

**SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY
AT HAMILTON**

[2025] SC HAM 47

HAM-CA6-24

JUDGMENT OF SHERIFF M J HIGGINS

in the cause

A

Pursuer

against

B

Defender

**Pursuer: McKenzie, (sol adv); Harper MacLeod LLP
Defender: Foster, solicitor; Liu's Legal Solutions Ltd t/aLB & Co, incorporating Hughes Dowdall
Foster**

HAMILTON, 9 May 2025

The sheriff having resumed consideration of the cause

(1) Sustains the First and Third pleas-in-law for the pursuer and accordingly finds it unnecessary to determine the Second, Fourth, Fifth, Sixth, Seventh and Eighth pleas-in-law for the pursuer; (2) repels all pleas-in-law for the defender other than pleas-in-law numbers 3 and 7 consideration of which is unnecessary; (3) grants decree for payment by the defender to the pursuer of the sum of **ONE HUNDRED AND THIRTY EIGHT THOUSAND AND THIRTY SIX POUNDS AND FORTY SEVEN PENCE (£138,036.47) STERLING** in respect of crave 1 with interest thereon at the rate of 8% per annum from 13 October 2023 until payment; and **TWO HUNDRED AND NINETY EIGHT THOUSAND ONE HUNDRED AND NINETY POUNDS AND SEVENTY FIVE PENCE**

(£298,190.75) STERLING in respect of crave two with interest thereon at the rate of 8% per annum from 13 October 2023 until payment; and (4) assigns a hearing on expenses on 22 September 2025 at 9.30am by webex.

Findings in fact:

1. The pursuer is A and he resides at X.
2. The defender is B and she resides at Y.
3. No proceedings are pending before any other court involving the present cause of action and between the parties hereto.
4. No agreement exists between the parties prorogating jurisdiction over the subject matter of the present cause to another court.
5. This court has jurisdiction in respect of this action by virtue of the defender's residence at Y.
6. The pursuer's father is C and he is the husband of and resides with the defender at Y.
7. The defender met C in the year 2000, and married him in the year 2004.
8. The pursuer and defender are not related by consanguinity.
9. The parents of C were JM and HM and they were accordingly the parental grandparents of the pursuer.
10. By Wills both dated 4 March 1999, JM and HM, both set up testamentary trusts in favour of the pursuer providing that the assets of the said trusts were to vest in the pursuer on his 25th birthday in March 2019.
11. In terms of their respective Wills, JM and HM appointed C, G and D, as trustees and executors.

12. By deed of assumption and resignation effectual on 10 September 2004, G and D resigned as trustees and executors and L was assumed as a trustee and executor.
13. C was one of the trustees and executors in each of the said trusts from their inception and remained so at all times thereafter.
14. JM died on 19 April 1999 and HM died on 21 June 2001.
15. Prior to their respective deaths, each of the JM ("JM trust") and HM ("HM trust") trusts made loans to E Ltd ("E Ltd").
16. The JM trust assets comprised of the creditor's interest in said loan.
17. The HM trust assets comprised of the creditor's interest in said loan.
18. As at the deaths of JM and HM, the balances due on the loans made from their trusts to E Ltd were £62,938 and £108,896 respectively.
19. Both of the said loans bore interest.
20. The business of E Ltd was car sales and owning and renting heritable properties to tenants.
21. Historically, E Ltd was a company established by JM and C and between them they were the sole shareholders in and owners of the company.
22. At some point after the death of JM, C became the sole shareholder in and owner of the company.
23. The defender became a director of E Ltd on 5 April 2006 at a time when the only other director of the company was C and upon her assumption as a director of E Ltd, the Registrar of Companies would have written to the defender to explain her responsibilities as a director of a limited company.

24. C resigned as a director of E Ltd on 7 April 2006 at which time the defender became the sole director of the company and she remained such until C again became a director of the company on 01 January 2009.

25. Upon her assumption as a director in E Ltd, the defender was advised by L, company accountant, on 26 February 2007 at the latest, that as a director of E Ltd she had duties (i) to ensure that E Ltd kept proper accounting records and (ii) to prepare accounts that give a true and fair value of the company in terms of Companies Act 1985.

26. The defender confirmed in writing that she acknowledged those duties on 26 February 2007.

27. As at the date the defender assumed office as a director of E Ltd, the loans remained outstanding to the JM and HM trusts and by 31 January 2007 the outstanding balances were £73,562.88 and £147,144.87 respectively.

28. Upon reaching 25 years of age the pursuer requested accounting from the trustees of the trusts, including C and L, of the sums due to him from the said trusts.

29. The pursuer was dissatisfied with their response and he raised an action against them of count, reckoning and payment in respect of each of the trusts in the Court of Session ("the Court of Session actions") which actions, were defended by C.

30. In respect of those actions, the presiding Lord Ordinary, found it established that in respect of each trust, on or around 31 January 2007, C breached his trust and fiduciary trustee duties by dishonestly misappropriating the balances on the said loans due by E Ltd to the trusts and applied these for his own benefit.

31. Decree was granted against C inter alia for payment of the misappropriated balances of the said loans, together with sums representing the investment return those funds ought

to have generated had they been invested in accordance with the duties of the trustees, rather than being misappropriated.

32. It was found established that the amount in respect of the misappropriation by C from the JM trust was £138,036.47 and the sum from the HM trust was £298,190.75.

33. C, in breach of his trust and fiduciary duty, misappropriated the balances of the loans due by E Ltd to the JM and HM trusts.

34. This misappropriation was effected by the transfer of the balance of the said loans into the “directors’ loan” account in the books of E Ltd and subsequent depletion of the balance of that account by personal expenditure.

35. The E Ltd financial statements (“accounts”) for the year ended 31 January 2006 recorded the loans due to the two trusts as “other loans” and showed a combined debit balance for them as £207,725.00 as at that date. These accounts were signed by the defender on 26 February 2007 at a time when she was the sole director of E Ltd and was the sole person with statutory responsibilities to prepare accounts for the company which gave a true and fair account of the financial affairs of the company.

36. The E Ltd accounts for the year ended on 31 January 2007 recorded a blank space in relation to “other loans” and the sum of £151,336.00 as “directors’ accounts”. These accounts were signed by the defender on 28 November 2008 at a time when she was the sole director of E Ltd and was the sole person with statutory responsibilities to prepare accounts for the company which gave a true and fair account of the financial affairs of the company.

37. The balances of the said loans were transferred into the directors’ loan account on 31 January 2007 at a time when the defender was the sole director of E Ltd and, accordingly, the person with exclusive legal control of its affairs.

38. The balances of the said loans were transferred into the directors' loan account shortly after the defender was expressly advised of and acknowledged her duties (i) to ensure that E Ltd kept proper accounting records and (ii) to prepare accounts that give a true and fair value of the company in terms of Companies Act 1985.

39. The defender knew, or ought to have known as the sole director of the debtor (E Ltd), that the said loans were due to the JM and HM trusts respectively.

40. The defender signed the accounts of E Ltd for the financial years ended 31 January 2006, which showed those loans.

41. In any event, the defender knew that the balances of the said loans were not due to her.

42. The defender knew that the transfer of the balances of the said loans to the director's loan account were false entries in the accounts of E Ltd.

43. The defender made, or at least permitted, those false accounting entries to be made.

44. The defender knew that there was no true director's loan balance to be depleted by personal expenditure.

45. The defender signed the accounts of E Ltd for the financial years ended 31 January 2007 and 31 January 2008.

46. Nevertheless, the defender allowed the director's loan balance to be so depleted and repeatedly caused, or at least permitted, false accounting entries to that effect in the accounts of E Ltd.

47. No honest person in the defender's position would have so acted.

48. The defender's actions assisted C in the misappropriation of the balances of the said loans.

49. C could not have misappropriated the balances of the said loans without the defender's assistance.
50. The defender dishonestly assisted C in his misappropriation of the balances of the said loans.
51. The defender benefitted from the proceeds of C's breaches of fiduciary duties in the knowledge of those breaches and/or benefitted gratuitously from same.
52. C sequestered himself in July 2024 following the expiry of a 6 month moratorium, and he is an undischarged bankrupt.
53. The pursuer has not recovered any monies from C in respect of the said decree granted in the Court of Session actions in his favour against C and his prospects of making recovery of all sums due from him are remote.
54. E Ltd went into administration in 2023.
55. The defender shared in the benefit of the misappropriation of the balances of the said loans and in particular, the defender received cash payments or transfers from the proceeds of C's misappropriations.
56. During the financial year ended 31 January 2007, when the defender was in receipt of her annual salary of around £12,000 per annum, cash deposits totalling £21,610.00 were deposited into the defender's bank account by her husband, C.
57. During the financial year ending 31 January 2008 cash deposits totalling £13,155 were paid into the defender's bank account by her husband, C.
58. During the financial year ending 31 January 2009 cash deposits totalling £24,930 were paid into the defender's bank account by her husband, C.
59. During the financial year ending 31 January 2010 cash deposits totalling £14,100.00 were paid into the defender's bank account by her husband, C.

60. During the financial year ending 31 January 2011 cash deposits totalling £14,210 were paid into the defender's bank account by her husband, C.

61. During the financial year ending 31 January 2012 cash deposits totalling £14,680 were paid into the defender's bank account by her husband, C.

62. These cash sums deposited into the defender's bank account for these years were cash payments received by the defender and were taken from E Ltd and came from the funds C, had misappropriated from the said trusts.

63. The defender was knowingly in dishonest receipt of the proceeds of C's breaches of trust and fiduciary duties in respect of the said trusts in relation to the said loan balances.

Findings In Fact And Law

64. The pursuer having suffered loss and damage as a result of the defender knowingly and dishonestly assisting C's breaches of trust and fiduciary duty *et separatim* her knowingly receiving same and benefitting from same is entitled to reparation therefor.

INTERLOCUTOR

65. THEREFORE (1) Sustains the First and Third pleas-in-law for the pursuer and accordingly finds it unnecessary to determine the Second, Fourth, Fifth, Sixth, Seventh and Eighth pleas-in-law for the pursuer; (2) repels all pleas-in-law for the defender other than pleas-in-law numbers 3 and 7 consideration of which is unnecessary; (3) grants decree for payment by the defender to the pursuer of the sum of **ONE HUNDRED AND THIRTY EIGHT THOUSAND AND THIRTY SIX POUNDS AND FORTY SEVEN PENCE (£138,036.47) STERLING** in respect of crave 1 with interest thereon at the rate of 8% per annum from 13 October 2023 until payment; and **TWO HUNDRED AND NINETY EIGHT**

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(£298,190.75) STERLING in respect of crave two with interest thereon at the rate of 8% per annum from 13 October 2023 until payment; and (4) assigns a hearing on expenses on 20 June 2025 at 9.30am by webex.

NOTE:

[1] Having regard to the pleadings, the evidence and the Joint Minute of Agreement of parties, I consider that the following were the live questions in this case:

- (i) Whether the defender dishonestly assisted her husband, C, in his established breaches of fiduciary duty owed to the pursuer.
- (ii) Whether the defender received the benefit of C's established dishonest breaches of fiduciary duty owed to the pursuer; and
- (iii) If either (i) or (ii) are answered in the affirmative, how much is owed by the defender to the pursuer, or alternatively, the amount for which the defender is obliged to account to the pursuer.

Pursuer's case

A, pursuer

[2] The pursuer is A. He is a Security Researcher. He resides at X.

[3] The pursuer gave a witness statement and adopted its contents as part of his evidence in chief. He also gave further parole evidence.

[4] His father is C, husband of the defender. His mother is C's former wife.

[5] His paternal grandparents were JM and HM. JM died after his 5th birthday and HM shortly after his 7th birthday.

[6] His mother and father separated when he was 6 or 7 years old. Initially his parents then shared custody of him and he lived part of the week with each of them.

[7] During this period his father then began his relationship with the defender and whenever he spent part of the week staying with his father in his father's home the defender was present. His relationship with the defender was "normal but never entirely close".

[8] At some point after his parents' separation he began residing solely in his mother's care. After this change his contact with his father stopped.

[9] In 2007 when he was 13 he emigrated to Z with his mother and his stepfather. He has lived in Z since.

[10] When he was approaching his 25th birthday his mother told him that his paternal grandfather had set up a trust for him. He contacted the solicitors who had acted in that regard and they told him his paternal grandmother had done so as well. He was told that the trust funds would vest in him on his 25th birthday that being in March 2019.

[11] He obtained copies of his late paternal grandparents' wills and the grants of confirmation to their estates. He could see from these that each of the trust funds had loaned money to E Ltd. The balance due by E Ltd to the trust fund set up by his grandfather was £62,938 at the date of his death and the sum due by E Ltd to the trust fund set up by his grandmother was £108,896 at the date of her death.

[12] His father, C, was one of the trustees in each trust from the start thereof and L became a trustee in each trust in 2004.

[13] His solicitors wrote to C and L and asked them for an accounting in respect of each trust. L replied that there was around £3,000 in the trusts due to him. He was dissatisfied with this response.

[14] When the trusts did vest in him he raised actions in the Court of Session for accounting in respect of each trust. The actions proceeded to proof together. He gave evidence and then listened to the rest of the evidence from the other witnesses including his father, C.

[15] A document lodged by C in the action involving his grandfather's trust and called "E Ltd Analysis of Other Loans and Directors Current Account" showed the loan balances, with interest, brought forward from the financial year ended 31 January 2006 to be £138,489.29 and £69,235.65 for HM and JM trusts respectively. That document also showed the balances on the loans being transferred to the "Directors loan account" and then showed other entries showing the money being taken out of the company ie E Ltd by the director. He found out from Companies House that the sole director of E Ltd at the time this transfer occurred was the defender.

[16] It was established in his Court of Session actions that his father, C, had misappropriated the loans due by E Ltd to the trust funds. The defender was the sole director of E Ltd when this misappropriation took place.

[17] On 14 September 2023, in his evidence in the Court of Session actions, C said it was the defender who was the sole director of E Ltd during the period 7 April 2006 to 1 January 2009. C said that during that period it was the defender who was the person responsible for the running of the company affairs because he was unable to do so. C said that he was not involved with the management of E Ltd for a period of 2 to 3 years at that time. He heard C give this evidence. He believed that was true because, from the documentation recovered from Companies House, he could see that the defender was the sole director of E Ltd at that time. The presiding Lord Ordinary in his judgment in the Court of Session actions did not make any comment on this part of C's evidence and did disbelieve some of C's evidence.

[18] Almost immediately after he served his Court of Session decree on C, the latter put himself into a debt moratorium meaning that nothing could be done to enforce the decree for a period of 6 months. Immediately upon the expiry of that 6 month period C made himself bankrupt.

[19] When he raised this action, he had no actual knowledge that the defender had received any money that was due to him from the trusts or that she had participated in the misappropriation of the trust money due to him.

[20] However, from the Analysis of Other loans and Directors' Current account document dated 13 April 2022 prepared by J and lodged by C during the Court of Session actions, the presiding Lord Ordinary determined that the sum of £220,707.75 was the combined balance due to the trusts by E Ltd as at 31 January 2007 and that was at a date when the defender was the sole director of E Ltd and was responsible for the preparation of E Ltd's accounts.

[21] This gave him cogent grounds for suspecting that the defender was involved in C's misappropriation of the trust funds and together with C's evidence in the Court of Session action that the defender was the person responsible for running the affairs of E Ltd during that time, that gave him compelling evidence that the defender was involved in the misappropriation.

[22] This same document demonstrates that the misappropriated money was taken out of E Ltd in the following years – some when the defender was sole director. This was evidence that the defender did benefit from the misappropriation of the trust funds.

[23] The money taken out of E Ltd increased from 31 January 2009 onwards when C became a director again and when the defender remained a director as well. This gave him

cogent reasons to believe that the defender continued to benefit from the misappropriated trust funds during that period.

L

[24] L is a Chartered Accountant. He has been practising as such for some 46 years.

[25] His firm were Accountants to E Ltd at the relevant time and prepared the accounts for the company.

[26] L gave an affidavit and adopted its contents as part of his evidence in chief. He also gave further parole evidence.

[27] He could not recall what specific advice, if any, he gave to the defender when she became a director of E Ltd in 2006. However, he denied the defender's allegation that, when she became a director, he explained to her that she would be a "mere figurehead" of the company; that C would continue to deal with all the business affairs of the company, and that he, ie L, would deal with all the formalities and legal requirements of the company including preparation of the accounts of the company. This allegation is untrue and that he would never have told a director of a limited company that they could simply be a "figurehead".

[28] His ordinary practice was to explain to a new director what their responsibilities were from an accounting perspective.

[29] A director has a statutory duty to prepare accounts for the company which must give a true and fair view of the state of affairs of the company. He would never tell a director that they could ignore their statutory duties by acting simply as a "figurehead".

[30] He would never tell a director that he or anyone else in his firm would take over the director's statutory duties.

[31] The following paragraph from the Accountant's Report to the Board of Directors of E Ltd in the accounts for the year ended on 31 January 2006 is in line with this ordinary practice of his:

"You have acknowledged on the balance sheet for the year ended 31 January 2006 your duty to ensure that the company has kept proper accounting records and to prepare accounts that give a true and fair view under the Companies Act 1985. You consider that the company is exempt from the statutory requirement for an audit for the year".

[32] At the relevant time, he himself was not the person in his firm who had the responsibility of preparing E Ltd's accounts. His colleague, K was the person who did. K was an experienced Accountant and he has no doubt that K would have acted professionally and properly in preparing the accounts.

[33] He did not prepare the unaudited accounts dated 31 January 2007 and so he could not speak to the detail of same. Accordingly he could not comment on the change of treatment in some of the loans due to the trusts to being loans due to the director of E Ltd. However, he was able to say that this was not something that his firm or K would have done under their own initiative and it would only have been done on the instruction of the director and on the basis of information provided by the director. He could not comment on whether it was C who gave K that information.

[34] He had a "handful of discussions" with the defender regarding the affairs of E Ltd but cannot recall the detail of those discussions. His impression at the time was that she "was well aware of the affairs of E Ltd... at least in general terms".

[35] The only part of E Ltd's accounts which he signed was the Accountant's Report to the Board of Directors. That specifically said that his firm were not instructed to carry out an audit of E Ltd's financial affairs so his firm did not check the information they were provided with by E Ltd. It also makes it clear to any director who did not provide his firm

with the information upon which the accounts were prepared, that they could not rely on his firm for the accuracy of the financial statements his firm produced.

[36] He was unable to recall if the information given to his firm for the preparation of E Ltd's accounts for the year ended on 31 January 2006 came from C. However, it was fair to say that during his time of involvement with E Ltd it was C who provided his firm with the information upon which E Ltd's accounts were based. After the years ending January 2006 and 2007 C continued to be his firm's primary contact with E Ltd.

[37] He was not aware that C was struggling with his mental health and stress when the defender became a director of E Ltd in 2006.

[38] He did not recollect saying to the defender that nothing would change in the running of the company when the defender became a director of E Ltd in 2006.

[39] He was not able to say whether, after the defender became a director of E Ltd in 2006, there was in fact any change in the way the company was ran thereafter because he was not in the shoes of the people who were involved in the day to day running of the company.

C

[40] C is the pursuer's father and the defender's husband.

[41] He recalled giving evidence in the Court of Session actions of account, reckoning and payment raised against him by the pursuer in relation to his intromissions with the trust funds.

[42] When asked if the evidence he gave in that action was truthful his response was "why wouldn't it be? Yes".

[43] He resigned as a director of E Ltd because he was suffering health problems and wanted to walk away from the company.

[44] He was told that he could not resign unless another director “became available”.

[45] He could not remember what he said in evidence in the Court of Session actions about the circumstances of his resignation.

[46] He could not recall being asked in evidence in the Court of Session actions if the defender was involved in the management of E Ltd after she replaced him as director.

[47] He was then asked directly if, after he resigned as a director, the defender was involved in the management of E Ltd. He replied that she was not and that the company “ran itself more or less” because it rented out properties and tenants paid their rent by standing order “so it ticked over itself”.

[48] When it was put to him that, when he was asked the same question in the Court of Session actions, he said that the defender was involved in the running of E Ltd and that he said “she took over the running of the company” he responded by saying that he “may have answered that question incorrectly” in the Court of Session.

[49] He was asked if he could recall that, in the Court of Session actions, he was asked how long he had been out of the management of E Ltd. He said he could not.

[50] He could not recall telling the Court of Session that he was out of the management of E Ltd for 2 or 3 years until he got himself “back on the level”.

[51] He was shown the signatures on the E Ltd accounts for the year ending on 31 January 2007 and was asked if he recalled being asked in the Court of Session actions whose signatures were on same. He responded by saying that he could not recall that but that he could now tell the court that they were “definitely not her’s” (ie the defender’s).

[52] He did not know whose signatures they were.

[53] He did not forge those signatures.

Defender's case

The defender, B

[54] The defender is B. She is married to and resides with the pursuer's father, C. She formerly worked but retired through ill health at some point in 2009 or 2010.

[55] She gave two witness statements and adopted their contents as part of her evidence in chief. She also further parole evidence.

[56] Much of the content of the defender's initial witness statement amounts to her recounting legal advice that she states she was given and her commenting on and giving her views upon the legal issues in the case. This was objected to by the pursuer and I heard same under reservation. I refer to my decisions on these objections which is narrated below.

[57] What follows is an account of what I consider to be the relevant evidence of the defender from her initial and supplementary witness statements and her further parole evidence at proof.

[58] She met the pursuer's father, C, in the year 2000 and they were married in the year 2004.

[59] When the pursuer was a child she met him a few times before she married his father. This was when her husband was having contact with the pursuer. Beyond this, she did not have and does not have any real relationship with the pursuer.

[60] When she met her husband he was already involved with E Ltd. She subsequently learned that he was a director of E Ltd and owned all the shares in the company.

[61] She only learned that her husband's parents had created trusts in favour of the pursuer, and that the trusts had made loans to E Ltd, after the pursuer had raised this action.

[62] She subsequently learned from her husband that the loans were made for the purpose of E Ltd buying property and not for the monies to be held within E Ltd. There was

no question of the monies being loaned for E Ltd to invest the monies elsewhere to produce financial returns on the investment. The money loaned had been used by E Ltd to buy property long before she met her husband.

[63] At no point did she ever receive any money or payment from E Ltd either directly or indirectly through her husband.

[64] She and her husband kept separate bank accounts for their own finances. Their finances were not comingled. Her husband paid the mortgage from his funds/account and she paid other marital expenses from her funds/account.

[65] She was not subsidised in any way by her husband and did not benefit from his income from E Ltd.

[66] At a point around 2006, and after she stopped working on medical grounds, her husband did start giving her housekeeping money from his own funds.

[67] She did not receive any of the proceeds of the breaches of trust by her husband and did not assist him in any way in carrying out those breaches.

[68] She became a director of E Ltd on 5 April 2006. The only other director at that time was her husband, C. She and her husband were then the only two directors of E Ltd until 7 April 2006 when her husband resigned and she thereby became the sole director of E Ltd.

[69] She was persuaded to become a director of E Ltd to relieve the stress that her husband was under at the time and on being assured by her husband and L, company accountant, that “nothing would change”, she would be “a figurehead” only and that she would “not have anything to do”.

[70] She was working full time in a stressful job and her own health was poor at the time and she would not have agreed to become a director had she been told that she actually had

to do anything. She did not know that becoming a figurehead director was inappropriate and nobody explained to her that it was.

[71] She signed the statutory accounts for E Ltd for the year ended on 31 January 2006.

These related to the financial period before she became a director of E Ltd and related to a period where she had nothing at all to do with the company.

[72] They showed the loans due to the two trusts as “other loans” and showed a combined debit balance for them as £207,725.

[73] She does not accept that the responsibility for recording loans and any action in relation to the loans during the year ended 31 January 2006 was her responsibility because she had nothing to do with E Ltd during that period and, at that point, she had no knowledge of the trusts or the indebtedness of E Ltd to the trusts. She did not receive any explanation of what was meant by the various entries in those accounts when she signed them.

[74] She did not have access to the information which resulted in the production of E Ltd’s accounts for the year ended on 31 January 2006. When she signed same as the sole director of E Ltd she relied on L, the company’s accountant, for the correct preparation of those accounts. Those accounts, as far as she was aware, were accurate when she signed them as they did record the sums due by E Ltd to the two trusts.

[75] The only accounts she signed were those for the year ended on 31 January 2006. This contradicts the terms of the Joint Minute of parties and in terms of which it is admitted by her that she signed E Ltd’s accounts for the year ended on 31 January 2008. However, in her further evidence at proof she denied signing those.

[76] The accounts for the year ended 31 January 2006 did record the existence of debts owed by E Ltd but did not specify that these were debts owed to trusts or to the pursuer.

Her husband never told her that there were any trusts and that the money was owed to his son, the pursuer, either directly or indirectly through the trust. E Ltd's company accountant, L, did not explain to her the workings that lay behind the figures in the accounts.

Accordingly, although she accepts that the debts existed, she was not aware of that at that time ie 31 January 2006, and there was nothing in those accounts to show that the loans were related to money owed to trusts or to the pursuer as opposed to simple trade creditors.

However, given that they did record the sums due to the trusts in the unspecific form of "other loans" those accounts for the year ended 31 January 2006 and which she signed were accurate.

[77] The responsibility for the change in the way the loans were recorded in E Ltd's accounts from the year ended 31 January 2006 ("other loans") to the year ended 31 January 2007 ("directors accounts") is entirely that of L, E Ltd's company accountant. She had no responsibility for this. She did not give any information to justify, permit or authorise any such change. The change was made without her knowledge. She did not make any claim that any money was due by E Ltd to her. She did not sign the accounts for the year ended on 31 January 2007 and the signatures thereon which bear to be her signatures are not her signatures.

[78] She did not actually see the accounts for the year ended on 31 January 2007 at the time they were prepared/signed and she did not see the figures used by L to prepare same.

[79] If the change of description of the loans in the accounts for the year ended on 31 January 2007 amounted to a misappropriation of the loaned money then she was completely ignorant of the misappropriation.

[80] She does not accept that a company director is personally responsible for undertaking every task of the company. A director is entitled to delegate to others tasks

such as the recording of loans and preparing accounts. E Ltd's accounts for the year ended on 31 January 2007 were prepared by the company's accountant, L and not by her. In any event, those accounts show accounting changes and not the transfer of the loan funds out of E Ltd itself. The balance shown in the "director's accounts" in those accounts were still funds held in the company of E Ltd as at 31 January 2007.

[81] Although in the Court of Session actions between the pursuer and her husband, it was determined that her husband had misappropriated funds from the trusts on or by 31 January 2007, she had not had sight of any of the figures which resulted in the accounts for E Ltd for the year ended on 31 January 2007.

[82] She does not know who signed the accounts for the year ended on 31 January 2007. She did not sign them. The only accounts she signed for E Ltd were those for the year ended on 31 January 2006.

[83] She does not know who signed the accounts for E Ltd after 31 January 2006 until her husband became director again and started signing them.

[84] She did not permit her husband to misappropriate funds due to the trusts or assist him to do so. She did not cause false entries to be made in E Ltd's accounts. She had nothing to do with the preparation of the accounts for E Ltd and the only set of accounts she signed were those for the year ended 31 January 2006 and they were accurate.

[85] She did not receive any payments from E Ltd either directly or indirectly and she did not receive any directors' loans. She did not permit the monies shown in the directors' loans accounts to be depleted by personal expenditure.

[86] She did not share in her husband's misappropriation of the trust funds.

[87] At no time did she knowingly and or dishonestly receive or benefit from her husband's misappropriation of the trust funds.

[88] She did not know anything about her husband's misappropriation of the trust funds and so could do nothing to prevent same.

[89] Title to her and her husband's matrimonial home, Y, was originally in her husband's sole name. On 30 November 2006 title was transferred from his sole name to their joint names with the consideration for the transfer recorded in the Land Register of Scotland as being for love, favour and affection. However, this was not a transfer for no consideration. Over a period of time, and many years before the date of the transfer of title, she made a number of financial contributions to repair, renovate and improve the subjects. She used her own funds to do so. She used the proceeds of sale of the home she previously owned, the proceeds of her own endowment policy, an inheritance from her mother and monies she received as part of her divorce settlement to do so. At the time of the transfer she became jointly responsible, along with her husband, for the new mortgage in their joint names which was taken out at the time of the transfer and secured against the subjects.

[90] Before she met him, her husband had received a separate loan from the HM trust to buy the house. At the time of the transfer of title to their joint names, from the funds they obtained through the new mortgage they took out in their joint names, her husband repaid the sums that were due to that trust but later misappropriated those repaid sums. She knew nothing about that and took no part in it and at no point received any benefit from those misappropriated repaid sums.

[91] So far as the payments of cash into her bank current account were concerned, her practice was to lift cash out of her savings account then pay it into her current account. She preferred to do this manually rather than by bank transfer so that she had documentary receipts for her doing so.

[92] After 4 November 2006 any other credits into her current account were mainly salary, DWP benefits, works pension and, from around January 2006, housekeeping payments from her husband after she stopped working. She assumed that any such monies her husband paid to her came from his earnings.

[93] None of the payments that were paid into her current account after 4 November 2006, and which she could not identify the source of, were from E Ltd because she never, to her knowledge, received any payments from E Ltd.

[94] She met L three times in 21 years and one of these was in 2006 when she agreed to become a director of E Ltd. That was when he told her that “nothing would change”. After that meeting with L she understood that she “was theoretically in charge” but she did not think that gave her a locus to say her husband that he could not do certain things in relation to E Ltd’s affairs.

[95] She did not delegate to her husband any tasks relating to the running of E Ltd. Her husband “just carried on running the company as he used to” and L continued to prepare the accounts.

[96] She did not review E Ltd’s company books.

[97] On a day to day basis she did not know what her husband was actually doing in respect of the company affairs. She would not know if her husband took cash out the company account. He continued to be a signatory on the company bank account and he continued to write cheques and she would not know if he did. She relied on her husband to conduct the company affairs properly and she assumed he was doing so. She did not perceive herself as having the right to question him about the company affairs.

[98] She did not sign the accounts for the year ended 31 January 2007. Had those accounts been presented to her for her signature she would not have understood the

relevance of the transfer of the funds from “Other loans” to “Directors loan accounts”. It was her husband who provided L with the information to prepare the accounts for the year ended on 31 January 2007 and all other years. She does not know what information he gave them that resulted in the change of the description of the loans in those accounts.

[99] During the year ended 31 January 2007, £43,727.88 was spent by E Ltd buying cars. She did not get any of them. She did not buy a car then and put it through the E Ltd accounts. E Ltd did not buy a car and give it to her. She did not spend any money during that year that came from E Ltd.

[100] She did not get a salary from E Ltd in any year after she became a director.

[101] She did not take any money from E Ltd during the years ended 31 January 2008 and 2009 and she did not receive any dividends either because she did not become a shareholder until 1 January 2021. Her husband was sole shareholder until then.

[102] She did not take any money from E Ltd during the years ended 31 January 2010, 2011 and 2012. She did not pay any expenses in the year 2012 and then subsequently receive them back from E Ltd.

[103] During the period 2006 to 2021 she did not receive any money from E Ltd in the form of the company purchasing a car for her, or in the form of dividends or reimbursement of expenses. During that same period her husband did not pay more into the running expenses of their matrimonial home, and she did not see any signs of her husband having a better lifestyle than before.

[104] She was not aware of E Ltd apparently doing significantly better in the year ending 31 January 2007 than 2006 albeit that the operating profit increased from £18,096 in 2006 to £71,155 in 2007.

[105] She was not aware of her husband taking money from E Ltd in 2006 or 2007 that he was not entitled to.

[106] She did not receive any money from her husband that came from the money he misappropriated from the trusts.

[107] When she signed the accounts for the year ended 31 January 2006, she had no reason to believe that they did not give a true and fair view of E Ltd's financial affairs. Her understanding was that they did give such a view.

[108] She was not shown the accounts for the year ended 31 January 2007 and did not sign them. She did not wonder or have any suspicion as to why she had not been shown them when she had seen and signed those for the year ended 31 January 2006. She accepts that in terms of her statutory duties she should have asked to see them.

[109] It was her husband and not L who used the word "figurehead" when they spoke to her at the time she agreed to become a director.

[110] Although her husband said in evidence on the Court of Session actions that, for the 3 year period starting in 2006, she was the person in complete charge of the company, in reality, she was not and, during that period, she did "nothing" in the company affairs. She did not ask her husband how the company affairs were doing because "he was not the type of person who would discuss this ... he is not the best communicator".

[111] In evidence in chief she said that the £11,700 paid into her savings account on 2 April 2008 was the proceeds of her selling her car.

[112] In cross-examination, in respect of the sum of £11,700, she accepted that, on the same date ie 2 April 2008, C, transferred the same amount of money out of his bank account. She accepted that it accordingly appeared that the £11,700 was in fact paid to her by her husband and was not from the sale of her car.

[113] In cross-examination, she then said that it could have been that she had loaned him this money and this could have been him paying it back to her. She refuted the suggestion that she had simply made this loan up to suit what she had previously said in evidence.

[114] She and C placed their property at Y on the market for sale in February 2024 for offers over £580,000. When they did so she was aware that an arrestment on the dependence of this action had been granted to the pursuer and that an inhibition had been placed over the property as well. She received advice from two solicitors that there was nothing to prevent them placing the house on the market for sale as there was no arrestment against her.

[115] She did not challenge or appeal the interim diligence decision when it was made because, notwithstanding that she was legally represented at the time, she was not told she could appeal or challenge the continuation of same.

[116] Their plan was to sell the property, pay some monies to her husband's creditors and use her share of what was left to buy a small property for them to live in.

[117] In cross-examination she was asked about the circumstances of her becoming a director in E Ltd. She repeated that her husband was exhausted and told her he was "going to walk away" from E Ltd as "he had had enough". He told her that would leave E Ltd without a director and that would mean the company would be struck off by Companies House. He asked her if she would become a director. She was apprehensive about doing so. Her husband told her "you won't need to do anything, the company runs itself". She asked him what was involved and he told her that "rental income will come into the bank" and that "he would deal with it". These were the circumstances of her agreeing to become a director of E Ltd.

[118] She then accepted that these were different circumstances than pled by her in Answers 6 and 12 on Record.

[119] It was put to her that her husband said in evidence in the Court of Session actions that, after she became a director of E Ltd, he was not involved at all in the management of the company for 2 to 3 years and that she was the person during who was in charge. Her evidence was that this was not an accurate account of the position and that her husband was wrong in saying that.

[120] When she agreed to become a director, L spoke to her and told her that she would not have much to do. She could not recall if L told her that it would be in order for her to be a mere “figurehead”. L did not tell her that he was assuming responsibility for the company accounts but he did say to her that “nothing would change” in that regard.

[121] In response to her allegation that L told her that she would be a mere “figurehead”, when he says in his affidavit in this case that he would never tell anyone (becoming a director) that they would be a figurehead, she said “he is telling a blatant lie”.

[122] Notwithstanding that L says in his affidavit that his ordinary practice was to explain to a new director what their responsibilities were from an accounting perspective and that they must produce accounts for the company which must give a true and fair account of the company’s financial affairs, he did not tell her this.

[123] Notwithstanding that L says in his affidavit that he would never have told a director that he or his firm would assume the director’s statutory responsibility as regards the accounts of the company, he did say that to her.

[124] She posited the question as to why L should be believed in this regard when he had misappropriated the trust funds. It was explained then to her that there had been no finding against L that he had misappropriated the trust funds and he had reached a without

prejudice settlement agreement with the pursuer in the Court of Session actions. As I understand it, that explanation did not alter the defender's view that L was lying in his affidavit as to what he said he told her.

[125] She accepted that, as a matter of fact and law, the E Ltd's Director's Report in the accounts for the year ending 31 January 2006 was her report as she was the sole director as at that date. However, her evidence was also that this was not explained to her at the time.

[126] She accepted that the Director's Report in those accounts was also signed by her and in that statement she acknowledges her statutory duties as a director to prepare accounts which give a true and fair view of the state of affairs of the company for the year ending 31 January 2006. She accepted that this meant that she knew then that she had these duties. However, she had been told by L that she "would not have to do anything for the company" and that, as he always had, he would continue to prepare the accounts after her appointment and that "nothing would change".

[127] It was put to her that L clearly and in writing - in the Accountants Report to the Board of Directors on the unaudited accounts for the year ending on 31 January 2006 - told her that these were matters she was responsible for. Her evidence initially was that she did not recall him telling her that in writing but when that document was shown to her she said that she "misunderstood the content of this letter".

[128] Notwithstanding that she had been told what her statutory duties were as a director in respect of the financial statements, she did not check same because she was a lay person.

[129] She did not telephone L to speak to him in this regard because she met him only three times in twenty odd years and L's relationship was with her husband not with her.

[130] It was put to her that by virtue of the Joint Minute of Agreement lodged with the court, she accepted that the signatures on the E Ltd accounts for the year ending on

31 January 2008 which bore to be hers were indeed hers. She responded by saying that irrespective of the terms of the Joint Minute she categorically denies that they are her signatures.

[131] When she sold her car in 2008 she did get a new car. It was not a Mercedes. The Mercedes shown in the driveway of her home in the Google Street Map dated August 2009 and produced by the pursuer was her husband's car albeit that it had on it her personal number plate. Both she and her husband drove the Mercedes. She did not know whether E Ltd owned the car if her husband personally owned it. The other car in the photograph was also her husband's car.

[132] In her witness statement she said that when she became a director in E Ltd in April 2006 she could not have taken an active role in the company because she was working full time in a stressful job and her own health was beginning to fail. It was put to her that that was untrue and that she was not working full time at that time. In this regard she was directed to her bank statements. These did not show any wage credits being paid into that account from her employer. In response her evidence initially was that that bank account had nothing to do with her and that these documents were not her bank statements.

[133] When it was explained to her that these documents were recovered by the pursuer under the terms of a specification of documents, her evidence then was that she may have made an error as to dates and that she may have in fact been in receipt of sick pay at that time.

[134] She accepted that the statements for that account show regular payments of £500 in cash being deposited into her account. She also accepted that, during the period 31 January 2006 to 31 January 2007, when she was in receipt of her annual salary of around £12,000 per annum, a total of £21,610 in cash was deposited into that account. Her evidence was that she

presumed that those were payments her husband paid to her as additional housekeeping money and to pay bills.

[135] It was put to her that those payments were not additional housekeeping money from her husband but were in fact money from the misappropriated funds he stole from the trust funds. Her evidence in response was that the money “was still in the company”.

[136] It was put to her that, from her bank statements, it can be seen that for the year ending 31 January 2008 cash deposits totalling £12,600 were paid into that her account. She was asked if those came from her husband and she confirmed that they did.

[137] It was put to her that that, from her bank statements, it can be seen that for the year ending 31 January 2009 cash deposits totalling £12,730 were paid into her account. She was asked if those came from her husband and she confirmed that they did. She went on to explain that any money paid into her account, if they were not earnings, would have come from her husband from his own funds.

[138] It was put to her that, from her bank statements, it can be seen that for the year ending 31 January 2010 cash deposits totalling £14,000 were paid into her account. She was asked if those came from her husband and she confirmed that they did.

[139] It was put to her that, from her bank statements, it can be seen that for the year ending 31 January 2011 cash deposits totalling £13,920 were paid into her account. She was asked if those came from her husband and she confirmed that they did.

[140] It was put to her that, from her bank statements, it can be seen that for the year ending 31 January 2012 cash deposits totalling £14,540 were paid into her account. She was asked if those came from her husband. She said that these could have been a mixture of money from her savings account she drew out and paid into this account and money from her husband for housekeeping.

[141] She refuted the suggestion put to her that the sums of £13,013.12 and £11,160.60 recorded as “Personal expenditure” for the years ending on 31 January 2007 and 2008 respectively in the “Analysis of Other loans and Directors Current account” document signed by J dated 13 April 2022 and produced in the Court of Session actions by her husband, were the cash payments she “syphoned off “ from E Ltd during the time when she was sole director of the company and came from the funds her husband misappropriated from the trusts.

[142] She also refuted the suggestion put to her that, after 1 January 2009, when her husband became a director of E Ltd again, and whilst she also remained as a director, the personal expenditure figures increased because both of them were then “playing the game” of syphoning off money from the company in this way.

[143] She accepted that it was established in the Court of Session that the figure of £207,725.00 recorded in the accounts for the year ended 31 January 2006 – which she signed as sole director – was owed to the trusts.

[144] She accepted that, in the accounts for the year ended 31 January 2007, the figure £207,725.00 figure had been taken from the “Other loans” column and the figure £207,724.94(rounded up to £207,725.00) then appeared in the “Directors’ loan account” which meant that that sum was recorded as no longer owed to the trusts but then was owed to the directors ie her as she was the sole director at that point.

[145] She was asked directly if she ever loaned E Ltd £207,724.94. She said that she did not.

[146] She accepted that, no matter how the transfer of this figure came about, the change from that figure appearing as “Other loans” to “Directors’ loan account” was a false entry in the accounts. She also accepted that those were accounts that bear to show that she, in terms

of her statutory duties as director, confirmed that they gave a true and fair view of the affairs of the company.

[147] She accepted that her evidence in chief was that her husband was stressed and exhausted and at the point of giving up and walking away from E Ltd; and that he told her that the company ran itself, and that he would continue to be responsible for some matters and L other matters and that was why she became a director in the company.

[148] She was asked why, in those circumstances, and when she did not need to do anything, her becoming a director helped her husband's exhaustion, stress etc. Her response was that this question would need to be asked of her husband.

[149] It was put to her that this explanation for her becoming a director made no sense. Her response was that it made sense to her at the time as she was "looking at someone who was exhausted and going through mental torture".

[150] She accepted the proposition that it would have made sense had she actually ran the company and so relieved her husband of the stresses of doing so.

[151] It was put to her that the signatures on the accounts for the year ended on 31 January 2007 which bore to be hers were indeed her signatures. She responded that they were not and that she had not signed those accounts.

[152] It was put to her that the signatures on the accounts for the year ended on 31 January 2008 which bore to be hers were indeed her signatures. She responded that they were not and that she had not signed those accounts.

[153] It was put to her that, in the accounts for the year ended 31 January 2007, when she was the sole director, it is recorded that the "Directors account" balance was £151,336. She accepted that was correct. She was then asked if E Ltd owed her £151,336 as at that date.

She responded that it did not but that she did not provide L with the information to prepare those financial statements, her husband did.

[154] It was put to her that if she did nothing as regards checking the accuracy of the accounts for the company, she effectively ignored her statutory obligations as director of the company, including when she was sole director, to ensure that they gave a true and fair account of the financial affairs of the company. She disagreed saying that she relied on her husband in respect of the information he continued to give to L for the latter to prepare the accounts.

[155] She understood that the effect of the Joint Minute was that she agreed the signatures on the accounts for the year ended 31 January 2008 – when she was sole director - which bore to be hers were indeed hers. Notwithstanding this, she denied that they were her signatures.

[156] She accepted that the accounts for the year ended 31 January 2008, when she was sole director, records the sum in the Directors accounts to be £140,175 and that she knew for a fact that the company did not owe her £140,175. It was put to her that she knew that to be inaccurate. She responded that she did not know that because nobody explained that to her and she did not know how to read accounts. She said that she “had to rely on a skilled individual Chartered Accountant to explain that” to her. She did not contact L, Accountant, to discuss this as she had no relationship with him. It was her husband who provided the information to L to prepare the accounts.

[157] She did not meet K, the colleague of L, who prepared the financial statements for E Ltd. She did not speak with him by telephone or have any communications with him.

[158] It was put to her that the pursuer’s case against her was that she dishonestly assisted her husband, C, or dishonestly knowingly received the proceeds of his breaches of trust and

fiduciary duties – the misappropriation by him of the trust funds – and that this was done through the vehicle of E Ltd when she was the sole director solely responsible for the conduct of the affairs of E Ltd. It was put to her that this meant that she was jointly and severally liable along with her husband on this basis for his misappropriation of the trust funds. She denied this and said that she did not have any knowledge of her husband's misappropriation of the trust funds; that she did not knowingly or dishonestly misappropriate any money and that she "had no knowledge of what was going on".

[159] It was put to her that the pursuer's esto case against her was that if she did not know what was going on she nevertheless agreed to be a "figurehead" and that she turned a blind eye to her husband's actions in breach of her statutory duties to do likewise. She responded that this was "absolute nonsense ... I had no knowledge of what was going on. Had I had knowledge of what was going on I would have addressed it ... I didn't turn a blind eye".

[160] Her husband is now bankrupt. There is no realistic prospect of him paying off the money due to the pursuer in terms of the Court of Session decree against him as his income consists only of benefits.

S

[161] S is a Forensic Document and Handwriting Examiner. She holds various degrees and is highly qualified and experienced in the field.

[162] She was instructed by the defender to examine two signatures within the E Ltd accounts for the year ended 31 January 2007 ("the questioned signatures") said to be the signatures of the defender and to determine if they are genuine signatures of the defender.

[163] In this regard she prepared a report dated 3 September 2024 (“her report”) which is produced by the defender in the Inventory of Productions for the defender number 6/1 of process. She also gave further parole evidence.

[164] She was not asked for the defender if she adopted the terms of her report in her parole evidence but she was taken through the report in detail and adhered to the terms of the report and her conclusions narrated therein.

[165] In her report she described her method of comparing signatures on different documents. I do not understand this to be contentious and so I do not repeat same herein. In brief it includes, but is not limited to, comparing the starting and finishing points of letters; direction of line stroke; full stops; connections between letters and relative heights/proportions of letters. An opinion as to the probability of authorship by the same person is then given by her based on the similarities and differences between the signatures.

[166] In her report she compares the questioned signatures with signatures known to be those of the defender. In this regard she states:

“Comparison of the two questioned signatures with the seventy two examples of (B)’s signature reveals a vague pictorial similarity, however a detailed examination reveals many significant differences in the construction of several of the letters”.

[167] She describes what these differences are and then goes on to state: “There are sufficient significant differences to indicate that the questioned signatures are not genuine examples of the signature of (B)”.

[168] In evidence in chief she said that she was able to say that she was sure about this. She described these differences as “major”. Briefly put these were as follows:

- (i) the differences in how the initial letter of the signature in the questioned signatures was formed from those in the known signatures;

- (ii) that there were full stops between the initial letter and the first letter of the surname in the known signatures but not in the questioned signatures;
- (iii) the second letter in the defender's surname was placed high up and underlined in the known signatures but placed at bottom and not underlined and in the questioned signatures;
- (iv) that there were differences in how the first and third letters were formed in the defender's surname;
- (v) that the rest of the signature after the third letter was less undulated in the known signatures where it is "almost a straight line" than it is in the questioned signatures where "it is more of a squiggle".

[169] In her report and in her further evidence in chief she discussed two possible situations. These were (1) that the disputed signatures were simulations of the defender's signature ie that someone other than the defender wrote them; and (2) that they were disguised signatures ie that the defender did write them but, in the way she wrote them, she tried to disguise that they were her signatures.

[170] In her further evidence in cross she discussed these along with a third possibility namely (3) that she was wrong and that it was the defender who wrote the disputed signatures.

[171] In her evidence in cross she agreed with the proposition that one of these three scenarios must be correct.

[172] Her conclusions in her report and in her further evidence in chief were as follows:

- (i) That the questioned signatures are not genuine examples of the defender's signature;

- (ii) That the evidence that the questioned signatures are simulations is inconclusive. She said in her further evidence in chief that there is evidence for and evidence against the questioned signatures being simulations. She was unable to say whether the questioned signatures are or are not simulations;
- (iii) That the evidence that the questioned signatures were written by the defender with a degree of disguise is inconclusive. She cannot exclude the possibility that the questioned signatures were written by the defender with some disguise.

[173] Her evidence was that she was unable to say whether, as between the questioned signatures being simulated signatures and disguised signatures, it was more likely to be one than the other.

[174] In cross-examination her evidence was that infirmity of health does not completely change the way a person forms letters. Moreover, she said that she was not aware of the defender's ill health but that there were no signs in the known signature samples that she was given which showed that the signatures were not fluid or showed signs of the person being too tired to complete same properly. I understood her evidence on this issue to be that it did not change her conclusions in any way.

[175] In cross-examination it was put to her, and she agreed, that there was a 100% chance that one of three things had happened as follows:

- (i) that the questioned signatures are the defender's signatures and she was wrong in her conclusions;
- (ii) that the questioned signatures are simulations by another party ie they are forgeries;

- (iii) that the questioned signatures are signatures written by the defender but with some deliberate disguising so that it could not be detected that they were her signatures.

[176] In cross-examination, it was put to her, and she agreed, that the chance, expressed in percentage terms, that (i) above was correct ie that she was simply wrong and that the questioned signatures were the defender's signatures, was great than 0%.

[177] It was also put to her in cross, and she agreed, that her opinion was that (ii) and (iii) at para [175] above ie that the questioned signatures were simulations or were signed by the defender but with disguise, were as equally possible as each other.

[178] It was put to her that, given this, that meant that, in statistical terms, there was a greater probability of the questioned signatures being those of the defender than not ie that the sum of (i) and (iii) above – both of which included possibility that the questioned signatures were indeed those of the defender – would always higher than (ii). She explained that such a statistical proposition had never been put to her before. Her evidence was that graphology did not proceed on the basis of statistical analysis and she said she did not agree that this was a correct interpretation of her conclusions.

The law

[179] It was a matter of agreement between the parties that the remedies sought by the pursuer had a sound and established basis in the law. The defender argued that, on the factual matrix of this case, the pursuer had failed to establish that the remedies sought should be granted. As a result of this, I state the position in law in brief terms. Additionally, although I was referred to a number of cases and only mention a few hereafter, I did take account of all cases I was referred to in that regard.

Dishonest assistance

[180] There is now no doubt that Scots law recognises a remedy for dishonest assistance in the commission of a breach of a fiduciary duty. The development of Scots law in this area can be traced through the following cases.

[181] In the case of *MacAdam v Grandison* [2008] CSOH 35, Lord Hodge said at paragraph 36:

“A person can incur such liability without his activity necessarily having been criminal. It is sufficient to incur such a liability that the person has dishonestly assisted in a breach of trust. In this context dishonesty is assessed objectively and can involve either conscious impropriety or reckless disregard to the rights or possible rights of others.”

[182] In the case of *Ted Jacob Engineering Group Inc v Robert Matthew, Johnson Marshall and Partners* 2014 SC 579, Lord Drummond Young observed as follows paragraph 100:

“Counsel for the petitioner further submitted that Scots law would recognise the principle that, in legal systems derived from English law, is referred to as knowing assistance or dishonest assistance in committing a breach of trust or breach of fiduciary duty. A detailed discussion of this principle is found in *Royal Brunei Airlines Sdn Bhd v Tan*: where a third party dishonestly assists a trustee to commit a breach of trust (or a person with fiduciary responsibilities to commit a breach of fiduciary duty) the third party is liable to the beneficiary of the trust or fiduciary duty for the breach, even though the third party receives no trust property, and regardless of whether the trustee has been dishonest or fraudulent. In my opinion it is likely that a broadly analogous principle would be applied in Scots law, with such variations as are necessary to reflect the fact that Scots law does not recognise anything akin to the English concept of an equitable interest. In the article mentioned in the last paragraph Prof Whitty suggests that a restitutionary remedy exists in Scots law in such a case. The basic principle involved is in my opinion manifestly just, serving as it does to protect the beneficiaries of trusts and other fiduciary relationships from dishonest conduct.”

[183] In the case of *Watson v Fletcher* [2023] CSOH 87, Lord Richardson held that there is “no doubt that Scots law recognises a remedy for dishonest assistance in the commission of a breach of fiduciary duty”.

[184] In the case of *Kidd v Lime Rock Management LLP* 2024 SLT 347 at paragraph 57

Lord Tyre summarised the material principles of dishonest assistance under reference to *Libyan Investment Authority v King* [2023] EWHC 265 (Ch). He said that these are:

- (i) There must be a trust or fiduciary obligation owed by the fiduciary to the pursuer.
- (ii) There must be a breach of trust/fiduciary duty by the fiduciary, which need not be dishonest.
- (iii) The defender must have assisted in or procured the breach.
- (iv) The defender must have acted dishonestly in providing the assistance.
- (v) For this purpose, deliberately turning a blind-eye counts as knowledge.

[185] Mere knowledge of a breach of fiduciary duty is not sufficient to render liable a person who is not himself subject to a fiduciary duty (*Watson*, at paragraph 64). As indicated by the term assistance, the defender must by their action or inaction do something which helps the delinquent fiduciary.

[186] At to the standard of dishonesty, the Scottish Courts have repeatedly followed the decision of the House of Lords in *Royal Brunei Airlines v Tan* [1995] 2 AC 378, per Lord Nicholls at 389:

“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."

[187] In the case of *Ivey v Genting Casinos (UK) Ltd* 2018 AC 391 at paragraph 74 said:

"The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and by Lord Hoffmann in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476, para 10: see para 62 above. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

[188] In this context, dishonesty is to be judged objectively, by the standards of ordinary decent people. Dishonesty can include turning a blind eye to the acts and omissions of the fiduciary.

Knowing receipt

[189] A person who profits from a breach of fiduciary duty is liable to account for the amount of that profit if either (i) it is received in knowledge of the breach of fiduciary duty or (ii) it is received gratuitously (*Ted Jacob*, at paragraph 99 - albeit the latter may more accurately be described as gratuitous receipt *Kings Trs v King* [2020] CSOH 101 paragraph 23, *Commonwealth Oil & Gas Co Ltd v Baxter* 2010 SC 156 at paragraph 16).

[190] The remedy is based upon constructive trust (*Ted Jacob*, *King's Trs*, *Commonwealth Oil & Gas*). As observed in Menzies Menzies, *The Law of Scotland Affecting Trustees* (2nd Ed, 1913), paragraph 1271 (cited in both *Commonwealth Oil & Gas* and *King's Trs*):

“Where funds affected with a trust come into the hand of another than the beneficiary, either gratuitously or with knowledge of a breach of the trust, the transferee is a constructive trustee.”

[191] The pursuer may therefore succeed in this aspect of his case against the defender if he established either that she benefitted from the proceeds of C's breaches of fiduciary duty (i) in the knowledge of those breaches or (ii) even if she was ignorant of those breaches – that she benefitted gratuitously.

[192] In either event, the defender's liability on this ground would be limited to the benefit she actually received from the breaches of trust.

The submissions of both parties

[193] Both parties provided the court with detailed written submission which were of great assistance to the court and for which I am grateful.

[194] I do not intend to repeat these in any great detail. Instead I intend to give a very brief outline of same.

Pursuer's submissions

[195] The pursuer submits that the defender should be found liable to make payment to him as craved on two separate but overlapping grounds.

[196] Firstly because the defender dishonestly assisted her husband, C, in his established breach of his fiduciary duties towards the pursuer.

[197] Secondly because the defender knowingly received proceeds of those breaches of duty.

[198] The breaches of fiduciary duty at issue involve C's misappropriation of loans due by E Ltd to the HM and JM trusts and the application of those misappropriated funds for his own benefit.

[199] In that regard, it has been established before the Court of Session (*A v B & others*) that:

"The only reasonable conclusion to draw from the accounts of E Ltd, the accounting produced by the first defender in respect of the JM trust and the failure to maintain proper accounts for the trust is that [C] intromitted with the two loans made by his parents to the company for his own personal benefit. The accounting shows that he depleted the director's loan account by personal expenditure ... [C] misappropriated the loans and used the money for his own personal purposes ... On or about 31 January 2007 [C] misappropriated the balances of the loans due by E Ltd to the trusts and applied these sums for the furtherance of his own interests ... I have found that the [C] breached his fiduciary duties as a trustee by misappropriating the trust funds for his own personal benefit."

[200] Parties have agreed that the findings of the Lord Ordinary are to be treated as correct and established before this court.

Defender's submissions

[201] The defender does not dispute that Scots law does recognise the basis upon which the pursuer's actions proceeds.

[202] The defender does not dispute that C breached his fiduciary duties he owed to the pursuer as beneficiary of the said trusts.

[203] Rather the defender's submissions are that, on the evidence led in this case, the pursuer has failed to prove that the factual matrix exists to allow the court to find that the defender has any liability on any ground towards the pursuer in respect of any loss suffered by him as a result of C's breach of fiduciary duties owed to the pursuer.

Preliminary matters

Those raised by the pursuer

[204] I allowed the evidence in chief of witnesses to be given by way of affidavit/statement.

[205] The pursuer objected to a substantial number of sentences contained in the defender's original and supplementary witness statements. I allowed that evidence to be led under reservation and I now deal with the issues of the relevance and admissibility of same.

[206] I do not repeat in detail which sentences are objected to. The pursuer's objections to these sentences essentially fell into two categories. Firstly that what the defender said in some of the sentences was unvouched and was not the best available evidence of what was said by her in that regard and should be treated as inadmissible. Secondly that what the defender said in some of the sentences amounted to her stating what she had been told about matters of law and what her views thereon were and should be treated as irrelevant.

[207] Some documentary evidence was lodged by the defender in relation to some of the sentences where the pursuer says what is said therein is unvouched by the defender. I consider it could be said that these documents amount to best evidence of what is said by the defender in those sentences and I think the pursuer's objection fails on this basis.

[208] What the defender says about the law is, in my view, something she is entitled to say as part of her case and is not irrelevant. I think the pursuer's objection fails on this basis.

[209] It seems to me that, rather than treating the content of the objected to sentences as being irrelevant and inadmissible, the correct approach for the court to take in this regard is to allow same to be admitted in evidence with the real issue being what weight, if any, can be given to what is said by the defender in these sentences.

[210] I accordingly repel the pursuer's objections in this regard.

Those raised by the defender

[211] The defender insisted on her preliminary pleas-in-law numbers 3, 4, 5, 7, 8, 9, 10, 11, 12 and 13. I shall deal with each in turn.

Pleas-in-law 3 and 7

[212] These relate to the defender's argument that the defender is not someone who owes the pursuer a duty to account.

[213] In this judgment I have found for the pursuer in relation to the principal ground of action ie dishonest assistance by the defender of C's fiduciary duty owed to the pursuer and, would also have found for the pursuer on the ground of knowing receipt for the actual amounts she received. As a result, I consider it has not been necessary to consider the pursuer's alternative basis of action which relates to count reckoning and payment.

[214] On that basis therefore I do not find it necessary to consider the defender's preliminary pleas numbers 3 and 7.

Plea-in-law 4

[215] This relates to the defender's argument that the action is premature because, if there is liability on the part of the defender, the pursuer is only entitled to recover from the defender in the event of not recovering from the principal perpetrator C.

[216] The evidence was that the pursuer had attempted to recover from C in terms of the Court of Session decree but was unsuccessful and had recovered nothing.

[217] The evidence was that C became bankrupt after the Court of Session decree was granted against him in favour of the pursuer and that there was little, if any, chance of him recovering anything from C.

[218] This evidence was not meaningfully challenged by the defender and, was in fact also her position in evidence. I accordingly consider that there is no merit in the defender's argument.

[219] I accordingly repel the defender's preliminary plea number 4.

Pleas-in-law 5 and 8

[220] This relates to the defender's arguments that the pursuer's case is insufficient in specification in relation to craves 1 and 2.

[221] The defender argues that the pursuer's averments in support of craves 1 and 2 amount to no more than accusations of dishonesty without specification of when funds were actually taken, how they were actually taken, the role the defender played in their misappropriation, how she was in dishonest receipt of the misappropriated funds and how she benefitted from them. The defender argues that in the absence of that information she does not know what the case against her is and so the pursuer's case is lacking in specification and is irrelevant and should be dismissed.

[222] Per Lord Glennie at paragraph 100 in the case of *Heather Capital Limited v Levy & McRae and others* (2017) SCIH 19:

“The purpose of pleadings is to give notice of the essential elements of the case. The pleadings should set out the bare bones of the case. They are not the place to set out in full the evidence intended to adduce”.

[223] I do not understand it to be contentious between the parties that the basic rule of pleadings is that each party must give fair notice to the other of that party’s case against the other so that the other party will not be ambushed at proof in having to answer a case he had no advance notice or warning of.

[224] So far as specification is concerned, in the 4th edition of *MacPhail Sheriff Court Practice* the learned author states at paragraph 9.28:

“A party’s averments in condescendence or answers must specify sufficient facts to allow the party to lead all the evidence desired to lead at the inquiry, and to give the opponent fair notice of what the party hopes to establish in fact ...”

[225] In the case of *MacDonald v Glasgow Western Hospitals* 1954 SC 453 at page 465

Lord President Cooper said the following: “The plea of lack of specification finds its proper place in a case where a defender does not know the case to be made against him and objects to be taken by surprise at the proof”.

[226] This was later approved by Lord President Carloway in the case of *Soofi v Dykes* (2017) CSIH 40 at paragraph 11.

[227] So far as relevancy is concerned, in the case of *Jamieson v Jamieson* 1952 SC (HL) 44, Lord Normand at page 50 said the following:

“The true proposition is that an action will not be dismissed as irrelevant unless it must necessarily fail even if all the pursuer’s averments are proved. The onus is on the defender who moves to have the action dismissed, and there is no onus of the pursuer to show that if he proves his averments he is bound to succeed”.

[228] Faced with a plea to the relevancy of a party's pleadings, the proper approach for the court to take is to consider whether, on a fair reading of the pleadings, assuming the averments contained therein to be true, that party's case is bound to fail – *Wilson v Norwich Union Fire Insurance Society Ltd* 1999 SLT 1139.

[229] In *MacPhail* 4th edition at paragraph 9.30 the learned author says the following:

“It is possible for a condescendence to be relevant, in respect that it states facts sufficient to render the action relevant in law, but to be lacking in specification in respect that it does not give fair notice of all the facts which the pursuer intends to establish. The degree of specification which will be deemed sufficient for fair notice depends on the particular circumstances of each case”.

[230] I do not agree with the defender's submissions.

[231] I consider that the pursuer's averments were sufficiently specific as to give the defender fair notice of the case against her. The pursuer makes the point in his written submissions that, during the proof, there were no objections taken by the defender to any questions or line of questioning put by the pursuer for lack of Record. That accords with my own notes of the evidence and, in my view, speaks to the defender not being taken by surprise by any unexpected questions or issues not foreshadowed in the pursuer's pleadings.

[232] Furthermore, I do not consider that it can be said that the pursuer's case must necessarily fail even if all his averments are treated as having been established.

[233] I accordingly repel the defender's preliminary pleas numbers 5 and 8.

Pleas-in-law 9, 10 and 11

[234] The defender argues that the pursuer seeks the same or similar damages from the defender when he has already accepted damages for the same loss from L. The defender

argues that the pursuer is not entitled to recover damages twice from different people for the same fault.

[235] The evidence showed that the monies the pursuer received from L were paid by the latter on a without prejudice basis. Accordingly, no admission of liability was made on the part of L and so no fault has been conceded or indeed established on the part of L.

Moreover, the evidence was clear that, in his judgment, the presiding Lord Ordinary “stripped out” from the total of the misappropriated funds, the said monies paid to the pursuer by L. The presiding Lord Ordinary’s judgment is of course a matter of agreed evidence between the parties.

[236] In my view, the evidence was that the sums the pursuer seeks from the defender are accordingly separate from the monies already recovered from L and that there is no overlap between the two.

[237] In my view, the logic of the defender’s argument is that the money paid by L should have been deducted twice from the sum C misappropriated. That was not done by the presiding Lord Ordinary and, as already noted, in terms of paragraph 3 of the Joint Minute of parties, “the findings of the Lord Ordinary in *A v B & others* should be treated as correct and established before this Court”.

[238] I consider that the defender’s argument in this regard is without foundation or merit.

[239] I accordingly repel the defender’s preliminary pleas numbers 9, 10 and 11.

Plea-in-law 12

[240] The defender argues that the pursuer erroneously proceeds on the basis that the defender, in her capacity as a director in E Ltd, has identical duties as C in his capacity as

trustee of the trusts but with no distinction between what may be required of a director and no explanation of why the duties should be precisely the same.

[241] I consider that this is essentially a complaint regarding specification and relevancy and I refer to my comments, which are to be deemed repeated herein, in relation to pleas-in-law numbers 5 and 8.

[242] I consider that the defender's argument in this regard is without merit for the same reasons as stated in respect of pleas-in-law 5 and 8.

[243] I accordingly repel the defender's preliminary plea number 12.

Plea-in-law 13

[244] The defender argues that the pursuer's case has prescribed and should be dismissed as a result.

[245] The defender argues that the breach of duty on which the pursuer's case rests occurred on or about 31 January 2007 and that the prescriptive period started to run in March 2019 when the pursuer reached the age of 16 years of age. The Initial Writ was served on the defender on 15 February 2004 and so more than 5 years after the commencement of the prescriptive period.

[246] The defender's position fails to take into account that a trustee's obligation to make reparation for any fraudulent breach of trust to which the trustee was a party or was privy is imprescriptible in terms of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"), Schedule 3, paragraph 1(e)(ii).

[247] Trustee is defined widely in terms of section 15 of the 1973 Act, and the dishonest assistant or knowing recipient has the responsibility of an express trustee (*Novoship (UK) Ltd v Mikhaylyuk* [2024] EWCA Civ 908).

[248] Even if the short negative prescription in terms of section 6(1) of the 1973 Act applies, the prescriptive period does not begin until the obligation becomes enforceable. The trusts at issue did not vest in the pursuer until he turned 25 in March 2019, thus the prescriptive clock could not commence until that date, which is within 5 years of the raising of the present action in February 2024.

[249] Further, even if that did not apply, the pursuer was not aware that he had suffered a loss until C provided an accounting of his intromissions with the trust well within 5 years of the commencement of the present proceedings.

[250] The pursuer's evidence on his lack of knowledge was completely unchallenged in cross-examination by the defender. On that basis, the running of prescription would not therefore commence until that date in terms of section 11(3) of the 1973 Act. Again, that is well within 5 years of the commencement of these proceedings.

[251] I consider that the defender's submission is without merit.

[252] I accordingly repel the defender's preliminary plea number 13.

Analysis and decision in case

[253] At the outset I think it would be helpful if I give brief explanation at this point as to my view of the credibility and reliability of the witnesses in the case.

The pursuer

[254] I found the pursuer to be a reliable and credible witness. He appeared to me to give his evidence in a balanced and straightforward way. He did not seem to me to make any attempt to embellish or exaggerate his evidence. I found him to be an impressive witness and I had no difficulty in accepting his evidence in full.

[255] Having said that, other than commenting on what was said and or established in the Court of Session action, in my view, the pursuer's evidence limited as regards the main issues in the case. I consider that is understandable given that he was not involved in any way in the running of the trusts or E Ltd.

L

[256] I also found the pursuer's witness L to be a credible and reliable witness.

[257] He appeared to me to give his evidence in a balanced and straightforward way albeit that he was not able to recall with exact clarity or in exact detail some of the matters involved because his memory thereon was not clear. Again I consider that that was understandable given the passage of time.

[258] When he could not recall such details he said so and did not seek to give evidence based on what he assumed or thought would have been the case. In my view this strengthened his credibility. I had no difficulty accepting his evidence.

C

[259] I found the pursuer's witness, C, to be a credible and reliable witness only in relation to a few specific matters which I will detail later in this judgment. Otherwise I found him to be neither credible nor reliable.

[260] He seemed to me to be vague in most of his evidence stating that he could not remember the details of relevant issues. I accept that he did provide some medical vouching for several health problems that he has, but, in my view, his vagueness was deliberate and was a matter of choice on his part.

[261] Apart from the few specific matters I will mention hereafter, I found his evidence to be neither credible nor reliable and I rejected same.

The defender

[262] I found the defender to be neither a credible nor reliable witness. She seemed to me to give evidence which was contrived to try and justify and explain her actions and involvement in the matter as being without fault or worthy of attracting criticism or liability.

[263] She consistently sought to apportion blame to others. Her evidence was entirely self-serving and at odds with the evidence of others which I found to be credible and reliable.

[264] Her position seemed to be that she knew nothing about a number of important issues in the case. For example, notwithstanding that she was a director, at times, sole director of E Ltd, she did not know what her husband did on a day to day basis when running E Ltd; how E Ltd was getting on business wise; why her husband needed a loan from her for E Ltd to buy a car; what E Ltd's accounts that she signed meant; what her statutory duties as director of E Ltd were and meant; what information was given to the company Accountants to let them prepare the accounts; why she was not shown the accounts for the financial year ending 31 January 2007 when she was shown and signed the accounts for the preceding year; why the treatment of the trust loans was switched in the accounts to directors loans and under who's instructions that happened. This seemed to extend to other, perhaps less important matters such as who owned the Mercedes car she drove.

[265] Her evidence was also inconsistent at times. For example, she gave inconsistent evidence as to who it was that told her she would be a mere figurehead when she became a director in E Ltd.

[266] Furthermore, it also seemed to me that, on a number of matters, she changed her position whilst giving evidence so as to suit the situation and other evidence. For example, she changed her evidence from money coming into her account being from her selling her car to later in evidence saying that the same money was her husband repaying a loan she gave to him.

[267] I rejected her evidence as being neither credible nor reliable.

S

[268] I found S to be a credible and reliable witness. She seemed to me to give her evidence in a balanced and straightforward way. In her evidence she was clearly doing her best to assist the court as an expert in the field in understanding and evaluating the issue of whether or not the questioned signatures on the accounts for E Ltd for the year ended 31 January 2007 were the defender's.

[269] I had no difficulty in accepting her evidence.

Main issues in the case

[270] Referring back to what I consider to be the main issues in the case, the first of these is as follows:

- (i) Whether the defender dishonestly assisted her husband C in his established breaches of fiduciary duty owed to the pursuer.

[271] In terms of the law, as discussed earlier, for the pursuer to succeed on this ground of action he must establish the following:

- (i) That C owed fiduciary duties to the pursuer.
- (ii) That C breached the fiduciary duties he owed to the pursuer.

(iii) That the defender by her acts and/or omissions assisted C in breaching those fiduciary duties.

(iv) That in assisting C in his breaches of fiduciary duty the defender acted dishonestly.

[272] In this context, dishonesty is to be judged objectively, by the standards of ordinary decent people. Dishonesty can include turning a blind eye to the acts and omissions of the fiduciary.

[273] A dishonest assistant is jointly and severally liable with the principal fiduciary for any loss suffered by the beneficiary as a result of the breach of trust.

[274] A dishonest assistant is also liable to disgorge any profit they themselves have made from a breach of trust *Ultraframe (UK) Ltd v Fielding* [2005] EWCH 1638 at [1600]:

“I can see that it makes sense for a dishonest assistant to be jointly and severally liable for any loss which the beneficiary suffers as a result of a breach of trust. I can see also that it makes sense for a dishonest assistant to be liable to disgorge any profit which he himself has made as a result of assisting in the breach.”

[275] This passage in *Ultraframe* was quoted with approval by the Supreme Court in the very recent decision in *Lifestyle Equities CV and another v Ahmed and others* [2025] AC 1.

[276] The upshot is that the dishonest assistant is liable in damages for the whole loss arising from the breach of trust in which they have assisted – whether or not they received any personal benefit. That, the pursuer submits, should include the loss of investment income, per the presiding Lord Ordinary in *A v B*.

“Where a trustee misappropriates trust funds or applies trust funds for his own purposes (or those of a company he controls), he may be found liable for such accumulation of income as the fund would have yielded had it been properly invested (*Campbell v Keith* (1840) 2 D 1367; *Cochrane v Black* (1857) 19 D 1019).”

[277] Has the pursuer, by credible and reliable evidence, established these four requirements? I consider that he has.

[278] It seems to me that the first and second requirements are, in fact, not contentious between the parties.

[279] There was no dispute that the trusts were set up for the benefit of the pursuer.

[280] There was no dispute that C was always a trustee in each of the trusts.

[281] Accordingly, in terms of the first of these requirements, there can be no dispute that C owed fiduciary duties to the pursuer.

[282] There is no dispute that C breached the fiduciary duties he owed to the pursuer. This was found to be established by the presiding Lord Ordinary in the Court of Session actions. In their Joint Minute the parties agreed that the presiding Lord Ordinary's findings in the Court of Session actions should be treated as correct and established in this case.

[283] Accordingly, in terms of the second of these requirements, there can be no dispute that C breached the fiduciary duties he owed to the pursuer.

[284] It is in the third and fourth of these requirements that the dispute between the parties lies.

[285] The presiding Lord Ordinary found it established that C misappropriated the sums due to the pursuer in or around 31 January 2007.

[286] The defender became a director of E Ltd on 5 April 2006 at a time when the only other director of the company was C.

[287] C resigned as a director of E Ltd on 7 April 2006 at which time the Defender became the sole director of the company.

[288] The presiding Lord Ordinary found it established that the misappropriation was effected by the transfer of the balance of the said loans into the "directors' loan" account in the books of E Ltd and subsequent depletion of the balance of that account by personal expenditure. As already stated, that judgment is a matter of agreement between the parties.

[289] For reasons I will shortly explain, I found the following established in evidence:

- (i) The defender signed the accounts of E Ltd for the financial year ended 31 January 2007.
- (ii) The balances of the said loans were transferred into the directors' loan account on 31 January 2007 at a time when the defender was the sole director of E Ltd and, accordingly, the person with exclusive legal control of its affairs.
- (iii) The balances of the said loans were transferred into the directors' loan account days after the first defender was expressly advised of and acknowledged her duties (i) to ensure that E Ltd kept proper accounting records and (ii) to prepare accounts that give a true and fair view of the company in terms of Companies Act 1985.
- (iv) The defender knew, or ought to have known as the sole director of the debtor (E Ltd), that the said loans were due to the JM and HM trusts respectively.
- (v) The defender signed the accounts of E Ltd for the financial years ended 31 January 2006, which showed those loans.
- (vi) In any event, the defender knew that the balances of the said loans were not due to her.
- (vii) The defender knew that the transfer of the balances of the said loans to the director's loan account were false entries in the accounts of E Ltd.
- (viii) The defender made, or at least permitted, those false accounting entries to be made.
- (ix) The defender knew that there was no true director's loan balance to be depleted by personal expenditure.

- (x) The defender signed the accounts of E Ltd for the financial year ended 31 January 2008.
- (xi) Nevertheless, the defender allowed the director's loan balance to be so depleted and repeatedly caused, or at least permitted, false accounting entries to that effect in the accounts of E Ltd.
- (xii) No honest person in the defender's position would have so acted.
- (xiii) The defender's actions assisted C in the misappropriation of the balances of the said loans.
- (xiv) C could not have misappropriated the balances of the said loans without the defender's assistance. She was the sole director of E Ltd at the time the misappropriation was recorded in E Ltd's accounts. As sole director only she had the responsibility for the accounts giving a true and fair account of the company's financial affairs. Only she could have authorised the false accounting that this represented. C could not have done so as he was not a director at that time.

[290] My reasons for finding the above to be established were as follows.

[291] The defender's evidence was that she was persuaded to become a director of E Ltd to relieve the stress that her husband, C, was under at the time and on being assured by him and L, company Accountant, that "nothing would change"; that she would be "a figurehead" only and that she would "not have anything to do" and that C would continue to run the company. She was working full time in a stressful job and her own health was poor at the time and she would not have agreed to become a director had she been told that she actually had to do anything. She did not know that becoming a figurehead director was inappropriate and nobody explained to her that it was.

[292] For a number of reasons I did not believe or accept this.

[293] Firstly, the explanation made no sense. If nothing was to change and C was to continue to run the affairs of E Ltd, in what way would that relieve the stress to C? No evidence was led by the defender that, for example, in some way, her becoming a director would mean that C would not need to attend to as much, if any, meetings with clients or suppliers or that he would no longer have to reply to correspondence from third parties or be involved in any clerical or administrative tasks for the company. Presumably, if she was to be a figurehead only and was to do nothing, then C would have to continue to do what he previously did. How would that relieve the stress on him?

[294] Secondly, she was inconsistent in her evidence as to exactly who told her this. In her witness statement (which she adopted without reservation) she said that C and L both told her that she “would be a figurehead and not have anything to do”. In cross-examination she then said that L had never used the word figurehead.

[295] Thirdly, as I noted the evidence, it was not put to either C or L on the defender’s behalf that they had told her this. With reference to the case of *Keenan v Scottish Wholesale Co-op Society Ltd*, 1914 SC 959, the defender must be taken to admit that her said allegations that they did are false. This carries with it necessary adverse consequences to the assessment of the defender’s credibility for having made those false allegations.

[296] The defender’s evidence was that she did not sign the accounts for E Ltd for the year ending 31 January 2007.

[297] For a number of reasons I did not accept this.

[298] S’ evidence was as follows:

- (i) That the questioned signatures (ie those on E Ltd’s accounts for the year ended 31 January 2007) are not genuine examples of the defender’s signature;

- (ii) That the evidence that the questioned signatures are simulations (ie written by someone else and not by the defender) is inconclusive. She said that there is evidence for and evidence against the questioned signatures being simulations. She was unable to say whether the questioned signatures are or are not simulations;
- (iii) That the evidence that the questioned signatures were written by the defender with a degree of disguise is inconclusive. She could not exclude the possibility that the questioned signatures were written by the defender with some disguise.

[299] Her evidence was that she was unable to say whether, as between the questioned signatures being simulated signatures and disguised signatures, it was more likely to be one than the other.

[300] I found S to be a credible and reliable witness. I accepted her evidence and concluded, when taken together with other evidence, and my above view of the credibility and reliability of the defender, that, on balance of probabilities, the defender did sign the E Ltd accounts for the year ending 31 January 2007 albeit with a degree of disguise.

[301] That other evidence is as follows:

[302] Firstly, the defender accepted that she had signed the E Ltd accounts for the preceding year and I find it incredible that she did not sign them for the year ending 31 January 2007.

[303] Secondly, the defender's position further lacked credibility by the fact that notwithstanding that, in effect, she admitted by Joint Minute that she had signed the accounts for the year ending 31 January 2008, in evidence at proof, she maintained that she

had not signed them. This was in direct contradiction to her position as per the Joint Minute of Agreement.

[304] Thirdly, C's evidence was that he did not forge the defender's signature on the accounts of E Ltd for the year end 31 January 2007. C was not cross-examined on this point. With no obvious reason to lie about this point, and none being suggested to him in cross-examination by the defender, I concluded that, to this limited extent, the evidence of C could be accepted on this point.

[305] Fourthly, C's evidence was that, although he could not remember what he said in evidence in the Court of Session, it would have been the truth. I accepted the evidence of the pursuer that C's evidence in the Court of Session was that he was not involved in the running of E Ltd for a period of 2 to 3 years and that during the time when the defender was the sole director of E Ltd it was she who was running the company then. I concluded that, to this limited extent, this part of the evidence of C could also be accepted on this point. I think this adds weight to the proposition that it was indeed the defender who signed E Ltd's accounts for the year ended 31 January 2007 when the misappropriation was essentially introduced into the books of E Ltd.

[306] I concluded that, on any reasonable view of the evidence, if the defender is to believed that she did not do so, then that would mean that the only other reasonable possibility was that it was someone from L's firm who signed them. This was not pled by the defender or pursued by the defender in evidence as a realistic possibility.

[307] I reached the conclusion, upon considering all the evidence, together with what I have made of the credibility and reliability of the witnesses on this issue, that it was the defender who signed the accounts of E Ltd for the year ending 31 January 2007.

[308] It was suggested to S that a mathematical proposition could be applied to her conclusions which led to the result that it could properly be said that there was more than a 50% chance that the defender had signed the E Ltd accounts for the year ended 31 January 2007. S did not accept that such an interpretation could be applied and for the avoidance of doubt I accepted her evidence in that regard.

[309] It was not disputed that the balances of the said loans were transferred into the directors' loan account on 31 January 2007 at a time when the defender was the sole director of E Ltd. However, the defender maintained her position that she had nothing to do with the running of E Ltd and that she relied on her husband, C, to run the company and this included him liaising with and providing L with all the documentation and information the latter needed to prepare the company's accounts. Her evidence was that she essentially delegated the responsibility for such matters and was entitled to do so and to rely on them in that regard.

[310] For a number of reasons I did not believe or accept the defender's evidence on these matters.

[311] Firstly, if the defender's evidence was to be believed and her position accepted, then it would essentially run a horse and carriage through established company law. The defender accepted that she signed the director's report for the E Ltd accounts for the year ending 31 January 2007. In and of themselves, they include an acknowledgement by her that it was her responsibility as sole director of the company to ensure that the accounts were a true and accurate picture of the financial affairs of the company. This is to be found in her director's statement included in those accounts and signed by her.

[312] In my view, whether she did or did not rely on others to run the company and prepare the accounts, that did not change the position that the legal responsibility for same being correct was hers.

[313] Moreover the evidence of L – which I accepted – was that, although he could not recall what specific advice, if any, he gave to the defender when she became a director of E Ltd in 2006, he denied telling the defender that she would be a mere figurehead; that C would continue to run the company and that he, ie L, would deal with all the formalities and legal requirements of the company including preparation of the accounts of the company. His evidence was that this allegation is untrue and that he would never have told a director of a limited company that they could simply be a “figurehead”.

[314] His evidence – which I accepted – was that his ordinary practice was to explain to a new director what their responsibilities were from an accounting perspective. This included that a director has a statutory duty to prepare accounts for the company which must give a true and fair view of the state of affairs of the company. He would never tell a director that they could ignore their statutory duties by acting simply as a “figurehead”. He would never tell a director that he or anyone else in his firm would take over the director’s statutory duties.

[315] I consider that the defender was in receipt of this information and advice and I do not believe her evidence where it conflicts with L’s evidence on these issues. I prefer the evidence of L in that regard.

[316] Secondly, I do not believe or accept the defender’s evidence that she did not have anything to do with the running of E Ltd. On this matter I accepted the evidence of the pursuer that C gave evidence under oath in the Court of Session that the defender was the person running E Ltd throughout the period of her sole directorship, and that he was not

involved in the management of the company for a period of 2 to 3 years thereafter as he was unable to do so.

[317] The defender's evidence was that she did sign the accounts for the financial year ending 31 January 2006. These included her director's statement, signed by her on 26 February 2007, acknowledging her statutory duty to prepare accounts which give a true and fair view of the state of affairs of the company. This meant that the balances of the loans were transferred into the directors' loan accounts very shortly after her acknowledgment of those duties.

[318] The evidence of the defender was that when she signed the accounts of E Ltd for the year ending 31 January 2007, she knew that E Ltd did not owe her any money and that she had not made any loans to E Ltd. Notwithstanding this she signed the accounts which showed that E Ltd did owe her money and that she had made E Ltd loans.

[319] I consider the evidence from L, taken together with the accounts of E Ltd produced by the pursuer, shows that the defender was properly informed of her statutory duties and responsibilities as a director of E Ltd and chose to ignore them by signing accounts containing false accounting entries as regards the loans.

[320] Moreover, the defender allowed the director's loan balance to be so depleted and repeatedly caused, or at least permitted, false accounting entries to that effect in the accounts of E Ltd.

[321] I consider the evidence shows that, in doing all of the above, the defender acted dishonestly in this regard and that no honest person in the defender's position would have so acted.

[322] I consider that the evidence shows that during the time when she was sole director of E Ltd and, thereafter when she was re-joined as director by C, the defender's actions assisted

him in the misappropriation of the balances of the said loans and that he could not have misappropriated the balances of the said loans without her assistance.

[323] I do not believe or accept the defender's evidence that she had nothing to do with the affairs and running of E Ltd, that she knew nothing of the misappropriation and that she did not assist C in this regard. I considered her to be an incredible and unreliable witness.

[324] On the other hand I accepted the evidence of the pursuer that C gave evidence under oath in the Court of Session action that the defender ran the company for the period of 2 or 3 years when he had taken a step back from same. I consider that the evidence of C that what he told the Court of Session in this respect was true and to this limited extent was credible and reliable and I accepted same.

[325] I preferred and accepted the evidence of L where it conflicted with the defender's evidence. His evidence was that he had a "handful of discussions" with the defender regarding the affairs of E Ltd and his impression at the time was that she "was well aware of the affairs of E Ltd... at least in general terms".

[326] On consideration of S' evidence I concluded, that the defender had signed the accounts for E Ltd for the financial year ending 31 January 2007 when the loans due to the trusts were converted to directors loans. I accepted the evidence of C to the limited extent that he did not sign her signature thereon.

[327] By her own admission the defender knew that E Ltd did not owe her any money nevertheless, in that, and I consider also, the following year she signed same knowing the entries in this regard were false. I did not accept her evidence that she knew nothing of the content or importance of these statements. I accepted the evidence of L and concluded therefrom that she did.

[328] Taking all these factors into account I consider that the evidence showed and established that the defender by her acts and/or omissions assisted C in breaching his fiduciary duties to the pursuer and that, in assisting him in doing so through the vehicle of E Ltd, the defender acted dishonestly.

[329] I have therefore concluded that the pursuer has established the requirements outlined at para [289] (i) to (xiv) above to establish that the defender dishonestly assisted her husband, C, in his established breaches of fiduciary duty owed to the pursuer and that she is liable to him in that regard.

[330] That being said, how much money is due by the defender to the pursuer?

[331] As part of her submissions in this case, the defender argues the established rule in *Clayton's* case should be applied. I disagree with that submission. In my view, the rule in *Clayton's* case is limited to applying in "normal" commercial or at arms' length type of transactions. This case does not involve such a scenario. At its simplest this case involves theft of money and, in my view, given the facts of this case, the rule in *Clayton's* case cannot apply on any reasonable basis.

[332] Furthermore, the sums paid by L have already been deducted from the sums sued for in the present action, as is clear from the judgment of the presiding Lord Ordinary in the Court of Sessions actions. The double deduction the defender, in reality, seeks by the operation of the rule would be without foundation or justification.

[333] I have concluded that the basic sums due, by the defender to the pursuer in respect of the JM and HM trusts is £73,562.88 and £147,144.87.

[334] I have reached that conclusion because, as at the date the defender assumed office as a director of E Ltd, the loans remained outstanding to the trusts and by the date of

misappropriation on or around 31 January 2007 the outstanding balances were £73,562.88 and £147,144.87 respectively.

[335] These sums are confirmed by the presiding Lord Ordinary in paragraphs 88 and 90 respectively in his judgment in the Court of Session actions.

[336] The pursuer submits that the sum due by the defender under this head of action should include the loss of investment income, per the presiding Lord Ordinary in *A v B & oths*.

“Where a trustee misappropriates trust funds or applies trust funds for his own purposes (or those of a company he controls), he may be found liable for such accumulation of income as the fund would have yielded had it been properly invested (*Campbell v Keith* (1840) 2 D 1367; *Cochrane v Black* (1857) 19 D 1019).”

[337] In the circumstances of this case I have concluded that the sum awarded should include the loss of investment income. I have reached that conclusion because I consider that there is a direct causal link between the misappropriation of the trust funds and the loss of investment income on same ie the former directly caused the latter.

[338] I consider that a proper interpretation of the case law in this area supports the conclusion that a dishonest assistant is jointly and severally liable with the principal fiduciary for any loss suffered by the beneficiary as a result of the breach of trust.

Accordingly, the defender should be jointly and severally liable along with C in this regard which should be inclusive of loss of investment income.

[339] Furthermore, the presiding Lord Ordinary in the Court of Session actions concluded that C was liable for the loss of investment income and it seems to me that, given that I have concluded that the defender dishonestly assisted him in his breach of fiduciary duties, the defender should be jointly and severally liable with him for the loss suffered by the pursuer including the loss of investment income.

[340] In relation to the loss of investment income to the JM trust, the presiding Lord Ordinary at paragraph 89 of his judgment, calculated that at £64,473.59 meaning that the total figure for loss to that trust as at 31 January 2007, inclusive of loss of investment income, and net of the monies paid on a without prejudice basis by L, was £138,036.47. This is the sum first craved.

[341] The position is a bit more complex in relation to the sums due in investment income to the HM trust.

[342] In paragraph 90 the presiding Lord Ordinary finds the sum due in respect of the loan to E Ltd is £147,144.87 and at paragraph 91 the sum due in respect of the personal loan to C is £139,843.24. The defender is not liable for the latter. Added together these total £286,988.11. This means that sum due to that trust in respect of the E Ltd loan is 51.27% of that combined total. At paragraph 93 of his judgment, the presiding Lord Ordinary calculates that the combined sum of £581,604.93 is due to that trust, net of the monies paid on a without prejudice basis by L, in respect of the loan to E Ltd and the loan to C personally. Deducting the £286,988.11 from the £581,604.93 gives a total of £294,626.82 in combined loss of investment income. Applying the 51.27% to the £294,626.82 figure means that the loss on investment income figure due to that trust in respect of the loan to E Ltd is £151,055.17. Adding the £147,144.87 and £151,055.17 figures together brings out a total due in respect of the loan to E Ltd at £298,200.04. This is the sum second craved (with a difference of £9.29).

[343] I consider that interest should run on these figures at the judicial rate of 8% per annum from 13 October 2023, that being the date of the decree pronounced in the Court of Session action, until payment.

[344] Referring back to what I consider to be the main issues in the case, the second of these is as follows:

- (ii) Whether the defender knowingly received the benefit of C's established dishonest breaches of fiduciary duty owed to the pursuer.

[345] Standing my conclusions in respect of the first of the main issues in this case, I think that it is unnecessary for me to consider this ground of the pursuer's case. However, I think it might be helpful to explain what my conclusions thereon would have been had I not concluded that the pursuer had established his case under the primary ground of dishonest assistance. In the circumstances I will do so in brief terms.

[346] A person who profits from a breach of fiduciary duty is liable to account for the amount of that profit if either (i) it is received in knowledge of the breach of fiduciary duty or (ii) it is received gratuitously (*Ted Jacob*, at paragraph 99 - albeit the latter may more accurately be described as gratuitous receipt *Kings Trs v King* [2020] CSOH 101 paragraph 23, *Commonwealth Oil & Gas Co Ltd v Baxter* 2010 SC 156 at paragraph 16).

[347] The remedy is based upon constructive trust (*Ted Jacob*, *King's Trs*, *Commonwealth Oil & Gas*). As observed in *Menzies Menzies*, *The Law of Scotland Affecting Trustees* (2nd Ed, 1913), paragraph 1271 (cited in both *Commonwealth Oil & Gas* and *King's Trs*):

"Where funds affected with a trust come into the hand of another than the beneficiary, either gratuitously or with knowledge of a breach of the trust, the transferee is a constructive trustee."

[348] The pursuer may therefore succeed in this aspect of his case against the defender if he established either that she benefitted from the proceeds of C's breaches of fiduciary duty (i) in the knowledge of those breaches or (ii) even if she was ignorant of those breaches – that she benefitted gratuitously.

[349] In either event, the pursuer's liability on this ground would be limited to the benefit she actually received from the breaches of trust.

[350] In the event that I had not found that the pursuer had established his case on the first ground above, I would have found that the pursuer had established this ground of action.

[351] For the same reasons as stated above, I found the defender's evidence on these issues to be both incredible and unreliable. Similarly, again for the same reasons as stated above, with the same limited exceptions as stated above, I also found the evidence of C on these issues to be incredible and unreliable.

[352] I did not believe the defender's evidence that she did not know of C's breach of his fiduciary duties. I consider that the preponderance of evidence was that she was aware of same and acted in that knowledge.

[353] In my view, the evidence clearly showed that the defender knew that she was not owed any loans by E Ltd when she signed the accounts for the year ending 31 January 2007. She knew that these, and the subsequent accounts I concluded were signed by her, therefore included false statements and accounting.

[354] Even if she was not aware of same, she clearly benefited from same. The evidence was that, after the misappropriation took place, she received monies on an ongoing basis. She accepted that she did so but maintained that these monies came from her husband and not from E Ltd and that they were for housekeeping. I consider that the evidence shows that they came ultimately from the misappropriated trust monies and were received via the vehicle of E Ltd. In my opinion, the flow of same from the depletion of these monies was clear from the evidence and, in particular, the defender's bank statements produced as documentary productions.

[355] I found her explanation that, her practice was to lift cash out of her savings account then pay it into her current account because she preferred to do this manually rather than by bank transfer so that she had documentary receipts for her doing so, to be unconvincing. Furthermore, it made little, if any, sense as receipts, or at least documentary proof, would have been readily available of an online or bank transfer of these monies from her saving to her current account.

[356] For the avoidance of doubt, I did not accept the defender's evidence that she took no part and did nothing as regards the affairs of E Ltd. I accepted the evidence of C that she alone was responsible for the running of the company during the time that she was sole director and that he took nothing to do with the running of the company for 2 or 3 years.

[357] Furthermore, the defender's own evidence was that she took no part and did nothing as regards the affairs of E Ltd and to that extent, if her version is correct, then she received these monies gratuitously.

[358] For the avoidance of doubt, I considered that the evidence led in respect of the transfer of title to the property at Y, the loans secured over same and the discharge of same were not in fact directly relevant to the issue between the parties around the liability of the defender for her husband's breach of fiduciary duties. That seemed to me to relate more to the issue of the personal loan from HM trust to C (and not to E Ltd) for which the defender was not responsible. Accordingly I attached very limited weight to the evidence on that issue.

[359] The sum I would have found the defender liable for in this regard would have been the sum she actually received ie £102,685.00 this being the cash payments over the period 13 February 2006 to 30 January 2012. The £102,685.00 can be seen from the defender's bank statements which were produced. I would have awarded interest at the rate of 8% per

annum on the cash payments from the date they were received until the date of intimation of the action and also from the date of intimation of the action until payment.

[360] Although the evidence was clear that the defender did not own the Mercedes car spoken of, and that she had the use and so benefit of same, I do not think the evidence was clear as to the period of use and so benefit, or what the basis of calculating, in monetary terms, what would be the use and benefit was as opposed to the value of the vehicle itself. Accordingly, I concluded that I was unable to include any sum in that regard into the assessment of the value of the monetary receipt and benefit the defender received in this regard.

[361] In light of my foregoing findings in fact, and findings in fact and law and my said answers to the live questions in this case, I accordingly (1) Sustain the First and Third pleas-in-law for the pursuer and accordingly find it unnecessary to determine the Second, Fourth, Fifth, Sixth, Seventh and Eighth pleas-in-law for the pursuer; (2) repels all pleas-in-law for the defender other than pleas-in-law numbers 3 and 7 consideration of which is unnecessary; (3) grant decree for payment by the defender to the pursuer of the sum of ONE HUNDRED AND THIRTY EIGHT THOUSAND AND THIRTY SIX POUNDS AND FORTY SEVEN PENCE (£138,036.47) STERLING in respect of crave 1 with interest thereon at the rate of 8% per annum from 13 October 2023 until payment; and TWO HUNDRED AND NINETY EIGHT THOUSAND ONE HUNDRED AND NINETY POUNDS AND SEVENTY FIVE PENCE (£298,190.75) STERLING in respect of crave two with interest thereon at the rate of 8% per annum from 13 October 2023 until payment; and (4) I reserve the question of expenses and assign a hearing on expenses on 22 September 2025 at 9.30am by webex.