal: in other words, by creating a conflict of interest between himself and his principal.

[20] As regards the situations in which a fiduciary duty may be held to exist, this is fact - specific in Scotland, as in England. The categories of fiduciary are not closed and can apply in a wide range of relationships: *Stair Memorial Encyclopaedia*, *Trusts, Trustees and Judicial Factors (Reissue/2)* 171; McGregor, 2-01. In *MacRoberts LLP* v *McCrindle Group* 2017 SC 1, Lord Brodie said at [48] that "the core feature of a fiduciary relationship is that it is fundamentally an obligation of loyalty", going on to quote Millet LJ in *Bristol and West Building Society*, above, at p18E where he said that breach of a fiduciary duty connotes disloyalty or infidelity. Lord Brodie went on to refer, in paragraph [49], to fiduciary duties arising from a relationship of trust and confidence. Finally, a fiduciary obligation may be owed by an employee who holds a post in which he is able to influence, in the sense of materially affect, the course of business between his employer and the donor of a secret payment: *Airbus*, above, paragraph 416.

[21] Drawing all of this together, having regard to the fact that bribery in both jurisdictions is underpinned by the same principles, the heavy reliance in the case law and by authors of Scottish textbooks (including *Gloag*) and the absence of any good reason why it should be more difficult to prove fraud in Scotland than in England, I conclude that there is no distinction between English and Scots law in the treatment of bribery. In both, it is the temptation to act against the interests of one's principal which is the mischief struck at. In both, a bribe is but one species of secret profit received without the consent of a person to whom the recipient owes a fiduciary duty. That being so, there is no requirement to prove the *mens rea* of fraud. The same policy considerations which preclude the court from an inquiry into what might have happened had the bribe not been paid, and which promote

the undivided loyalty of a fiduciary to his principal apply equally in Scotland as in England. Thus there are sound policy reasons for the irrebuttable presumption which exists in English law, and, as I find, also in Scots law, that the recipient of the bribe was influenced by it.

[22] In summary, I find that bribery is a free-standing cause of action, distinct from any cause of action arising out of fraud, and that once payment of the bribe is established, it is to be irrebuttably presumed that the recipient was influenced by its payment.

[23] Even if I am wrong in both of these conclusions, as will be seen, the outcome of this case is unaffected given the strength of the evidence of fraud; and an abundance of circumstantial evidence giving rise to a legitimate (and unanswered) inference that Mr Galbraith was influenced by bribery to award the contract to the second defender.

Agreed or undisputed facts

[24] It is convenient to begin by setting out facts which are either agreed by joint minute, or which cannot be disputed because they derive from contemporaneous correspondence, including emails.

"Starter for ten" - the "sweeties" emails

[25] Police recovered deleted emails from a laptop, including emails between David Irvine of Odin Consulting Engineers and his son, Graeme Irvine, also of Odin Consulting Engineers, which alluded to the receipt and giving of "sweeties". Odin were part of the team engaged in the project. The first email, from David Irvine to Graeme, bearing the heading "Petrol Counties", sent on 21 May 2013, stated:

> "Fuckin phone all but grubbed again

> We have green light re above but there is a complication
> My new best pal expects a bag of sweeties"

On 24 May 2013, Graeme Irvine emailed David Irvine stating, among other things:

> "Here is my starter for ten
> Oil States needs a contractor – lots of industrial.
> Lagans would be ideal and are looking to continue at new LE project
> We do our utmost to get Lagans in on Oil States – possible sweeties to Paul Galbraith from ML, Mike runs the job for them, we get some sweeties for making it happen, Mike returns the favour to Lagan by making sure they get LE2, we get more sweeties …… it is fucking beautiful."

David Irvine's reply to that (in large bold font, underlined) was:

> "Absolutely fuckin brilliant!!!!!!
> Greame (*sic*) – I am looking forward to tomorrow…..
> BELIEVE IN YOURSELF !!!!!!!!!!!"

[26] At this stage, I observe that a clearer reference to the possible payment of bribes can scarcely be imagined. "Petrol Counties" was a somewhat jejune disguised reference to "Oil States" (none of the witnesses who gave evidence was aware of any other company or project going by that name). "Sweeties" in context, not least that it is described as a complication, is likely to mean some form of financial inducement, rather than an expectation of confectionery. ML is Michael Lagan. The reference to Paul Galbraith is self-explanatory. Everything which follows must be read in the context of those emails.

The procurement process

[27] On 24 May 2013, the date of Graeme Irvine's email, tender pre-qualification documentation (PQD) was issued by Ken Scott of EPPS to fifteen potential contractors for the project. The second defender was not one of these fifteen. Mr Scott emailed a copy of the PQD to Mr Galbraith. On 30 May 2013, at 12:24, Graeme Irvine, at the request of his father, emailed details of the second defender to Mr Galbraith. That day, Mr Galbraith

forwarded Graeme Irvine's email to Mr Scott by email, and asked if the second defender could be added to the list of potential contractors for the project. Mr Scott confirmed to Mr Galbraith that it could be added, commenting that he had a mate that had worked with them, and that they were "very civils geared". Mr Scott also emailed a copy of the PQD to the second defender and updated Mr Galbraith accordingly.

[28] On 19 June 2013, EPPS sent the first defender a pre-qualification report on the tender returns. The report records *inter alia* that (i) "The responses were generally all of good quality and all companies demonstrated good capability of [*sic*] the project Principal Contractor role"; and (ii) the second defender scored 59 points, which was the lowest score out of the 11 responses that were received from potential contractors. On 19 June 2013, Mr Galbraith emailed the pre-qualification report to David Irvine, without comment.

[29] On 20 June 2013, David Irvine forwarded that report to the second defender stating (again in large bold font, underlined):

> "P&C
> LORENE
> PLEASE KEEP ABSOLUTELY P&C OFF THE RECORD
> CAN YOU LET TOM AND MICHAEL SEE THIS PLEASE"

The references to Tom and Michael are to Mr O'Hare and Mr Lagan.

[30] On 2 August 2013, seven stage one tenders were received. On 5 August 2013, Mr Galbraith emailed Mr Stephen to advise him that, on reviewing and scoring the seven stage one tenders received, five had been put forward for interview on Thursday 8 August 2013. The five invited to interview were: Balfour Beattie, Galliford Try (otherwise known, and hereinafter referred to, as Morrison Construction, or simply Morrison), Ogilvie Construction, the second defender, and Robertson Construction.

[31] On 8 August 2013, interviews of the five contractors were held. On 9 August, Mr Stephen emailed Mr Scott Moses stating that Morrison would likely be selected.

[32] On 9 August 2013, EPPS sent Mr Galbraith a financial appraisal of the Work Package Estimate for the Stage 2 Tender on-costs by email. Mr Scott advised that the second defender's estimated on-costs were "sticking out higher".

[33] On 11 August 2013, at 10.14, Mr Scott sent abbreviated Minutes for Morrison and the second defender to Mr Galbraith and to David Irvine. Mr Scott described Morrison and the second defender as "the two currently favoured interviewees". Mr Irvine forwarded that email to Mr Tom O'Hare of the second defender at 11.39, stating:

> "ABSOLUTELY P&C
> There is little in this
> Morrisons majored on M&E stuff that's why Paul asked the question to you
>
> There (*sic*) idea re the CBR increases etc is maybe useful but we have good quality material available for free And there are lots of bunds to put the crap"

[34] On 12 August 2013, EPPS sent its Stage 1 tender report to the first defender by letter for the attention of Mr Galbraith. Mr Scott had previously emailed the draft report to Mr Galbraith and David Irvine on 11 August at 12.10. Mr Irvine forwarded that email, and the draft, to Mr O'Hare at 11.39 on 11 August at 12.13, again with the heading "ABSOLUTELY P&C".

[35] On 28 August 2013, Mr Scott sent an e-mail to Mr Galbraith with a comparison of the second defender and Morrison. Mr Scott observed *inter alia* "Morrisons clearly ahead!" Mr Scott also observed that "it's clear however that both of them have significant queries and qualifications outstanding and needing bottomed out before any acceptance".

[36] Later on 28 August 2013, at 18.49 Mr Scott emailed Mr Galbraith with a draft of final questions for Morrison. At 20.04 Mr Galbraith forwarded that email to David Irvine, and at 21.07 Mr Irvine forwarded it to Mr O'Hare.

[37] At 18.05 on 30 August 2013, Mr O'Hare emailed a revised programme to Mr Scott (copying in Mr Galbraith). Fifteen minutes later, at 18.20, Mr Scott emailed Mr Galbraith describing the programme as a "pile of pish" which did not understand the procurement route. At 19.05, still on 30 August 2013, Mr Scott emailed Mr Galbraith again, stating that he did not think the second defender's programme was achievable unless it was heavily accelerated. He expressed criticisms of the second defender's tender submission in comparison with other tender submissions. In particular, he said:

> "I don't believe the Lagan Programme is achievable unless it is heavily accelerated. We will pay for this in the procurement of 2nd stage Work Packages. 6 companies telling us about 50 weeks + and one company telling us 43 does concern me in terms of their limited experience of this type of Facility. Having read through their Quality submission again this afternoon, I believe it was without doubt one of the poorest submissions …"

Four minutes later, at 19.09, Mr Galbraith forwarded that email to David Irvine stating simply "FYI".

[38] Meanwhile, at 18.43 on 30 August 2013, Eddie Robertson of Morrison had emailed Mr Scott offering to reduce Morrison's programme by three weeks. He emailed again at 12.35 on 31 August 2013, this time copying in Paul Galbraith, and attaching his email of the previous day, with further changes to the programme. Less than an hour later, at 13.29 on 31 August, Mr Galbraith forwarded that email chain to Mr O'Hare.

[39] At 19.59 on 31 August, Mr O'Hare emailed Mr Scott, copying in Mr Galbraith, attaching a detailed draft programme, providing further information about how Lagan would achieve its programme. At 21.19 on 31 August, Mr Galbraith replied to Mr O'Hare's

email in these terms: "Tom, without being patronising, this is what I meant! Good return. Paul". Mr O'Hare replied to that email at 20.41 on 31 August stating "Paul, Defiantly (*sic*) not. Lesson learnt. Thanks. Tom"

[40] On 3 September 2013, EPPS sent a letter to the first defender (for the attention of Mr Galbraith) with its Stage 1a tender report. Among other things, it reported (a) that the "tenders received" figures were: Lagan - £6,829,180.47 and Morrison - £7,023,543.39; (b) that the provisional sums in each tender for superstructure steelworks were: Lagan - £1,268,902.76 and Morrison - £1,414,000, but that Morrison's figure was realistic and Lagan's was unrealistically low; (c) that the real tender comparison was: Lagan £14,357,777,72 and Morrison - £14,194,543.39 and (d) that adding the estimated Stage 2 Work Package, the effective comparative totals were: Lagan £14,357,777,72 and Morrison £14,194,543,39. After making further comments for and against each tender, this section of the report concluded that: "Morrison Construction are the clear winner at this stage and would normally receive our Recommendation to proceed to Stage 2 Tender."

[41] On 3 September 2013, Paul Galbraith emailed Mr Stephen to inform him of the Stage 1 costs and proposed Programme of both the second defender and Morrison Construction. He reported the "tenders received" figures, and the respective completion dates of 29 July 2014 for Lagan and 10 October 2014 for Morrison. He did not report the other figures reported by EPPS nor did he report their recommendation that Morrison be appointed. He described Lagan as being "streaks ahead" on their delivery.

[42] On 5 September 2013, Mr Galbraith e-mailed Mr Stephen to tell him that he had informed the second defender of its success in being appointed to progress to stage 2 and Main Contractor status the previous night. Mr Galbraith also indicated to Mr Stephen that,

as per an earlier email, he would formulate a letter of intent with an indemnity limit which he would pass by the legal team and Mr Stephen for approval prior to issue.

[43] On 5 September 2013, Mr Galbraith e-mailed all of the design team, Mr Stephen and Mr O'Hare to inform them that the second defender had been appointed preferred contractor. Mr Galbraith stated that the pursuer was "extremely happy with the progress and delighted to have [the second defender] on board to deliver this important project".

[44] On 5 September 2013, Mr O'Hare emailed all of the design team and Mr Stephen.

[45] On 17 September 2013, Mr Scott of EPPS emailed Mr Galbraith expressing concerns over the information issued by the second defender.

[46] On 11 November 2013, the first defender, acting on behalf of the pursuer, issued a Letter of Intent to the second defender.

[47] In September and October 2014, after concerns had been expressed about the second defender's performance (including that the completion date had been revised to April 2015, from the originally proposed date of July 2014) Mr Galbraith conducted a further procurement exercise involving not only the second defender but also Morrison (again) and another company, Bowmer & Kirkland. During this period, the second defender threatened to walk off site if a contract was not signed.

[48] On 15 October 2014, the pursuer entered into a building contract with the second defender for the design and construction of the Heartlands project.

Meetings

[49] On 12 December 2013, Mr Lagan met Mr Galbraith at Morton's Club in London. On 5 May 2014, Mr Lagan met Mr Galbraith, and David Irvine, at The Witchery restaurant in Edinburgh.

Conversion Works

[50] On 23 January 2014, Mr O'Hare contacted Mr Galbraith by email looking to make contact with Mr Galbraith's sister, Lynsey Cole, in order to view her loft conversion. That was a reference to works to be undertaken at a property in Gourock, which was owned by Ms Cole. Loft conversion works to that property were carried out by Apple Orchard Construction under the instruction of the second defender between around February and May 2014. Mr O'Hare provided Mr Galbraith with an update on the progress of works to "*Lynsey's house"* by email dated 22 May 2014. Apple subsequently invoiced the second defender in respect of the loft conversion works in the total amount of £66,028.56 plus VAT. Ms Cole did not make payment to the second defender of any sum attributable to the works carried out by Apple to her property.

Other evidence

The anonymous letter

[51] The first inkling the pursuer had that the contract might have been procured by bribery came from an anonymous letter sent to Oil States International, Inc in Houston and forwarded to Mr Stephen, who spoke to its terms. In brief, the author, a self-proclaimed whistle-blower, made a specific allegation that a bribe was taken by Mr Galbraith in the form of the second defender carrying out building work to his sister's house in Gourock, in return for being selected as the contractor for the Heartlands project. The letter further alleged (a) that Tom O'Hare asked the second defender's workers to carry out the building works in Gourock before and after work started at Heartlands, in January 2014 and that the work was worth around £70,000 to £80,000 and (b) that Mr Galbraith later asked Mr O'Hare for further bribes in the form of "brown envelopes" of cash. The letter clearly implicated

Mr O'Hare as the person who had paid/arranged the bribes and finished by saying that he had left the business suddenly on 31 July 2016 having been forced to resign or to face being sacked.

[52] In parenthesis, I observe that we know, from the agreed or undisputed facts, that much of what is stated in the letter was true. The second defender did carry out building work to Mr Galbraith's sister's house, worth between £70,000 and £80,000.

Hearsay evidence

[53] Receipt of the letter prompted Mr Stephen to contact the police, and to instigate his own enquiries. In his evidence, he spoke to two occasions on which he was given information about bribes. The first was in September 2016, when John Stirling, an employee of the pursuer, told him that Steve Parr, of the Parr Group (which had installed the electrical equipment) had something to tell him. Mr Parr duly met Mr Stephen and told him that he knew about "the brown envelopes as well as the loft conversion", which he clarified as being the loft extension of Mr Galbraith's sister's house. He said that the second defender had offered the work to him but he had declined it. He also said that he was aware of meetings in London where cash was passed from Lagan to Mr Galbraith. He knew this because he was friends with Tom O'Hare, who had said he was at meetings in London where cash was given to Mr Galbraith. Mr Lagan was behind the bribes. The second occasion when Mr Stephen was given information was at a meeting with Tom O'Hare at Belfast Airport in early 2017, arranged at Mr O'Hare's request. He had made detailed notes of the meeting shortly after it concluded, and he spoke to the terms of these, as follows. Mr O'Hare had alleged that he was aware of two meetings between Mr Lagan and Mr Galbraith where two brown envelopes were handed over. The first was in London at

around Christmas time in "2014" (*sic*) and the second was at the Witchery in Edinburgh in 2014. Mr Lagan told him that he had met Paul and given him his Christmas present. Mr O'Hare also said that the project had initially come through David Irvine. At the time it first appeared, Mr Irvine advised him that the price for the project was £500,000 which should be factored into the project to be paid at some point to Paul. He then contacted Colin Loughran, of the second defender, who said that Mr Lagan should be contacted. He believed David Irvine had been paid cash lump sums as well as Paul. Mr O'Hare was also aware of the loft conversion, which he said was carried out at the direction of Mr Lagan to Mr Loughran to Mr O'Hare then to Dean Gordon then to Orchard, who carried out the work. The value of the works, £76,000, was not just the loft conversion but was rework throughout the property and included white goods. Mr O'Hare said that the second defender only won the contract due to the information received at the proposal stage from Mr Galbraith and David Irvine, the flow of information typically being from the former to the latter, and then on to him. The information related to the other proposals put forward from the other contractors quoting for the project.

[54] Again, I pause to observe that much of what Mr O'Hare told Mr Stephen is now known to be true, not only in relation to the loft conversion but in relation to the flow of information from the Irvines to the second defender. Not only did the recovery of deleted emails by police confirm that that was exactly what had happened, but Mr Stephen could not possibly have known those details at the time of his meeting with Mr O'Hare; thus, his note is likely to be an accurate record of what he was told by Mr O'Hare in that and in other respects.

[55] In cross-examination, Mr Stephen acknowledged that there were fundamental differences between the accounts given by the author of the anonymous letter, Mr Parr and

Mr O'Hare and that he had not challenged Mr O'Hare on these differences. He also acknowledged that he had no means of knowing which, if any, of the accounts were true. It was not put to him that the meeting with Mr Parr had not taken place or that he was lying, or mistaken, in relation to it.

[56] Mr Parr also gave evidence, although he had not provided a witness statement. He did not remember any meetings with Mr Stephen when allegations of bribery or corruption were discussed. He thought he would remember such a meeting had it taken place. He volunteered a question of his own, "Was this not at the stage where Mr Galbraith had already been questioned?" In cross-examination, Mr Parr said he did not know who John Stirling was, and the suggestion that he had mentioned brown envelopes and the loft conversation did not "ring any bells". He would know if he had said something like that; he was not saying it did not happen but he had no recollection of it; and he repeated that he was sure he would remember such a conversation if it had occurred. When asked why he had asked about the stage of Mr Galbraith being questioned if he knew nothing about the meeting he was being asked about, he replied simply that "it was common knowledge".

[57] I did not find Mr Parr to be a satisfactory witness. Although he attempted to explain his own question away by saying that "it was common knowledge", the fact that he asked it, and the manner in which he did so, tended to suggest that he did well remember the meeting which he had with Mr Stephen. His evidence vacillated between denials that a meeting had taken place, and an inability to remember whether it had. He professed an inability to remember things that happened six years ago, although was sure he would remember "something like that". Although he was confident he had not told Mr Stephen about any bribes, he declined to go so far as to say that Mr Stephen must be lying. He appeared more concerned to ensure that no blame attached to his company – although none

was ever suggested – than with candidly answering the questions put to him (as evidenced for example by his replies "we were not involved" and "there was an investigation and nothing to do with our company").

[58] By contrast, Mr Stephen gave his evidence in an open, non-combative and unassuming manner. He would have no cause to fabricate evidence that Mr Parr had made bribery allegations, and it was not suggested to him that he had. Given the view I have formed of their respective credibility and reliability, I have no hesitation in accepting Mr Stephen's evidence in preference to that of Mr Parr. (Even if I had not formed such a negative view of Mr Parr's evidence, I would have accepted Mr Stephen's evidence, given the failure to challenge his account of the meeting in cross-examination: *Browne* v *Dunn* (1893) 6R 67; *McKenzie* v *McKenzie* 1943 SC 108, LJC Cooper at 109.) I therefore find that Mr Parr did make allegations of bribery to Mr Stephen at a meeting in 2016. Further, the fact that Mr Parr mentioned the loft conversion to Mr Galbraith's sister's house, one fact which is known to be true, demonstrates that the information he had (at least to that extent) came from a reliable source.

Other evidence given by Mr Stephen

[59] Mr Stephen also said that he was not given the stage 1 report sent by Mr Scott to Mr Galbraith on 2 September 2013. Nor was he told of Mr Scott's concerns over the second defender's tender. He did not learn of the second defender's appointment, by the first defender, until after the event.

The police investigation

[60] In his witness statement, Police Sergeant Porter spoke to the police investigation, in the course of which a number of people, including David Irvine, Graeme Irvine, Mr Galbraith and Mr O'Hare had been interviewed and various documentation recovered. That included the sweeties emails and the other emails referred to above, between the Irvines, Mr O'Hare and Mr Galbraith. Sergeant Porter also said that a number of payments had been made by Paul Galbraith to David Irvine. The dates of payment were 13 June 2013, 19 June 2013, 22 August 2013, 29 August 2013, 24 October 2013, 4 November 2013 and 13 June 2014.

Supporting evidence of cash payments to Mr Galbraith

[61] Further evidence that Mr Galbraith received cash bribes came from Sergeant Porter, who said that on 24 November 2017 he was contacted by telephone by a female who said she was Janna Galbraith, Mr Galbraith's daughter. While the purpose of her call was to provide a character reference for her father, she also said that he had made numerous trips to Belfast and that she had seen a safe in his room which contained Northern Irish banknotes. She said that he had told her that he would be given a large bonus on the Heartlands project "no matter what".

Mr Scott

[62] There were aspects about Mr Scott's witness statement which were unsatisfactory. It became evident during his cross-examination that although there had been video meetings between him and the pursuer's solicitors, the statement had been prepared by the latter and was not in Mr Scott's own words; and that he did not have all the documents to hand when

he approved, and subsequently signed, it. This was doubly unsatisfactory in relation to those parts which were pejorative of Mr Galbraith. Thus, for example, where he said at paragraph 4.1 of his statement that he did not know anything about the second defender, that was not accurate: he was constrained to admit that what he meant was that he did not know a great deal about them but that he was aware they were "civils geared". At paragraph 5.9 of his statement, he referred to one section of his report which stated that the second defender's costs were 25% more expensive than Morrisons, without having referred to later sections, where adjustments had been made, showing that the adjusted differential was only 12.5%. Mr Scott put this down to his not having had his report to hand when he read over his statement. The higher figure was the comparison of tenders received, before adjustments had been made. Mr Scott conceded that the report gave a fair impression and his witness statement did not. Then again at paragraph 5.36 of his witness statement, Mr Scott referred to an email from Mr Galbraith to Mr Stephen dated 3 September 2013 which referred to stage 1 costs for Lagan and Morrisons respectively of £6.829m and £7.023. Mr Scott said in his witness statement that he did not know where Mr Galbraith had got these figures from but in cross-examination he conceded that they were the "tender received" figures and that he could see where they came from. He accepted that the statement contained pejorative language suggesting Mr Galbraith had invented figures, which he had not done.

[63] Mr Scott was plainly uncomfortable at having to make these concessions. It is unfortunate to say the least that the person who prepared his witness statement chose to use pejorative language and plainly either did not have the relevant documents to hand or paid inadequate attention to them. It is also unfortunate that Mr Scott accepted his draft witness

statement at face value without checking from the underlying documents that what had been stated was accurate. Those documents ought to have been sent to him.

[64] To the extent that Mr Scott's witness statement makes pejorative comments about Mr Galbraith, I therefore discount it. However, it does not follow that his evidence carries no weight or that I should refrain from drawing my own inferences from Mr Galbraith's somewhat selective approach to the sharing of information with Mr Stephen. In his oral evidence, I found Mr Scott to be doing his best to tell the truth and to be mostly reliable. As he correctly pointed out, Mr Galbraith did not give a balanced view of the figures to Mr Stephen. The point about the figures quoted above is not that it was not known where the figures came from but that to give the tenders received figures rather than the adjusted figures was at best a half-truth.

[65] I do not find it necessary to repeat Mr Scott's evidence at length. As was submitted for the pursuer, its principal significance was: (i) he was unaware of the backroom dealings shown in the emails; (ii) such backroom dealings would not be expected in ordinary contract procurement; and (iii) *quantum valeat*, his reaction to being shown those backroom dealings was one of "horror".

[66] Senior counsel for the first defender spent some considerable time in cross-examination securing a series of concessions to the effect that many of Mr Galbraith's actions were ones which might reasonably have been taken; for example, that it was part of Mr Galbraith's role to test offers (both the second defender's and Morrison's); that there were significant questions to be asked of Morrison also; and that the quicker programme offered by the second defender was a significant advantage (although Mr Stephen said in his evidence that a reliable date was more important to him than an early date). This was all apparently designed to show that Mr Galbraith's decision to accept the second defender's

tender was a reasonable one. Be all that as it may, it misses the point, which is not whether Mr Galbraith might have been entitled to award the contract to the second defender but whether he was influenced (or is irrebuttably presumed to have been influenced) by payment of a bribe or bribes. If he did in fact receive a bribe, it is nothing to the point that he might have awarded the contract to the second defender even had no bribe been paid.

Mark Fegan

[67] Mr Fegan said that Apple had invoiced the second defender in three invoices, in April, May and July 2014, for a total sum of £61,258.56 plus VAT. When the invoices were not paid, he chased Brian Cowan of the second defender for payment, who told him to wait until he took instructions from head office. Mr Cowan came back to Mr Fegan and told him to re-invoice the work to the Heartlands project. Mr Fegan asked his staff to remove the reference to the address of the property from the invoices and to reissue them. The sum claimed was subsequently paid for by the second defender by cheque. The cross-examination of Mr Fegan by senior counsel for the first defender was directed to establishing who had given the instruction to re-invoice the work, rather than challenging the credibility and reliability of Mr Fegan's evidence that he had been instructed to, and did, re-invoice the work. I accept Mr Fegan's evidence.

Lynsey Cole

[68] In her witness statement, Ms Cole said that work had been done to her house in Gourock, which her brother, Paul Galbraith, had agreed to pay for. She was unaware of the identity of the builder until receiving an invoice from the second defender, which was for more than she had expected. She had passed it to Mr Galbraith who had taken care of it.

Approach to the evidence

[69] Before considering what facts are established by the evidence, it is first necessary to resolve the two issues of principle between the parties as to how I should approach it, namely, first, the standard of proof, or more accurately, the extent to which cogent and compelling evidence is required before the court is entitled to conclude that bribes were given; and, second, who should bear the consequences of the failure to call the alleged wrong-doers, principally Messrs Galbraith, Lagan, O'Hare and the Irvines.

Standard of proof and the weight of evidence required

[70] The parties agreed, correctly, that the requisite standard of proof is balance of probabilities: *Mullan* v *Anderson* 1993 SLT 835. The first defender's submissions thereafter were largely if not entirely predicated on the proposition that the payment of bribes by businessmen was inherently improbable. That proposition requires to be tested.

[71] To adapt and expand Lord Hoffman's example in Secretary of *State for the Home Department* v *Rehman* [2003] 1 AC 153 at paragraph 55, the sighting of a lioness in Regent's Park might be inherently improbable, but perhaps would be less so if a lioness was known to have escaped from London Zoo a short time before. So, here, the originating email "… starter for ten … we get sweeties for making it happen" is indeed a starter for ten, and colours all subsequent events. It removes, at a stroke, any inherent improbability which might otherwise have existed. (For that matter, Mr Galbraith's conviction and subsequent imprisonment for a separate fraud committed in the course of the Heartlands project also substantially reduces the improbability of his accepting a bribe). Thus the first defender's

argument on this point does not get off the ground. However, in deference to the submissions made, I will deal with it briefly.

[72] Senior counsel for the first defender submitted that where a court was being asked to conclude that something inherently improbable had occurred, cogent and compelling evidence was required. Hearsay evidence, although competent, should not be accorded any weight. The best evidence rule required direct evidence. Although the Inner House, in *Scottish Ministers* v *Stirton* 2014 SC 218 had said that the quality of evidence required would depend on the circumstances of the case, this overlooked certain passages in the speeches of Lord Hoffman and Baroness Hale in *In Re B* [2009] 1 AC 11 to the effect that inherent improbability should be the starting point.

[73] In *Stirton*, which is binding on me, Lord Justice Clerk Carloway (as he then was), in delivering the court's opinion, said at [117] and [118] that where the alleged facts are inherently improbable it may be more difficult to prove they are more probable than not, but proof of unlawful conduct does not fall into any special category and there is no presumption that serious crime is inherently improbable. Accordingly, even apart from the sweeties emails, I would not have taken as a starting point that bribery was inherently improbable or that the approach to deciding whether it had probably occurred or not should be approached differently from any other essential fact which must be proved.

[74] That is sufficient to sweep away the bulk of the first defender's submissions on this point. To the extent that the first defender argued, at least in its written submissions, that the best evidence rule required a certain type of evidence, or precluded reliance on hearsay, that was, with respect, misconceived although senior counsel for the first defender modified that position in oral argument by submitting that it was simply a matter of weight. As the Dean of Faculty submitted for the pursuer, the best evidence rule is merely an exclusionary

one, which in some circumstances precludes the admission of evidence which is not the best evidence (such as oral testimony about a written contract which is known to exist), although even that has been weakened by section 2 of the Civil Evidence (Scotland) Act 1988, which rendered hearsay evidence admissible. Since no objection has been taken to the admissibility of any of the evidence relied upon by the pursuer, it is available for the court to consider. The best evidence rule is not a rule which literally requires a party to lead the "best" evidence before a particular fact can be held to be proved.

[75] While I accept that hearsay evidence must be treated with caution, I do not accept that no weight whatsoever falls to be attached to it. Where some parts of a hearsay statement, particularly one against interest, are corroborated by other evidence (which is the case here, in relation to the hearsay evidence of what Mr O'Hare said), it is more likely that other parts of the statement are also true. I accept that the hearsay statements are available as adminicles of evidence. I exclude from this the evidence of DS Porter about what Janna Galbraith (or more accurately, a person claiming to be Mr Galbraith's daughter) told him about bank notes, to which I attach no weight. If the pursuer had wished to rely on that evidence, relating to a fact of which there is no other evidence whatsoever, it ought to have called Ms Galbraith to give evidence: *cf Davies* v *McGuire* 1995 SLT 755, Lord Gill at 757D.

[76] Perhaps more fundamentally, I do not accept the inherent assumption in the first defender's submission that direct evidence is "better" than indirect evidence. The standard written directions to juries in criminal trials include a direction that:

> "where circumstantial evidence is based on accurate observation, it can be powerful in its effect. Individually each fact may establish very little but in combination they may justify the conclusion that the accused committed the crime charged".

Substituting "accurate observation" with "contemporaneous documentation", that applies with equal or greater force to the present case. It has long been recognised that evidence of

contemporaneous documentation is a better means of getting at the truth than oral testimony: see, for example, *Simetra Global Assets Ltd* v *Ikon Finance Ltd* [2019] 4 WLR 112, Males LJ at paragraphs 48 and 49, where he referred not only to documents passing between the parties but "internal documents including emails [which] tend to be the documents where a witness's guard is down and their true thoughts are plain to see". As he went on to add, such documents are generally regarded as far more reliable than oral evidence of witnesses, far less their demeanour. In the present case, the emails between David and Graeme Irvine were internal documents, and the same can be said of those between Mr Galbraith and the Irvines, and between David Irvine and Tom O'Hare, in the sense that none of these were ever intended to see the light of day insofar as third parties (the pursuer) were concerned. Quite what the evidence of Mr Galbraith, either Irvine or Mr O'Hare would have added to the pursuer's case, or what might have been added by the "turn of their eyelids" (*cf Clarke* v *Edinburgh and District Tramways Co Ltd* 1919 SC (HL) 35, Lord Shaw of Dunfermline at 37) is not immediately obvious.

Failure to call witnesses

[77] That said, it may well be that if any of the "missing" witnesses had been called, one of more of them might have been able to give exculpatory explanations for what otherwise appears to be incriminatory. This leads on to the second point of controversy between the parties which is who must bear the consequences of a failure to lead evidence from the alleged wrongdoers. Each party asserts that a negative inference should be drawn against the other, where neither called the witnesses in question.

[78] Senior counsel for the first defender submitted that because it was caught in the middle between the pursuer and second defender, and had no first-hand knowledge of

whether bribes had been paid or not, common sense required the pursuer to call the alleged wrong-doers. Had they been called there might have been an innocent explanation for what might otherwise have appeared suspicious. It would be unfair on the wrong-doers to find that they had committed a fraud when they had not had the opportunity of being heard.

[79] These arguments can be disposed of swiftly. As I have explained above in paragraphs [74] to [76] there is no requirement on a pursuer to lead direct evidence. If it chooses to peril its case on circumstantial evidence, it may do so. If the facts proved give rise to a presumption that the facts necessary for success exist, the evidential burden of proof will shift to the defender, who must either lead evidence to rebut the presumption against him or fail in the action or issue of fact in question: Walker and Walker, *The Law of Evidence in Scotland (fifth ed)*, paragraph 2.6.1. There is no suggestion in that passage, or in any of the other authorities to which I was referred, that a pursuer must adduce evidence from the alleged wrong-doer, whether to bolster its case, or to prove that there is no exculpatory explanation. Such a requirement would run contrary to the very essence of an adversarial system, and there is no such practice (*cf* historical sexual abuse cases, in which it would be repugnant if the pursuer were obliged to call his or her abuser). It follows that no adverse inference falls to be drawn against a pursuer who does not call an alleged wrong-doer as a witness. Depending on the facts of the case, it may be that the pursuer runs the risk of leading insufficient evidence to discharge the evidential burden, but that is a separate issue (*cf Efobi* v *Royal Mail Group Ltd* [2021] 1 WLR 3863, a racial discrimination claim, where the burden of proof was held not to have shifted to the employer, and so the question of which party bore the consequence of not calling the decision-maker did not arise for determination. If the burden of proof had shifted, the employer might have been placed in a position of difficulty: Lord Leggatt, paragraph 47). For completeness, it is nothing to the

point that the witnesses at one time featured on the pursuer's witness list, or that somewhat anodyne summaries were given of what they might speak to. That did not amount to an assurance that they would be called and no unfairness arose in this case in any event, because the first defender was given notice before the proof that the pursuer no longer intended to call the witnesses. Equally, nothing turns on the first defender's decision to release the third party from of the action after the pursuer's case had closed, which was a tactical decision for it, and it alone, to take.

[80] As for the suggestion that it is unfair to the witnesses to make any finding against them that they were party to bribery, the simplest answer to that is to observe that no finding I make in this action can be binding upon them in any future proceedings in which they might be involved. That is sufficient to obviate any unfairness which might otherwise have arisen. I have considered whether I should anonymise their details but since the pursuer's case is that bribes, simply being a type of secret profits, were paid, not that there was any criminality, I have decided that it is not necessary to do so.

[81] A more difficult question is to what extent if at all should a negative inference be drawn against the first defender because of its failure to lead evidence from the witnesses in question. I was referred to case law to the effect that where a defender fails to lead evidence, the court is at the very least entitled to draw inferences favourable to the pursuer (*O'Donnell* v *McKenzie* 1967 SC (HL) 63 at 71, 73; *Davidson* v *Duncan* 1981 SC 83 at 89; *Royal Bank of Scotland* Plc v *Carlyle* 2010 CSOH 3 at paragraph [36]). The precise extent and ambit of any such rule was not explored in the cases cited, but where it applies the court is entitled to draw positive inferences from a party's evidence, in favour of that party. When that is understood, the rule appears to be simply another way of saying that a defender who fails to discharge an evidential burden which has shifted to it is likely to fail.

[82] A different question, which has been explored in English cases to which I was either referred, or which are referred to in those cases, is the extent to which a negative inference may be drawn against a party who fails to call a particular witness, which might then be used to bolster the case against that party. It is unnecessary to refer to that line of authority in any detail, but it is apparent that views vary as to whether this is a matter governed by legal criteria or whether it is simply a matter of "ordinary rationality": see *Efobi*, above, Lord Leggatt at paragraph 41. Either way, factors to be taken into account include the availability of the witness, what relevant evidence it is reasonable to expect the witness would have been able to give, what other evidence there is in the case, and the significance of these points in the context of the case as a whole.

[83] In the present case, the extent to which the witnesses were available to give evidence is unclear. Apart from Mr Lagan, who was present within the court precincts, the witnesses were proving difficult to cite. Where the witnesses were not under the first defender's control, so to speak, (with the possible exception of Mr Galbraith, whom the first defender might have been expected to ask whether he had received benefits, and if so, could they be explained), and the first defender (without their co-operation) had no means of knowing what evidence they would give, for which it cannot be blamed, I do not consider that this is a situation where it would be fair on the first defender to draw an inference adverse to it, due to its not having called the witnesses in question. However, it does not follow that I am not entitled to draw positive inferences from the pursuer's evidence, standing the state of the evidence, and I turn to that in the next section.

Conclusions on the evidence

[84] The following facts lead to an inference that Mr Galbraith received benefits, and that they influenced his award of the contract to the second defender:

a. The "sweeties" emails, which (in effect) mention bribes at the very outset of the procurement process, and contain a reference to Paul Galbraith.

b. The Irvines' other communications, in particular the references to "P&C" and "off the record", redolent of shady goings-on.

c. The payments passing from Mr Galbraith to the Irvines, confirming that there was a link between the two, and the absence of a plausible legitimate explanation therefor.

d. The highly irregular sharing of price sensitive information with Mr O'Hare during the procurement process, all stemming from Mr Galbraith although often conducted through the medium of the Irvines.

e. Of particular note, Mr Gilmour's email of 31 August 2013 sharing price sensitive information with Mr O'Hare.

f. The whole timeline of the emails on 30 and 31 August 2013, described in paragraphs [36] to [39], which read together found a clear inference that Mr Galbraith was assisting the second defender with its bid, as shown, for example, by the otherwise curious comment "Tom, without being patronising, this is what I meant" in the email of 31 August 2013.

g. The selective nature of the information passed by Mr Galbraith to Mr Stephen, and the half-truths told.

h. The fact that the second defender was awarded the contract.

i. The anonymous letter received by Mr Stephen, of limited weight in itself but available as an adminicle of evidence.

j. Mr Stephen's hearsay evidence of what Mr O'Hare told him, another adminicle, entitled to some weight given the support it derived from the emails subsequently recovered.

k. The works undertaken on Mr Gilmour's sister's house, which provided the clearest possible evidence that a bribe had been paid to the tune of £66,000 plus VAT in the shape of work by Apple on the instruction of the second defender, paid for by the second defender, then re-invoiced to the Heartland project on the instructions of someone at Lagan, so that it was charged to the pursuer.

Senior counsel for the first defender submitted that these facts did not bear the conclusions the court was being invited to draw. The hearsay evidence was not best evidence and was of limited value. Mr Scott's evidence showed that the choice of the second defender as the stage 2 contractor was a reasonable one. David Irvine was part of the interview team and, as such, was entitled to receive information. The pursuit of Bowmore & Kirkland in 2014, when Mr Galbraith was apparently losing patience with the second defender undermined the pursuer's case – it showed that Mr Galbraith was not at that stage favouring the second defender.

[85] While those are all legitimate points, the facts listed above, taken together, lead to a strong inference not only that benefits were given to Mr Galbraith but that they induced him to award the contract to the second defender. In the absence of any contradictory evidence from the first defender which might have (for example) explained away the payments, or otherwise displaced the natural inference which falls to be drawn, I am entitled to, and do,

conclude that that was precisely what happened. While I have held that proof of fraud is not required, I also infer that Mr Galbraith did have the requisite *mens rea* for fraud, which can be inferred from his whole actings, but in particular (a) the invoicing of the work done on his sister's house and (b) the withholding of information from the pursuer, in the knowledge that price-sensitive information was being shared with the second defender. In that latter regard, as was said by Lord McNaughten in *Gluckstein* v *Barnes* [1900] AC 240 at 250-251, sometimes half a truth is no better than a downright falsehood.

Did the benefits given to Mr Galbraith amount to bribes?

[86] While I have from time to time used the terms "bribe" and "bribery" in the foregoing discussion of the evidence, it remains for me to consider whether the payments made amounted, in law, to bribes, and if so, whether the first defender is to be held accountable therefor.

[87] The first of those questions need not detain us long. Although the first defender did not, as I understand it, concede that the benefits said to have been given to Mr Galbraith, if proved, were bribes, it is difficult to see how they could not be, since they fall within the classic definition of bribery. Mr Galbraith owed a duty of trust and confidence to the pursuer, being a fiduciary duty in the widest sense. He was in a position to affect the course of business between the pursuer and the second defender. He was the very person entrusted with ensuring a level playing field in the tender process, and the pursuer was entitled to his disinterested loyalty, as a matter of extreme importance. He set himself up as the gatekeeper between the pursuer and others, most notably EPPS. Mr Scott said that he regarded the first defender as his client. All communications to the pursuer were to pass through Mr Galbraith. Even if the payments and benefits given to him constituted a

reasonable fee for his efforts in assisting the second defender to win the tender (*cf* the example given in *Airbus* above), they ought to have been disclosed to the pursuer, but were not. At best for him, Mr Galbraith was placed in a situation where his own interests conflicted with those of the pursuer. There is no question but that the cash payments, and benefits in kind, to him amounted, in law, to secret profits or bribes.

[88] Turning to the second question, whether the first defender is liable for Mr Galbraith's actions in receiving bribes which induced him to award the contract to the second defender, I heard submissions on the extent to which the first defender itself owed a fiduciary duty to the pursuer. The first defender disputed that it did, arguing that it was merely a project manager, not an agent. Insofar as it matters, I consider that it did owe a fiduciary duty. The first defender was appointed as project manager by virtue of an appointment agreement dated 28 July 2014. Clause 9.1 of the agreement conferred express authority on the first defender (among other things) to make financial decisions in relation to the project and to negotiate and execute the building contract. The services provided were defined in Schedule Part 2 as including the provision of assistance and advice to the pursuer on all elements of the project throughout its lifecycle. Although the procurement phase had been substantially completed by the time the agreement was executed, clause 2.3 provided that the appointment was deemed to have commenced from the time the first defender began to perform any services covered by the appointment. Thus, for the purposes of the procurement exercise leading to the selection of the second defender as contractor, it was an agent with power to bind the pursuer (as it did), and thus that it owed a duty of loyalty.

[89] However, the primary cause of action is not so much that the first defender breached its fiduciary duty, but, more straightforwardly, that the contract was procured by bribery

(which as we have seen, is a cause of action in itself). The real issue is whether or not the first defender is vicariously liable for Mr Galbraith's actions in accepting bribes.

Vicarious liability

[90] Where a corporate entity is employed to provide services, it is possible that the bribe will be taken by an employee without the knowledge and approval of its directors. A company will nonetheless be vicariously liable for intentional wrong doing by one of its employees if his wrongs were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable: *Lister* v *Hesley Hall Ltd* [2002] 1 AC 215, Lord Steyn at [28] as applied by the Inner House in *Wilson* v *Exel (UK) Ltd* 2010 SLT 671 at [25]. The sufficiency of the connection may be gauged by asking whether the wrongful actings can be seen as ways of carrying out the work which the employer had authorised: *Lister*, Lord Clyde at [37]; *Wilson*, Lord Carloway at [27]. A broad approach should be adopted, looking at the context of the act complained of, not just the act itself (*Wilson*, [28]).

[91] The facts of the present case are not dissimilar to those in *Petrotrade Inc* v *Smith* [2000] Lloyds rep 486, (which therefore pre-dated *Lister* and *Wilson*), where employees of the defendant, who had authority to enter into port agency contracts on the defendant's behalf, bribed an employee of the claimant to secure a port agency contract for the defendant. The court held at [21] that the relevant contracts could be categorised as "the conclusion by illegitimate means of a transaction that they were authorised to conclude by legitimate means" and thus that the defendant was vicariously liable.

[92] The present case, of course, involves the converse situation where the question is whether the employer of the recipient of the bribe, rather than the person who made it,

should be held vicariously liable, but it is difficult to see why there should be a different outcome. Mr Galbraith was authorised by the first defender to administer the procurement process on behalf of the pursuer, the very service which the first defender was contractually obliged to provide. Not only Mr Galbraith, but the first defender itself, owed a fiduciary duty to the pursuer. In awarding the contract to the second defender, he was carrying out work he was authorised to do, but in an unauthorised way. In all these circumstances, Mr Galbraith's wrongful act was so closely connected with his employment that it is fair and just to hold the first defender vicariously liable for payment of the bribes.

[93] Finally, and for completeness, *Petrotrade* is authority, if any be needed, that even if the controlling mind of the second defender did not instruct the bribes, it would be vicariously liable for the actions of its employees in paying bribes to Mr Galbraith. For that reason, it is unnecessary for me to make any finding as to which of its directors or employees instructed or paid the bribes.

Conclusion and disposal

[94] In summary, for all of the foregoing reasons, I have decided:

(i) that Mr Galbraith received benefits from the second defender, in the form of cash payments of unknown amounts and building services, which were not disclosed to the pursuer;

(ii) that Mr Galbraith owed a fiduciary duty to the pursuer and that the said benefits therefore constituted bribes;

(iii) that in any event, were it necessary to do so, the *mens rea* of fraud has been proved on a balance of probabilities;

(iv) that there is an irrebuttable presumption that the bribes induced the award of the contract for the Heartlands project to the second defender;

(vi) even in the absence of such a presumption, it has been proved on a balance of probabilities that the bribes induced the contract;

(vii) the first defender is vicariously liable to the pursuer for the loss caused (yet to be established).

[95] I have therefore sustained the pursuer's second plea-in-law and repelled the first defender's third plea-in-law insofar as directed at the pursuer's first conclusion.

Postscript – settlement, publication and anonymisation

[96] The proof concluded on 6 July 2022. On 3 August 2022, parties were notified that my opinion would be issued on the following day, and it was duly emailed to agents at 9am on 4 August 2022. At 8.57am that morning an email was received by the court stating that the parties had reached an extra-judicial settlement. The email was received too late to prevent the opinion from being issued (even if that would have been appropriate in relation to a finalised opinion which had already been signed) since, apart from anything else, I was not made aware of the settlement until some hours later. However, at the first defender's request, I was able to delay publication of the opinion to afford some breathing space, and to give parties the opportunity to address me on whether publication was appropriate and, if so, to what extent, if any, the opinion should be anonymised.

[97] Parties have now had that opportunity at a by order hearing fixed for that purpose. In the first place, senior counsel confirmed that a settlement of the entire action had been agreed. The terms of that settlement are confidential between the parties, but the settlement

was made without any admission of liability. As a result of the settlement, no judicial determination of the parties' dispute is now required.

[98] That said, given that the opinion had in fact been finalised and issued, senior counsel for both parties agreed that it was appropriate that it should be published. Reference was made to the English cases of *Barclays Bank plc* v *Nylon Capital LLP* [2012] Bus LR 542 and *Jabbar and another* v *Aviva Insurance UK Ltd* [2022] 4 WLR 68. In broad terms, those cases suggest that in circumstances akin to the present the relevant factors in deciding whether an opinion should be published are (a) whether the opinion deals with a point of law of some potential general interest; (b) whether it is in the public interest that some exposure of wrongdoing or other activity (which need not amount to criminality) be exposed; (c) the state of preparation of the opinion (which is of less weight than the other factors, but nonetheless relevant); (d) the reasons for any desire to avoid a judgment; and (e) whether the opinion is that of an appellate court or a court of first instance (which cuts both ways, since an appellate court's judgment will be binding on other courts, but the justification for publication may be stronger in the case of a court at first instance where the wrongdoing, if such there be, will not yet have been the subject of any public judgment). Finally, *Jabbar* makes clear that there is no need to show exceptional circumstances before publishing a judgment after a case has settled.

[99] Taking those factors into account in the present case, I agree with parties that publication is appropriate. The case does raise a novel point of law on which this opinion, if nothing else, may stimulate academic discussion; the case was litigated in public and does, in the most general sense, expose wrongdoing (short of criminality); neither party wishes to stop publication; and, *quantum valeat*, the opinion had already been completed before the settlement was reached.

[100] The sole contentious issue is whether or not I should anonymise the opinion by referring to the first defender only by an initial, which is the extent of anonymisation sought by it. The pursuer does not consent to any anonymisation. In this regard the Dean of Faculty referred to the requirement for open justice, described by the Inner House in *BBC* v *Chair of the Scottish Child Abuse Inquiry* 2022 SLT 385 at [44] as "a cornerstone of the legal system". The Dean also referred to the leading modern authority on anonymisation in Scotland, *MH* v *Mental Health Tribunal* 2019 SC 432, and to Lord Rodger's question in *Re Guardian News* [2010] 2 AC 697 at paragraph 63: "What's in a name? 'A lot', the press would answer."

[101] At the outset, it must be understood that there is no question of the court making, or being asked to make, any form of anonymity order, or an order preventing publication of the first defender's name. The proof was conducted in public and to that extent the name is already in the public domain. There is no restriction on publication of any detail about the case. Thus the issue here is different from that which was before the court in *MH*, where an anonymity order was sought. The distinction between an anonymity order, and simple anonymisation of a judgment is clear from *MH* at [21] where it is stated that the court has the power at common law to withhold information, including the names of parties, from opinions which are published in hard copy or on the internet but that this power cannot operate as a means of press censorship.

[102] That said, open justice requires that in general the parties' names should be published, unless there is a good reason for anonymisation. In considering whether there is a good reason, I accept the submission of senior counsel for the first defender that there are three factors underlying the requirement for open justice. First, it ensures that the court is open to scrutiny; second, it is important that wrongdoing where it exists is uncovered, and

third, the media should be able to name names where that is important. I also accept that where, as here, a party wishes to preserve its anonymity, the court must carry out a balancing exercise. In that regard, it is highly relevant in the present case that the court is no longer required to judicially determine the dispute between the parties, settlement having been reached. It is difficult to see that the public interest demands publication of the first defender's name in an opinion on the internet when there would have been no publication of any sort had settlement been reached earlier. Putting that another way, there is less need for public scrutiny of the court where the opinion issued is, by that time, merely of academic interest. It is also highly relevant that the first defender itself is not a wrongdoer. There is no need to name it for the public to understand the events in question, and who did what. The public interest is met by the publication of all other details in the case.

[103] Drawing all of this together, I accept that the first defender has a legitimate interest in not having its name forever associated with a case in which bribery has been found to be established. I do not consider that the principle of open justice is compromised in any way by referring to the first defender only by an initial, and I have therefore anonymised this opinion to that very limited extent.