SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY
AT AIRDRIE

[2026] SC AIR 106

AIR-CA5-24

JUDGMENT OF SHERIFF ANTHONY McGLENNAN

in the cause

NCS UTILITIES LIMITED

Pursuer

against

STEWART HOLMES

First Defender

and

CONSULTIV UTILITIES LIMITED

Second Defender

and

MAUREEN HOLMES

Third Defender

Pursuer: Garioch
First Defender: Party
Third Defender: McShane, advocate

AIRDRIE, 24 September 2026

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

The pursuer

1. The pursuer is NCS Utilities Limited ("NCS").

2. NCS is a company registered under the Companies Act. It is part of the wider NCS group of companies ("NCS Group").

3. NCS has its principal place of business in Glasgow.

4. NCS Group primarily operates within the office supplies sector and has done for over 30 years.

5. NCS was incorporated in 2015. NCS represented an expansion of the NCS Group business portfolio into the utilities sector.

NCS' business model

6. NCS operates within the utilities sector as an introducer.

7. In carrying out its introductions NCS sources businesses who have an interest in changing their utility supplier.

8. Once a business with such an interest is sourced, NCS arranges for the business to sign a letter authorising a utility broker (sometimes known as a consultant) to investigate tariffs available from suppliers in the sector in question, with a view to finding a more beneficial tariff from an alternative supplier.

9. Should the business introduced to the broker thereafter enter into a contract with the utility supplier recommended by the broker, the broker is paid a fee by the utility supplier.

10. Where that takes place the brokers pay NCS a fee based upon a percentage of the commission which they themselves receive.

11. NCS enters into contractual relationships with brokers.

12. During the currency of Mr Holmes' employment at NCS, the company entered into contractual relationships with a variety of brokers for their introduction services. The brokers whom NCS agreed to refer customers to included Pulse Business Solutions Limited,

Utility Alliance Limited, Utilitywise PLC ("Utilitywise"), and Everflow Limited ("Everflow").

13. The contracts with these brokers provided for NCS to be paid 60 per cent of the commission received by the broker.

14. NCS' operation as an introducer depended heavily on mining cross sales opportunities utilising the existing and extensive business customer base of NCS Group.

15. During the currency of Mr Holmes employment at NCS, the majority of the customers referred to brokers were sourced from the client database held by companies within NCS Group.

The first and third defenders

16. The first and third defenders are Stewart Holmes ("Mr Holmes") and Maureen Holmes ("Mrs Holmes") respectively.

17. Mr and Mrs Holmes are a married couple. Their marriage is longstanding.

18. Mr and Mrs Holmes lived together during the currency of the events material to this action. They reside at the address in Coatbridge stated in the instance of the record.

19. Mr and Mrs Holmes have a joint bank account number XXXXXXX ("the joint bank account"). They held the joint bank account during all times material to this action.

20. The joint bank account was used for the day to day living and household expenses of Mr and Mrs Holmes during all times material to this action.

21. Mrs Holmes had access and examined the joint bank account regularly during all times material to this action.

22. Mrs Holmes' maiden name is Brady.

23. XXXXXXXX.com is the personal email address of Mrs Holmes (hereinafter "her personal email account" or "Mrs Holmes' personal email account").

Mr Holmes' employment with NCS

24. Mr Holmes was employed by NCS from 1 September 2015 until 21 January 2021.

25. Mr Holmes received a salary from NCS. He also received commission payments predicated upon commission earned for the company.

26. Mr Holmes' contract of employment was signed on behalf of NCS by Jim McGrory. Jim McGrory is a director of NCS. He signed the contract on 2 September 2015. Mr Holmes signed the contract of employment on 2 August 2016.

27. In executing his role with NCS, Mr Holmes occupied a senior role. He led the sales team. He was given critical commercial information in the form of provision of unfettered access to the database of all customers of NCS Group. This was information that other employees had only restricted access to.

28. Clause 2 of the terms and conditions of the contract of employment was headed "Duties".

29. Sub-clause 2.1 of the contract set out that: "You shall serve in the capacity of 'Sales Manager - Utilities Division' and shall carry out such duties as the Company from time to time require".

30. Sub-clause 2.3.1 of Mr Holmes' contract of employment with NCS was:

> "(you will) undertake and carry out to the best of your abilities such duties and exercise such powers in relation to the Company's business as may from time to time be assigned or vested in you by the board".

31. Sub-clause 2.3.3 of Mr Holmes' contract of employment with NC was: "(you will) devote the whole of your time, attention and skill to the discharge of your duties under this contract".

32. Sub-clause 2.3.4 of Mr Holmes' contract of employment with NCS was: "(you will) faithfully and diligently perform such duties and at all times promote the best interests of the Company".

33. Clause 14 of Mr Holmes' contract of employment was headed "acknowledgements by the employee".

34. In terms of sub-clause 14.1 Mr Holmes acknowledged that: " ..the Company and each Group Company possess a valuable body of Confidential Business Information."

35. Sub-clause 13.1 of the contract of Mr Holmes' contract of employment with NCS defined "Confidential Business Information" as meaning:

> "..all and any Corporate Information, Marketing Information, Technical Information and other information (howsoever recorded or stored) to which the Company or any Group Company attaches an equivalent level of confidentiality or in respect of which it owes an obligation of confidentiality to any third party: (a) which you shall acquire at any time during your employment by the Company; and (b) which is not readily ascertainable to persons not connected with the Company or any Group Company either at all or without a significant expenditure of labour, skill, or money".

36. In terms of sub-clause 14.2 Mr Holmes acknowledged: "…the Company will give you access to Confidential Business Information in order that you may carry out your duties".

37. In terms of sub-clause 14.3 Mr Holmes acknowledged that: "your duties include, without limitation, a duty of trust and confidence and a duty to act at all times in the best interests of the Company".

38. In terms of sub-clause 14.5 Mr Holmes' acknowledged that:

> "your knowledge of Confidential Business Information directly benefits you by enabling you to perform your sales management duties or to make sales and earn commissions thereon".

39. In terms of sub-clause 14.6 Mr Holmes' acknowledged that:

> "the disclosure of any Confidential Business Information to any customer or actual or potential competitor of the Company or any Group Company would place the Company or relevant Group Company at a serious competitive disadvantage and would cause financial and other damage to the Businesses."

40. Sub-clause 15.4 of Mr Holmes' contract of employment was headed: "Conflict of interest".

41. In terms of sub-clause 15.4.3(a) Mr Holmes agreed that during his period of employment he would:

> "…not without the Company's prior written permission hold any Material Interest in any person's firm or company which (a) is or shall be in competition with any of the Businesses".

42. Mr Holmes resigned from his employment with NCS on 21 January 2021.

43. Mr Holmes' resignation followed immediately on from a meeting with Jim McGrory in which Mr Holmes was challenged upon information NCS had received that he had been trading on his own behalf as an introducer.

SynergyCo Limited

44. SynergyCo Limited (SC504678) was incorporated on 30 April 2015.

45. Mr Holmes was the sole shareholder and director of SynergyCo Limited from 30 April 2015 until the company was dissolved on 25 October 2016.

SynergyCo (Scotland) Limited

46. SynergyCo Scotland Limited (SC549418) was incorporated on 4 November 2016.

47. Mr Holmes was the sole shareholder and director of SynergyCo (Scotland) Limited from 4 November 2016 until the company was dissolved on 18 December 2018.

Usage of SynergyCo

48. Mr Holmes also used the name SynergyCo generically to trade as a sole trader.

49. The email account for SynergyCo Scotland was used by both Mr and Mrs Holmes during the period of time material to this action.

Jim McGrory

50. Jim McGrory has worked with NCS Group since 1998. He was appointed as a director of NCS and continues to hold that directorial role today.

51. During his employment with NCS, Mr Holmes reported to Mr McGrory.

Michael Hayes

52. Michael Hayes is a chartered accountant who is the finance director of both NCS Group and also NCS. He was appointed as finance director of NCS on 27 August 2015.

Brian Aitken

53. Brian Aitken is a salesperson currently employed by Bernard Corrigan Limited.

54. Mr Aitken was previously employed in the sales team of NCS as an account manager between 1 April 2019 and October 2022. Prior to that he had been employed as a salesperson for NCS Office Systems (Scotland) Limited from July 2017 until 1 April 2019.

55. Between 1 April 2019 and 21 January 2021 Brian Aitken reported to Mr Holmes at NCS and worked closely with him.

Liam Barrett and Consultiv

56. Liam Barrett was a partner channel development manager with Utilitywise PLC ("Utilitywise") until that company entered administration in or around February 2019.

57. Mr Barrett began employment with Consultiv Utilities Limited ("Consultiv") in the same capacity shortly thereafter.

58. Utilitywise was a utility brokerage.

59. Consultiv is also a utility brokerage, operating in the market of gas and electricity utilities.

60. Mr Barrett's role at both firms included sourcing introducers who Utilitywise, and later Consultiv, would work in partnership with.

61. As partner channel development manager at Utilitywise, Mr Barrett managed the firm's relationship with NCS. Working in that role Mr Barrett's main point of contact at NCS was Mr Holmes.

62. Upon commencing employment with Consultiv, Mr Barrett was approached by Mr Holmes with a view to Mr Holmes partnering with Consultiv as an introducer.

63. In making his approach Mr Holmes told Mr Barrett that NCS was no longer operating as an introducer in the gas and electricity utility markets, that he was working on his own account in those markets.

64. Mr Holmes contracted on 4 March 2019 with Consultiv to introduce clients to them.

65. Thereafter from 4 March 2019 until the point of his resignation from his employment with NCS, Mr Holmes introduced prospective clients to Consultiv and traded with them.

66. Mr Holmes received payments of commission from Consultiv where those introductions resulted in Consultiv receiving a fee from an energy supplier.

67. The commission earned by Mr Holmes when trading with Consultiv would have been earned by NCS had Mr Holmes: (a) not contracted with Consultive: but (b) had adhered to his obligations to NCS in terms of his contract of employment and placed the business through NCS.

68. Mr Holmes entered into a new contract with Consultiv immediately following his resignation from NCS.

Everflow

69. Mr Holmes contracted on 14 October 2019 with Everflow to introduce clients to their water utilities brokerage.

70. The written contract was not signed. Mr Holmes is designed as SynergyCo Scotland sole trader in the unsigned contract.

71. Thereafter during 2020 and 2021 until the point of his resignation from his employment with NCS, Mr Holmes introduced prospective clients to Everflow and traded with them.

72. The commission earned by Mr Holmes when trading with Everflow would have been earned by NCS had Mr Holmes: (a) not contracted with Everflow: but (b) had adhered to his obligations to NCS in terms of his contract of employment and placed the business through NCS.

Usman Sikander, GET, and Energy Prices Direct

GET

73. Between 7 January 2016 and October 2020 Mr Sikander was a director of GET Solutions Scotland Limited ("GET").

74. GET operated as a utility broker relative to energy supplies. It was dissolved in October 2020.

75. GET Solutions was associated with GET Solutions UK Limited ("GET Solutions UK").

76. Mr Holmes approached Mr Sikander in 2016 and requested that he be able to partner with GET as an introducer.

77. In making this approach Mr Holmes advised Mr Sikander that he had a bank of clients who he would be able to introduce to GET.

78. Mr Holmes through SynergyCo Limited thereafter contracted on 6 September 2016 with GET to act as an introducer of their services and then traded with GET as an introducer.

79. Mr Holmes thereafter traded with GET through SynergyCo Limited and SynergyCo (Scotland) Limited, between 2016 and 2018 inclusive.

80. GET was dissolved in October 2020.

81. The commissions earned by Mr Holmes when trading with GET through SynergyCo Limited and SynergyCo (Scotland) Limited would have been earned by NCS had Mr Holmes: (a) not contracted with GET (b) had adhered to his obligations in terms of his contract of employment and placed the business through NCS.

Energy Prices Direct

82. Usman Sikander is a director of Energy Prices Direct Limited ("Energy Prices Direct") and has been since 24 August 2009. Energy Prices Direct operate as a utility broker relative to energy supplies.

83. In 2017 Mr Sikander was approached by Mr Holmes with Energy Prices Direct. Mr Holmes requested he partner with Energy Prices Direct as an introducer.

84. An agreement was reached for Mr Holmes to trade with Energy Prices Direct as an introducer and he thereafter traded with them as an introducer between 2017 and 2020 inclusive.

85. The commissions earned by Mr Holmes when trading with Energy Prices Direct would have been earned by NCS had Mr Holmes: (a) not contracted with Energy Prices Direct (b) had adhered to his obligations in terms of his contract of employment and placed the business through NCS.

Brightwater

86. Brightwater Services Limited ("Brightwater") are a utility broker in the water sector.

87. Mr Holmes contracted on 21 March 2019 with Brightwater to act as an introducer of their services and then traded with Brightwater as an introducer during 2020 and 2021.

88. The commissions earned by Mr Holmes when trading with Brightwater would have been earned by NCS had Mr Holmes: (a) not contracted with Brightwater (b) had adhered to his obligations in terms of his contract of employment and placed the business through NCS.

89. Jan Elizabeth Mitford-Barberton is employed by Brightwater as their head of sales. She has been in their employ since June 2020.

Mr Holmes' resignation, the NCS investigation and the destruction of evidence

90. Mr Holmes resigned from NCS. He did so in the office of NCS.

91. His resignation took place at a meeting with Jim McGrory and followed upon a request by Mr McGrory that he produce correspondence relating to an NCS customer who had complained that Mr Holmes sought to trade on his own behalf with them as an introducer.

92. Mr Holmes did not produce that correspondence but instead emailed a letter of resignation from his work computer. Mr Holmes then immediately left their office.

93. Mr Holmes left his work computer on when he left the office. The portal which Mr Holmes used to trade with Everflow was left open.

94. NCS obtained information concerning Mr Holmes' illicit trading with Everflow from the portal.

95. An investigation was then initiated by NCS into the extent of Mr Holmes' illicit trading.

96. Michael Hayes was tasked with conducting the investigation.

97. Interrogation of Mr Holmes' work computer provided information concerning Mr Holmes' trading activities, including spreadsheets which accounted commissions earned by Mr Holmes from brokers he had traded with.

98. The investigation was however hampered by actions taken by Mr Holmes in deleting emails and documents which related to his illicit trading activities.

99. Mr Hayes obtained other information pertinent to his investigation from Brian Aitken.

100. Mr Hayes was also provided with information pertinent to his investigation by utility brokers with whom Mr Holmes had traded on his own account.

101. Further information pertinent to the investigation was provided to Mr Hayes by way of court orders made during this action.

102. The information provided to Mr Hayes included bank statements from the joint bank account.

103. From the information provided to him, Mr Hayes made calculations of the commissions that would have been earned by NCS had Mr Holmes conducted the illicit trades with brokers on behalf of NCS, instead of having done so on his own behalf.

The breaches of contract by Mr Holmes

104. On numerous occasions during the currency of his employment, during the periods identified in the findings in fact above, by way of his reaching of agreements and trading with Consultiv, Everflow, GET, Energy Prices Direct, and Brightwater, Mr Holmes breached sub-clauses 2.3.1, 2.3.3, 2.3.4, 14.3 and 15.4.3(a) of his contract of employment.

The actions of Mrs Holmes

Overarching findings

105. At all times in which Mr Holmes was employed by NCS, Mrs Holmes was aware that he was so employed.

106. During the period of Mr Holmes employment with NCS, Mrs Holmes became aware that her husband was breaching his contract of employment by trading on his own account as an introducer with utility brokers.

107. During the period of Mr Holmes employment with NCS Mrs Holmes assisted Mr Holmes in his trading activities with Consultiv, Everflow and Brightwater.

108. Mrs Holmes was aware that in providing this assistance to Mr Holmes she was assisting Mr Holmes in breaching his contract of employment.

109. Mrs Holmes knew that what she was doing in assisting Mr Holmes trade with brokers in contravention of his contract of employment was dishonest.

110. The assistance provided constituted dishonest assistance.

111. Mrs Holmes assisted her husband in trading with Consultiv following on from his resignation from NCS.

Commission payments

112. Commission payments obtained by Mr Holmes from his illicit trading with Consultiv, Everflow and Brightwater were paid by those companies into the joint bank account.

113. Between July 2018 and January 2021, 58 such payments of commission were paid into bank account.

114. Mrs Holmes gained economic advantage from assisting Mr Holmes trade with those brokers by way of those commission payments received.

General acts of assistance by Mrs Holmes

115. On 11 March 2019 Mrs Holmes sent an email from her personal email account to Mr Holmes which contained the following promotional narrative:

> "Synergy Co are an established Energy Broker who assist clients in procuring electric or natural gas from energy wholesalers/suppliers.

> Electricity and natural gas process can change daily and can (sic) therefore purchasing can be extremely challenging for most businesses who are without energy managers.
>
> Synergy Co will provide you with a valuable consulting role that will provide a transparent view on contract offers".

116. In the email signature block at the conclusion of the email's terms is as follows:

> "Maureen Holmes
>
> Business Support
>
> Synergy Co"

Mrs Holmes' assistance in relation to Mr Holmes' trading with Consultiv

117. On 21 March 2019 at 9.15am Mr Holmes sent an email from his personal email account to Mrs Holmes email account. The email copied in Liam Barrett via his Consultiv email address. This email was sent 17 days after Mr Holmes had entered into a contract with Consultiv. It read:

> "Hi Mo
>
> Here is the LOA, Liam can talk you through what needs done
>
> Kind regards
>
> Stewart Holmes"

118. At 9.17am on 21 March 2019 Liam Barrett replied to the email. He copied in Mrs Holmes and also a colleague at Consultiv, Daniel Bertram. The email read:

> "Thanks Stew,
>
> Maureen, Happy to chat through this and explain the processes etc.
>
> My numbers are below….
>
> I've copied Dan into this email too as he is the account manager for the relationship.

Many thanks,

Liam".

119. On 24 May 2019 at 0928 hours Liam Barrett sent an email to the personal email account of Mrs Holmes, copying in the personal email account of Stewart Holmes. It read as follows:

"Good morning Maureen,

Hope this email finds you well.

Stewart has asked me to drop you a message to introduce myself and outline the way commissions and invoices work on our side.

At the beginning of each month normally the 7th working day of each month I will send you an excel spreadsheet showing all the meters sold, supplier sold to, term of contract sold, uplift in the deal and sales value. It is then broken down monthly overt the next 6 years to show exactly how much and when commission is due to be paid. Each month scroll along to the current month and any in green is what needs invoicing for that month. Anything in purple is what has been paid and black is what is expected in the future. A lot of information I know but what I will do next month is send you a copy of the spreadsheet so you can see what this looks like, there wont be any commission due next month I don't think but it will give you an idea of how it all works.

Below is my contact details if you ever have any queries or questions. Also copied into this email is Daniel, he is account manager for the partnership and can also discuss anything if I am not available.

Many thanks, speak soon,

Liam".

120. On 26 July 2019 at 0935 hours Mrs Holmes sent an email from her personal email account to Liam Barrett which was headed "July Invoice". The text of the email read:

"Amended as per telephone conversation

Maureen Holmes

Business Support".

121. The email of 26 July 2019 sent by Mrs Holmes related to amendment of an invoice previously forwarded to Consultiv by Mr Holmes on 19 July 2019.

122. On 10 February 2020 at 1359 hours Mrs Holmes sent an email from her personal email account to Liam Barrett which was headed "Monthly Invoice" and which attached an invoice from SynergyCo billing Consultiv the sum of £6,071.57 for the month of January 2020. The text of the email read:

> "Hi Liam,
>
> Here you go
>
> Best regards
>
> Maureen Holmes
>
> Business Support".

123. During the period in which Mr Holmes traded with Consultiv whilst still employed by NCS, Mrs Holmes was copied into emails sent by Mr Holmes to personnel at Consultiv. Such emails usually related to commission reports as described in Liam Barrett's email of 24 May 2019, or the sending of invoices by Mr Holmes to Consultiv.

124. Mrs Holmes assisted her husband trade with Consultiv Utilities Limited during the period in which he traded with them. Her role was administrative in nature.

125. Mrs Holmes assisted her husband in agreeing a new contract with Consultiv immediately following on from his resignation from NCS.

126. Mrs Holmes was named on that new contract.

Mrs Holmes' assistance in relation to Mr Holmes' trading with Everflow

127. The signatory for SynergyCo Scotland in the contract with Everflow of 14 October 2019 is identified as "Maureen Brady for and on behalf of Synergy co Scotland".

128. It was intended that Mrs Holmes sign the contract.

129. On 9 June 2020 at 1135 hours Mr Holmes sent an email from his person email account to Gordon Jack of Everflow headed "Synergy Co Everflow Accounts". The text of the email read:

> "Hi Gordon
>
> Here are the accounts that needs (sic) to be transferred to Synergy Co please
>
> If you need anything else just let me know
>
> Kind regards
>
> Stewart".

130. Mrs Holmes was copied into her husband's email of 9 June 2020 to Everflow, at her personal email account.

131. During the period in which Mr Holmes traded with Everflow whilst still employed by NCS, Mrs Holmes sent at least six emails to Everflow from the Synergy email account. These emails would be signed off using the name "Mo". The emails related to matters related to invoicing and commission.

132. Mrs Holmes assisted her husband trade with Everflow during the period in which he traded with them. Her role was administrative in nature.

Mrs Holmes' assistance in relation to Mr Holmes trading with Brightwater

133. On 21 March 2019 at 1520 hours Garry Temple an employee of Brightwater sent an email to Mrs Holmes' personal email account headed "Brightwater Introducers Agreement".

It contained the contract between Mr Holmes and Brightwater and sought that Mrs Holmes arranged for it to be signed. The email read:

> "Hi Maureen
>
> Further to my telephone call with Stewart this afternoon, he asked me to send the Introducers Agreement to your email address.
>
> Can you please arrange the signing with a witness and scan all the pages back to myself? When I get the agreement back I can set you up on our pricing portal.
>
> Kind Regards
>
> Gary Temple
>
> Partner Relationship Manager".

134. At 1533 hours that same day Mrs Holmes sent an email from her personal email account replying to Mr Temple's email. Therein she agreed for it to be signed. Her email read:

> "Good afternoon Garry,
>
> Thank you for your email
>
> I will have this signed with witness and scan all pages back to you by close of play tomorrow
>
> Best Regards
>
> Maureen Holmes
>
> Business Development Support".

135. On 25 March 2019 Mrs Holmes forwarded the signed agreement to Garry Temple as an attachment. The email was sent from her personal account, copying in Mr Holmes and designating herself in the signatory block as "Maureen Holmes, Business Support".

136. On 27 March 2019 Garry Temple emailed Mrs Holmes acknowledging receipt of the signed agreement and promising to have the agreement countersigned and returned to her.

His email also contained advice on how to operate the portal used by Brightwater in their dealings with relationships and extended the offer of a phone call if further explanation was required.

137. Later on 27 March 2019 Mrs Holmes emailed Garry Temple at 1648 hours from her personal email account confirming that she had been able to successfully operate the portal. When doing so she designed herself in the signatory block as "Maureen Holmes, Business Support".

138. Mrs Holmes assisted Mr Holmes in having his contract with Brightwater signed and forwarded to Garry Temple.

139. Thereafter whilst Mr Holmes was trading with Brightwater, emails were exchanged between Garry Temple and Mrs Holmes relating to invoicing issues. This included exchanges taking place upon 3 April, 9 April, 11 April, 30 April and 21 May 2019. In each of the exchanges on these dates the email address for Mrs Holmes was that of her personal email account. In each email sent by Mrs Holmes on these dates she designed herself in the signatory block as "Maureen Holmes, Business Support".

140. Mrs Holmes assisted the first defender trade with Brightwater Services Limited throughout the period the first defender traded with them, the third defender's role being administrative or operational in nature.

141. Mrs Holmes assisted her husband trade with Brightwater throughout the period in which he traded with them. Her role was administrative in nature.

Materiality

142. The assistance which Mrs Holmes provided to Mr Holmes in his trading with Consultiv, Everflow and Brightwater was material assistance.

Commission

143. When trading with Consultiv in breach of his contract Mr Holmes agreed a commission rate of 70 per cent of the fee Consultiv earned from suppliers.

144. As a result of trading with Consultiv in breach of his contract with NCS as previously set out in these findings in fact, Mr Holmes earned commission totalling £211,242.40.

145. As a result of trading with Everflow in breach of his contract with NCS as previously set out in these findings in fact, Mr Holmes earned commission totalling £96,542.62.

146. As a result of trading with GET in breach of his contract with NCS earned commission totalling £59,335.98.

147. As a result of trading with Energy Prices Direct in breach of his contract with NCS as previously set out in these findings in fact, Mr Holmes earned commission totalling £17,733.00

148. As a result of trading with Brightwater in breach of his contract with NCS as previously set out in these findings in fact, Mr Holmes earned commission totalling £1,107.36.

Consultiv payment

149. In settlement of crave one of the action Consultiv made payment to NCS of £160,000.00.

Makes the following findings in fact and law:

1. The contract of employment agreed between Mr Holmes and NCS prohibited him, inter alia, from agreeing to trade and trading with utility brokers on his own behalf as an introducer.

2. During the period in which he was employed by NCS, Mr Holmes owed fiduciary duties to NCS not to agree to trade, nor engage in trading on his own behalf as an introducer with utility brokers.

3. By agreeing to trade and then trading with Consultiv, Everflow, GET, Energy Prices Direct and Brightwater during the currency of his contract of employment Mr Holmes breached sub-clauses 2.3.1, 2.3.3, 2.3.4, 14.3, and 15.4.3(a) of the aforesaid contract of employment.

4. These breaches of Mr Holmes contract of employment were material breaches.

5. By agreeing to trade and then trading with Consultiv, Everflow, Get, Energy Prices Direct and Brightwater during the currency of his contract of employment Mr Holmes breached his aforesaid fiduciary duties to NCS.

6. Mrs Holmes was an accessory to Mr Holmes in his trading with Consultiv, Everflow, and Brightwater by way of provision of dishonest assistance.

7. NCS suffered loss as a consequence of the above-mentioned trading by Mr Holmes with Consultiv, Everflow, GET, Energy Prices Direct and Brightwater.

8. The loss suffered by NCS amounts to the commission which Mr Holmes earned from the brokerage firms of Consultiv, Everflow, GET, Energy Prices Direct, and Brightwater which would have been earned by NCS had Mr Holmes not breached his contract of employment and fiduciary duty.

9. NCS are entitled to restitution from Mr Holmes for the loss suffered through Mr Holmes trading with Consultiv, Everflow, GET, Energy Prices Direct, and Brightwater.

10. NCS are entitled to payment of damages from Mrs Holmes in respect of the dishonest assistance provided to Mr Holmes in respect of his trading with Consultiv, Everflow and Brightwater.

11. Restitution of the loss suffered through Mr Holmes' trading with Consultiv requires that the sum of £160,00.00 paid by Consultiv in settlement of the action be deducted from any sum awarded in terms of the NCS' first crave.

12. Mr Holmes also made secret profits by way of his trading with Consultiv whilst employed by NCS.

13. Mr Holmes was not entitled to those secret profits.

14. NCS are entitled to payment of the secret profits obtained by Mr Holmes by way of his trading with Consultiv.

15. NCS are entitled to restitution of the following losses from Mr Holmes:

a. £21,064.91 in respect of Mr Holmes' trading with Consultiv.

b. £96,542.62 in respect of Mr Holmes' trading with Everflow.

c. £59,335.98 in respect of Mr Holmes' trading with GET.

d. £17,733.00 in respect of Mr Holmes' trading with Energy Prices Direct.

e. £1,107.36 in respect of Mr Holmes' trading with Brightwater.

16. NCS are entitled to payment amounting to £30,177.49 in respect of the secret profits obtained by Mr Holmes.

Makes the following findings in law:

1. NCS having suffered loss as a consequence of Mr Holmes' trading with Consultiv, decree for payment of £21,064.91 in terms of crave one of the writ should be granted against Mr Holmes and in favour of NCS.

2. Mr Holmes having obtained secret profits by way of his trading with Consultiv, decree for payment as craved at crave two of the writ should be granted against Mr Holmes and in favour of NCS.

3. NCS having suffered loss as a consequence of Mr Holmes' trading with Everflow, decree for payment as craved in terms of crave three of the writ should be granted against Mr Holmes and in favour of NCS

4. Mr Holmes having suffered loss as a consequence of Mr Holmes' trading with GET, decree for payment of £59,335.98 in terms of crave four of the writ should be granted against Mr Holmes and in favour of NCS.

5. NCS having suffered loss as a consequence of Mr Holmes' trading with Energy Prices Direct, decree for payment as craved in terms of crave five of the writ should be granted against Mr Holmes and in favour of NCS.

6. NCS having suffered loss as a consequence of Mr Holmes' trading with Brightwater, decree for payment of £1,107.36 in terms of crave six of the writ should be granted against Mr Holmes and in favour of NCS.

ACCORDINGLY:

1. Sustains the pursuer's first plea-in-law.

2. Sustains the pursuer's second plea-in-law.

3. Sustains the pursuer's third plea-in-law.

4. Sustains the pursuer's fourth plea-in-law.

5. Sustains the pursuer's seventh plea-in-law to the extent that the third defender was an accessory to the first defender's breach of contract.

6. Continues consideration of the pursuer's eighth plea-in-law.

7. Repels each of the first defender's pleas-in-law.

8. Repels the third defender's third and fourth pleas-in-law.

9. Continues consideration of the third defender's first and second pleas-in-law.

THEREFORE:

1. Grants decree against the first defender quoad the pursuer's first crave for payment by the first defender to the pursuer of £21,064.91, continues consideration of the crave quoad the third defender for further submissions to be received on the quantum of damages for which the third defender is liable to the pursuer;

2. Grants decree as craved against the first defender quoad the pursuer's second crave;

3. Grants decree against the first defender quoad the pursuer's third crave as craved, continues consideration of the crave quoad the third defender for further submissions to be received on the quantum of damages for which the third defender is liable to the pursuer;

4. Grants decree against the first defender quoad the pursuer's fourth crave, for payment by the first defender to the pursuer of £59,335.98;

5. Grants decree as craved against the first defender quoad the pursuer's fifth crave;

6. Grants decree against the first defender quoad the pursuer's sixth crave for payment by the first defender to the pursuer of £1,107.36, continues consideration of the crave quoad the third defender for further submissions to be received on the quantum of damages for which the third defender is liable to the pursuer;

7. Fixes a hearing for further submissions to be received on the quantum of damages to ordered to be made by the third defender to the pursuer quoad the pursuer's first, third and sixth craves, assigns the hearing to call on Tuesday 17 November 2026 at 10.00am by way of Webex conference call;

8. Directs that written submissions and authorities be lodged and exchanged by parties by no later than Tuesday 3 November 2026 at 12 midday; and

9. Directs that parties restrict their oral submissions to one half hour each;

10. Continues consideration of the expenses of the action meantime.

NOTE

Introduction

[1] I have in this note continued the usage of the defined abbreviated designations occasionally used in my findings and orders.

[2] This action has its origins in the NCS' assertion that a former senior sales manager, Mr Holmes, breached both his contract of employment with them and also fiduciary duties he owed to them. That he also obtained secret profits whilst in their employ.

[3] All of this happened, NCS say, by way of Mr Holmes carrying out work for himself as introducer to utility brokerages, that being a field in which he was employed to sell their services. NCS maintain that when breaching his contract/fiduciary duty in this way, Mr Holmes obtained commission earnings from a number of brokerages, namely: Consultiv, Everflow, GET, Energy Prices Direct and Brightwater. These commission earnings, it is asserted, were due to NCS.

[4] An action was thus raised against Mr Holmes. However, the action was also raised against one of the aforementioned brokerages, Consultiv. They were convened as the second defender. Finally Mrs Holmes was convened as the third defender.

[5] The case against Consultiv was based on the delict of having induced Mr Holmes' breach of his contract of employment by way of his dealings with them. However, during the action Consultiv reached extra-judicial settlement with NCS. Payment was made by Consultiv to NCS in the sum of £160,000.00.

[6] The case against Mrs Holmes proceeded through proof. It was also based upon the premise that she induced her husband's breach of contract with NCS, esto that she had been an accessory to the same by way of provision of dishonest assistance. The inducement/dishonest assistance by Mrs Holmes was averred to have occurred more widely, involving the breaches of contract that took place by way of Mr Holmes' trading with Consultiv, Everflow and Brightwater.

[7] For ease of understanding of later passages of the note I produce below a table outlining the craves that were before me at proof, the defenders convened in each instance, and the pleas-in-law pled.

Crave number	**Sum craved for payment**	**Defenders**	**Brokers**	**Plea in law**
1	£181,064.91	Mr Holmes Consultiv Mrs Holmes	Consultiv	(1) Mr Holmes materially breached his contract with the pursuer *et separatim* his fiduciary duties as their agent. NCS sustained loss

				and damage as a consequence thereof. (2) The sum craved being a reasonable estimate of the loss and damage sustained by the pursuer as a consequence of Mr Holmes material breach of contract *et separatim* breaches of his fiduciary duties decree should be granted (5) Consultiv having induced Mr Holmes breach of contract with NCS is liable to make reparation. (6) The sum craved being a reasonable estimate of the loss and damage sustained by NCS as a consequence of the Consultiv's conduct, decree should be granted against NCS.

				(7) Mrs Holmes having induced et separatim been an accessory to the Mr Holmes breach of contract is liable to make reparation therefor. (8) The sum craved being a reasonable estimate of the loss and damage sustained by NCS as a consequence of Mrs Holmes' conduct, decree should be granted quoad the third defender as craved.
2	£30,177.49	Mr Holmes	Consultiv	(2) Mr Holmes having earned commission secretly and in breach of his contract to NCS and not being entitled to profit therefrom, decree should be granted as second craved.
3	£96,542.62	Mr Holmes Mrs Holmes	Everflow	(1) Mr Holmes materially breached his contract with the pursuer *et separatim* his fiduciary duties as their

				agent. NCS sustained loss and damage as a consequence thereof. (3) The sum craved being a reasonable estimate of the loss and damage sustained by the pursuer as a consequence of Mr Holmes material breach of contract *et separatim* breaches of his fiduciary duties decree should be granted (7) Mrs Holmes having induced et separatim been an accessory to the Mr Holmes breach of contract is liable to make reparation therefor. (8) The sum craved being a reasonable estimate of the loss and damage sustained by NCS as a consequence of Mrs Holmes' conduct, decree

				should be granted quoad the third defender as craved
4	£101,929.47	Mr Holmes	Get	(1) Mr Holmes materially breached his contract with the pursuer *et separatim* his fiduciary duties as their agent. NCS sustained loss and damage as a consequence thereof (4) The sum fourth craved being a reasonable estimate of the loss and damage sustained by NCS as a consequence of Mr Holmes material breach of contract anent his dealings with GET Solutions Scotland Limited, et separatim Mr Homes having earned commission secretly from this relationship and not being entitled to profit therefrom,

				NCS s entitled to decree as fourth craved
5	£17,733.00	Mr Holmes	Energy Prices Direct	(1) Mr Holmes materially breached his contract with the pursuer et separatim his fiduciary duties as their agent. NCS sustained loss and damage as a consequence thereof. (2) The sum craved being a reasonable estimate of the loss and damage sustained by the pursuer as a consequence of Mr Holmes material breach of contract et separatim breaches of his fiduciary duties decree should be granted
6	£1,200.00	Mr Holmes Mrs Holmes	Brightwater	(1) Mr Holmes materially breached his contract with the pursuer et separatim his fiduciary duties as their agent. NCS sustained loss

				and damage as a consequence thereof. (2) The sum craved being a reasonable estimate of the loss and damage sustained by the pursuer as a consequence of Mr Holmes material breach of contract et separatim breaches of his fiduciary duties decree should be granted. (7) Mrs Holmes having induced et separatim been an accessory to the Mr Holmes breach of contract is liable to make reparation therefor. (8) The sum craved being a reasonable estimate of the loss and damage sustained by NCS as a consequence of Mrs Holmes' conduct, decree should be granted quoad the third defender as craved.

Background

[8] I was readily able to make findings upon the background to the action given what was admitted and the evidence received. The latter will be set out in my explanation of my findings concerning Mr Holmes' breaches of contract.

[9] NCS is a one of the NCS group of companies. That wider group originated as suppliers of office equipment. For 30 years and more they have operated in that field. During that time they have also expanded into other markets. In doing all of this a considerable client base was built up across the group. Their target clients were, it seemed, always businesses and not individuals. In or around 2015 their diversification involved entering the utilities supply sector.

[10] In the utilities sector NCS' offering was and is as an introducer. They identify an end user, that is a customer of a utility services supplier, who is considering changing supplier. Having done so they introduce the customer to a broker. To make this arrangement workable NCS reach agreement to work with identified brokers. The customer signs a letter authorising the NCS identified broker to seek to obtain the best available tariff in the marketplace for the utility in question. Where a more favourable tariff is found, and the customer then contracts with the supplier offering that tariff, a flow of commission payments follows. The broker receives a commission payment from the supplier. This often calculated on the basis of a percentage of the tariff. In turn the broker pays NCS as introducer of the customer, a commission. This commission is based on a percentage of the broker's own commission.

[11] At the material time for this action NCS were focussed on the corporate market. This was so because they relied heavily upon cross selling to the existing client base of the wider

group of NCS companies. As said, that was composed of business clients. It was also easier to obtain attention and interest in their offering from clients with whom the wider group had an ongoing relationship. However, at the inception of NCS there was a lack sector experience. An outside hire was required. Stewart Homes had such sector experience. He was recruited as the sales manager for NCS. He effectively headed their team in this new venture.

Mr Holmes' contract of employment with NCS

[12] Mr Holmes' contract of employment was signed on behalf of NCS on 2 September 2015. Mr Holmes signed on 2 August 2016. The contract was a central feature of the action. It was not challenged that Mr Holmes had agreed to its terms.

[13] Sub-clause 2.1 of the contract set out that Mr Holmes would serve in the capacity of "Sales Manager - Utilities Division". In executing his role with NCS, he was later joined by a Brian Aitken who reported into him. In terms of sub-clause 2.3.1 Mr Holmes undertook to carry out his duties to the best of his abilities. As per sub-clause 2.3.3 he agreed to devote the whole of his time, attention and skill to the discharge of his duties in terms of the contract. Further, as per sub-clause 2.3.4 he agreed to faithfully and diligently perform his duties under the contract and at all times promote the best interest of NCS.

[14] Mr Holmes acknowledged at sub-clause 14.3 that his duties included, without limitation, a duty of trust and confidence and a duty to act at all times in the best interest of NCS. In terms of sub-clause 15.4.3 (a) Mr Holmes agreed that during his period of employment he would not, unless provided with NCS' prior written permission, hold any material interest in any person's firm or company which was or was to be in competition with any of the NCS Group businesses.

[15] There was unchallenged evidence that Mr Holmes, and Brian Aitken were given unfettered access to the database of all customers of NCS Group. This was information that all other employees had only restricted access to.

[16] Mr Holmes left his employment with NCS on 21 January 2021. That was not in dispute. He maintained that he was dismissed. I rejected that position. I favoured the evidence that he had resigned immediately upon being confronted by Jim McGrory, a director with NCS, with the allegation that he had been conducting work on his own behalf.

Mr Holmes' breaches of contract

Overarching findings

[17] Following consideration of an unchallenged notice to admit and the written and parole evidence led at proof, I found that Mr Holmes had repeatedly breached his contract with NCS. That he had done so by agreeing to trade as an introducer on his own behalf and thereafter doing so. I found that he did so as set out in the findings in fact above.

Admissions

[18] There were some limited admissions made in Mr Holmes' pleadings. More significantly a notice to admit had been served upon him which had not been challenged. Later attempts by him to be allowed to object to the same although late had been refused. As it goes however, the evidence which would have been led in that regard had the notice been challenged was set out before me. NCS did so in order to seek to establish the case against Mrs Holmes.

Evidence

[19] NCS led their directors Jim McGrory and Michael Hayes. They also led Brian Aitken. Aside from what might be described as the NCS witnesses, evidence was led from what might be described as brokerage witnesses; Usman Sikander and Jan Barberton. Each of these witnesses adopted affidavits previously sworn and each gave parole evidence.

James McGrory

[20] Mr McGrory gave evidence as to the company's operations and Mr Holmes' role at the firm. In doing so Mr McGrory explained that Mr Holmes was given unfettered access to details of all customers on the NCS Group's database. Provision of such access was unique. It was designed to assist Mr Holmes build NCS' business.

[21] He went on to explain that Mr Holmes had resigned on 21 January 2021. The antecedent event had been that a client of the NCS Group, Regent Garden Medical Centre in Glasgow, had made a complaint to NCS. The practice did not want Mr Holmes to be further involved with their business. Mr Holmes had told one of their practice managers that he was no longer employed by NCS and that he had set up business on his own. Prompted, Mr McGrory checked NCS' IT system and found out that there was no longer a live contract with the medical centre. He requested Mr Holmes attend the office to meet with him that day. When confronted with the allegation that it appeared he had been trading on his own account, Mr Holmes became agitated and defensive. Asked by Mr McGrory to show historical correspondence with the medical practice, Mr Holmes instead returned to his desk and emailed a resignation letter. He then immediately left the office, without shutting his computer down. The portal which was used for trading with the water utility broker

Everflow was left open on the computer. At this point an investigation was commenced by NCS into Mr Holmes' trading activities.

[22] Mr McGrory was only lightly cross-examined, however at submission Mr Holmes' asked that I treat this evidence with considerable caution. As a director Mr McGrory had a direct financial and personal interest in the outcome of these proceedings. He was neither independent nor impartial accordingly.

[23] More particularly the following critiques were made:

- The letter of complaint from the medical practice had not been produced. The evidence about the complaint was a fabrication.
- Mr McGrory's affidavit referenced a meeting between on 9 February 2019 in a way which was factually incorrect and misleading.
- When asked directly why he wished to offer Mr Holmes employment, Mr McGrory stated "because I know you." This was deliberate understatement. The true reason was Mr Holmes' specialist skill set and knowledge, developed through SynergyCo, which NCS sought to utilise for their own commercial benefit.
- The complete omission of reference to SynergyCo was a deliberate tactic, consistent with a pattern of withholding evidence that did not support the position of NCS.

[24] In my finding these critiques were often centred on issues which were not material, in some instances it was difficult to understand any bearing they might have on the issues in dispute. Alternatively, where potentially relevant critiques were made, they amounted to sweeping assertions unsupported by the evidence. Separately, I do not consider that evidence should simply be discounted because it emanates from a personality who might

benefit from his or her evidence being accepted. On that basis any person giving evidence on their own behalf would have their evidence set aside. In Mr McGrory's evidence, and the evidence of the other directors of NCS, I did not detect anything which illustrated any signs of a witness misleading the court or otherwise tailoring evidence to bolster their case. I found Mr McGrory's evidence to be credible and reliable.

Michael Hayes

[25] Michael Hayes gave evidence relating to the commercial relationship and feeing arrangements between NCS, the brokers they worked with, and the utility suppliers. He explained that most of the work that came NCS' way was garnered from existing clients of NCS Group. He addressed, in detail, with reference to numerous productions, the various breaches of contract by Mr Holmes which he had discovered during his investigation of the same. He described the analysis he had conducted of information he had received, and his calculation of the commission Mr Holmes had earned in his illicit trading. The information upon which this was based included emails and invoicing discovered on Mr Holmes' computer. Information had also been passed to him from Consultiv and other brokers. The investigation was however hampered when it became apparent that Mr Holmes had engaged in deletion of material.

[26] Mr Holmes maintained that this evidence should be afforded limited weight. Firstly, as with Mr McGrory, Mr Hayes was not an independent or impartial witness. Secondly Mr Hayes was said to have hacked into Mr Holmes' personal email account. The evidence had been unlawfully obtained. Mr Hayes had also produced two pages from Mr Holmes' Facebook account. This betrayed that his investigation was personal and vindicative. Documentary evidence had also been omitted from presentation because it would have been

favourable to Mr Holmes. Additionally, Mr Hayes admitted making salary deductions to settle SynergyCo invoices. This was fatal to NCS position that activities through that firm were secret and unauthorised. Further he had produced a document confirming that SynergyCo had a pre-existing agreement with GET, one entered into months prior to his joining NCS. This contradicted NCS' narrative and confirmed the pre-existing nature of the commercial relationships NCS sought to characterise as breaches of contract and cast serious doubt on the credibility on NCS' case as a whole.

[27] Mr Hayes was cross-examined more substantially by Mr Holmes, but I did not consider it was impactful. I was quite certain that nothing in Mr Hayes actions indicated that he was behaving vindictively. Not unnaturally he had been asked as a director to carry out investigation into potential bad actings with potential revenue loss implications. I could see nothing vindicative in his approach, it seemed careful and followed a trail that began with the information found on the open Everflow portal. Equally there was nothing which I took from his evidence that suggested that he, or anyone else at NCS, had permitted Mr Holmes to continue to trade on his own behalf through either of the SynergyCo entities. That was a position unsupported by any witness evidence beyond that provided by Mr and Mrs Holmes. It ran contrary to what would be normal commercial practice and would have been very much at odds with NCS' determination to break into the utilities market. The allegation of hacking was entirely unsubstantiated. Conversely, I accepted Mr Hayes' account that in his investigations he had encountered evidence of Mr Holmes having destroyed digital documentary evidence. I found the evidence of Mr Hayes to be cogent, credible and reliable.

Brian Aitken

[28] Brian Aitken gave evidence upon the operations of the sales team at NCS, but also of his involvement in the initial investigations into Mr Holmes' breaches of contract. His evidence was very lightly addressed in cross-examination. Notwithstanding that, Mr Holmes nevertheless submitted that Mr Aitken's evidence should also be treated with caution. Firstly, his prior involvement in building the case against him entailed that the evidence lacked independence. His position that he had a close and longstanding working relationship with Mr Holmes was a significant exaggeration which adversely affected the weight that should be attached to the evidence overall. Mr Aitken had also given evidence that NCS had never had any customer directly receive an invoice for any utility bill. This admission was of the "utmost importance" it fundamentally undermined NCS' claims regarding customer relationships, customer data, and any alleged breach of contract founded upon.

[29] I found no merit in these submissions. It was frankly difficult to understand the relevance of some of what was asserted. Elsewhere there were sweeping allegations unsupported by the evidence, or points which had had importance attached to them when in fact they were immaterial to proper consideration of the evidence. I found the evidence of Mr Aitken to be credible and reliable also.

Usman Sikander

[30] Mr Sikander is a director of Energy Prices Direct and previously had been a director of GET. His evidence supported NCS' position concerning Mr Holmes' trading with his brokerages on his own account. He was however somewhat sceptical of Mr Hayes'

calculation of Mr Holmes' commissions obtained from GET - although he ultimately found the figure to be feasible.

[31] Mr Holmes pointed to Mr Sikander's evidence that he first met Mr Holmes in 2016. This he asserted established that the relationship between SynergyCo Limited and GET pre-dated his employment with NCS. Mr Sikander confirmed that commission payments were made not by GET but by an associated company GET Solutions UK, a separate legal entity. They were made not to Mr Holmes but to SynergyCo Limited. This he maintained further complicated the pursuer's financial claims. Further, a contract document relied upon was unsigned. This too undermined the claim made against him.

[32] I found Mr Sikander's evidence to be supportive of NCS case concerning Mr Holmes' illicit trading with GET and Energy Prices Direct. His evidence was taken with reference to numerous documentary productions which lent support to it. The points raised in submission by Mr Holmes were not well founded in fact or law and did not impact on my assessment of evidence.

Jan Barberton

[33] Jan Barberton of Brightwater also gave evidence which supported the proposition that Mr Holmes had traded with that firm in breach of his contract with NCS. I rejected the objection to the admissibility of this evidence which had at one point been stated by Mrs Holmes.

[34] Mr Holmes meantime asked me to treat the evidence as "largely interpretive rather than factual in nature". Her characterisation of communications with him as typical of broker arrangements and her conclusion that Mrs Holmes was treated by her as a sub-broker represented her personal opinion rather than established fact. It was evidence

to which I should apply limited weight in the absence of "independent corroboration." I should also scrutinise the provenance of the email correspondence referred to in the course of her evidence - should it be that any of these emails were obtained through unauthorised access to his personal email account.

[35] I rejected the suggestion that the emails which supported Ms Barberton's evidence were obtained unlawfully through hacking for the reasons aforesaid. It was, in short, an assertion made without support. I am afraid I failed to understand the meaning of the other challenges from Mr Holmes. Ms Barberton gave what was in essence a small but straightforward piece of evidence. She spoke of Mr and Mrs Holmes interactions with Brightwater. There was nothing which was suggestive of a lack of credibility or reliability concerning what was said to the court. Cross-examination did not affect that appraisal of the evidence, nor consideration of the submissions made.

Mr Holmes' evidence

[36] Where it was material Mr Holmes evidence was often contradictory and surprisingly lacking in detail. His parole evidence was frequently evasively given. At proof his pleadings on energy prices direct remained that the relationship with that firm related to maintenance contracts and repairs in respect of boilers. Mr Holmes departed from that position in parole evidence. At a commission hearing held for the action Mr Holmes produced payment statements from GET showing that he had only been paid in the region of £200.00. That too was departed from in his parole evidence at proof. On a number of occasions very unlikely scenarios were set out, principally around his purported use of his wife's email accounts, or his purported adoption of her name in emails. Evidence that NCS

had hacked into his account was unsupported elsewhere in evidence. There was however acceptance that had made "secret profits" of £107,719.34.

[37] I found that NCS had conducted a thorough investigation into the extent of Mr Holmes misconduct following his dismissal. This included obtaining invoices sent by Mr Holmes to the brokers, emails that had been exchanged about the works carried out, and access to bank accounts held by him. They were hampered by efforts by Mr Holmes to destroy documentary evidence. Nevertheless by this means they were able to establish trading that had been carried out in breach of contract. This evidence was bolstered by the evidence taken from their former employee Brian Aitken, and Usman Sikander and Jan Barberton.

[38] In his trading Mr Holmes had on occasions reached agreement and traded through two companies: SynergyCo (Scotland) Limited and SynergyCo Limited. He was the sole shareholder of both companies. He was appointed as sole director of SynergyCo Limited on 30 April 2015 and so he remained until it was dissolved on 25 October 2016. SynergyCo (Scotland) Limited was incorporated on 4 November 2016 and Mr Holmes was its sole director from that date until it was dissolved on 18 December 2018. He was the controlling mind of both companies. They were simply a thin veil behind which he hoped to conduct trading that breached his contract without being detected.

[39] I rejected Mr Holmes' position that NCS had been informed of his ownership of SynergyCo prior to joining NCS, and that the company accepted this as a condition of his engagement. This was presented to suggest that his obligations in terms of sub-clauses 2.3.1, 2.3.3, 2.3.4, 14.3 and 15.4.3(a) of his contract had been waived. There was no supporting evidence that NCS had accepted the continued trading of either SynergyCo entity in the field in which they were seeking to establish themselves. That they would do so ran

contrary to any commercial logic. Further, Mr Holmes accepted acting surreptitiously when breaching his contract. That did not square with NCS somehow homologating trading through the SynergyCo companies.

[40] I found that the evidence supported NCS' assertions that Mr Holmes had reach agreement to trade and then traded with each of the brokers identified in NCS pleadings. That he had done so for the periods of time detailed in my findings in fact.

The other issues in contention

[41] Having reached those conclusions the focus of consideration became the following matters:

- Whether Mrs Holmes was liable to NCS having induced breaches of contract by Mr Holmes, and if so to what extent.
- Whether Mrs Holmes was liable to NCS as an accessory to the breaches of contract, and if so to what extent.
- Whether the quantum of payment sought from Mr Holmes accurately and properly represented the loss that required reparation.
- Whether the quantum of payment sought from Mrs Holmes accurately and properly represented the loss that required reparation.

Whether Mrs Holmes was liable to NCS having induced breaches of contract

[42] NCS averred that Mrs Holmes had induced her husband's breach of contract with Consultiv, Everflow and Brightwater by provision of assistance.

The requirements of inducement

[43] The delict of inducing a breach of contract occurs where two parties contract and a third party, knowing of the terms of their contract, and acting without lawful justification, induces one of those parties to breach that contract. Lord Hodge in *Global Resources Group* v *MacKay* [2008] CSOH 148 at paras [10] to [14], adopting dicta in the House of Lords decision in *OBG Limited and another* v *Allan and others* [2007] UKHL 21 at paras [39] to [43], identified five characteristics of the delict:

i) One of the contracting parties must be in breach of contract.

ii) The party inducing the breach must know that their acts will have that effect. In other words, the inducing party must know the acts they are inducing will result in a breach of contract by that party. In this regard blind eye knowledge is sufficient.

iii) The inducing party must intend to procure the breach either as an end in itself or as the means by which they achieve some further end.

iv) The inducing party must induce the breach by persuasion, encouragement or assistance.

v) A lawful justification for inducing the breach may be a defence.

The position of NCS

Breach of contract

[44] In terms of the first characteristic, Mr Holmes in his dealings with the three brokerages had clearly breached his contract with NCS.

Lawful justification

[45] There was no lawful justification available from the evidence for inducing Mr Holmes' breach of contract. Nor was it proposed. Mrs Holmes' position was simply that she had not induced the breaches.

Knowledge

[46] In terms of the second characteristic, per Lord Hodge in *Global*, were it established that Mrs Holmes knew of her husband's contract of employment and elected not to inquire as to its terms, this would amount to knowledge for the purpose of this delict (see also *OBG Limited*, at paras [40] and [192] and *Watson* v *Fletcher and others* [2023] WL 08439890 at paragraph 83).

[47] Mrs Holmes knew that by trading on his own account with the three brokerages her husband was in breach of his contract of employment. Mr and Mrs Holmes were a married couple with a close relationship. They shared a home, a bank account, and a social life. Mr Holmes having been employed by NCS for 6 years, it was irresistible that Mrs Holmes knew what her husband's role with NCS involved and the strictures that would apply to trading on his own account in the field in which he was employed.

[48] In any event, Mr Holmes' evidence was that his wife knew he had had a sales role with the pursuer and was involved in the utilities sector, further that she was aware during 2019 that Consultiv were trying to get him to breach his contract with NCS. More than that, Mrs Holmes own evidence was that she knew Mr Holmes was employed by NCS in a sales capacity within the utilities sector, that he had a contract of employment with them, and that she had knowledge that he a sideline. Ultimately, she accepted that she

knew her husband operated in breach of his contract with NCS, adding that at one point she had urged him to stop. The evidence therefore established the required knowledge.

Intention

[49] The law is that it is not necessary that the inducing party intends to harm the innocent contracting party. Intention may be established if the inducement is the means by which the inducing party secures an economic gain. Mrs Holmes intended to procure the breach to obtain economic advantage. This was evidenced by the receipt of commission payments from brokers. These had been paid into the joint bank account. In parole evidence she admitted that sums totalling £107,642.70 were received into the same. She accepted that funds paid into this account were used for household expenditure. Efforts made in her parole evidence to distance herself from the account resulted in contradictory positions being adopted. She gave evidence that she made regular payments into the account whilst also stating that such payments were very sporadic. It was clear that Mrs Holmes benefitted from the receipt of the commission payments received in the joint account, that as such she gained an economic advantage from her husband's breaches of contract. The requirement of intention was fulfilled.

Assistance

[50] The modus by which Mrs Holmes had induced her husband's breach of contract was the assistance which she had provided to him. The law provides that assistance may manifest itself in different ways. It may be established by the inducing party having dealings with the contract breaker which the inducing party knew were inconsistent with the contract in place *(Global* Lord Hodge at paragraph 13, *Middlebrook Mushrooms Limited* v

Transport and General Workers' Union and Others [1993] ICR 612, and *DC Thomson and Co, Limited* v *Deakin* [1952] chapter 646). Alternatively, it may be by way of an active step taken in knowledge of a covenant which facilitates the breach of that covenant (*British Motor Trade Association* v *Salvadori* [1949] chapter 556 Roxburgh J at page 564). Passive events, such as the inducing party agreeing to purchase material sold in breach of contract, even where it was the contract breaker offering to sell the material as opposed to the inducing party offering to buy, have also been held to be sufficient (*Aviva Insurance Limited* v *David Oliver* [2019] EWHC 2824, HH Judge Eyre QC paragraph 45.)

[51] There was a significant body of evidence pointing to Mrs Holmes providing assistance. Principally this came in the form of emails evidencing exchanges with the brokers. Emails that related to Mr Holmes' work with the brokers. Emails which were sometimes sent to and received from her personal email address.

Consultiv

[52] The documentary evidence established that in the trading with Consultiv, Mr and Mrs Holmes sub-divided their functions. Mr Holmes operated sales. Mrs Holmes had an administrative function. This was replicated in trading with the other brokers too.

[53] As a starting point the evidence relating to the period immediately following the termination of Mr Holmes' employment whilst not part of the claim made demonstrated Mrs Holmes knowledge of the pre-existing trading and her ability to assist her husband. On Monday 25 January 2021, 4 days on from her husband's dismissal, Mrs Holmes sent an email to him headed "Energy Leads". Her email footer was "Business Support". The narrative in the email was "Get to Work". Attached was a list of companies. This was

correspondence enclosing leads, that is to say companies who Mr Holmes might seek to obtain business from.

[54] Mrs Holmes explanation was that she had come across the list on an old computer and sent it on at the request of her husband, without any real knowledge of what it was. Meantime "Get to work" was simply a figure of speech. The email footer dated back to 2019, and she rarely used this email account. Her use of multiple footers elsewhere in email correspondence merely depended upon on what she thought worked at the time. Those propositions were fanciful and should be rejected. The more cogent and obvious conclusion to be drawn was that she was helping her husband trade. This was followed on 27 January 2021 by an exchange of email through which it appeared that Mrs Holmes set up a contract with Consultiv. The broker forwarded an email to a SynergyCo email account marked for Mrs Holmes. The contract identified her as the contracting party referencing her maiden name, Brady. Mrs Holmes' denial of involvement in these emails was undercut by production during the proof of the signed contract. Mrs Holmes then accepted the signature was hers.

[55] These events in January 2021 bore upon Mrs Holmes' earlier involvement in her husband's dealings with Consultiv. Within a week of the March 2019 contract being agreed between that company and her husband, Mrs Holmes' emailed Mr Holmes a sales narrative for his use when using his trading name SynergyCo. She used the email footer "Business Support Synergy Co". In evidence she accepted that the purpose of the email was to assist her husband trade. On 21 March 2019 Mr Holmes introduced Mrs Holmes to Consultiv by email with a view to both discussing operational matters. Consultiv followed up on the email. Mrs Holmes admitted the existence of the email but denied involvement thereafter.

[56] That stance was not credible. It was illogical that Mrs Holmes would cease involvement thereafter standing the terms of the previous emails. There were also email communications involving Consultiv and Mrs Holmes after that date. By way of example in May of that year Mrs Holmes wrote to Consultiv concerning securing of payments. There were also numerous emails in process where Mr Holmes wrote to Consultiv concerning payment of commission and copied his wife in. In addition, when engaged in defending the action, Consultiv had lodged an affidavit sworn by their employee Liam Barrett. Therein he stated that Mrs Holmes assisted Mr Holmes trade with his company. That was consistent with an internal email at Consultiv which identified Mrs Holmes as part of Mr Holmes' trading entity. There was an operative evidential presumption that the emails bearing to be sent or received from Mrs Holmes' email address were so sent or received. Mrs Holmes admitted that some of the emails were sent or received by her, but not others. Where she denied that email correspondence, she had not provided credible evidence rebutting the presumption. What was said was vague and did not bear scrutiny. There was repeated reference to the use of her name being a smokescreen which Mr Holmes had utilised (without her knowledge) to hide his involvement in his illicit trading. That proposition fell down as a viable explanation given that a large number of emails were pieces of correspondence which were also sent to Mr Holmes. Neither had the smokescreen explanation been supported by the parole evidence from Mr Holmes.

Everflow

[57] The trading for Everflow commenced with a contract dated 14 October 2019. It ran in the names of Everflow and SynergyCo Scotland. Mrs Holmes' name was on the contract as the signatory for SynergyCo Scotland. The explanation provided by Mrs Holmes should

not be accepted. Her claim was that she only became aware of this fact during the currency of the action and upon investigation was told by her husband that her name was placed in the contract as he was "messing about". This was not credible.

[58] Mrs Holmes was so copied into emails with her husband. The explanatory evidence from Mrs Holmes that she was copied in as a "back up" was likewise incredible. It was undermined by reason of there also being emails sent from the SynergyCo email account (addressing payment of commission) which were signed in the name of "Mo". Mrs Holmes' position that the latter occurred because Mr Holmes sought to disguise his own involvement by using her name was contradicted by both Mr and Mrs Holmes being named in many emails. The truth was that the couple were working together as a team on the trading with Everflow.

Brightwater

[59] Mrs Holmes had arranged execution of the contract with Brightwater and had accepted the same in her parole evidence. She had also witnessed the contract. Mrs Holmes accessed Brightwater's portal and was involved in emails dealing with operational issues. In her evidence she largely accepted her involvement in the email exchanges with Brightwater but maintained that this was part of the smokescreen designed to hide her husband's trading from NCS. This ran contrary to the evidence of Mr Holmes which was to the effect that these emails were exclusively exchanged with him and that reference to Mrs Holmes formed part of a running joke of some form. Mrs Holmes' position upon her involvement in these emails was not credible. It should be rejected. The truth was she was assisting her husband trade with Brightwater.

Mr Holmes evidence

[60] Mr Holmes' evidence on the involvement of his wife equally lacked credibility and should be rejected too. His stances included:

- His email to Consultiv introducing Mrs Homes was merely some form of reminder to himself.
- He had sent emails from Mrs Holmes' personal email account, merely because he would use any account when emailing.
- He had been the person who had changed email footers on his wife's email account into his wife's name through boredom.

[61] He was however unable to explain why the footer "Kind Regards Mo" was used in emails he had purportedly sent, nor elaborate on the smokescreen position adopted by his wife. In actuality the explanation was obvious. Mrs Holmes was the person sending and receiving emails and was assisting Mr Holmes in his trading.

Conclusion

[62] I should accept that all of the requirements for inducing breach of contract had been met and find that Mrs Holmes had induced her husband's breach of contract.

The position of Mrs Holmes

[63] NCS had failed to prove Mrs Holmes' intention to induce a breach of contract. Lord Hodge's explanation of the components of inducement as set out in *Global* assisted understanding of why NCS' case for inducement had to fail.

[64] Mrs Holmes may not have known the terms of the contract of employment, but it was accepted that she had awareness of its existence. As she lived with Mr Holmes

undeniably, she had the means of knowledge of its terms. However, Mrs Holmes required to know she was inducing a breach of contract. It was insufficient to establish that she was procuring an act which amounted to a breach of contract (Lord Hoffman at paragraph 39 of *OBG*). Moreover, Mrs Holmes would have to be established to have intended to procure the breach, either as an end in itself or a means to an end.

[65] The key was that procuring the breach required the conduct of Mrs Holmes to be causative of the breach. She must be shown to have operated on her husband's will in that regard (*Kawasaki Kisen Kaisha Limited* v *James Kemball Limited* [2021] 1 CLC 284 per Popplewell LJ at paragraphs 28 to 34). Timing of the assistance is in that regard critical. Lords Hoffman and Nicholls in *OBG* referred to the breach requiring to be a consequence of the inducing party's words or conduct. Lord Hodge at paragraph 13 of *Global* observed that the contract must be breached on account of the defender's conduct in "persuading, encouraging or assisting him to do so". What came from these authorities was that to induce a breach of contract, the breach must result from the defender's conduct up to or at that point of the breach. Inducement cannot post-date the decision of the party to the contract to breach it. One cannot operate on a will to induce a breach of contract, where the decision has already been made to breach.

[66] NCS relied on Mrs Holmes' purported assistance. They based their case on her conduct from March 2019 onwards. However, a fundamental part of the overall case was that from September 2016 until the point of his departure from NCS Mr Holmes had been in breach of the contract. Where Mrs Holmes was said to be involved in breaches of the contract of employment this took place only after the decision had already been reached that the contract would be breached. It was the brokers who were willing to trade with

Mr Holmes and the individuals at those brokerages, and not Mrs Holmes, who were inducing the breach of contract.

Consultiv

[67] Mrs Holmes did not deny providing a measure of administrative assistance to her husband in respect of Consultiv from 21 March 2019 but assistance which did not operate on his will to breach his contract with NCS. Mr Holmes' evidence was that he had been approached by Consultiv relative to partnering with them and had reached agreement to do so. This evidence was not contradicted. The fact of the contract having been issued by Consultiv in the name of Mrs Holmes was accordingly irrelevant to the question of whether she induced him to breach his contract of employment in the first place. There was therefore no evidence of Mrs Holmes having acted to operate on Mr Holmes' will to induce him to enter into the trading relationship with Consultiv. The evidence of Mr Holmes that he had made his wife aware of the discussions with Consultiv was not enough. Awareness of a likely breach or even failing to prevent it did not amount to the active causative participation required. Mrs Holmes' concession that she prepared promotional material on 11 March 2019 was likewise nothing to the point. At that juncture Mr Holmes had already decided to enter a further phase of his breach of contract by trading in competition with yet another entity. Moreover, there was no evidence of the material having been thereafter distributed. Tellingly on Mrs Holmes' uncontradicted evidence the material was produced at Mr Holmes' behest, indicating that he was in fact operating on her will.

Everflow

[68] Mr Holmes agreed that he traded with Everflow, having entered into a contract with them on 14 October 2019. His evidence was that he had been in discussion with Mr Jack of that firm for several months prior to reaching agreement to trade. That evidence was not contradicted. Furthermore, there was no evidence that Mrs Holmes was even aware of these discussions. The contract which was issued identifying her as the trading partner was unsigned. The evidence was however that industry practice was that agreement would be reached prior to issuing of a written contract. Moreover, issuing an agreement in Mrs Holmes was possibly a device to mask and facilitate Mr Holmes trading with Everflow. Here also, once Mr Holmes commenced trading with Everflow, any administrative assistance which Mrs Holmes provided could not be said to have induced a breach of the contract of employment which had already been embarked upon.

Brightwater

[69] Mr Holmes evidence was that having met Garry Temple of Brightwater at a networking event in Edinburgh around January 2019 he was approached by him relative to the prospect of becoming an introducer for Brightwater. Thereafter discussions took place over a period of 6 weeks prior to a written agreement being issued. This evidence was uncontradicted. There was no suggestion that Mrs Holmes was aware or involved in these discussions. Thus, once more there was no evidence that Mrs Holmes operated on her husband's will to induce him to enter a trading relationship. The witnessing of the execution of the agreement was a passive act, simply verifying the signature of the party signing. Any later provision of administrative services post-dated the breach of contract and therefore the scope of the delict.

The joint bank account

[70] It was not disputed that payments from Mr Holmes' activities trading in competition with his employers were deposited into the joint bank account. It having not been established that Mrs Holmes had operated upon her husband's will to induce him to breach his contract in the first place, the receipt of benefit at a later date was not material. The salient issue was whether something has happened to cause the breach, not what happened to the income earned as a result of that breach. The schedule of joint bank account deposits brought out in evidence also presented logical difficulties for NCS. It contained payments from brokers stretching back well beyond the point at which NCS stated Mrs Holmes became involved in assisting her husband. That supported the proposition that Mr Holmes had decided to trade in competition with his employers independently.

Whether Mrs Holmes was liable to NCS as an accessory to the breaches of contract

The position of NCS

[71] Mrs Holmes was also an accessory to her husband's breaches of contract. As such she was jointly and severally liable to NCS in respect of the loss and damage they sustained as a consequence. Mrs Holmes' dishonest assistance was relied upon. The characteristics required of the delict of dishonest assistance were set out in *Kidd* v *Lime Rock Management LLP* [2024] CSOH 28, para [61]:

i) The principal wrongdoer must be fiduciary to the claimant.

ii) There must have been a breach of fiduciary duty.

iii) The defender must have assisted or procured the breach.

iv) The defender must have acted dishonestly in providing assistance.

v) Turning a blind eye may act as knowledge.

[72] The basis for asserting assistance and of blind eye knowledge were already before me. Whether or not Mr Holmes as the principal wrongdoer was fiduciary to NCS depended on my analysis of the obligations in the contract of employment. The determination to be made was whether equity dictated he was fiduciary to NCS (*University of Nottingham* v *Fishel and another* [2000] ICR 1462 at page 1491 and *Samsung Semiconductor Europe Limited* v *Docherty* 2011 SLT 806 at paragraph 26). The terms of the obligations in sub-clauses 2.3.3, 2.3.4, 14.3and 15.4.3(a) demonstrated that was so. Additionally, there was the unchallenged evidence that, uniquely, Mr Holmes was entrusted with unfettered access to all customers on the database of NCS Group. The contents of the database amounted to trade secrets. That supported the existence of a fiduciary duty.

[73] The assessment of dishonesty of actings required a determination as to whether the defender's conduct, viewed as a whole, was dishonest. First, the subjective knowledge and state of mind of the assistant required to be considered relative to the assistance. Second, that state of mind along with all the other relevant facts including the actions of the assistant, should be considered objectively as a "jury question" (see Lord Richardson in *Watson* v *Fletcher and others* [2023] WL 08439890 at paragraph 62). Mrs Holmes had admitted that she knew that her husband should not be trading in competition to the pursuer. The evidence was that she had assisted that trading. The assistance was on any view dishonest. Subjectively and objectively, she had provided dishonest assistance.

The position of Mrs Holmes

[74] Firstly, there was no case on record against Mrs Holmes specifying provision of dishonest assistance to Mr Holmes. What was pled was simply provision of assistance. This leg of NCS case failed for that reason. Esto it had not been established that Mr Holmes' relationship with NCS was fiduciary, nor that Mrs Holmes acted with a dishonest state of mind.

[75] Whether a fiduciary duty arises in the context of an employment relationship required careful identification of the particular duties undertaken by the employee said to create the fiduciary duty. The question to ask was whether in all the circumstances the employee had placed himself in a position where he must act solely in the interests of his employer. Particular care must be taken not to automatically equate contractual duties of good faith and loyalty or trust and confidence with fiduciary duties (*University of Nottingham University*). The duty of loyalty owed by an employee did not itself make the employee a fiduciary "without more" (Lord Glennie in *Samsung Semiconductor Europe Limited* at paragraph 26.)

[76] In *Hopcraft and another* v *Close Brothers Limited* [2025] UKSC 33 the Supreme Court set out a number of principles that should be applied when considering the matter. The test for identifying a fiduciary duty is objective. A core element is undertaking to act for another in circumstances which give rise to a relationship of trust and confidence. The central obligation is loyalty, and other obligations arise from that central obligation, for example, to avoid conflicts of interest and not to profit. However, the existence of trust and confidence in a commercial context is not itself enough to impose fiduciary duties. Further, assuming duties in contract to protect the interests of another is similarly insufficient. The relationship of trust and confidence is the consequence, and not the cause of a fiduciary duty. In a

similar vein the fact that someone is in a position of vulnerability may be the consequence and not the cause of the existence of a fiduciary duty.

[77] Sub-clauses 2.3.3, 2.3.4 and 14.3 of the contract of employment were contractual duties. The duties at sub-clauses 2.3.3 and 2.3.4 are not recognised facets of the core fiduciary duty discussed in *Hopcraft* at paragraphs 89 and 90. The reference to acting in the best interests of the company is an attempt to borrow part of the formulation of the director's duty contained in section 172(1) of the Companies Act 2006. Sub-clause 14.3 is a duty of trust and confidence but as per *Hopcraft* a fiduciary duty did not arise merely on account of the inclusion of this provision. The wider context required to be analysed. NCS had led insufficient evidence of the same.

[78] NCS relied on the unfettered access to the group database of clients, access that had never been offered previously to any employee. The contract of employment, in a number of sub-clauses, regulated use and prohibited misuse of the confidential customer information. However, access to that information was surely necessary to allow the newly formed sales team to generate business in a sector which NCS had not previously conducted business. The fact that doing so rendered NCS vulnerable to exploitation of the material was a consequence. It did not create a fiduciary obligation. The pursuer cannot work from a potential consequence of a fiduciary duty to prove the existence of one.

[79] Leaving that aside, the assistance required to be dishonest. Knowledge of the facts which make the conduct wrongful is insufficient, the assistant must possess a dishonest state of mind (*Twinsectra Limited* v *Yardley* [2002] 2 AC 164 per Lord Hoffman at paragraph 20). The test for dishonesty differs subtly from that relating to blind eye knowledge. The requirements for dishonest assistance are (i) a suspicion that certain facts exist, and (ii) a deliberate decision to refrain from taking any step to confirm their existence (*Group*

Seven Limited v *Nasir* [2020] chapter 327 at paragraphs 59-62). Thereafter the court must apply a two-stage: Firstly, what did the person know or genuinely believe about the facts in issue? Secondly would the assistance be deemed to be when assessed against the objective standard of the ordinary decent person? However there is no requirement that the person must appreciate that what has been done is by those standards dishonest (see *Royal Brunei Airlines* v *Tan* [1995] 2 AC 378 at 389 B-G and *Ivey* v *Genting Casinos (UK) Limited* [2018] AC 391 at paragraphs 60 and 74 to 75). In conducting these assessments the court must look at all circumstances, including the reasons for the defender's conduct (*Kidd* v *Lime Rock Management* at paragraphs 80 and 81). In the present action the record was absent of averments on Mrs Holmes' purportedly dishonest state of mind. The pursuer's case should fail for this reason. Nor was the two-stage test for dishonesty addressed. Even leaving that to one side, whilst Mrs Holmes had admitted an awareness at some point that Mr Homes was trading with others while working for NCS, her evidence was that NCS knew of SynergyCo when they engaged her husband. That in effect his trading was tolerated. This was not an instance of making a conscious decision not to inquire about matters. Mrs Holmes had a belief as to all relevant facts and crucially assumed that NCS knew about the trading. She left her husband to his own devices. The reasonable person would on those beliefs do likewise.

Materiality

[80] Assistance rendered must also be material in order to incur liability. NCS required to show that Mrs Holmes had materially assisted her husband (*Hopcraft* paragraph 74). The email correspondence attributed to Mrs Holmes was comparatively light in volume. She and her husband challenged much of it. One email highlighted supported these challenges.

The email to Everflow on 21 October 2020 relating to Morgan Glen Surgery, emanated from a SynergyCo email account but was signed off "Mo". It read: "And yes I'm seeing them late this afternoon to get the readings". Mrs Holmes has worked in administration in the care sector and gave unchallenged evidence that she did not know how to obtain a water meter reading. In those circumstances, despite being subscribed "Mo", the email was almost certainly sent by Mr Holmes. That being so, the inference was that no email should be accepted as being sent by Mrs Holmes unless she had admitted authorship. Adopting that approach would further diminish the volume of assistance which the court could be satisfied was provided by Mrs Holmes through her administrative work. In any event even absent of that finding, the assistance was so minimal as to fail to attract liability.

Quantum

The position of NCS

Mr Holmes' liability

[81] The damages sought by NCS amounted to the loss suffered. This was constituted by the commission earnings which they were deprived of. Admissions had been made by Mr Holmes through the notice to admit of the commission he had earned. Mr Hayes had also given credible and reliable evidence on the matter.

Mrs Holmes liability

[82] The quantum of damages sought upon a joint and several basis from Mrs Holmes was restricted to earnings obtained by Mr Holmes from his trading with Consultiv,

Everflow, and Brightwater. Her own evidence, given on 13 January 2026, admitted the commission earned as follows:

i) Consutiv - £211,242.40;

ii) Everflow - £96,542.62;

iii) Brightwater - £1,107.36.

Consultiv

[83] It was accepted that the sum of £160,000.00 paid by Consultiv to NCS in extra-judicial settlement of the action required to be deducted.

The position of Mr Holmes

[84] NCS had failed to establish entitlement to decree in the sums craved.

Absence of expert and impartial evidence

[85] The figures were not vouched by any expert, accountant or independent evidence. Mr Hayes's evidence concerning the quantum of loss should be afforded limited weight. As a director of NCS he had a direct financial interest in the proceedings. He was not impartial. NCS bore the burden of proving the sums variously craved for payment. This required evidence not assertion. NCS had not discharged that burden to the required standard of proof.

Previous offers in settlement

[86] I should also take into account previous settlement proposals made by NCS. What had been offered was that he pay £135,000.00 immediately and a further £65,000 2 years

later. That had been accepted only for the offer to be withdrawn following on from NCS reaching agreement of settlement terms with Consultiv.

The notice to admit

[87] Mr Holmes previous solicitor had negligently failed to challenge the notice to admit. It would be unjust to hold him personally liable for the full claimed sum as a consequence of this professional failure.

Admitted personal liability

[88] Personal liability was accepted to a limited degree. Properly this was restricted to payments received personally, which may be described as secret profits, they amounted to £107, 719.34 in total. This was composed of:

i. Consultiv: £71,674.14

ii. Everflow Limited: £34,861.20

iii. Brightwater Services Limited: £1,184.00

The position of Mrs Holmes

[89] Both heads of the claim against Mrs Holmes relied upon accessory liability albeit on differing bases. As accessory liability cannot be greater than the liability of the principal wrongdoer, in each head of claim the damages which could be claimed against Mrs Holmes depended on the principal liability of Mr Holmes.

Mr Holmes' liability

[90] NCS' case was predicated on Mr Holmes competing with his employers in order to make an unauthorised profit. The clauses in Mr Holmes' contract of employment which prohibited the same reflected a common law duty as set out in *Harvey on Industrial Relations and Employment Law* at paragraph 175. Conventionally the employee was required to account to his employer for that profit (*Harvey* at paragraph 162).

[91] If a fiduciary duty was proved to exist, the facets of the duty which would be breached would be the duty not to make a take a benefit from a third party in the absence of informed consent, the "no profit" rule regarding unauthorised profits described in *Hopcraft* at paragraphs 89 and 90. This also carries a duty to account. Conventionally the measure of recovery is also the profit received (*Hopcraft* at paragraphs 68 to 70). The pursuer had failed to identify the basis in contract or equity, which entitled recovery beyond unauthorised profits.

Mrs Holmes liability for unauthorised profits

[92] Quoad Mrs Holmes there was a critical distinction between the two bases upon which the claim against her was pled. Liability for inducing breach of contract rendered the third party jointly and severally liable with the contract breaker, thus equally liable for the profits gained by the contract breaker. With dishonest assistance, that was not so. The dishonest assistant is liable only for any profit which it is proved that they made, which requires specific proof of the extent of the profit received personally by the assistant as per *Hopcraft supra* at paragraphs 75 and 76.

[93] In the event that the claim of having induced the breach of contract failed but dishonest assistance was proved, the measure of damages was the profits which

Mrs Holmes had personally made. The evidence came from deposits made into bank accounts; £71,674.14 from Consultiv, £38,861.20 from Everflow; and £1,107.36 from Brightwater. However, it should be considered that the evidence of these payments merely exhibited unauthorised profits earned by Mr Holmes it was not evidence of a profit personally made by Mrs Holmes.

The sums paid by Consultiv and the order to be made

[94] NCS concede that settlement was reached with Consultiv in the sum of £160,000.00. The sum paid to Mr Holmes in respect of commission from Consultiv was £71,674.14. Consultiv had been craved to be jointly and severally liable with Mr and Mrs Holmes. The sum paid by Consultiv satisfied that crave. No order ought to be made against Mrs Holmes for damages should liability attach to her.

Decision on inducement of Mr Holmes' breach of contract

[95] Thomson's *Delictual Liability* at paragraph 2.9 neatly summarises the law relating to the delict of inducing breach of contract thus:

> " If A induces B to break his contract with C, C can sue B for breach of contract. Alternatively, C may be able to sue A in delict for inducing B to break his contract with C. This actionable wrong was recognised as part of Scots law in British Motor Trade Association v Gray, where Lord Russell approved counsel's concession that 'by the law of Scotland an actionable wrong is committed by one who intentionally and without lawful justification induces or procures someone to break a contract made by him with another, if damage has resulted to that other, provided the contract creates contractual relations recognised by law'.
>
> In OBG Ltd v Allan, the House of Lords emphasised that inducement of breach of contract is an example of accessory liability: A is only liable if B breaks his contract with C as a consequence of A's acts: A's liability in delict for inducement of breach of contract is therefore accessory to B's breach of his contract with C. There is no liability if A's conduct simply makes B's performance of its contract with C more onerous without there being a breach".

[96] In *OBG* Lord Hoffman at paragraphs 39 to 44 inclusive also set out the "essential elements" of inducement:

> "39. To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so. This proposition is most strikingly illustrated by the decision of this House in British Industrial Plastics Ltd v Ferguson [1940] 1 All ER 479, in which the plaintiff's former employee offered the defendant information about one of the plaintiff's secret processes which he, as an employee, had invented. The defendant knew that the employee had a contractual obligation not to reveal trade secrets but held the eccentric opinion that if the process was patentable, it would be the exclusive property of the employee. He took the information in the honest belief that the employee would not be in breach of contract. In the Court of Appeal [1938] 4 All ER 504, 513, MacKinnon LJ observed tartly that in accepting this evidence the judge had 'vindicated his honesty … at the expense of his intelligence' but he and the House of Lords agreed that he could not be held liable for inducing a breach of contract.
>
> 40. The question of what counts as knowledge for the purposes of liability for inducing a breach of contract has also been the subject of a consistent line of decisions. In Emerald Construction Co Ltd v Lowthian [1966] 1 WLR 691 union officials threatened a building contractor with a strike unless he terminated a subcontract for the supply of labour. The defendants obviously knew that there was a contract-they wanted it terminated-but the court found that they did not know its terms and, in particular, how soon it could be terminated. Lord Denning MR said, at pp 700–701:
>
> > 'Even if they did not know the actual terms of the contract, but had the means of knowledge-which they deliberately disregarded-that would be enough. Like the man who turns a blind eye. So here, if the officers deliberately sought to get this contract terminated, heedless of its terms, regardless whether it was terminated by breach or not, they would do wrong. For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not.'
>
> 41. This statement of the law has since been followed in many cases and, so far as I am aware, has not given rise to any difficulty. It is in accordance with the general principle of law that a conscious decision not to inquire into the existence of a fact is in many cases treated as equivalent to knowledge of that fact: see Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd [2003] 1 AC 469. It is not the same as negligence or even gross negligence: in British Industrial Plastics Ltd v Ferguson [1940] 1 All ER 479, for example, Mr Ferguson did not deliberately abstain from inquiry into whether disclosure of the secret process would be a breach of contract.

He negligently made the wrong inquiry, but that is an altogether different state of mind.

42. The next question is what counts as an intention to procure a breach of contract. It is necessary for this purpose to distinguish between ends, means and consequences. If someone knowingly causes a breach of contract, it does not normally matter that it is the means by which he intends to achieve some further end or even that he would rather have been able to achieve that end without causing a breach. Mr Gye would very likely have preferred to be able to obtain Miss Wagner's services without her having to break her contract. But that did not matter. Again, people seldom knowingly cause loss by unlawful means out of simple disinterested malice. It is usually to achieve the further end of securing an economic advantage to themselves. As I said earlier, the Dunlop employees who took off the tyres in GWK Ltd v Dunlop Rubber Co Ltd 42 TLR 376 intended to advance the interests of the Dunlop company.

43. On the other hand, if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended. That, I think, is what judges and writers mean when they say that the claimant must have been 'targeted' or 'aimed at'. In my opinion the majority of the Court of Appeal was wrong to have allowed the action in Millar v Bassey [1994] EMLR 44 to proceed. Miss Bassey had broken her contract to perform for the recording company and it was a foreseeable consequence that the recording company would have to break its contracts with the accompanying musicians, but those breaches of contract were neither an end desired by Miss Bassey nor a means of achieving that end.

44. Finally, what counts as a breach of contract? In Torquay Hotel Co Ltd v Cousins [1969] 2 Ch 106, 138 Lord Denning said that there could be liability for preventing or hindering performance of the contract on the same principle as liability for procuring a breach. This dictum was approved by Lord Diplock in Merkur Island Shipping Corpn v Laughton [1983] 2 AC 570, 607–608. One could therefore have liability for interference with contractual relations even though the contracting party committed no breach. But these remarks were made in the context of the unified theory which treated procuring a breach as part of the same tort as causing loss by unlawful means. If the torts are to be separated, then I think that one cannot be liable for inducing a breach unless there has been a breach. No secondary liability without primary liability. Cases in which interference with contractual relations has been treated as coming within the Lumley v Gye tort (like Dimbleby & Sons Ltd v National Union of Journalists [1984] 1 WLR 67 and [1984] 1 WLR 427) are really cases of causing loss by unlawful means."

[97] Lord Hodge in his Outer House opinion in *Global* followed *OBG* and acknowledged the consistent approach taken upon the wrong of inducing breach on sides of the border:

> "10. ….. the recent decision of the House of Lords in OBG Ltd v Allan is important. In that case their Lordships disaggregated the tort or delict of inducing breach of contract from the tort or delict of causing loss by unlawful means. The House of Lords rejected the analysis that there was a general tort of interference with contractual rights of which the two torts were sub-categories. In order to consider the pursuers' submission in the context of the decision in OBG Limited v Allan, it may be appropriate to summarise the characteristics of each of these delicts.
>
> 11. In both jurisdictions A commits the delict or tort of inducing a breach of contract where B and C are contracting parties and A, knowing of the terms of their contract and without lawful justification, induces B to break that contract. When that occurs, B is liable to C for breach of contract and A is liable to C for the delict of inducing that breach. The delict has the following five characteristics. First, there is no delictual liability unless B breaks his contract. That is why Lord Hoffmann in OBG Ltd spoke of the liability as a secondary or accessory liability. While a Scottish lawyer analysing the delict might not speak of an accessory liability, the expression is useful nonetheless in its emphasis that the delict is committed where breach of contract, and not some lesser interference with the contractual relations, results from A's acts. Secondly, for A to be liable for inducing breach of contract, he must know that his acts will have that effect. A is not liable if he ought reasonably to have known that the act which he was inducing B to perform involved a breach of contract by B if in fact he did not know that. I noted in paragraph 9 above that there was a suggestion that Scots law and English law differed as to the circumstances in which A will be treated as having sufficient knowledge. Although it is not necessary to decide the point in this case, in which the defender was aware of the terms of the contract between the pursuers and GDP as he signed the agreement on behalf of the latter, it respectfully appears to me that if A consciously decided not to inquire into the terms of the contract between B and C in the knowledge that there was a contract and that his actions were likely to induce a breach of that contract, that knowledge and the wilful turning of a blind eye as to the details of the contract would be sufficient knowledge. Lord Mayfield in Rossleigh Ltd at p.360 left open the possibility of liability arising in such circumstances in which the court could treat the turning of a blind eye as tantamount to an intention that the contract be broken.
>
> 12. Thirdly, A must intend to procure the breach of the contract either as an end in itself or as the means by which he achieves some further end. Thus in the common case where B is an employee of C and A wants B to work for him instead, A may have no wish to harm C but in obtaining the economic advantage of B's services he necessarily causes B to break his contract with C. Mr McBrearty and Mr Napier were correct in their agreement that it is not sufficient to establish the delict that B's breach of contract is simply a foreseeable result of A's actions. In OBG Ltd Lord Hoffmann (at para 43) stated: 'if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion, it cannot for this

purpose be said to have been intended.' He went on to disapprove of the decision of the Court of Appeal in Millar v Bassey [1994] EMLR 44 and explained his position thus: 'Miss Bassey had broken her contract to perform for the recording company and it was a foreseeable consequence that the recording company would have to break its contracts with the accompanying musicians, but those breaches of contract were neither an end desired by Miss Bassey nor a means of achieving that end'. In the present case it is not correct to describe the breach of GDP's contract as merely a foreseeable consequence in that sense, as Mr McBrearty sought to argue. The defenders' provision of services to a competitor of the pursuers, which of itself involved GDP in breach of its contract, was the means by which the defender pursued his own economic advantage. It was a necessary and deliberate step towards that goal.

13. Fourthly, A must induce B to break his contract with C by persuading, encouraging or assisting him to do so. In 'Delictual Liability' (3rd ed.) at p.39 Professor Joe Thomson states that the inducement must be directed at B, the person in the contractual relationship with the victim, C, and refers to Middlebrook Mushrooms Ltd v Transport and General Workers' Union [1993] ICR 612, CA. In that case a trade union carried on a campaign against an employer by distributing leaflets to shoppers outside supermarkets to which the employer supplied its mushrooms, urging the shoppers to boycott the employer's produce. The Court of Appeal held that the trade union had not committed the tort of inducing a breach of contract as the defendant's members directed their persuasion to the purchasing public and not the (allegedly) contract-breaking supermarket. See also Calor Gas Ltd v Express Fuels (Scotland) Ltd 2008 SLT 123, Lord Malcolm at para 47. It is clear from BMTA v Salvadori and BMTA v Gray that the tort or delict is not confined to circumstances where A has to persuade B to break his contract but can also be committed where A has dealings with B which A knows are inconsistent with the contract between B and C. In either event A induces or assists B to do something (or to refrain from doing something) which involves B breaking his contract with C.

14. Fifthly, if A has a lawful justification for inducing B to break his contract with C, that may provide a defence against delictual liability. Thus a father may seek to prevent his minor son from entering what he perceives as an unwise marriage: Findlay v Blaycock (above). A's pursuit of his own economic advantage is not of itself a justification. Although the House of Lords did not discuss this fifth characteristic in OBG Ltd it is clear from other cases that lawful justification can provide a defence. See Glamorgan Coal Company v South Wales Miners' Federation referred to in paragraph 9 above. For example in Edwin Hill & Partners v First National Finance Corporation plc [1989] 1 WLR 225 the Court of Appeal held that a security holder was justified in protecting its security for the repayment of a loan to make the dismissal and replacement of a developer's architects a condition of the provision of further finance to the developer who was otherwise unable to repay his loan or complete the development."

[98] I approached the question of whether Mrs Holmes had induced her husband's breach of contract episodically. I examined each purported breach separately, namely her purported inducement to breach the NCS contract in terms of his trading with; Consultiv, Everflow, and Brightwater. It is not correct to assess matters on the basis that once the contract was breached for the first time it was not possible to thereafter induce a breach of the contract. There were therefore separate and demarcated breaches of contract.

[99] I accepted the evidence presented by NCS that Mrs Holmes had corresponded on her husband's behalf with Consultiv, Everflow, and Brightwater. The emails were often sent from her personal email account, and/or carried her name upon them. Mrs Holmes accepted that she had been engaged in some of the correspondence. Where she disputed that she was the author of emails, or the recipient (or intended recipient) I found her evidence, and that of Mr Holmes, to lack credibility. The smokescreen explanation was far-fetched, lacking in logic, and presented unconvincingly. The terms of the email to Everflow on 21 October 2020 (concerning the taking of meters readings) did not necessarily entail that Mrs Holmes' could not have been the author of the email. Further it did not serve to undermine the balance of the evidence on this matter. This pointed implacably to Mrs Holmes being the author/recipient of the correspondence where that was claimed by NCS.

[100] Mr Holmes had a contract of employment with NCS that prohibited him from agreeing to trade with other utility brokers on his own behalf and from doing so. I had found that notwithstanding that he did both things with Consultiv, Everflow, and Brightwater and therefore breached his contract in each instance. I was also satisfied on the evidence that Mrs Holmes knew that her administrative role in her husband's trading with the brokers assisted him in these breaches of his contract.

[101] Mr and Mrs Holmes are a married couple who reside together. She knew that her husband held a position as a sales executive for NCS in the utilities sector. She knew that he was so employed when she was corresponding on his behalf with the brokers. There was an irresistible inference that she was aware that his contract of employment prohibited trading on his own behalf in the same sector. In any event her evidence, whilst often evasive on the overall matter, included her admission that during the material period Mr Holmes was engaged in a "sideline", that he was doing so with Consultiv. Her evidence also ultimately included her acceptance that she was aware that Mr Holmes was trading in breach of his contract of employment.

[102] In terms of the third characteristic, I was also satisfied, by the evidence of monies being paid into the joint bank account, that Mrs Holmes was obtaining economic gain through the assistance she provided. It was an inescapable inference that she knew that these sums were coming into the account. I rejected her evidence that she rarely examined the account. The monies came in during the period she was providing assistance. It was similarly strongly inferred that Mrs Holmes knew these sums flowed from the illicit trading which she was assisting her husband in.

[103] There was no lawful justification for Mr Holmes' breaches of contract, as is clear from the reasons rehearsed for my findings in fact concerning the breaches. This left before me only the fourth characteristic.

[104] There was no evidence that Mrs Holmes had persuaded her husband to reach agreement or trade with any of the brokers. Her involvement had commenced om occasions at the point at which the written contract was to be signed and thereafter. In the context of the findings I had otherwise made, matters reduced to determining whether the assistance Mrs Holmes provided to Mr Holmes procured Mr Holmes' breach of his contract with NCS.

In conducting that analysis, I firstly rejected counsel for Mrs Holmes' proposition that Mr Holmes' having elected to engage in a breach of his contract in 2016 by illicit trading, it became impossible thereafter for Mrs Holmes to induce a breach of contract. I return here to my earlier views on assessing each of the breaches of contract separately.

[105] Thereafter I agreed with NCS' proposition that assistance was a means by which a breach could be induced and that the authorities recognised a number of forms of assistance. However, that did not detract from the requirement of causation. The assistance must always be causative of the breach. I agree with the submission of counsel for Mrs Holmes that this requires that it operate on the will of the contracting party, and take place at the time of, or prior to, the breach. In the present case in each of the trading relationships where NCS say Mrs Holmes induced her husband's breach there is no evidence that the assistance was causative of the breach. Mr Holmes was experienced in the market in which he operated. It is conceded by NCS that he had committed breaches of his contract with NCS prior to Mrs Holmes becoming involved. It is a clear inference from his proven actions that from close to the inception of his employment with NCS, he had determined that he would seek to work illicitly on his own behalf. The evidence demonstrated that he followed a path of taking his opportunities where he could to enter into trading agreements with brokers in contravention of his employment contract. Mrs Holmes assisted him once those decisions had already been made. She provided assistance, but that assistance did not cause Mr Holmes to enter into these illicit trading arrangements nor operated on his will to do so. I was not persuaded that Mr Holmes had induced any of the breaches of contract.

Decision on Mrs Holmes' accessory liability

[106] Lord Drummond Young in his opinion for *Ted Jacob Engineering Group Inc* v *Robert Matthew, Johnson-Marshall and Partners* 2014 SC 579 (paragraph 100) recognised the delict of providing dishonest assistance in the commission of a breach of a fiduciary duty:

> "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."

[107] Lord Tyre in the Outer House in *Kidd* v *Lime Rock Management* at paragraph 61 adopted the five-stage test for the delict/tort as set out by Miles J in *Libyan Investment Authority* v *King* [2023]. I agree with Mr Garioch that in line with that test, the liability of Mrs Holmes came down to the existence of a fiduciary duty.

[108] Dealing with other matters: Mrs Holmes' assertion that the case had not been pled on record was without merit. The seventh plea-in-law pled that she had induced her husband's breach of contract "*et separatim* was an accessory to the first defender's breach of contract with the pursuer". The record averred that she had assisted her husband. It averred also that he had a fiduciary duty to NCS. Her assistance was pled at length and the context was that "at the very least …(she) wilfully turned a blind eye to the first defender's activity in breach of his contract to the pursuer". Assistance, as aforesaid, I found had been

provided. I was clear it was dishonest assistance. I rejected Mrs Holmes' assertion that she harboured the thought that SynergyCo trading was something NCS was willing to allow. As is rehearsed I found that she was assisting her husband in the knowledge that in doing so she was assisting him in breaching his contract of employment. Latterly in her evidence she had accepted as much. Examining matters through the prism of how "ordinary decent people" would view such actings, I was readily satisfied that they would view them as being dishonest.

[109] On the existence of a fiduciary duty I noted that Lord Glennie in *Samsung supra* at paragraph 26 approved in Scots Law the analysis provided by *University of Nottingham*:

(i) An employee is not a fiduciary simply by virtue of being an employee.

(ii) Circumstances may, however, arise in the context of an employment relationship, which place the employee in the position of a fiduciary.

(iii) Any implied fiduciary obligations must be consistent with the contractual terms.

(iv) The question in every case is whether the duties undertaken by the employee were such that he put himself in the position where he had to act solely in the interests of the employer. This can be looked at by considering whether the employer could control what the employee did or, conversely, was vulnerable to misuse by the employee of his position. It is not necessary for the employee to be the employer's agent (if the employee is also an agent, he would owe fiduciary duties as such anyway).

(v) An employee may also be put in a position where fiduciary obligations arise because the circumstances are such that the employee is put in a position where he is obliged to account. This includes circumstances where the employee uses

his position as an employee to further his own interests or obtains an advantage by virtue of his position as an employee.

(vi) Fiduciary obligations may arise in respect of part only of the employment relationship.

(vii) A potential conflict between the relevant duty of the employee and his own financial interest is sufficient to give rise to an obligation to account, even if the employee did not in fact act contrary to the interests of his employer. A potential conflict arises where there is a "real sensible possibility of conflict".

(viii) It is not a requirement of an obligation to account that the employer has suffered a loss.

(ix) It does not matter that the return to the employee is for services done for a third party.

(x) Nor does it matter that, in obtaining the benefit, the employee is acting under an independent contract.

[110] The Supreme Court decision in *Hopcraft* explored fiduciary duties quoad commercial transactions as opposed employee/employer relationships. As such I saw *University of Nottingham* as the apposite authority. Examining matters in that light I was satisfied that the circumstances of Mr Holmes employment with NCS placed him in the position of a fiduciary. In doing so I examined the provisions of his contract of employment and the context of his employment with the company.

[111] As previously rehearsed, in terms of the terms and conditions of the contract of employment, the "Duties" clauses included agreement to:

- Undertake and carry out to the best of his abilities such duties and exercise such powers in relation to the NCS' business as may from time to time be assigned or vested in him by its board (sub-clause 2.3.1).
- Devote the whole of his time, attention and skill to the discharge of his duties under this contract (sub-clause 2.3.3).
- Faithfully and diligently perform such duties and at all times promote the best interests of NCS (sub-clause 2.3.4).

[112] Clause 14, headed "acknowledgements by the employee" included at sub-clause 14.1 Mr Holmes' acknowledgment that NCS and NCS Group possess a valuable body of Confidential Business Information. That term was comprehensively defined at sub-clause 13.1 as

> "..all and any Corporate Information, Marketing Information, Technical Information and other information (howsoever recorded or stored) to which the Company or any Group Company attaches an equivalent level of confidentiality or in respect of which it owes an obligation of confidentiality to any third party: (a) which you shall acquire at any time during your employment by the Company; and (b) which is not readily ascertainable to persons not connected with the Company or any Group Company either at all or without a significant expenditure of labour, skill, or money."

[113] In terms of sub-clause 14.2 Mr Holmes acknowledged that NCS would give him access to Confidential Business Information in order that he could carry out his duties. By way of sub-clause 14.3 Mr Holmes acknowledged that his duties included, without limitation, a duty of trust and confidence and a duty to act at all times in the best interests of NCS. Per sub-clause 14.5 he acknowledged that his knowledge of Confidential Business Information would directly benefit him by enabling him to perform sales management

duties or to make sales and earn commissions. He acknowledged in terms of sub-clause 14.6 that disclosure of any Confidential Business Information to any customer or actual or potential competitor of NCS or NCS Group would place NCS or the relevant NCS Group company at a serious competitive disadvantage and would cause financial and other damage to the businesses.

[114] Sub-clause 15.4 of Mr Holmes' contract of employment was headed: "Conflict of interest". In terms of sub-clause 15.4.3(a) Mr Holmes agreed that during his period of employment he would not, unless provided with NCS' prior written permission, hold any material interest in any person's firm or company which was or was to be in competition with any of the NCS Group businesses.

[115] Looking at these various clauses together I was satisfied that a fiduciary obligation on the part of Mr Holmes to NCS was consistent with the terms and conditions of his contract of employment. Certainly, he was obliged to act solely in the interests of NCS. It was a new start venture for NCS, they had employed him for his industry experience. They had given him unprecedented and unfettered access to their client database to allow him to grow their business. NCS although part of a wider much more established group was a new entrant into the marketplace. Mr Holmes had been given a senior role, effectively leading their team. These factors in combination with the contractual provisions entailed that Mr Holmes had a fiduciary duty to not to enter into trading arrangements with the brokers he contracted with and not to trade thereafter with those brokers. Counsel for Mrs Holmes submitted that as per *Hopcraft supra* (paragraph 74) the assistance rendered required to be material and not minimal. I could not agree with his further submission that what had been carried out by Mrs Holmes was minimal. The evidence displayed that she executed a significant and important administrative function on behalf of her husband. I was therefore

also satisfied that Mrs Holmes was liable in terms of her provision of dishonest assistance to her husband's illicit trading as averred upon.

Decision on quantum

[116] NCS are entitled quoad Mr Holmes to reparation for the loss they suffered by way of his trading with the brokers now sought per each of the crave. The measure of loss is the commission NCS would have received. In calculating that sum they provided evidence which was detailed and structured. It came principally from Michael Hayes, who is a chartered accountant and whose credibility I have previously addressed.

Craves one and two: Trading with Consultiv

[117] Craves one and two seek payment related to Consultiv. The sums sought were calculated with reference to a spreadsheet which was maintained by Consultiv. It identified the customers introduced by Mr Holmes where he had earned commission. It had been downloaded by Mr Holmes to his work computer and was retrieved by NCS. Cogent reasons were provided for discounting the prospect of clawback. What was illustrated was that Mr Holmes obtained entitlement to commission in the sum of £234,719.36. The proposition thereafter was that were it not for Mr Holmes acting in the way he did and bringing the business to Consultiv, the clients in question would have been brought to NCS' contracted broker and a commission earned from that broker. The commission rate that would have applied would have been 60 per cent as opposed to the 70 per cent which Mr Holmes agreed with Consultiv. The disparity of 10 per cent required to be factored in. As such the sum sought in crave one was £181,064.91. However, Consultiv were sued jointly quoad the first crave one. Their payment of £160,000.00 in settlement requires to be

deducted from the sum. The order for payment would therefore be for £21,064.91. I shall return to the issue of the sum for which Mrs Holmes is liable.

[118] However, Mr Holmes was not entitled to the secret profit of that 10 per cent earned in breach of his contract. He required to make payment to NCS for that profit. The sum identified in NCS' second crave, £30,177.49, was the quantum of that secret profit.

Crave three: Trading with Everflow

[119] Relative to Everflow, Mr Hayes advised that information was garnered in a like way. On the day he left NCS Mr Holmes had left open upon his computer the portal he used with that company. This revealed customers he had referred to Everflow and the commission he had earned. Subsequent discussions with Everflow further clarified matters. Here also there was no issue of clawback arising. The lost commission amounted to £96,542.62.

Crave four: Trading with GET

[120] In terms of GET, Mr Holmes had access to two spreadsheets which had been maintained by GET to record deals placed with them. The potential commission therefrom was £101,929.47. However, from that it was calculated that new business lost, rejected deals and non-applicable deals left potential commission at £59,335.98. Mr Sikander gave evidence that whilst this calculation seemed high it was feasible. Mr Holmes' cross-examined on the basis that the commission he earned totalled £22,000.00 somewhat at odds with his admission that he had previously been paid £15,004.64. I considered the workings of Mr Hayes had been careful and that the reserved acceptance of the accuracy of the figure provided in evidence by Mr Sikunder was not sufficient reason to make me doubt

that figure. Mr Holmes alternative figure was not presented on any cogent basis. The sum due therefore is £59,335.98.

Crave five: Trading with Energy Prices Direct

[121] In relation to Mr Holmes trading with Energy Prices Direct the sum sued for was based upon what were clearly payments from Energy Prices Direct for commission earned, the statements being produced in evidence. The sum came to £17,733.00.

Crave six: Trading with Brightwater

[122] Likewise in relation to Mr Holmes trading with Brightwater the sum sued for was based upon a schedule of commission payments made to Mr Holmes by Brightwater. The sum came to £1,107.36.

Damages for provision of dishonest assistance

[123] The position for Mr Holmes on quantum is clear. Decree can now be granted against him. Quoad crave one, payment of the sum of £21,064.91 will be ordered. Quoad crave two £30,177.49. Quoad crave three, payment of the sum of £96,542.62 will be ordered. Quoad crave four payment of the sum of £59,335.98 will be ordered. Quoad crave five payment of the sum of £17,733.00. Finally, quoad crave six, payment of the sum of £1,107.36 will be ordered.

[124] However, quoad craves one, three, and six Mrs Holmes was convened as a defender. Mrs Holmes liability emanates from the delict of provision of dishonest assistance to Mr Holmes. The issue in determining the quantum of the order for payment to be made relative to Mrs Holmes is whether she is jointly liable for payment of these sums along with

her husband, or liable for another specified amount predicated on a calculation of her profits from her husband's breaches of contract.

[125] I require further submission upon this issue. The delict in focus is lightly touched upon by authority in Scots Law. It was unclear from what was placed before me what the settled position is as to how the damages which flow from the delict are to be calculated. I had conflicting submissions, but I was unsatisfied that they addressed the issue in sufficient detail. Moreover, the submissions may now be refined in terms of the various findings which I have now made. As such, meantime I have continued consideration of the first, third and sixth craves in terms of Ms Holmes until I have received those submissions and determined the extent of Mrs Holmes liability to payment of damages.

[126] I have assigned a hearing to be addressed on that issue.