OUTER HOUSE, COURT OF SESSION

[2023] CSOH 87

A339/18

OPINION OF LORD RICHARDSON

In the cause

JAMES ADRIAN WATSON

Pursuer

against

GRAHAM EDWARD FLETCHER

First Defender

STEVEN McCOLL

Second Defender

DAVID FRANK RANDLES

Third Defender

JEAN LESLEY RANDLES

Fourth Defender

DAVID MARTIN PEERS

Fifth Defender

and

SBAY-C SA(1) Limited

Sixth Defender

Pursuer: Lindsay KC; Thorntons Law LLP
First Defender: McKinlay; Lindsays LLP
Second Defender: Brown; Drummond Miller LLP
Third, Fourth and Sixth Defender: A Garioch, (sol adv); Gilson Gray LLP
Fifth Defender: Sanders; Levy & McRae

6 December 2023

Introduction

[1] This action concerns a dispute, which I heard at debate, about the development of property in Portpatrick. Each of the defenders sought to challenge aspects of the pursuer's case.

[2] The factual background to the dispute is both complex and contentious. However, for present purposes, it may be summarised as follows.

[3] The pursuer sues as the assignee of a company, now in administration, Croftshore Limited. Croftshore is the heritable proprietor of an area of land at Heugh Road, Portpatrick. That land had been acquired by Croftshore for the purposes of residential development. The development was initially undertaken for Croftshore by the first defender.

[4] The directors of Croftshore were the pursuer, the first defender and a third individual, Dermot Shilton. Croftshore is a wholly owned subsidiary of Portpatrick Holdings Limited ("Holdings"). Holdings is also now in administration. At the relevant time, the issued share capital in Holdings was held as follows: 10% by the pursuer; 10% by the pursuer's wife; 40% by the first defender; and 40% by Mr Shilton.

[5] In or about 2006, two plots of ground which were situated to the west of the area of land owned by Croftshore were acquired by Portpatrick Holidays LLP ("Holidays"). The members of Holidays were the first defender; Susan Leslie Fletcher (the first defender's

former wife); and Dermot Shilton. Holidays then began to develop its site. However, on 24 April 2013, Holidays was placed in administration.

[6] Following Holidays' entry into administration, there were discussions between Mr Shilton and the first defender, on the one hand, and the joint administrators of Holidays, on the other, in relation to the possible purchase of the Holidays site. At this time, the directors of Croftshore sought to obtain funding for this purchase. Two of Croftshore's directors, the pursuer and Mr Shilton, also sought to resolve a drainage issue which affected both Croftshore's site and the Holidays site. Resolution of this issue involved entering into negotiations for the grant of a servitude with a third party, Major Orr Ewing, who owned land adjacent to the Croftshore and Holidays sites.

[7] Ultimately, the discussions with the administrator of Holidays did not result in an agreement between the administrators and Croftshore for the purchase of the Holidays site. Instead, in December 2013, the joint administrators of Holidays concluded missives for the sale of the Holidays site with the sixth defender. At that time, the second defender was the sole director and shareholder of the sixth defender.

The pursuer's case

[8] In the present action, the pursuer avers that settlement of the transaction between the joint administrators of Holidays and the sixth defender took place on 30 September 2014 when title to the Holidays site was conveyed to the sixth defender. The pursuer also avers that the third, fourth and fifth defenders provided financial assistance to the sixth defender to enable it to purchase the Holidays site.

[9] The pursuer goes on to aver that the first defender, together with the third, fourth and fifth defenders, devised and put into execution a scheme whereby the sixth defender

would acquire ownership of the Holidays site to the exclusion of Croftshore and the profits would be shared by them. The pursuer's case is also that the first and second defenders procured the sixth defender to enter into and conclude negotiations with Major Orr Ewing in respect of the servitude in competition with Croftshore.

[10] According to the pursuer, by June 2014, matters had come to a head between the parties. The pursuer and Mr Shilton met with the first, third, fourth and fifth defenders. (The second defender had ceased to be a director of the sixth defender on 4 March 2014. At that time, the third defender became the sole director and shareholder of the sixth defender in place of the second defender.) At the meeting, the pursuer set out his position that the first defender was acting in breach of his fiduciary duties to Croftshore. According to the pursuer, the defenders present declined to desist with progressing the first defender's scheme.

[11] By May 2015, a draft summons at the instance of Croftshore against the first, third, fourth and fifth defenders had been intimated to those defenders. In response, the pursuer avers that the first defender threatened to stop working for Croftshore in its development. The first defender and Croftshore were unable to reach agreement. On 6 July 2015, the first defender ceased work for Croftshore. Croftshore sought to find an alternative contractor and site supervisor. However, the pursuer avers that the first defender failed both to return to site and to co-operate with Croftshore's alternative contractor and site supervisors. Eventually, on 26 August 2015, Croftshore entered administration.

[12] Accordingly, in the present action, the pursuer seeks damages from all of the defenders. In the case of the first defender, the pursuer's action proceeds on the basis of an alleged breach of the first defender's fiduciary duties as a director of Croftshore. In the case of the second to sixth defenders, the pursuer bases his claim on the principle of dishonest

assistance by those defenders of the first defender. The pursuer quantifies his damages on the basis of the profits that Croftshore would have made had it had the opportunity of developing the Holidays site.

[13] As an alternative, the pursuer seeks an accounting of profits that the pursuer claims the first defender made through the development of the Holidays site.

[14] Separately, the pursuer also seeks to recover as damages from the first defender the costs associated with Croftshore's entry into administration in August 2015. That claim proceeds on the basis that Croftshore's entry into administration was caused by the first defender's actions, in breach of his fiduciary duties, in walking off the Croftshore development site and in failing to co-operate with the handover to a new contractor and a new site supervisor.

[15] It is also necessary to mention that the pursuer and the first defender are also parties to a related action in which I heard a debate immediately after the present case. That case (A338/18), arises out of the same circumstances as the present case. However, in that case the pursuer sues the first defender as the assignee of Holdings. My Opinion in the related action has been issued concurrently with this one.

The first defender's arguments

[16] Counsel for the first defender challenged the relevancy of the pursuer's pleadings in support of both the pursuer's claim for damages arising from the first defender's alleged breach of fiduciary duty in respect of the acquisition and development of the Holidays site (the pursuer's first conclusion); and the pursuer's claim for damages arising from Croftshore's entry into administration (the pursuer's second conclusion).

[17] The first defender did not seek dismissal of the pursuer's action as whole so far as directed against him because he accepted that, following an amendment which I allowed at the outset of the hearing, the pursuer had pled a relevant case seeking an accounting from the first defender on the basis of alleged breaches of fiduciary duty. The first defender disputed that the pursuer had any entitlement to this remedy but accepted that resolution of this dispute would require evidence.

The Holidays site claims

The defenders' arguments

[18] The starting point for the first defender's attack on the pursuer's pleadings was recognition of the fact that, in order to succeed in his claim, the pursuer required to demonstrate that, but for the alleged breaches, Croftshore could have successfully pursued the opportunity represented by the Holidays site. This was clear from the way in which the pursuer quantified the damages he sought. These were based on the profits that the pursuer asserted could have been made by Croftshore from the development of the Holidays site.

[19] Counsel for all of the other defenders adopted and developed this argument.

[20] The short point was that the pursuer had failed to aver that Croftshore would have been in a position to purchase the Holidays site. In particular, counsel for the first defender focussed on the fact that the pursuer had failed relevantly to set out the basis upon which Croftshore would have been able to fund the purchase of the Holidays site. In Article 3 of condescendence, the pursuer appeared to accept that Croftshore would have required to obtain both external funding and contributions from the directors and/or shareholders of Croftshore. The directors of Croftshore included the first defender. The first defender was also one of the shareholders in Croftshore's parent company Holdings. However, the

pursuer simply did not offer to prove either that those directors and/or shareholders would have made such a contribution or that they would have been under an obligation to make such a contribution. The pursuer had made no averments explaining where the necessary funds were to come from.

[21] It was contended that the high point for the pursuer was what counsel for the first defender characterised as his "carefully worded" averments that none of the directors would have refused to make such personal financial contributions and that the first defender would have been in a position to contribute financially to the purchase of the Holidays site as he was able to contribute to the funding of the site by the sixth defender. The pursuer had not set out a basis from which he was entitled to seek to infer that, but for the first defender's breach of fiduciary duty and the dishonest assistance of the other defenders, it was more probable than not that Croftshore would have been able to obtain the necessary funding to purchase the Croftshore site.

The pursuer's response

[22] Counsel for the pursuer's starting point was to draw attention to the fact that this part of his case was pled on the basis that Croftshore had lost the chance to develop Holidays site. This was clear from the pursuer's averments in Article 10. The issue of potential funding for that acquisition was one of the factors which, after proof, would have to be considered in assessing the question of whether, as a result of the actions of the defenders, Croftshore had lost the chance of developing the Holidays site.

[23] Viewed against that background, counsel for the pursuer submitted that his averments in respect of causation were relevant and a proof before answer should be

allowed. In Article 3, the pursuer had set out the factual basis upon which the "more probable than not" averment was made:

> Croftshore was not balance sheet insolvent;
>
> Croftshore had the support of its bankers. Its directors had discussed the broad terms of a funding offer with its banker and those discussions were positive in tone. At no time had the bank ever advised that it would not fund Croftshore's purchase but it had advised that it would require a percentage of the purchase price to be paid by Croftshore's directors/shareholders;
>
> The directors of Croftshore had discussed the possibility of each director making a personal contribution and none of the directors had refused to make such contribution. The directors of Croftshore had a good relationship at that time; and based on the first defender's contribution to the purchase of the Holidays site by the sixth defender, he would have been in a position to contribute to the purchase by Croftshore. In this regard, counsel for the pursuer highlighted that on the pursuer's case, the first defender would have been left with the choice of either funding Croftshore's acquisition or abandoning the opportunity.
>
> Counsel for the pursuer emphasised that in this case, the pursuer averred that the diversion from Croftshore of the opportunity represented by the Holidays site had occurred at a relatively early stage and this restricted the factual circumstances about which the pursuer could make averment.

[24] Counsel for the pursuer also drew attention to the averments made in respect of the quantification of damages in Article 10. The pursuer incorporated a Schedule of Losses and expert report (6/47 and 6/48 respectively) detailing how the sum claimed as a loss of profit had been calculated. This calculation disclosed, among other things, the pursuer's position

in respect of: the anticipated cost of the Holidays site; the breakdown of that sum as between bank funding and funding from the directors of Croftshore; and the anticipated cost of finance.

[25] This was the factual basis upon which the pursuer averred that but for the first defender's breach of fiduciary duty and the dishonest assistance of the other defenders, it was more probable than not that Croftshore would have been able to obtain the necessary funding to purchase the Croftshore site.

Decision

[26] I am satisfied that the pursuer's averments of causation made in support of his claim for a loss of profit arising from the acquisition of the Holidays site are relevant and ought to be admitted to probation.

[27] Based on what the pursuer has averred in Articles 3 and 10, I do not consider that it can be said that were the pursuer to prove all of his averments at proof, he could not establish causation. I do not consider that the criticisms made by the first defender take adequate account of the fact that this part of the pursuer's case proceeds on the basis that, as a result of the actions of the defenders, Croftshore lost the chance to develop the Holidays site and that the diversion of this opportunity occurred at a relatively early stage. I accept the submission made on behalf of the pursuer that, when one considers the factual averments made as a whole (summarised at [23] above), the pursuer has set out a basis from which the inference can be drawn that it was more probable than not that Croftshore would have been able to obtain the necessary funding to enable it to purchase the Holidays site. In other words, the pursuer has relevantly set out a basis upon which it could be inferred that it was more probable than not that Croftshore would have obtained the necessary funding

from its bankers with relevant contribution being made by Croftshore's directors (who were also the shareholders of Holdings).

[28] Furthermore, I consider that when the pursuer's averments, including the Schedule of Losses and expert report (6/47 and 6/48 respectively), are considered as a whole, the pursuer has given fair notice of his case in respect of the acquisition of the Holidays site and the funding of that acquisition.

The claim for administration costs

The first defender's arguments

[29] Counsel for the first defender highlighted that the pursuer's claim for the costs which Croftshore incurred by entering administration focussed on the actions of the first defender in his capacity as a contractor engaged by Croftshore. The pursuer averred that the first defender had breached his fiduciary duties by walking off the Croftshore development site and failing to co-operate with the handover to a new contractor and a new site supervisor.

[30] The parties were in agreement that at the critical time for this part of the pursuer's case, the first defender was wearing two hats – he was both a director of Croftshore and, at the same time, he was a contractor working for Croftshore on its development. Counsel for the first defender submitted that this dual role was not, in itself, controversial. There was no suggestion that a director was precluded from having a contractual relationship with the company of which he or she was director (see, for example, *Gloag and Henderson: The Law of Scotland* (15th Edition) at paragraph 46.03)

[31] However, the first defender's criticism was that the pursuer's case conflated the two roles that the first defender was fulfilling. The pursuer was seeking to impose duties on the first defender which arose as a result of his role as director in respect of the actions he took

as a contractor. This imposition had no relevant legal basis. Furthermore, it confused matters. Insofar as Croftshore wished to claim in relation to the actions of the first defender as contractor, those claims should be founded on the terms upon which the first defender had been engaged by Croftshore. In relation to his actions as a contractor, the first defender could not, it was contended, be in breach of his fiduciary duties unless he was also in breach of the terms of his engagement. In that regard, it was submitted that it was telling that the pursuer made no case in respect of the underlying contract.

[32] In advancing this submission, counsel for the first defender acknowledged that neither he nor senior counsel for the pursuer had identified any authority directly on this issue. Counsel for the first defender recognised that there were authorities which related to directors earning secret profits. He accepted that those authorities supported the proposition that the fact that a director was acting otherwise than a director in making a secret profit was no answer to a claim by the company to recover those profits (see, for example, *Item Software (UK) Limited* v *Fassihi* [2005] ICR 450 at paragraph 38). However, those authorities fell to be distinguished because, in that situation, the obligation to account for secret profits arose from the director's fiduciary duties rather than from the other capacity in which the director was working. Whereas, in the present case, the first defender's obligations in relation to the works he was carrying out for Croftshore arose, not from his capacity as director, but from his engagement, as a contractor, by Croftshore. Counsel accepted that there could be cases in which there was an overlap in the duties that applied to a director acting in different capacities but this was not one of them.

[33] Counsel highlighted that the first defender also advanced this argument in the related action brought by the pursuer as assignee of Holdings (A338/18).

The pursuer's response

[34] Senior counsel for the pursuer submitted that the fallacy in the first defender's argument was to assume that the duties imposed by each of the two roles he was fulfilling at the critical time – director and contractor - could not apply at the same time. In other words, the fact that the first defender was engaged as a contractor by Croftshore did not somehow relieve him of his fiduciary duties. He also highlighted the fact that the pursuer's case was not based on a normal contractual dispute. According to the pursuer, the first defender had sought to force Croftshore to withdraw the draft summons and, when he had been unsuccessful, he had walked off the Croftshore development site. Thereafter, the first defender had refused either to return to work or to co-operate with the new contractor and supervisor in the knowledge that these actions would place Croftshore in financial difficulties. These were not normal business decisions. If the first defender wished to contend that his actions were somehow justified by the terms of his engagement, that was a matter for him to raise.

[35] Counsel for the pursuer submitted that his position was supported by those authorities which made clear that a director's duties to account for secret profits applied whether or not the opportunity arose while the director was acting in his or her capacity as a director (see *Item Software* as above at [32] and *Commonwealth Oil and Gas Co Limited* v *Baxter* 2010 SC 156 at paragraph 79). This line of authority supported the pursuer's position that a director's fiduciary duties continued to apply to him even when he was acting otherwise than as a director.

Decision

[36] I do not accept the first defender's argument. I consider that the pursuer has averred a relevant case in respect of this part of his claim.

[37] The flaw in the first defender's approach is that highlighted by senior counsel for the pursuer. The fact that, at the material time, the first defender was acting as a contractor rather than directly in his capacity as a director does not mean that his directorial duties no longer applied to him.

[38] The pursuer's case is that through his actions of walking off site and refusing to co-operate, the first defender was breaching his duty "to act in the way he considered in good faith would be most likely to promote the success of Croftshore for the benefit of its members as a whole" (see Article 10). Contrary to the submission of the first defender, the duty upon which the pursuer founds is therefore one which arises from the fact that the first defender was, at the material time, a director of Croftshore. On the pursuer's case, it continues to apply to him notwithstanding he is also engaged as a contractor by Croftshore.

[39] This approach is consistent with the line of authorities which were referred to in argument relating to a director's duty to account for secret profits (*Item Software* as above at [32] and *Commonwealth Oil and Gas* as above at [35]). For the reasons I have given in the last paragraph, I do not consider that these authorities can be distinguished from the case the pursuer avers as counsel for the first defender sought to do.

The second defender's arguments

[40] The second defender challenged the relevancy of the case against him which was pled on the basis that he had dishonestly assisted the first defender in his breaches of fiduciary duty.

[41] Counsel for the second defender accepted that Scots law recognised, as a matter of principle, a remedy for dishonest assistance in the commission of a breach of a fiduciary duty (see *Ted Jacob Engineering Group Incorporated* v *Robert Matthew, Johnson-Marshall and Partners* 2014 SC 579 at paragraph 100; *MacAdam* v *Grandison* [2008] CSOH 53 at paragraph 37).

[42] However, counsel for the second defender submitted that the pursuer had failed in two respects to set out a relevant case.

Dishonest assistance

[43] The second defender's first argument was that the pursuer had failed properly to aver a relevant case of dishonesty on the part of the second defender. Counsel submitted that the test for dishonesty in this context could be derived from English authority. The starting point was what was said by Lord Nicholls of Birkenhead in *Royal Brunei Airlines* v *Tan* [1995] 2 AC 378 at page 389, B to G:

> "Before considering this issue further it will be helpful to define the terms being used by looking more closely at what dishonesty means in this context. Whatever may be the position in some criminal or other contexts (see, for instance, *Reg.* v *Ghosh* [1982] Q.B. 1053), in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not

> escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.
>
> In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless."

[44] In this regard, counsel drew particular attention to *Satnam* v *Dunlop Heywood Limited* [1999] 3 All ER 652. In that case, the Court of Appeal had made clear that mere knowledge of a breach of fiduciary duty was not sufficient to render liable a person who was not himself subject to a fiduciary duty (see *Satnam* at page 671).

[45] Counsel for the second defender recognised that consideration of the issue of dishonesty would require the ascertainment of all relevant circumstances (see *Group Seven Limited* v *Nasir* [2020] Ch 129 at paragraph 61), but this did not relieve the pursuer of the normal rules of pleading. For there to be proof, there had to be averment. Furthermore, counsel drew attention to the well-known rule in respect of pleading fraud or dishonesty that the defender is entitled to know with precision and certainty the allegations being directed against him (*Royal Bank of Scotland plc* v *Holmes* 1999 SLT 563).

[46] Against this background, counsel for the second defender submitted that it was striking how little was averred by the pursuer in respect of the second defender's conduct. It was common ground that the second defender was the sixth defender's sole director and shareholder from shortly after incorporation in early 2013 until he resigned and transferred his shares on 4 March 2014. It was also common ground that the sixth defender was incorporated as a vehicle for the purpose of acquiring the Holidays site. From this starting point, the pursuer appeared to focus on two activities in particular. First, during the period

of the second defender's directorship, the sixth defender had concluded missives for the acquisition of the Holidays site. Second, again under his directorship, the sixth defender had opened negotiations for the acquisition of a servitude for the Holidays site with Major Orr Ewing.

[47] Counsel for the second defender submitted that what was averred by the pursuer did not satisfy the legal test for dishonesty as set out in the authorities. In relation to the acquisition of the Holidays site, there was no suggestion that this was *per se* dishonest. For example, there was no suggestion that Croftshore had a right of exclusivity in respect of the site. Furthermore, although it was alleged that the second defender had "actively concealed" the involvement of the first defender from Croftshore, there was no averment that the second defender had a duty to disclose this information. There was also no averment that the second defender had positively represented that the first defender had no involvement. In relation to the negotiations for the servitude, this occurred at a time when, on the pursuer's pleadings, it was known that the sixth defender had concluded missives. Again, there was nothing inherently dishonest in what the pursuer averred the second defender had done.

[48] The pursuer's case rested on the fact that it was alleged that the second defender knew that the first defender was involved with Croftshore and that Croftshore might have an interest. But the fact that the first defender was, as counsel put it, "riding two horses" did not come close to the threshold of dishonesty. Accepting the pursuer's case would have the effect of essentially imposing the fiduciary's duties on the assistant. Counsel for the second defender argued that there was nothing in the pursuer's averments that went beyond what he described as "sharp-elbowed competition". The pursuer's case could not be distinguished from *Satnam* (above at [44]) in which it had been made clear that the mere

knowledge of the breach of fiduciary duty by the assistant was not sufficient: there required to be a finding of dishonesty on their part.

Causation

[49] The second argument advanced on behalf of the second defender related to pursuer's averments of causation.

[50] The point being made by the second defender was separate from his adoption of the causation arguments advanced on behalf of the first defender (see above at [21]). The argument advanced on behalf of the second defender was that the pursuer had failed to relevantly aver that the actions of the second defender had caused the losses which the pursuer now claimed.

[51] Counsel for the second defender recognised that the relevant test of causation in claims of dishonest assistance was not straight-forward. There was no direct Scots law authority on the point. Furthermore, the question appeared presently unresolved in English law. Counsel referred to two apparently conflicting Court of Appeal cases on the point: *Novoship (UK) Limited* v *Mikhaylyuk* [2015] QB 499 at paragraphs 94 to 107 and *Group Seven* (see above at [45]) at paragraph 110. Counsel submitted that resolution of this issue might itself turn on the way in which remedies for dishonest assistance are characterised and the precise legal bases for those remedies. This was because it was submitted that different considerations might fall to be applied to the issue of causation depending on whether the remedy was characterised as deriving from the law of trusts or, alternatively, from the law of delict (see the analysis of Lord Reed in *Commonwealth Oil and Gas* v *Baxter* [2007] CSOH 198 at paragraph 197). However, he submitted that, as what was sought was reparation (see the pursuer's first plea in law) the appropriate test was that common law

rules of causation should apply. In other words, that the pursuer had to aver that the second defender's actions were a material cause of Croftshore's loss.

[52] In the event, it proved unnecessary for counsel for the second defender to develop these submissions further because, at this point, senior counsel for the pursuer helpfully clarified that he accepted that, as the remedy the pursuer sought against the second defender was a delictual one, the pursuer required to aver that the second defender's dishonest assistance had caused or materially contributed to the causing of Croftshore's loss.

[53] On this basis, counsel for the second defender submitted that the pursuer had failed to aver a relevant case in respect of causation. As he had highlighted in the arguments he had advanced in respect of the issue of dishonest assistance, the actions of the second defender upon which the pursuer relied did not demonstrate a material causal effect. There was nothing that it was said that the second defender had carried out which could not have been done by others. His role, it was said, was essentially an administrative one. Furthermore, on the pursuer's own averments, the second defender had ceased to be involved on 4 March 2014 and the transaction had continued in his absence.

The pursuer's response

[54] Senior counsel for the pursuer began by making clear that he took no issue with the second defender in relation to the submissions made on the law. He submitted that, in the circumstances, in order to resolve the dispute between the parties, there was no need for the court authoritatively to determine as a matter of Scots law the legal basis of the remedy for dishonest assistance. His position was, in short, that the pursuer sought a delictual remedy against the second defender and, as such, the normal common law rules of delictual causation applied. As such, he entirely accepted that it was necessary for the pursuer to

aver that there was a causal connection between the acts of dishonest assistance and the loss that Croftshore had incurred.

[55] He also took no issue with the submissions made by the second defender on the test for dishonest conduct. He emphasised that, based on the test set out by Lord Nicholls in *Royal Brunei* (see above at [43]) was broader than criminal conduct or that which established a civil wrong.

[56] Against that background, senior counsel submitted that the pursuer had set out a relevant case against the second defender. Senior counsel drew attention to two elements. First, the pursuer averred that the second defender knew from the outset that the first defender was a director of Croftshore; that Croftshore was seeking to purchase the Holidays site; and that he was being contacted in order to assist in obtaining funding for that purpose (see Article 3 of condescendence). Second, thereafter and despite that knowledge, the second defender proceeded to assist the first defender in his scheme to acquire and develop the Holidays site without Croftshore being involved. In particular, the pursuer averred that the second defender acted, through the sixth defender, as the first defender's "front man". In this regard, the pursuer averred that the second defender had actively presented both himself and the sixth defender as having no connection with the first defender. This description of the role he played came from an email from the second defender to the first defender on 12 February 2014, at the end of his period of involvement (see Article 4 of condescendence). The pursuer had averred that, in fulfilling that role, the second defender had: concluded missives for the purchase of the Holidays site; he had assisted in obtaining funding for the first defender; and he had conducted negotiations for the acquisition of the servitude (see Articles 4, 6, 7 and 8).

[57] Based on these averments, senior counsel submitted that a relevant case had been pled by the pursuer both in respect of dishonesty and on the separate question of causation raised by the second defender. On the issue of causation, the pursuer had averred that the second defender had achieved significant milestones in advancing the first defender's scheme. These averments had to be seen in the context of the pursuer's case against the second defender which was based on establishing that he was jointly and severally liable along with the other defenders.

Decision

[58] Based upon the authorities to which I was referred, there is no doubt that Scots law recognises a remedy for dishonest assistance in the commission of a breach of a fiduciary duty (see *Ted Jacob* and *MacAdam* as above at [41]).

[59] That notwithstanding, there would appear to be a degree of uncertainty both as to the precise legal basis for that remedy and, as a result, the way in which that remedy is to be characterised. The questions posed by Lord Reed in *Commonwealth Oil and Gas* (as above at [51]) remain unresolved. However, in light of the way in which the argument was developed before me (see [51] and [52] above) and the conclusions I have reached, I do not need to resolve these complex and thorny problems.

[60] In short, I consider that the pursuer has pled a relevant case against the second defender.

[61] On the first issue raised by the second defender, namely whether what the pursuer averred the second defender had done amounted to dishonest assistance, I consider that the flaw in the second defender's argument is to focus too much on the individual actions averred and to ignore what is pled as to the context of those actions.

[62] I do not consider that the authorities require that each of the actions taken in assistance of one who is acting in breach of his fiduciary duties are *per se* dishonest. Rather, what is required is that once all of the relevant facts are ascertained, it can be concluded that the assistant's conduct is as whole dishonest. The authorities make clear that the test for dishonesty has two stages. First, the subjective knowledge and state of mind of the assistant is to be considered. Second, that state of mind along with all the other relevant facts including the actions of the assistant, is to be considered objectively. The application of this test is described as being a "jury question" (see *Group Seven*, as at [45], at paragraph 58).

[63] Viewed from this perspective, I consider that the pursuer has averred a relevant case of dishonesty against the second defender. The pursuer's case is that the second defender had actual knowledge of the first defender's breach of fiduciary duty and actively assisted him in that breach by effectively acting as his representative – his "front man" – in the conclusion of missives; the initial discussions in relation to the acquisition of the servitude; and in obtaining funding. To paraphrase Lord Nicholls in *Royal Brunei* (see above at [43]): honest people do not intentionally deceive others to their detriment by actively creating a false impression. Furthermore, unless there is a very good and compelling reason, an honest person does not actively assist another to effect a transaction if he knows that the transaction is being carried out in breach of that person's fiduciary duties.

[64] To this extent, I consider that the facts of the pursuer's case, if proved, can easily be distinguished from the facts of *Satnam* (above at [44]) which was relied upon by the second defender. *Satnam* concerned a claim by a property development company against Dunlop Heywood & Co, a firm of surveyors, and Morbaine, a rival property development company. For present purposes, the facts of the case were that Satnam had an interest in a particular development site. Following Satnam's entry into administrative receivership, Dunlop

Heywood advised Morbaine of: Satnam's receivership; Satnam's interest in the development site; and, that the planning authorities were well disposed towards the development. This was done without Satnam's knowledge. Morbaine subsequently acquired the site. Against this background, the Court of Appeal rejected Satnam's claim against Morbaine on the basis that mere knowledge of a breach of fiduciary duty was not sufficient to render liable a person who was not himself subject to a fiduciary duty (at page 671).

[65] The critical difference between the facts of *Satnam* and the pursuer's averments is that in *Satnam* there was no finding that Morbaine had participated in the breaches of duty by Dunlop Heywood (at page 669). The case against Morbaine was perilled solely on its knowledge of the fact that Dunlop Heywood had acted in breach of duty. In the absence of Morbaine owing Satnam any fiduciary duty, the English Court of Appeal held that knowledge was not sufficient. However, in the present case, the pursuer avers that the second defender actively assisted the first defender in effecting his breaches of duty.

[66] In light of my conclusion in respect of the first argument, I can deal with the issue of causation more briefly.

[67] As to the question of the relevant test for causation, as I have noted above (at [56]), senior counsel for the pursuer conceded that the pursuer required to aver that the second defender's dishonest assistance had caused or materially contributed to causing Croftshore's loss. As the pursuer was not relying on the different test for causation set out by the English Court of Appeal in *Group Seven* (see above at [51]), I do not need to resolve the question of whether such a test properly forms part of Scots law. However, I am satisfied that senior counsel's concession was properly made. Given the derivative nature of the claim against the second defender, which depends upon establishing a breach of fiduciary duty by the

first defender, I do not consider that the test of causation for establishing accessory liability against the second defender should be less strict than that which applies to establishing primary liability against the first defender (see *Kidd* v *Paull and Williamsons LLP* 2018 SC 193 at paragraph 46).

[68] Applying this test, I consider that the pursuer has averred a relevant basis on which it could be said that the second defender had materially contributed to causing Croftshore's loss through the role played in implementing what the pursuer characterises as the scheme for purchasing and developing the Holidays site. In particular, I consider that the pursuer's averments in respect of the role played by the second defender, through the sixth defender, in concluding missives for the purchase of the Holidays site (Article 4); and in initiating negotiations in respect of the servitude (Article 6) are relevant for inquiry.

The third, fourth and sixth defender's arguments

[69] The argument advanced on behalf of the third, fourth and sixth defenders was essentially the same as that advanced on behalf of the second defender. The solicitor advocate for these defenders took no issue with the law as it had been set out on behalf of the second defender. His contention was that the pursuer had not averred a relevant case of dishonest assistance by these defenders and, in particular, the third and fourth defenders.

[70] The solicitor advocate began by criticising the reference in the pursuer's averments to a "scheme" whereby the first to fifth defenders would acquire ownership of the Holidays site to the exclusion of Croftshore (Article 3). The pursuer had not provided proper notice of what was said to underpin or constitute this "scheme". It was accepted that the pursuer had averred that the third and fourth defenders attended meetings with the pursuer and Mr Shilton. But no notice was given of exactly how and when this scheme was created. In

particular, there was no explanation of how Croftshore was to be "excluded". There were averments in Article 4 detailing steps taken by the third defender in relation to providing financial assistance to the first defender. Article 4 also contained averments that the third defender was the second defender's successor as "front person" from 4 March 2014. Article 6 contained averments in respect of the acquisition of the servitude. However, the actions founded upon by the pursuer were not in themselves dishonest.

[71] Pausing at this point, it was submitted that, properly construed, the pursuer's averments could not be said to go further than being an offer to prove that the third and fourth defender knew from the first defender that the Holidays site was for sale; that Croftshore was also interested; and that the third and fourth defenders had also pursued that opportunity. This did not amount to dishonesty in terms of the case law. The third and fourth defenders were in the same position as the rival property development company in *Satnam* (see above at [64]).

[72] It was accepted that in Article 7, the pursuer made averments concerning the meeting between the parties on 10 June 2014. This was the meeting at which, according to the pursuer, the third, fourth and fifth defenders had been confronted by the pursuer and informed that the first defender was acting in breach of his fiduciary duties. However, these averments did not assist the pursuer because by this time, June 2014, the sixth defender had already concluded missives (in December 2013) and was in control of the transaction. Properly understood, it was not a case of the first defender being assisted by the other defenders. The pursuer, it was submitted, had things back to front. The first defender was assisting the sixth defender.

[73] Finally, in relation to the sixth defender, it was accepted that in order to dismiss the case against it, I would require to accept the submissions advanced for both the second defender and the third and fourth defenders.

The pursuer's response

[74] Senior counsel rejected the criticism of the averments setting out the "scheme" in Article 3 of condescendence. First, he noted that the criticism being made only concerned the lack of specification of those averments as opposed to the existence of the scheme itself. In other words, the dispute between the parties was not about whether the first defender had brought the Holidays site opportunity to the other defenders which had then been collectively pursued by them through the sixth defender. The dispute was whether the actions of the defenders in pursuing that opportunity were dishonest.

[75] Second, and in any event, those criticisms were unfounded. Senior counsel focussed on the averments of the meeting on 10 June 2014 in Article 7. The critical averments were as follows:

> "On 10th June, 2014 the pursuer and Mr Shilton met with the first, third, fourth and fifth defenders at Middlethorpe, North Yorkshire. At this meeting the pursuer informed the third, fourth and fifth defenders, inter alia, that: *(i)* it had previously been agreed by all of the directors of Croftshore, including the first defender, that Croftshore would purchase the Holidays site and that Croftshore would obtain the necessary servitude rights from Major Orr-Ewing; and *(ii)* the first defender was breaching the fiduciary duties he owed to Croftshore by attempting to divert the opportunities to purchase the Holidays site and to obtain the necessary servitude away from Croftshore and to the sixth defender. The third, fourth and fifth defenders were under no legal obligation to assist the first defender. The pursuer asked the third, fourth and fifth defenders to stop assisting the first defender in his breaches of the fiduciary duties he owed to Croftshore. In particular, the pursuer asked them to stop providing the first defender with funding. They refused to do so and, thereafter, continued to assist the first defender with his scheme for the sixth defender to purchase and develop the Holidays site and to acquire the necessary servitude from Major Orr-Ewing, all to the exclusion of Croftshore. Without such assistance, the first defender would not have been able to complete this scheme.

> Accordingly, if the third, fourth and fifth defenders had complied with the pursuer's instructions and had stopped providing the first defender with funding and other assistance, the first defender would not have been able to divert the opportunity to purchase the Holidays site away from Croftshore."

[76] Senior counsel submitted that these averments put beyond doubt that as from the meeting, on the pursuer's case the third, fourth and fifth defenders had actual knowledge of the fact that they were assisting the first defender in breaching his fiduciary duties. At this point, the scheme could still have been aborted. The completion of the Holidays site transaction did not occur until 30 September 2014. From the date of this meeting, the third, fourth and fifth defenders had continued to assist the first defender. It was this assistance which distinguished the pursuer's case from the facts of *Satnam*.

[77] The pursuer's case against these defenders prior to the meeting on 10 June 2014 was based on them having "blind-eye knowledge". This was a reference to what Nelson was supposed to have done at the battle of Copenhagen. It was explained by the Court of Appeal in *Group Seven* (above at [45]):

> "59. The discussions of knowledge by Lord Hoffmann and Lord Millett in *Twinsectra* [2002] 2 AC 164 indicate that knowledge of a fact may be imputed to a person if he turns a blind eye to it, […] or if in legal parlance he deliberately abstains from inquiry in order to avoid certain knowledge of what he already suspects to be the case. It is convenient to use the expression 'blind-eye knowledge' to denote imputed knowledge of this type. In the context of dishonest assistance for breach of trust or fiduciary duty, it was common ground before us, and we consider it correct in principle, to equate blind-eye knowledge with actual knowledge for the purposes of the first stage of the test laid down in [*Royal Brunei]* and endorsed in *Barlow Clowes* […] and *Ivey*. It is important, however, to understand the limits of the doctrine. It is not enough that the defendant merely suspects something to be the case, or that he negligently refrains from making further inquiries. As the House of Lords made clear in *Manifest Shipping Co Ltd* v *Uni-Polaris Insurance Co Ltd (The Star Sea)* […] the imputation of blind-eye knowledge requires two conditions to be satisfied. The first is the existence of a suspicion that certain facts may exist, and the second is a conscious decision to refrain from taking any step to confirm their existence […]. The judgments also make it clear that the existence of the suspicion is to be judged subjectively by reference to the beliefs of the relevant person, and that the decision to avoid obtaining confirmation must be deliberate."

[78] Finally, in relation to the sixth defender, senior counsel submitted that the attempt to argue that these defenders were assisting the sixth defender rather than the first defender did not work. The pursuer's case, as clearly averred in Article 3, was that in assisting the sixth defender, the other defenders were assisting the first defender. The pursuer's averment was that profits generated from the development of the Holidays site were to be shared by them. This included the first defender who had diverted the opportunity away from Croftshore.

Reply

[79] In a brief reply, the solicitor advocate for the third, fourth and sixth defenders challenged the pursuer's description of the case against these defenders. When the pleadings were considered, the pursuer had not set out a proper basis upon which blind-eye knowledge could be imputed to these defenders prior to the meeting in June 2014. In particular, the pursuer had not set out the circumstances which were said to give rise to suspicion on the part of the third and fourth defenders.

[80] Furthermore, in relation to the pursuer's case post June 2014, it was submitted that, if the pursuer did not have a relevant case for the earlier period, then the actions of the third and fourth defenders thereafter could not properly be characterised as dishonest. If the third and fourth defenders had clean hands up until the meeting on June 2014, then, as the third defender through the sixth defender was controlling the deal, how could simply proceeding be characterised as dishonest?

Decision

[81] I am satisfied that the pursuer has set out a relevant case against the third, fourth and sixth defenders.

[82] I have reached this conclusion primarily on the basis of the averments which the pursuer makes in respect of the meeting in June 2014 in Article 7 of condescendence (see paragraph [75] above). I consider that these averments do set out a relevant case of dishonesty. From the date of the meeting in June 2014, on the pursuer's averments, the third and fourth defenders, acting through the sixth defender, were actively assisting the first defender in breaching his fiduciary duties. Again, paraphrasing Lord Nicholls in *Royal Brunei* (above at [43]) I do not consider that an honest person would, in the absence of a very good and compelling reason, continue actively to assist another in effecting a transaction if he knew that the transaction were being carried out in breach of that person's fiduciary duties.

[83] In relation to the period prior to the meeting in June 2014, I consider that there is some force in the first argument advanced on behalf of the third and fourth defenders in reply (see [79] above). It does not seem to me that the pursuer has clearly set out a basis for properly imputing "blind-eye knowledge" to the third and fourth defenders in this period prior to June 2014. As Lord Scott said in *Manifest Shipping Co Limited* v *Uni-Polaris Insurance Co Ltd (The Star Sea)* [2003] 1 AC 469 at paragraph 116 (which, in turn, was quoted by the Court of Appeal in *Group Seven* (above) at paragraph 60):

> "In my opinion, in order for there to be blind-eye knowledge, the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe. To allow blind-eye knowledge to be constituted by a decision not to enquire into an untargeted or speculative suspicion would be to allow negligence, albeit gross, to be the basis of a finding of privity."

Applying this approach to the pursuer's pleadings, it is not clear to me how the averments of actual knowledge on the part of the third and fourth defenders "at all material times" in Article 8 of condescendence are consistent with a case of blind eye knowledge prior to June 2014. A similar point can be made in respect of the pursuer's averments in Article 3 of condescendence concerning the devising and execution of the scheme "Thereafter" and the fourth defender's role therein. Accordingly, I do not consider that it can be said that the pursuer's case of blind-eye knowledge against the third and fourth defenders in the period prior to the meeting in June 2014 has been grounded and targeted on specific facts.

[84] However, despite that, I do not consider that the pursuer's averments directed against the third and fourth defenders prior to the meeting in June 2014 can be said to be irrelevant at this stage. That is because the pursuer's averments as to the third and fourth defender's knowledge during this period and the evidence led in proof thereof cannot be said, at this stage, to be irrelevant to the question of whether those defenders acted dishonestly. As I have set out above in respect of the second defender, the first stage in the test for dishonesty is to ascertain all the relevant facts as to the knowledge of the defenders even if that falls short of "blind-eye" knowledge (see *Group Seven* (above) at paragraph 61).

[85] It is also essentially for this reason that I reject the second argument advanced in reply on behalf of the third and fourth defenders (see [80] above). That argument proceeds on the basis that, in the absence of a case based on blind-eye knowledge, the third and fourth defenders were approaching the meeting on 10 June 2014 with "clean hands". In short, I do not consider that I can reach a conclusion on that point without hearing evidence and, thereafter, applying the two stage test for dishonesty developed in the case law (see [62] above).

[86] Finally, in relation to the case against the sixth defender, as it was accepted that this was dependent on my conclusions on the arguments advanced by the second, third and fourth defenders, I will also allow this case to proceed to proof.

The fifth defender's argument

[87] The position of the fifth defender was again, essentially, to adopt the analysis of the second defender and, by applying it to the case against him, to argue that the pursuer had not averred a relevant case.

[88] Counsel for the fifth defender adopted the criticisms made by the solicitor advocate for the third, fourth and sixth defenders of the pursuer's averments of a "scheme". The pursuer could not simply assert that there was a scheme. The pursuer required to set out what the scheme consisted of and, in particular, in relation to the fifth defender both his subjective knowledge or belief and that his conduct was objectively dishonest in light of that knowledge or belief.

[89] Counsel submitted that when one considered the pursuer's averments in relation to the fifth defender in light of that requirement, they fell short. Although the pursuer made averments in relation to the fifth defender's involvement in providing financial assistance to the sixth defender through various property transactions in Article 4, these averments gave no fair notice as to why the fifth defender's conduct was "dishonest". Counsel made the same submission in respect of the averments made in Article 7 concerning the fifth defender's involvement in the negotiations with Major Orr Ewing. In the absence of these underlying factual averments, counsel submitted that there was no proper basis for the case of dishonest assistance made against the fifth defender in Article 8.

The pursuer's response

[90] As a starting point, senior counsel for the pursuer again referred to the averments made in Article 7 concerning the meeting on 10 June 2014 in Article 7 (see [75] above). Everything that he had submitted in respect of that meeting in relation to the third, fourth and sixth defenders was equally applicable to the fifth defender who was also present at that meeting.

[91] However, senior counsel also drew my attention to averments made in Article 3 concerning an email from the first defender to the fifth defender dated 6 May 2013. The averments are as follows:

> "In an email to the fifth defender dated 6th May, 2013 he [the first defender] stated that should the fifth defender join with the first defender in becoming a 'private investor' the benefits would include avoiding any profit from the development site having to be shared with the pursuer to the extent of 20% and Dermot Shilton to the extent of 40% (those being the proportions, in percentage terms, of the respective shareholdings of Mr Watson and his wife, and Dermot Shilton, in Croftshore's parent company, Holdings)."

[92] On the basis of these averments, senior counsel submitted that the pursuer's case against the fifth defender was stronger than the case against the third, fourth and sixth defenders. As regards the fifth defender, the pursuer offered to prove that he had actual knowledge of the intention to divert the opportunity presented by the Holidays site away from Croftshore at the very outset.

[93] Against this background of the fifth defender's knowledge, senior counsel submitted that the pursuer had relevantly averred a case of dishonest assistance against the fifth defender when considered what the pursuer averred the fifth defender had done to assist the first defender. He drew particular attention to the averments made in respect of the steps taken by the fifth defender in providing finance to the sixth defender in Article 4.

Decision

[94] I am satisfied that the pursuer has averred a relevant case against the fifth defender.

[95] In summary, the pursuer avers that the fifth defender was aware of the first defender's intention to divert the opportunity represented by the Holidays site away from Croftshore. As was pointed out by senior counsel, the pursuer sets out a basis for fifth defender's knowledge both in the averments concerning the email dated 6 May 2013 (in Article 3) and in respect of the meeting on 10 June 2014 (in Article 7). Against this background, the pursuer further avers what the fifth defender was said to have done to assist the first defender in effecting the transaction to acquire and develop the Holidays site. This involved, in particular, the steps taken in relation to obtaining the financing for that acquisition.

[96] As such, I do not consider that were the pursuer to prove all of his averments at proof, it can be said that his case against the fifth defender would necessarily fail. I do not consider that the pursuer's averments against the fifth defender would, if proved, necessarily be incapable of establishing dishonesty by application of the two stage test for dishonesty (see [62] and [63] above). As I have concluded in relation to the second defender's arguments, unless there is a very good and compelling reason, an honest person does not actively assist another to effect a transaction if he knows that the transaction is being carried out in breach of that person's fiduciary duties.

Disposal

[97] For the reasons I have set out above, I consider that the pursuer's case, as amended, is relevant for probation. Accordingly, I will refuse the motions made on behalf of each of the defenders.

[98] I will put the case out by order in order to discuss further procedure.

[99] I will reserve all questions of expenses meantime.