OUTER HOUSE, COURT OF SESSION

[2019] CSOH 8

CA100/17

OPINION OF LORD DOHERTY

In the cause

C.J.C. MEDIA (SCOTLAND) LIMITED

Pursuer

against

KENNETH SINCLAIR

Defender

Pursuer: Davies; TC Young LLP
Defender: Bowen QC; Harper Macleod LLP

25 January 2019

Introduction

[1] In this commercial action the pursuer sues the defender, a former director, for count, reckoning and payment in respect of alleged breach by him of fiduciary duties owed to the pursuer. I heard a proof before answer to determine (i) whether the defender had breached his fiduciary duties; if so, (ii) whether he had an obligation to account to the pursuer in respect of that breach; and, if so, (iii) the period in respect of which the defender ought to account.

[2] The pursuer led evidence from Gary Clark, Gordon O'Donnell, Michael Ripley, Jordan Ross, Elizabeth Plenderleith, Kirsten Nelson, Colin Graham, Robert Craig, Douglas

Millar, Thomas Montgomery, Kenneth MacMillan, Stuart Bell and David Fleming. The defender was the only witness for the defence who gave oral evidence. Each of the witnesses apart from Mrs Plenderleith had prepared one or more signed witness statements or affidavits which formed the substance of his or her evidence-in-chief. In terms of the joint minute (no 63 of process) it was agreed that the witness statements of two further witnesses adduced by the pursuer ("A" and Rachel Coombs) and of three further witnesses adduced by the defender (Charles Crawford, Stuart Feather and Caroline McGrath) should be treated as their evidence in the case.

Background

[3] Gary Clark is a former professional footballer. After his football career was over he worked for a time as the commercial manager at Hamilton Academical, and in the late 1990s he started a marketing business which was carried on by a company which he incorporated, C.J.C. Marketing Limited. The business involved selling advertising space. The advertising medium was panels in washrooms at football stadia and licensed premises.

[4] Mr Clark and the defender had been childhood friends. The defender had sales experience, but he had been made redundant from his employment in the late 1990s. He and Mr Clark thought that it may be mutually beneficial if the defender assisted Mr Clark with C.J.C. Marketing Limited. By 2002 the defender and Mr Clark were equal partners in the business. They realised that its focus was a media business rather than a marketing business. In that year they incorporated the pursuer to carry on the business, initially as C.J.C. Media Ltd. (In 2016 the pursuer changed its name to C.J.C. Media (Scotland) Limited). The defender and Mr Clark were the directors, and they were and continue to be the only shareholders. Each holds 50% of the shares.

[5] The pursuer operated from Glasgow. It grew and was successful. In addition to selling media rights in washrooms, it obtained other sources of media work. Some of this was outdoor media work. Much of it was publicly funded social and health education work for the Scottish Government.

[6] The division of responsibilities between the defender and Mr Clark was that the defender dealt with sales and relationships with the pursuer's customers, whereas Mr Clark handled the operational side of the business. A consequence of this division was that, so far as media buyer customers were concerned, the defender was the face of the company.

[7] Between 2005 and 2010 the defender and his family lived in Italy. During this period he continued to perform the same role with the pursuer as before. Contact with customers was by telephone and email, and was face to face only when he visited the United Kingdom. He and his family returned to live in Glasgow in 2010. He continued to perform the same role within the pursuer on his return.

[8] The Scottish Government carries out public procurement exercises for the award of its media work. Following those exercises it appoints media providers. Those media providers then source their requirements from others. From 2000 to 2008, and from 2011 onwards, Carat was appointed by the Scottish Government as a media provider. Between 2008 and 2011 Mediacom was its appointed media provider.

[9] In each of the years 2007-8 to 2012-13 the appointed media provider contracted with the pursuer for it to perform media work in community pharmacies throughout Scotland. Each year the work involved posters for 9 or 10 separate health campaigns being placed in each pharmacy. Each campaign lasted for about a month and was followed by the next one. The work for each year was generally awarded to the pursuer in about the beginning of March, when details of the topics and timings of the campaigns were provided. The

particular topics and timings were subject to change during the year, but, on the whole, the planned campaigns were largely adhered to. The pursuer arranged for the printing of the various necessary posters, for their placement in pharmacies by self-employed contractors whom they engaged for the purpose, and for their removal and replacement at the end of each campaign.

[10] On 5 March 2013 the defender resigned as a director of the pursuer. On 6 March 2013 the defender incorporated a new company, Tactical Media Limited ("Tactical"). Less than three weeks later Tactical was awarded the 2013-2014 community pharmacy contract by Carat in preference to the pursuer.

[11] Unfortunately, the falling out between the defender and Mr Clark has been bitter. The present litigation is but one of several manifestations of the antipathy which now exists between them. There has been police involvement, and there have been criminal proceedings in the Justice of the Peace Court and civil proceedings in the Sheriff Court. For present purposes it is unnecessary to elaborate further upon those matters, save to say that they are demonstrative of the depth of bad feeling that has existed since the break-up.

[12] The case pled for the pursuer was (i) that the defender acted in breach of his fiduciary duties to the pursuer both while he was a director and after his resignation; and (ii) that he thereby appropriated for the benefit of Tactical several of the pursuer's business opportunities. However, when it came to closing submissions counsel for the pursuer restricted the pursuer's case to the appropriation by the defender of the community pharmacy opportunity. In those circumstances it is unnecessary to set out the evidence in respect of the other business opportunities which were discussed at the proof.

The evidence

The defender's objection relating to the Power Point file (JB 28 and 29)

[13] At the commencement of the proof counsel for the defender objected to the evidence contained in, or any other evidence concerning, an electronic version of a Power Point file (JB 29) and a hard copy print out of that file (JB 28). Neither the pursuer nor the court had been provided with any prior notice of the objection. I allowed the evidence concerned to be led under reservation of all questions of competency and relevancy.

Mr Clark

[14] Mr Clark accepted that he drank heavily after his wife left him in 2002. However, the separation and the excessive drinking had both been short-lived. He had soon been back to his normal hard-working self.

[15] The business had prospered up to the time of the defender's resignation. Mr Clark had worked very hard to ensure that it had. As time had gone on the defender had focussed on the client-facing side of the business and Mr Clark had dealt with the business logistics. Mr Clark's recollection was that a factor in this allocation had been a spreadsheet analysis of workloads which Mr Fleming had carried out in late 2005. It had shown that Mr Clark's workload was too heavy. It had been agreed that the defender would take over sales work that Mr Clark had been doing. Prior to this reallocation the defender had done most of the client facing work, but after the reallocation he did all of it. The division of work had not been the result of any apprehension that Mr Clark might be associated with unwanted press publicity. Mr Clark accepted that in late 2002 he had visited "Cupids", a sex club in Manchester with a high-profile MSP, Tommy Sheridan, and others. He maintained that he had been unaware that the club was to be visited. On arrival he sat at the bar and had a few

drinks, but had then left. He denied that he had been at a "sex party" in a flat immediately before the trip to Manchester, or that he had told the defender that he had been at such a party. A press story about the Cupids visit had appeared in the News of the World newspaper in November 2004, but Mr Clark had not been named. The police had spoken to him in 2010 about it, and he had given evidence in relation to it at Mr Sheridan's perjury trial later that year. Mr Clark had been named in press reports of the trial.

[16] Over the years Mr Clark had shouldered the brunt of running the pursuer. He had not been keen on the defender moving to Italy, but he had agreed to it with some reluctance. It had been awkward fielding calls in the office for the defender without disclosing that he was not in the country. His trips back had not been frequent - certainly not as frequent as every six to eight weeks.

[17] Towards the end of 2006 Mr Clark and an employee of the pursuer, Mr Fleming, assisted a young female employee ("A") to set up an online lingerie sales business. They contributed about a hundred pounds each to the venture. Mr Clark's recollection was that he had told the defender about it at the time. There had certainly been no attempt to hide it. A had worked on that business from the office in her own time, but the business had not got off the ground. Later, in September 2007, the pursuer had paid for the catering for a joint birthday party for A and her partner (who was one of the pursuer's contractors). The catering had been a present from the pursuer to both of them. Mr Clark's recollection was that the defender would have known about the payment at the time and, indeed, would have countersigned the cheque to pay for it. The payment had not been a source of conflict. Mr Clark was outraged at the false and scandalous suggestion that he had been having an affair with A. He had treated her like a daughter.

[18] The directors and major shareholders in Sole Media Limited ("Sole Media") were Mr O'Donnell and Iain McIntosh. Mr Clark's (minority) shareholding in Sole Media (10 shares out of a total shareholding of 98 shares) had never been an issue with the defender. The defender had always been aware of it. Both Mr Clark and the defender had been offered the opportunity to take 10 shares each in about 2007, but the defender had not taken up the offer. It had been thought that there was scope for co-operation between the pursuer and Sole Media. Mr Clark had not received any dividend from Sole Media - he had not profited in any way from the shareholding. He transferred the shares back to Sole Media for no consideration in 2009 because, contrary to the understanding between the two companies which he had believed to exist, Sole Media put an advertisement in a washroom of licensed premises.

[19] After the defender returned from Italy he and Mr Clark had not seemed to work as well together in the office as they had previously. On occasions Mr Clark had been irritated by the defender's behaviour, and there had been some disagreements about business issues. While at times there had been tension between them as a result, there had been an adequate business relationship until March 2012 when they had a serious falling out over a printing bill for a pharmacy campaign. The bill had been higher than normal because, unusually, there had to be two different print runs: the dates of the campaign in Grampian had been different from the dates elsewhere so that separate posters were needed. The defender suggested to Mr Clark that he was deliberately overpaying the printer because he was a friend. Mr Clark had been very angry indeed at that suggestion. He had taken it as a slur on his integrity. He concluded it would be better if he and the defender did not work in the office at the same time. Since the defender did not want to work from home for any part of the week, Mr Clark decided that he would work from home. From then on they

communicated with each other by email, Skype messaging, and telephone rather than face to face.

[20] The deterioration in the relationship led to Mr Clark and the defender discussing possible options to end their working together, such as buying each other out or splitting the business. However, no agreement was reached. Mr Clark was conscious that the defender was the person dealing with media buyers. He recognised that if there was a buy-out, or if the business was split, the defender would be at an advantage because he was the person whom the media buyers knew. With that in mind he thought it would be prudent if he did more of the customer-facing work for a significant period to form relationships with media buyers before any sale or split. He told the defender that is what he wanted to do.

[21] In December 2012 the defender raised the issue of payment of a dividend. He suggested that he and Mr Clark each take a dividend of £25,000. Mr Clark had been content that they each take £15,000, but he was concerned that the community pharmacies contract had not yet been renewed. He suggested that a second dividend of £10,000 should be contingent upon the contract being renewed. He and the defender had agreed upon that.

[22] On 26 February 2013, without prior notice or discussion with Mr Clark, the defender transferred £10,000 from the pursuer's bank account to his own account. He sent a Skype message to Mr Clark: "Just transferred the final part of my dividend. You can do yours when you are ready." Mr Clark was astounded and enraged. He Skype messaged the defender that he was not entitled to the payment and that it should be repaid immediately. He tried to speak to the defender by telephone. When eventually they spoke Mr Clark was very abusive towards the defender. He threatened to smash up the defender's home and to smash up the defender if he did not repay the money. The defender recorded the call (JB 32). Mr Clark acknowledged to the court that he had been "totally out of order".

Nonetheless, he felt that the defender had been calculating, and that he had entrapped him. Later, Mr Clark was charged with a contravention of s127 of the Communications Act 2003 in respect of the call. Following a summary trial he was acquitted.

[23] Mr Clark instructed the pursuer's solicitors to write to the defender demanding repayment. They did that by letter dated 5 March 2013. The defender resigned on that day. He repaid £10,000 to the pursuer. The pursuer's solicitors wrote again to the defender on 6 March 2013 requiring the return of all company property and all confidential information and documents, and reminding him of his duties of confidentiality to the pursuer. The defender's company laptop and other items were returned to the pursuer's solicitors in about the middle of that month. However, all of the data on the defender's laptop and on his wife's laptop had been deleted.

[24] Mr Clark had been surprised when Carat had asked the pursuer to pitch against Tactical for the 2013-14 community pharmacy contract. The pursuer had never been asked to pitch against anyone for renewal of a community pharmacy contract before. Mr Clark had been very disappointed when the contract was awarded to Tactical. The pursuer had the track record of providing the service, whereas Tactical had no track record. The pursuer had also offered to do the work for a lower price than Tactical and had offered further added value services. Mr Clark had been left with a strong feeling of injustice at the outcome. He complained about it to Carat and to the Scottish Government. He questioned the propriety of the decision.

[25] Mr Clark had been suspicious that all the data had been deleted from the defender's laptop. Data on the laptop would only have been backed up on the pursuer's systems if the defender had been in the office on a Friday and had opted for it to be backed up. Mr Clark asked Mr Ripley to try and restore the deleted data. Mr Ripley was able to do that. Within

the restored data there were items which suggested that the defender had been taking steps in advance of his resignation to set up in competition with the pursuer. First, on 2 May 2012 he had registered the domain name "tacticalmedia.co.uk". Second, the deleted data included a draft Power Point presentation for "Tactical Media" (JB 28 and 29) which bore to have been last modified in October 2012 by "Ken". Mr Clark denied the suggestion put to him in cross-examination that he had fabricated the presentation after the laptop had been returned to the pursuer. Third, it appeared that in late 2012 the defender had applied to the pursuer's bank to open a bank account for a new company.

[26] Mr Clark accepted that on 2 July 2013 he put a false statement on the pursuer's website to the effect that the pursuer had bought 40 social media groups. As far as Mr Clark was concerned this had been a bit of fun to rile the defender. He also accepted that in the course of preparation for the litigation he removed the defender's reference from the top of a number of invoices which were then lodged as productions (JB 196). He maintained that he did that because he couldn't bear to see the defender's initials on them. He agreed that in October 2013 he incorporated a new company, C.J.C. Media UK Ltd, and that that company had traded since its incorporation, although he maintained that its business focus was different from the pursuer's.

Gordon O'Donnell

[27] Mr O'Donnell is a director of Sole Media, a media and advertising agency which owns advertising space in five-a-side football venues and gym locker rooms. He recalled a meeting having taken place in about 2007 between himself, his fellow director Mr McIntosh, Mr Clark, and the defender. The focus of the pursuer and Sole Media differed - they were not competitors. It was thought that there could be benefits for both companies if they sold

each other's advertising space and products to clients, with commission payments being made by one company to the other in that event. It was agreed that Sole Media would not access licensed premises other than through the pursuer. Mr O'Donnell also proposed that Mr Clark and the defender should become minority shareholders in Sole Media (with each having a 10% shareholding). Mr Clark had taken up the offer but the defender had not been interested. Thereafter the companies had worked together and had sold each other's products and media space. The defender had been involved in these sales (JB 3 and 4). In August 2009 Mr Clark transferred his shares back to Sole Media for no consideration because he discovered that that company had put media in a washroom in licensed premises in Paisley. Mr Clark had been annoyed about that.

Michael Ripley

[28] For the last 18 years Mr Ripley has run Paisley PC Doctor, a business providing technical services for computers, networks and electronic equipment. In about April or May 2013 the pursuer asked him to recover data from two laptops which the defender had returned to the pursuer. Although it would appear to someone logging on to the laptops that there was no data, in fact most of the data had not been securely erased. The file partition table had been, but the rest of the underlying data - the Table of Contents and the files themselves - had not. It had been an ideal data recovery situation. It had been a simple process for Mr Ripley to scan each of the hard drives using data recovery software ("Get Data Back for NTFS"). That had taken about 24 hours. Data recovery from damaged hard drives was a very common task for him. He made a clone of each of the hard drives and recovered the data using the clone. That was standard practice. It ensured that if there was any damage to the files during the retrieval process it would be the clone, not the hard drive,

which was affected. In this case there had been no data loss, and no damage to the files. There was 100% recovery. That was what was to be expected where only the file partition table had been deleted. Mr Ripley copied the files on to his server. He also copied them on to Mr Clark's laptop. After he had done this he returned the hard drives to Mr Clark.

[29] Months later, Mr Ripley was in the pursuer's office replacing a keyboard. Mr Clark mentioned that, among the files copied to him from the defender's laptop, a Power Point file had been of particular interest. Mr Ripley routinely purged data from his server to make storage space available. When the time came for the next routine purge of the server he had recollected the conversation with Mr Clark. As a result, while he deleted most of the files which had been recovered from the laptops, he decided not to delete Power Point files and email data files.

[30] Later still, Mr Clark contacted Mr Ripley to say that he was having difficulty finding the Power Point file that he had mentioned. He asked Mr Ripley to repeat the data recovery process on the hard drive, and he returned the hard drive to him. Mr Ripley was very busy at the time - he was moving office. He did not have time to scan the hard drive again.

[31] In December 2017 Mr Ripley uploaded the recovered Power Point files which were on his server to a private section of his website. The file of interest to Mr Clark was among them. It was named "Mkting021012.PPT" (JB 28 and 29). Mr Ripley confirmed it had been recovered by him from the defender's hard drive. The file's metadata showed that it was last modified on "02 October 2012, 16:41:34" and that the person using the laptop at that time was "Ken". The file had not been modified since then. Metadata is data relating to a document which is not part of it. Mr Ripley indicated that he was not an expert on metadata. However, in his opinion it would be a very difficult task to alter metadata (eg to insert a false date of last modification or a false user). He doubted whether even someone

with his experience of computers could do it. If someone tried it, the slightest alteration would be likely to corrupt files. It would be a very high risk strategy because it would be obvious to an expert examining it that it had been altered. He opined that "there was no way on this earth" that the file could have been modified before he recovered it. He did not assent to the proposition that an expert would need to have the hard drive in order to determine when and by whom the file was modified. That would be the optimal position, and it would be reasonable for the expert to request the hard drive; but in Mr Ripley's view it would be sufficient for the expert to have the Power Point file.

[32] Since moving office Mr Ripley had been unable to find the hard drive. He described the loss as weighing quite heavily upon him.

Colin Graham

[33] Mr Graham is a self-employed contractor. He worked on that basis for the pursuer from 2007 until 2015. A large part of that work involved distributing materials in community pharmacy campaigns. Mr Clark gave him his instructions, and he gave Mr Clark timesheets or phoned him with details of the hours he worked. He remembered an occasion not long before the defender resigned when he had been in the pursuer's garage with Jordan Ross, Robert Craig, Gary Kendall and the defender. He recalled the defender saying that there was no reason why they couldn't work for him. In cross-examination, he indicated that he did not recognise the address (83 Loanbank Quadrant, Glasgow) on the invoice JB 209 (p1095), and that the invoice had not been prepared by him. He had done the type of work described at the time but his practice had been to send a text to Mr Clark with his hours worked.

Jordan Ross

[34] Mr Ross worked for the pursuer as a self-employed contractor from 2007 until 2015. A large part of that work involved distributing materials in pharmacy campaigns. The pharmacy campaigns were the core of the pursuer's work. Mr Clark gave him his instructions. He recalled an occasion towards the end of 2012 when he had been in the pursuer's garage with Mr Graham and Mr Craig. It was possible Gary Kendall was there as well, but he wasn't sure about that. The defender had told him that he was not to worry because when he got the pharmacies there would be a lot of work available. In cross-examination, he indicated that he did not recognise the address (2A Mural Street, Barrhead) on the invoice JB 207, and that he had not prepared the invoice. He had done the type of work described at the time but his practice was simply gave the pursuer a note of the hours he worked.

Robert Craig

[35] Mr Craig worked for the pursuer as a self-employed contractor for about 10 years, until after the defender's resignation. A large part of that work involved distributing materials in pharmacy campaigns. Mr Clark gave him his instructions. He recalled an occasion less than a year before the defender resigned when he had been in the pursuer's garage with Mr Graham, Mr Ross and Mr Kendall. The defender had said to them something along the lines of "things will be different when I get the pharmacies contract". In cross-examination, he indicated that he did not recognise the address (183 Titwood Road, Glasgow) on the invoice JB 208, and that he had not prepared the invoice. He had done the type of work described at the time but he would simply have phoned the office to say how many hours he had done.

Thomas Montgomery

[36] Between about 2001 and 2004 Mr Montgomery sublet a room in the pursuer's office from which he ran his business as a driving instructor. He was in the office most days, as was Mr Clark. His impression of Mr Clark was that he was hard working. He recalled Mr Clark's wife leaving him. It had affected Mr Clark badly. He recalled him binge drinking over a number of days, but that had not lasted for long. In cross-examination he indicated that he and Mr Clark had visited Cupids with Mr Sheridan in 2002. He had given evidence to that effect at Mr Sheridan's perjury trial.

Kenneth MacMillan

[37] Mr MacMillan used to have a printing business. Between 2004 and 2012 he did quite a bit of work for the pursuer. On a few occasions he was instructed to provide urgent printing for a pharmacy campaign. In March 2012 the pursuer ordered printing for the Easter campaign. It had been different from previous orders. Two different print runs were needed because pharmacies in Grampian had different Easter holidays from the rest of the country. The Grampian posters had to show the different dates. Since the number of print runs was doubled for both A1 and A3 posters there was a corresponding increase in cost. Through a contact, Mr MacMillan got a big printing company to do the work. The cost should have been more but he got a good deal from the company. The price which he charged the pursuer - £1,850 - had been reasonable for the work involved.

Kirsten Nelson

[38] Until 2017 Ms Nelson was employed as a bookkeeper with the pursuer's accountant. Her duties involved the maintenance of payroll and VAT records. She had no involvement with client matters other than payroll and VAT. She visited the pursuer's office every couple of weeks in the course of her work. She knew Mr McIntosh was a client of her employer, and she spoke to him from time to time. She had not known that Mr Clark had a shareholding in Sole Media. She was positive she had never had any discussion with Mr McIntosh or with Mr Clark about that. She had no knowledge of or involvement with such matters.

A

[39] A worked as an office administrator with the pursuer between 2005 and 2007. She had got on well with Mr Clark. The catering for the party to celebrate her 21st birthday and her partner's 30th birthday had been paid for by the pursuer. Mr Clark had known the caterers. He and his wife had attended the party. Mr Clark had been like a mentor to her. When she had come up with the idea of an online lingerie business Mr Clark and Mr Fleming had advised and encouraged her. They had each contributed money - it had been a partnership. Work relating to the venture had been done outside of the pursuer's business hours. However, the venture had not got off the ground. It had only lasted a couple of months. A was clear that Mr Clark had not had any alcohol issues when she worked for the pursuer. She was disgusted and humiliated by the allegation that she had had an affair with Mr Clark. The allegation was baseless.

David Fleming

[40] Mr Fleming is a very close friend of Mr Clark. He worked for the pursuer between 2005 and 2016. Before that he worked abroad. He had been aware of Mr Clark and his wife separating for a short period. He had never seen Mr Clark binge drinking. He had prepared the tasks spreadsheet in December 2005 at Mr Clark's request. He had got involved with the lingerie venture because he hoped it would bring in some extra money. He recollected the defender being told about it at the outset. The venture had "crashed and burned" within weeks. There was no truth in the suggestion that he had told the defender that Mr Clark and A were having an affair. If they had been, he would not have mentioned it to the defender. The suggestion that there had been an affair was ridiculous. Mr Clark had treated A like a daughter.

Stuart Bell

[41] Until December 2016 (when he retired) Mr Bell was employed by Carat as an Investment Director, responsible for media training and negotiations. He was also the Contract Manager for Carat's contract with the Scottish Government. NHS community pharmacy campaigns were part of the media work handled by Carat for the Scottish Government. The defender was the only person from the pursuer whom Mr Bell dealt with.

[42] Around the time that the pharmacy contract was due to be renewed for 2013 -2014 the defender advised Mr Bell that he had left the pursuer and had set up his own company, Tactical. At around the same time Mr Clark also got in touch to advise that the defender had left. Each was disparaging about the other to Mr Bell.

[43] Mr Bell decided to ask both the pursuer and Tactical to pitch for the 2013-2014 pharmacy campaigns. In his witness statements he indicated that each company was

provided with a brief, but in oral evidence he confirmed that he could not remember if there had been a formal written brief. As far as he was concerned Mr Clark and the defender knew what they were to be doing because they had been involved in doing the work up to that time.

[44] Both pitches had been good. The pursuer had offered a cheaper price, but once the prices were adjusted to take account of commission Tactical was not a great deal dearer. The pursuer had offered free use of its bar panels and of an App, but neither was of any real interest in the context of the pharmacy campaigns. So far as the element of commission which Carat kept was concerned, it made no significant financial difference to Carat which offer was accepted. As far as Mr Bell was concerned, although price was important it was not the determinative issue. Nor was Tactical's proposed use of local contractors (but it was a positive factor in environmental terms). The critical issue was confidence in the provider. He knew and trusted the defender. He had never let him down in the past. On the other hand, Mr Bell had no first-hand experience of Mr Clark. The pursuer minus the defender was a very different proposition to the pursuer with the defender. As far as Mr Bell was concerned the defender was a very important cog in the wheel. Accordingly, he decided to go with Tactical. However, because Tactical was a new company the offer to it was, on a trial basis, for an initial 3 month rolling campaign period rather than for the normal 12 month period. That had been agreed in a telephone call between Mr Bell and the defender when Tactical was appointed. Had Mr Bell opted for the pursuer he thought that the offer would also have been made on that trial basis.

[45] Mr Clark was disappointed with the decision. He complained to Mr Bell's superiors at Carat and to the Scottish Government about it, and he questioned the professionalism of Mr Bell and Carat. Carat had taken a dim view of this. It decided not to deal with the

pursuer in the future. Tactical performed the pharmacy work very satisfactorily during the trial period and thereafter.

Charles Crawford

[46] Mr Crawford worked with Mediacom between about 1999 and 2015. Since 2015 he has been managing director of Frame Media, a media buying agency. He recalled that up to about 2011 Mediacom operated the pharmacy campaigns for the Scottish Government. It placed the work with the pursuer. The person at the pursuer whom Mediacom dealt with was almost exclusively the defender. After 2011 Mediacom continued to place some work with the pursuer, but less than before because it had lost the Scottish Government contract. When the defender left and set up Tactical Mr Crawford had chosen to use it rather than the pursuer because he knew and trusted the defender to do a good job. He had also referred colleagues to the defender. Tactical's work had been very good. However, the occasions when he had had call to use Tactical's services had been few. After moving to Frame he had continue to brief Tactical and to refer colleagues as and when required.

Elizabeth Plenderleith

[47] Mrs Plenderleith is a business manager with the Clydesdale Bank at its head office in Glasgow. She has been there since November 2016, and she has been Mr Clark's relationship manager since then. She spoke to bank correspondence and documents which were in the Joint Bundle. On 25 September 2012 a team manager in the office, Donna Campbell, had emailed the defender. The email (JB 27) stated:

> "... I have attached an Account Opening Form and a Limited Company Mandate for completion once you have the new company in place...".

The form and mandate were attachments. The mandate was headed "Business Customer Mandate - Limited Company". In a further email from Mrs Campbell to the defender dated 20 December 2012 she had written:

> "... As per our telephone conversation please find attached new mandate, can you please get all signatories to sign and post back ..."

A further "Business Customer Mandate – Limited Company" form was attached.

[48] The bank has no records shedding any further light on the circumstances in which the emails were sent. Mrs Campbell has retired. In Mrs Plenderleith's view account opening forms and mandates would not have been sent out unless the customer had requested them. They would not be sent out because a customer changed branch. The Business Banking Centre at Linwood closed in 2012, but the accounts of customers there would not have been affected by the closure. Their sort code and account numbers would have remained the same.

[49] However, if there were any changes to the information held on a company's Business Customer Mandate (eg company details or authorised signatories) a new Business Customer Mandate would have to be completed.

The defender

[50] The defender's account of the initial years of working with Mr Clark was not materially different from Mr Clark's account. However, he maintained that between about October 2002 and about 2004 Mr Clark had had an alcohol problem. It began when his wife left him. Their separation lasted for 4 or 5 months. Mr Clark had been prone to binge drinking and had regularly been absent from work for days at a time. In late 2002 Mr Clark had confided in the defender that he and others (including Mr Sheridan) had been present at

a sex party in Scotland and that they had also gone to Cupids. The defender had been very concerned about the risk of adverse publicity. Later, in November 2004, the News of the World had published a story about the Cupids visit. It reported that an unnamed former footballer was a member of the group. About two weeks later a press article indicated that Mr Clark had been best man at Mr Sheridan's wedding. The defender had continued to be concerned for the pursuer's good name, particularly since it was involved in health promotion work (including sexual health promotion work) for the Scottish Government. As a result, in 2005 he and Mr Clark had agreed that the defender would do all the client-facing work. In fact, the defender had done the vast majority of such work up until that time.

[51] The defender indicated that his move to Italy had been with Mr Clark's "full blessing". He had returned to Scotland every 6-8 weeks or so to see clients and to attend to other aspects of the business. While he was in Italy (he thought in about November 2006) Mr Clark had phoned him to say that the pursuer was going to pay for the catering at A's 21st birthday party. The defender said he had not been told until after Mr Clark had agreed with A that the pursuer would pay for it. In early 2007 the defender had found out about the lingerie venture. He had been very annoyed. It had been a reputational risk for the pursuer, and he was concerned that company time and resources were being used. When he raised it with Mr Clark he was assured that the venture was over. He recalled that around the same time Mr Fleming told him that Mr Clark was having an affair with A.

[52] Another source of friction had arisen in August 2009. The defender had discovered for the first time that Mr Clark was a shareholder in Sole Media. He had not been told of it previously, and there was no truth in the suggestion that the defender had been at a meeting with Mr Clark and the directors of Sole Media where both he and Mr Clark were given the opportunity to become shareholders. In August 2009 Kirsten Nelson had been visiting the

pursuer's office. In the course of a conversation with the defender and Mr Clark she mentioned that she had had to remind Mr McIntosh of Mr Clark's shareholding in Sole Media. Mr Clark had been embarrassed, and the defender had been astonished. It seemed to him that Mr Clark had been trying to direct business to a competitor in which he had an interest. Mr Clark's explanation to the defender was that he had agreed to take the shareholding as a favour to Mr O'Donnell so that Mr O'Donnell would have control if he fell out with the other major shareholder. Mr Clark had agreed to give up the shareholding.

[53] After his return from Italy the atmosphere in the office between the defender and Mr Clark had been a little different, perhaps because Mr Clark had had free reign of the office for the previous 5 years. In October 2010 Mr Clark had given evidence at the Sheridan perjury trial and this had been widely reported. While the defender had been nervous about the good name of the company, in fact clients had not made the connection between that publicity and the company. The relationship with Mr Clark settled down again, but by the end of 2011 Mr Clark's behaviour had deteriorated. He became regularly verbally abusive, even threatening, towards the defender.

[54] In March 2012 Mr Clark had come into the office, had made a bank transfer, and had filed a purchase invoice in the purchases folder. This had aroused the defender's suspicion. Normally purchase invoices would be filed quarterly by Kirstin Nelson, and usually an invoice would not be paid until 30 days after receipt. Later the defender retrieved the invoice. In his witness statement he stated:

> "51. ... The invoice was for £1,790 from a supposed business called "Kenny Mac Printers" ... upon investigation I discovered found out (*sic*) that it was actualy (*sic*) a friend of Gary's called Kenneth MacMillan.
>
> 52. I then made inquiries with printers for the same quantity and quality of posters should (sic) have cost in the region of £800-900. It appeared to me that not only was

> there a very large mark-up being added to what the printing should have cost but this was being passed on to our client."

The defender indicated that he "confronted" Mr Clark about the payment and the speed with which it had been made. Mr Clark had become very angry and abusive, and from that point onwards Mr Clark had worked from home.

[55] During cross-examination the defender accepted that he had known who Mr MacMillan was, and that he had done printing work for the pursuer many times before, but initially he maintained that previously Mr MacMillan had always been working for different (or differently named) businesses. However, under reference to JB 14 he accepted that was not correct, and that he had previously ordered and been supplied with printing by Kenny Mac Printing Services. He also accepted that in fact he had ordered the contentious print job from that business. He thought the price ought to have been closer to £1,100, which he explained would be about £1 per poster. However, he accepted that there had been a requirement for different posters for Grampian (50 A3 and 140 A1) in addition to the 250 A3 and 1050 A1 for the rest of Scotland.

[56] In the months which followed the printing argument the defender discovered a number of "dubious" invoices for contractors. Contact with Mr Clark was by telephone, texts, and Skype messaging rather than face to face. The defender believed it would be better for them both if there was a parting of the ways, and there was some discussion about possible ways of achieving this. However, ultimately Mr Clark's position was that he was not prepared to sell his shareholding unless and until he had the opportunity of carrying out the client-facing role for a number of years (at least 2 years, and possibly as long as 5 years).

[57] While the discussions with Mr Clark were ongoing the defender made inquiries with the Clydesdale Bank as to whether it would lend the pursuer funds to buy out Mr Clark.

Since no agreement with Mr Clark was reached the matter did not proceed further. Had an agreement been reached it would have been necessary for the pursuer to execute a new bank mandate (because if Mr Clark ceased to be a shareholder and director he would no longer have been an authorised signatory for the pursuer).

[58] The defender accepted that in May 2012 he registered the domain name tacticalmedia.co.uk. This had not been with a view to him setting up a new company to compete with the pursuer. Rather, he had appreciated that the name might be of value, and that he might be able to resell it.

[59] In his witness statement, and initially during his oral evidence, the defender stated that he and Mr Clark had agreed to take a dividend of £25,000, with a first instalment of £15,000 in December 2012 and a second instalment of £10,000 in February 2013.

[60] Each of them took the first instalment in December 2012. However, on 26 February 2013 when the defender texted Mr Clark to say he had taken the second instalment, Mr Clark denied they had agreed that it could be taken. He was abusive and threatening towards the defender. He threatened to come to the defender's house if £10,000 was not repaid to the pursuer immediately. During a telephone call he threatened to smash up the defender and his home. The defender refused to repay saying that they had an agreement. He recorded the call (JB 36) and reported it to the police.

[61] As far as the defender was concerned, the telephone call ended what was left of his relationship with Mr Clark. He concluded that it would be impossible for them to continue working together. He decided that he should to resign as a director. He consulted his solicitors about this, and about where he would stand if he set up in competition with the pursuer. He told them that there was an agreement which had entitled him to take the £10,000 dividend. The advice he was given by his solicitors included the advice set out

in their telephone attendance note of 12 March 2013 (7/204 of process). He was advised that he should return all company property to the pursuer, including data on his company laptop. He was told that it would be open to him to delete personal information. He told his solicitors that the pharmacy contract had come to an end and that the pursuer was about to tender for ten new campaigns for the following year. His solicitors advised that the pursuer might seek to prevent Tactical from tendering for the contract on the basis that the defender had confidential information/trade secrets, eg about the pursuer's pricing structure: but that they thought that would be a difficult case for the pursuer to make. The defender took from the legal advice that "I was able to go out and trade and that there was no restrictive covenant in place to prevent me from doing so".

[62] The defender resigned on 5 March 2013. On 6 March 2013 Tactical was incorporated. On the same day the defender contacted many of the pursuer's customers to indicate that he had left the pursuer and would now be carrying on business with Tactical. The people contacted included Mr Bell and Ms Scott.

[63] The defender indicated that he had all the data on his company laptop removed before he returned the laptop to the pursuer. He suggested that much of the data might have been backed up on the pursuer's server because each Friday afternoon those working in the office had the opportunity to back up data.

[64] On 18 March 2013 Mr Bell telephoned the defender and asked Tactical to submit a pitch for the pharmacy contract. The defender asked him to confirm the request in writing, which Mr Bell duly did (JB 52). By email of 19 March 2013 (JB 53) Mr Bell sent the defender an updated list of the pharmacies. The defender maintained that he used no confidential information in preparing Tactical's tender. He relied on his experience.

[65] During cross-examination the defender accepted that in a Skype message discussion on 19 December 2012 (JB 16, pp 148-149) he and Mr Clark had agreed that a dividend payment of £15,000 could be made, but that any decision on any further dividend payment should await confirmation that the pharmacy contract had been renewed for 2013-2014. His ultimate position was that although it had not been agreed that he could take the further dividend, he took it because he thought he was entitled to it as a shareholder. He accepted that while he was a director it had been his responsibility to obtain the renewal of the pharmacy contract. He also agreed that his only contact with Ms Scott was in connection with the pharmacy contract; that when the pursuer originally got the contract it had taken weeks for it to do the initial preparation, and that anyone new to the contract would have to go through the same exercise; that he had been able to rely upon his substantial knowledge of the pursuer when preparing Tactical's bid; that that was all information he had acquired as a director of the pursuer; and that Tactical had been asked to pitch for the contract on the basis that the defender already knew how it operated.

[66] The defender indicated that he had not prepared the Power Point presentation. It had not been on his laptop when it was in his possession. It must have been created by someone else after he returned it to the pursuer. He had not sought to set up a bank account for Tactical before he resigned. The email of 25 September 2012 from Donna Campbell of the Clydesdale Bank (JB 27) which referred to attaching an account opening form and a limited company mandate "for completion once you have the new company in place" was likely to have been a reference to the need to change the mandate if and when Mr Clark was bought out. The email of 20 December 2012 from the Clydesdale Bank's Janice McLaren (JB 35) attaching a new mandate form had been something which the Bank had requested that the defender and Mr Clark complete and return. The defender thought it was associated with

the change of branch from the Linwood Business Centre (which closed) to the Head Office in Glasgow, but whether that was correct or not both he and Mr Clark had completed the new mandate and it had been returned to the Bank (JB 16, p 148).

[67] While he accepted that it was no defence if he was in breach of his fiduciary duties, the defender considered that Mr Clark had acted in breach of his fiduciary duties to the pursuer by incorporating C.J.C. Media (UK) Limited on 8 October 2013, and by forming a joint venture company, C.J.C. Sole Media Partnership Limited, with the owners of Sole Media on 2 August 2016; and by carrying on business with these companies to the detriment of the pursuer.

Relevant statutory provisions

[68] The Companies Act 2006 provides:

> "**170 Scope and nature of general duties**
>
> The general duties specified in sections 171 to 177 are owed by a director of a company to the company.
>
> A person who ceases to be a director continues to be subject–
>
> to the duty in section 175 (duty to avoid conflicts of interest) as regards the exploitation of any property, information or opportunity of which he became aware at a time when he was a director, and
>
> ...
> To that extent those duties apply to a former director as to a director, subject to any necessary adaptations.
>
> (3) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.
>
> (4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties ...

...

172 Duty to promote the success of the company

A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to–

...

(c) the need to foster the company's business relationships with suppliers, customers and others,

...

175 Duty to avoid conflicts of interest

A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).

...

(7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

1157 Power of court to grant relief in certain cases

If in proceedings for negligence, default, breach of duty or breach of trust against–

an officer of a company ...

...

it appears to the court hearing the case that the officer ... is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit.

..."

Counsel for the pursuer's submissions

[69] Mr Davies submitted that the defender had acted in breach of his fiduciary duties to the pursuer both before and after his resignation. He had put himself in a situation where he had an interest which conflicted with the interests of the company. The prospect of the company obtaining renewal of the community pharmacy contract had been a maturing business opportunity which the pursuer had been actively pursuing, and which it had fully expected to obtain as it had done in previous years. The pursuer had delegated to the defender the responsibility for achieving the renewal. In placing himself in a position of conflict with the company in relation to the contract the defender was in breach of s175. The breach began before his resignation and continued after it. Even if there was no breach before his resignation, there was certainly a breach of s175 (as applied and modified by s170) after he resigned. Reference was made to *Foster Bryant Surveying Ltd* v *Bryant* [2007] EWCA Civ 200, per Rix LJ at paragraphs 8-10, 42 - 93; *First Subsea Ltd* v *Balltech Ltd* [2018] Ch 25, per Patten LJ at 21.

[70] Mr Clark, while plainly not without his faults, was an honest witness. His evidence was supported by other witnesses and by the documents. On the other hand, there were several instances where the evidence which the defender gave did not tally with the documents or the other evidence. He had not been justified in making the allegation he had about the payment to Mr MacMillan. He had not been entitled to take the £10,000 dividend payment in February 2013. At around the time of his resignation he had not provided his solicitors with the whole relevant circumstances; and he had not followed their advice to return his laptop complete with the data stored on it (other than his personal data). In so far as Mr Clark's evidence conflicted with that of the defender on material matters Mr Clark's evidence should be preferred.

[71] The defender's objection to the evidence in, and relating to, JB 28 and 29 should be repelled. The objection came at a very late stage, on the morning of the proof. The productions had been lodged since the summer of 2017. While the hard drive from the defender's laptop had not been lodged, and it was accepted that it would have been the best evidence, it had been lost in the circumstances which Mr Ripley had explained. In that state of affairs the court ought to admit the available secondary evidence. While the hard drive had not been available for examination by the defender, the file was the next best thing. The defender could have had the file examined by an expert had he wished.

[72] Mr Ripley had been adduced as an ordinary witness to fact, not as an expert witness. He spoke to what he had done and what he had observed. That evidence was admissible. Reference was made to *Kennedy* v *Cordia Services LLP* 2016 SC (UKSC) 59. However, on the evidence he did have skill and experience in recovering data from computer hard drives; and he had been able to explain what was contained in the metadata and what it meant. He had readily acknowledged that he was not an expert on the subject of metadata. The court should conclude from his evidence that the Power Point presentation JB 28 was recovered by him from the hard drive of the defender's laptop; and it should accept that the Power Point file's metadata stated that it had last been modified on 2 October 2012 by "Ken". The only real alternative to the defender having created it - that Mr Clark fabricated it - was fanciful. The court should accept Mr Clark's evidence that he did not fabricate the file or the metadata. It was plain from Mr Ripley's evidence that fabrication would have been an extremely difficult task, and it would have been easily detected by an expert. It should also be borne in mind that the defender had not led any evidence which contradicted Mr Ripley.

[73] There was clear evidence of the defender having put himself in a position of conflict before he resigned. He acquired the domain name. He took preparatory steps towards

opening a bank account for Tactical. He prepared the Power Point. His comment to Mr Graham, Mr Ross and Mr Craig showed that by the time he made it he was contemplating taking the pharmacy contract from the pursuer. On this point the evidence of the three contractors should be preferred to that of the defender.

[74] Even if the court was not satisfied that the defender breached his fiduciary duties before his resignation, and that the resignation was not prompted or influenced by a wish to acquire the pharmacy contract for the benefit of himself, it was plain that the defender had immediately placed himself in a position of conflict following his resignation. He pursued the pharmacy contract. He contacted Ms Scott and Mr Bell right away. He knew that renewal of the pharmacy contract was a maturing business opportunity. He had been the director responsible for achieving renewal. The invitation from Mr Bell to submit a tender for the work had come because of the defender's knowledge and experience of the contract, and because of the personal connection which he had made with Mr Bell while he was a director. The defender had been privy to all of the pursuer's confidential information, including pricing. He was able to prepare Tactical's tender with the benefit of that information. Even if he had not used any confidential information, he put himself in a position of conflict in order to exploit the pursuer's maturing business opportunity.

[75] The court ought not to exercise its power under s1157 to relieve the defender in whole or in part from his liability for breach. He had not acted honestly. Nor, looking at matters objectively, had he acted reasonably. In any case, even if he had acted honestly and reasonably, in the whole circumstances the court ought not to conclude that he should fairly be excused. The defender knowingly placed himself in a position of conflict. While he had taken some legal advice, it could not be said that his solicitors had been fully informed as to

all of the material circumstances. Moreover, he had not followed all of the legal advice which he had been given.

[76] The defender had an obligation to account for the profits arising from the breach of fiduciary duty. Mr Davies primary position was that the accounting should be for a period of four years from 2013-2014. He argued that had the 2013-2014 contract been renewed it would have been likely that there would also have been renewals in subsequent years. If the court did not accept that was appropriate, at the very least it should be for the year 2013-2014. Reference was made to *CMS Dolphin Ltd* v *Simonet* [2002] BCC 600, per Lawrence Collins J at paragraphs 97 - 105.

Counsel for the defender's submissions

[77] Mr Bowen submitted that the pursuer had failed to prove its case. The defender had not breached his fiduciary duty to avoid placing himself in a position of conflict with the pursuer. There had been no breach while he remained a director. Nor had there been any breach after his resignation.

[78] The defender's duties to the pursuer had been modified prior to his resignation. First, during 2012 Mr Clark had made it clear in Skype message discussions that he was content that the business be split and that he and the defender should compete against each other. Second, in his written closing submissions Mr Bowen suggested that as a result of the telephone call on 26 February 2013 the defender was effectively excluded from the management of the pursuer's affairs (cf *In Plus Group Ltd* v *Pyke* [2003] BCC 332). While the first suggested means of modification was canvassed by Mr Bowen during oral submissions, the second argument was not mentioned.

[79] The disputes in relation to Mr Clark's behaviour in 2002-2004, his Sole Media shareholding, VIP Lingerie, and the Kenny Mac Printing invoice, were "not directly relevant other than as matters of credibility". In relation to those matters, and in relation to other issues which were directly relevant, in so far as the evidence of the defender and the witnesses led on behalf of the pursuer diverged, the defender's evidence ought to be accepted as being more credible and reliable. He had given his evidence in a fair and straightforward way. On the other hand, Mr Clark was not a credible or reliable witness. He had admitted doctoring some of the productions to remove the defender's reference. The contractor's invoices JB 207-209 were not genuine invoices. He had also admitted placing false information on the pursuer's website in July 2013. The circumstances surrounding the non-availability of the hard drive were very suspicious. When assessing the evidence of other witnesses the court should bear in mind that some witnesses were close to Mr Clark.

[80] As regards pre-resignation breach, the only matter which the pursuer had established was that the defender had registered the domain name on 2 May 2012. However, that had not been a breach of the defender's fiduciary duties. Registration had not been with a view to competing with the pursuer. It had been an investment opportunity. The defender had not attempted to set up a bank account for Tactical in late 2012. The relevant correspondence at that time had related to the provision of a new mandate for the pursuer. The suggested comment to the contractors had not been made. Their accounts differed in material respects. They were partisan. It was implausible that the defender would have made the comment to them.

[81] The remaining pre-resignation matter was the Power Point file. The defender maintained his objection to the admissibility of evidence concerning it, including

Mr Ripley's evidence. The best evidence was the hard drive. It had not been produced, and the defender was very clearly prejudiced by its absence. He had not been able to have it examined by an expert in order to determine when the file was created and modified, when the purported metadata relating to it had been created, and whether and if so, when, it had been modified. The circumstances of the loss of the hard drive had not been satisfactorily explained. It was only during the course of Mr Ripley's evidence that it emerged that he maintained that it had been lost while in his custody. Neither Mr Clark nor Mr Ripley had adverted to it in their witness statements. The secondary evidence relied upon should not be admitted. If it was admitted it should be scrutinised very carefully indeed in the whole circumstances in light of the prejudice to the defender resulting from the loss of the primary evidence. Reference was made to *Stirling Aquatic Technology Ltd* v *Farmocean AB (No 2)* 1996 SLT 456. It was important to remember that Mr Ripley was not an expert witness. He could only competently give evidence as to fact. He was entitled to describe what he had done and what he had observed, but he was not able to give opinion evidence. It was implausible that the defender had prepared the Power Point. It contained spelling errors. Apart from the first page it contained pages which were clearly marked as pertaining to the pursuer.

[82] There had been no post-resignation breach. The defender had not used trade secrets or confidential information. He had been entitled to compete (through Tactical) with the pursuer for the 2013-2014 pharmacy contract. While it was accepted that the pharmacy contract had been a maturing business opportunity for the pursuer, the defender had not actively pursued the opportunity. On the contrary, Tactical had been invited by Mr Bell to submit a tender.

[83] If, contrary to Mr Bowen's primary submission, the defender did breach any of his fiduciary duties, it was nonetheless appropriate that the court should exercise its power

under s1157 to relieve him from liability for the breach. The defender had acted honestly, and his conduct had been reasonable. He had taken appropriate legal advice. In the whole circumstances he ought fairly to be excused from liability. Reference was made to *Coleman Taymar Ltd* v *Oakes* [2001] 2 BCLC 749, per Barling J at paragraph 10.

[84] In the event that the defender is found liable and is not relieved, any account of profits should be restricted to a period of 6 months (or, at most, 12 months). That would be a realistic time frame. Since a restrictive covenant for in excess of such a period would have been likely to have been unenforceable, it would be unreasonable to order an accounting for a longer period.

Decision and reasons

Credibility and reliability

[85] The fall-out between the defender and Mr Clark has been bitter. It would be naïve to ignore that factor when assessing their evidence.

[86] Aspects of Mr Clark's conduct cause me concern. He altered certain of the productions to remove the defender's reference. His explanation for doing that was unconvincing. It seems likely that he was the author of invoices which bore to have been issued by contractors (albeit I think it probable that the work involved was indeed done and that the payments noted were indeed made). He saw nothing wrong with having put a false and misleading announcement on the pursuer's website in order to rile the defender. His threatening behaviour on 26 February 2013 was an intemperate and unacceptable response to the defender's conduct, even though, as I explain below, in my opinion Mr Clark had good grounds for grievance.

[87] On the other hand, some of the defender's conduct also causes me disquiet. As I discuss below, in my opinion he made a serious and unjustifiable allegation that Mr Clark deliberately overpaid Mr MacMillan. In my view he was also clearly in the wrong in taking a "dividend" of £10,000 in February 2013. Further, contrary to the legal advice which his solicitors had given him, he sought to have all data deleted from his company laptop before he returned it to the pursuer.

[88] I am also unimpressed by the way in which the defender conducted certain aspects of his defence to the action. Matters having no real relevance to the issues in dispute were raised and traversed (in one instance with unacceptable disregard to the risk of damage to a third party). Mr Bowen's ultimate position was that these, largely historical (and in some instances salacious and scandalous) matters were only relevant to assessing Mr Clark's credibility. I did not find them to be of any material assistance in that regard. In my opinion the truth of the matter is that the real aim of adducing this evidence was more to portray Mr Clark in a generally unfavourable light than to assist with the resolution of any of the real issues in the case.

[89] In my view the defender exaggerated the length of the period that Mr Clark indulged in binge drinking after his wife left him, and the extent to which it interfered with his work. I am not persuaded that Mr Clark's association or alleged association with salacious or scandalous events had any material effect on his relationship with the defender, on his ability to perform his duties, or on the way duties were allocated between the defender and him. Nor am I persuaded that the payment for the birthday party, or the very brief involvement of Mr Clark and two employees in the lingerie venture, or the fact of Mr Clark's shareholding in Sole Media, were viewed by the defender at the material times as having a significant deleterious effect on his relationship with Mr Clark.

[90] In my view it is particularly unfortunate that the defender saw fit to ventilate the allegation of an affair between the defender and a young employee, and to persist with it even after it became clear that the defender's alleged source would not support the allegation. It was clear from Mr Fleming's witness statement that he denied making the allegation to the defender and that he denied that there had been an affair. Even if, prior to that point, making the allegation had been justifiable (and I do not think it was) in my opinion it ought to have been withdrawn once Mr Fleming's witness statement became available.

[91] In the whole circumstances I think there are good reasons for approaching the evidence of both Mr Clark and the defender with considerable caution. In general, where their evidence is controversial I have accepted it only where I have been able to find some support for it elsewhere in the evidence.

[92] I am conscious that some of the other witnesses (Mr Fleming, Mr O'Donnell and Mr Macdougall) are or were friends of Mr Clark. Others (Mr Craig, Mr Ross, Mr Graham and Mr Montgomery) knew Mr Clark well and were on good terms with him. I am alert to the risk that because of these ties they might be inclined to seek to assist Mr Clark when giving evidence. I have approached the evidence of each of them with a degree of caution for that reason. However, except where their evidence is inconsistent with my findings, I have accepted their evidence. At the end of the day, I think that their evidence largely relates to matters which are peripheral or of little materiality to the critical issues. So far as the remaining witnesses are concerned, I have no reason to doubt their credibility. Except where the findings which I have made indicate otherwise, I have accepted their evidence as being reliable on all material matters.

The relationship between Mr Clark and the defender prior to March 2012

[93] I am content that prior to March 2012 the working relationship between Mr Clark and the defender was reasonably satisfactory. As in any business relationship, there had been occasional stresses, disagreements and differences of view, but nothing which went beyond that, in my opinion. The business prospered. The defender and Mr Clark each focussed on different activities. The defender concentrated on the client-facing role and Mr Clark on the logistics of operating the business. This appears to have evolved naturally and to have reflected the skills which each had developed over the years. I do not accept the suggestion that the division of duties developed because of any perceived risk of adverse publicity involving Mr Clark.

The dispute over the Kenny Mac Printing payment

[94] The allegation by the defender that Mr Clark deliberately overpaid a friend caused a serious deterioration in the directors' relationship in March 2012. Mr Clark reacted angrily to the accusation.

[95] In my opinion the accusation was not well-founded. Mr MacMillan had been instructed by the pursuer to provide printing on several previous occasions. On the occasion in question it was the defender who instructed him. I am satisfied on the evidence that the reason the particular print job was more expensive than usual was that two different specifications were involved, one for Grampian and one for elsewhere. I am also satisfied that the price charged was reasonable in the circumstances.

[96] In my opinion Mr Clark was justifiably aggrieved and offended by the accusation. It impugned his integrity. If the defender had concerns he wished to explore he ought to have approached them much more carefully and tactfully. In fact, the accusation was groundless.

Even so, Mr Clark's response - refusing to work in the office when the defender was there - seems to me to have been disproportionate to the offence which the accusation caused.

Management of the pursuer's affairs between March 2012 and February 2013

[97] Between March 2012 and February 2013 the relationship between Mr Clark and the defender was strained. Nevertheless, while there was no face to face communication, the pursuer's affairs appear to have been managed adequately. The directors had informal discussions about splitting the business, and about one or other of them buying out the other. However no agreement was reached.

The "dividend" of £10,000

[98] On 19 December 2012 Mr Clark and the defender had a Skype message discussion about dividends (JB 16, pp 148-149). They agreed (i) that a dividend of £15,000 each could be taken immediately; (ii) that if the community pharmacy contract was renewed for 2013-2014 a further dividend of £10,000 each could be taken; and (iii) that in the event that the contract was not renewed they would have to look again at what, if any, further dividend was appropriate.

[99] I am satisfied that the defender was not entitled to take the payment of £10,000 which he took on 26 February 2013. At that time no decision had been made by Carat in relation to the 2013-2014 contract. The defender took the payment without discussing it first with Mr Clark. Thereafter, he asserted repeatedly, and without any proper justification, that they had agreed that the dividend could be taken. He persisted in that position until partway through his oral evidence.

[100] Mr Clark reacted angrily to the news that the defender had removed £10,000 from the pursuer's bank account. He was further enraged by the defender's assertion that he was acting in accordance with the agreement which had been reached. Once again, he was justifiably aggrieved by the defender's conduct. However, as he accepted, the threats which he made during the telephone call were inexcusable and deplorable.

Modification of the defender's fiduciary duties?

[101] Mr Bowen (faintly) submitted that Mr Clark and the defender had agreed that the defender should be free to compete with the pursuer. The suggested basis for that proposition was said to be the Skype messages between them during 2012. In my opinion, when those messages are read fairly and in context it is plain that no such agreement was reached. Nor did Mr Clark expressly or impliedly consent to any modification of the fiduciary duties which the defender owed to the pursuer (see *Commonwealth Oil & Gas Co Ltd* v *Baxter* 2010 SC 156, per Lord President Hamilton at paragraph 10, per Lord Nimmo Smith at paras 78 and 80).

[102] The second submission relating to modification was that the defender was effectively excluded from management of the pursuer's affairs, and that as a result the defender's fiduciary duties were modified. The submission was adverted to only briefly in Mr Bowen's written submissions, and it was not developed during oral submissions. In my view it is not well-founded. I accept that Mr Clark's threatening behaviour on 26 February 2013 made it reasonable for the defender to conclude that he could not resume a working relationship with him. However, there is no evidence that prior to his resignation as a director the defender was effectively excluded from management of the pursuer's affairs. I am not persuaded that in the whole circumstances the defender's fiduciary duties were expressly or

impliedly modified at that time. Nor am I satisfied that once he resigned he ceased to have the fiduciary duties of a former director (s170(2), s175). In my opinion he remained obliged to avoid placing himself in a position of conflict with the pursuer by taking advantage of an opportunity which had been a maturing business opportunity for the pursuer before his resignation.

[103] The scenario here seems to me to be readily distinguishable from that in *In Plus Group Ltd* v *Pyke, supra*. In that rather unusual and special case (see Brooke LJ at para 75, Sedley LJ at para 90, Jonathan Parker LJ at para 94) a group of four companies was owned and operated by two directors. The defendant director had a serious stroke in June 1996 which rendered him unfit to participate in the management of the companies for several months. By January 1997 he considered that he had recovered sufficiently to resume his duties, but his fellow director resisted his return. He was effectively expelled from the companies. He was denied any remuneration from them or any access to relevant financial information. In order to earn a living he formed a new company, and from the summer of 1997 that company obtained work from a major customer of one of the plaintiff companies. The trial judge found that the customer was not prepared to instruct the plaintiff companies to do any more work for them in view of a great number of complaints it had about their work since the defendant had ceased to control the work. He held that the defendant had committed no breach of fiduciary duty. His decision was affirmed by the Court of Appeal (Brooke LJ at paras 76-77; Sedley LJ at paras 89-90).

[104] In contrast, in the present case the defender was not effectively excluded from the management of the pursuer's affairs. He was not deprived of remuneration to which he was entitled. He was not prevented from having access to the pursuer's financial information (cf *Commonwealth Oil & Gas Co Ltd* v *Baxter*, *supra*, per Lord Nimmo Smith at para 80).

[105] Moreover, in *In Plus Group Ltd* v *Pyke* it was not suggested that the defendant was exploiting a maturing business opportunity which belonged to the plaintiffs.

Breach before resignation?

[106] I am not satisfied that the defender breached his fiduciary duties prior to his resignation.

Domain name

[107] I am not persuaded that registration of the domain name placed the defender in a position of conflict with the pursuer. It was not suggested that the pursuer had any claim to the name. Whether it was purchased as an investment (as the defender maintains), or whether he planned to use it in a business of his own at some future time, in my view mere registration of the name did not give rise to a conflict between the defender's interests and the interests of the pursuer.

Power Point file

[108] Some of this chapter of the evidence was highly controversial. The defender and Mr Clark both denied that they created or modified the file. Mr Davies contended that on this point the evidence of Mr Clark and Mr Ripley should be accepted, and that the evidence of the defender should be rejected.

[109] I accept the evidence of Mr Ripley that he recovered the file from the defender's company laptop, and that the metadata which he described were the metadata which he found were associated with the file when he examined it. In my opinion these were

ordinary matters of fact which Mr Ripley was competent to speak to. In my opinion there is no reason to doubt his credibility or reliability in relation to them.

[110] However, in my view other aspects of Mr Ripley's evidence were opinion evidence which only a skilled witness would have been qualified to give. Mr Ripley did not claim to be giving that evidence as a skilled witness who possessed relevant expertise. None of the steps normally associated with setting up a witness as an expert were taken here. Mr Ripley was not asked to prepare a report. An expert's report ought to set out *inter alia* his qualifications and experience, his expertise, by whom he was instructed, the matters in relation to which he has been asked to provide an opinion, and the material provided to him. It ought to contain the usual declarations that the expert is independent, and that he understands and has complied with his duties to the court and to the parties.

[111] In my view Mr Ripley's evidence as to the difficulty of altering a file's metadata, and the likelihood of that having happened here, is inadmissible opinion evidence. Accordingly, I shall sustain the defender's objection to the admissibility of that evidence. In fairness to Mr Ripley, he acknowledged that these were matters upon which he possessed no expertise.

[112] If the laptop had gone directly from the defender to Mr Ripley I may have been more inclined to attach some significance to the metadata which Mr Ripley observed. The fact is, however, that the laptop was in the custody of Mr Clark before it went to Mr Ripley. In those circumstances the loss of the hard drive is significant. Had it been available the defender could have had it examined by a suitable expert to obtain an opinion as to when and by whom the file was created and modified. In my opinion the defender is materially prejudiced by the loss of that opportunity.

[113] If the file and its metadata were thought by the pursuer to be significant it ought to have been obvious that it was important that the hard drive should be carefully preserved.

The loss is said to have occurred in the hands of Mr Ripley, and to have been inadvertent. However, the fact of the loss and such explanation for it as was provided emerged only during the oral evidence of Mr Ripley. That was highly unsatisfactory. The loss ought to have been disclosed much earlier. The whole circumstances ought to have been fully explained by Mr Ripley and Mr Clark in their witness statements. Even in Mr Ripley's oral evidence the precise circumstances of the loss were rather vague, as was the evidence as to the nature and extent of the efforts to search for the hard drive.

[114] In the result I am not persuaded that it would be right to attach any significant weight to the metadata evidence. In the whole circumstances the pursuer has not satisfied me that the defender was the author of the Power Point file.

[115] In any case, even had it been proved that the defender was the author, I doubt whether that in itself would have involved a breach of the defender's fiduciary duties to the pursuer. By October 2012 division of the business had been mooted. There was nothing to stop the defender from exploring plans for the future should he cease to be a director, as long as he did not do anything which amounted to a breach of his fiduciary duties. It seems to me that, on this hypothesis, the file was, at best, a partial first draft of promotional material which would have been private to the defender and which never reached the stage of being communicated to potential customers (or indeed anyone else).

The alleged statement to the contractors

[116] I am conscious that Mr Craig, Mr Ross and Mr Graham worked closely with Mr Clark, and that they had very little day-to-day contact with the defender. There were some indications that their sympathies and loyalties lay with Mr Clark rather than with the defender. I have approached their evidence with a degree of caution because of that.

Nevertheless, I think it unlikely that they have conspired together to concoct a false account. Nor do I regard the differences between their evidence as being material. I conclude that the defender did make some reference to the possibility of them working with him at some time in the future. I do not think it implausible that such an observation might have been made. At the material time the relationship between the defender and Mr Clark had deteriorated to the point that they did not meet face to face, and the possibility of a business split or a buy-out had been mooted.

[117] However, once again I am not persuaded that the making of the observation involved a breach by the defender of any of his fiduciary duties to the pursuer. It was consistent with the contractors continuing to work with the pursuer, albeit dealing with the defender instead of Mr Clark. Even if what was being adverted to was the possibility of future competition with the pursuer, I am not persuaded that the defender's casual passing reference to that possibility was a breach by him of his fiduciary duties.

Bank correspondence

[118] I am not persuaded that the bank correspondence is indicative of any breach by the defender of his fiduciary duties. While it seems unlikely that the need to complete a new application or mandate arose from the management of the pursuer's account moving from Linwood to Glasgow, I am not satisfied that the bank correspondence proves what the pursuer suggests it proves. On the contrary, I think that it is largely consistent with the defender's suggested recollection of events. I accept his evidence that he did not apply to open a bank account for Tactical in the latter part of 2012. I mean no disrespect to Mrs Plenderleith when I say that I did not obtain a great deal of assistance from her evidence. While she was able to speak to the correspondence and documentation which the

bank had on file, and to general practices of the bank, she was not in a position to speak for the bank representatives who had actually been involved at the material times. It seems more likely than not that, for whatever reason, the bank did require a new mandate to be completed in December 2012 and that both Mr Clark and the defender duly completed it. I think it may reasonably be inferred that the new mandate was required because there had been a change to some aspect of the required particulars provided in the previous mandate.

Breach after resignation?

[119] Mr Davies was very vague as to the precise nature and terms of any trade secrets or confidential information which the defender was said to have exploited. In any case, I am not satisfied on the evidence that such use by the defender has been established.

[120] In my opinion the critical question is whether the opportunity for the pursuer to obtain the 2013-2014 pharmacy contract was a maturing business opportunity belonging to the pursuer. In my view it was.

[121] The pursuer had been awarded pharmacy contracts for several years in succession. Prior to the events of 26 February 2013 and the defender's resignation on 5 March 2013 there had been a strong expectation that the contract for 2013-2014 would be awarded to the pursuer. The defender had been responsible for obtaining the previous pharmacy contracts for the pursuer, and he was tasked by it with obtaining the 2013-2014 contract. There was no evidence that there was a rival contender with any real prospect of obtaining the award.

[122] While I do not regard it as critical to my decision, I am satisfied that the defender took active steps to solicit the contract. He contacted Ms Scott and Mr Bell. He made it clear to them that he had left the pursuer, but that he would be carrying on business under the

auspices of Tactical. On any realistic view the customer was being invited to consider Tactical as a rival for the pharmacy contract.

[123] In any case, whether or not the initiative was defender-led or customer-led, in my opinion the defender was under a duty to avoid a conflict with the pursuer in relation to the 2013-2014 pharmacy contract. He knew that it had been a maturing business opportunity for which he had been responsible. While it is immaterial whether the pursuer could in fact have taken advantage of that opportunity (s175(2); see also *In Plus Group Ltd* v *Pyke*, *supra*, per Brookes LJ at para 71), the fact is that the defender knew very well that the pursuer continued to seek to realise the opportunity.

S.1157

[124] I could only grant the defender relief from liability for his breach of fiduciary duty if I was satisfied that he acted honestly and reasonably, and that having regard to all the circumstances he ought fairly to be excused.

[125] While I am prepared to accept that the defender acted honestly, I am not satisfied that he acted reasonably. In my opinion a reasonable person in his position would not have acted as he did. He would have recognised that the 2013-2014 pharmacy contract was a very important and maturing business opportunity for the pursuer, and that he had been the person responsible for nurturing it. In my view it would have been obvious to him that it would be unreasonable of him to seek to profit from, or put himself in a position of conflict with the pursuer in relation to, that maturing business opportunity.

[126] I take full account of the fact that the defender took legal advice. However, I am not satisfied that his solicitors were fully informed of the importance to the pursuer of the 2013-2014 pharmacy contract or of the fact that it was a maturing business opportunity which the

defender had been tasked to nurture and realise. I think it probable that had they been fully informed the advice which they would have given the defender would have been materially different from the advice which they in fact gave.

[127] Since I am not persuaded that the defender acted reasonably, it is unnecessary to consider whether in all the circumstances he ought fairly to be excused. However, even had I been convinced that the defender acted reasonably, I would not have granted relief. I would have concluded that it would not have been fair to excuse him in the whole circumstances, not least because of the importance to the pursuer of the opportunity which the defender exploited and because the defender and Tactical have obtained significant benefits from the breach.

Accounting for profits

[128] It is common ground that in the event of the defender being in breach of fiduciary duty, and if he is not relieved from liability, he has an obligation to account. However, there is controversy as to the period in respect of which the defender ought to be liable to account.

[129] In my opinion the appropriate accounting ought to be for all of the 2013-2014 pharmacy contract campaigns. The 2013-2014 pharmacy contract was the relevant maturing business opportunity which the defender profited from. The profits obtained by reason of the breach were the profits from those campaigns - no more and no less. While it is unnecessary for the pursuer to demonstrate that it would have obtained the contract had the defender not submitted a tender, in my opinion it is almost certain that it would have been successful given its good track record and the absence of any other real rival for the work. I am unconvinced that in those circumstances the renewal of the contract in its favour would have been for a trial period of three months instead of the normal twelve months.

Disposal

[130] I shall put the case out by order to discuss (i) the terms of an appropriate interlocutor to give effect to my decision; (ii) any motion for expenses which may be made; and (iii) further procedure.