

BL 2020 NCL 000017

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN NEWCASTLE

BUSINESS LIST (Ch)

Before HHJ Kramer sitting as a Judge of the High Court at the Moot Hall,  
Newcastle upon Tyne on 6 May 2022

BETWEEN

(1) HEATING TRADE SUPPLIES GROUP LIMITED

(2) MUSTAFA ERDEM BALDUDAK

Claimants

and

(1) MARK MATTEO

(2) NATIONAL BOILER PARTS LIMITED

Defendants

**This is a signed judgment handed down by the judge, with a  
direction that no further record or transcript need be made**

JUDGMENT

1. This is a dispute between two businessmen, Mr Baldudak, and Mr Matteo. The former is represented by Jonathan Rodger of counsel, who also represents Heating Trade Supplies Group Ltd (“HTS”). Mr Matteo is

represented by leading counsel, Hugo Page QC. National Boiler Parts Limited was dissolved following the issue of these proceedings.

2. There are a number of issues between the parties, but at the heart of the dispute is the claim by Mr Baldudak that he is the sole legal and beneficial owner of 100% of the shares in HTS and that money he has put into that company was by way of loan and not a payment in return for shares. Mr Matteo asserts that he is the beneficial owner of 50% of the shares in that company, which both parties acknowledge was set up as a quasi-partnership, and, in his capacity as a shareholder, he has been unfairly prejudiced by having been excluded from the management of the company since 12<sup>th</sup> November 2021. He claims £1 million of the money provided to the company by Mr Baldudak was the price paid for a 50% holding in HTS.
3. On the unfair prejudice argument, Mr Baldudak counters that if Mr Matteo did have a beneficial shareholding, his exclusion was justified due to alleged breaches of his fiduciary and statutory duties to the company. He alleges that Mr Matteo has been taking money from the company to which he is not entitled and for which he has failed to account. He relies upon the fact that Mr Matteo set up a company called National Boiler Parts Limited, which he says was done secretly and in order to compete with HTS for Mr Matteo's personal benefit. There is also a claim by the company for the repayment of Mr Matteo's director's loan account and injunctive relief sought to prevent him from interfering in the business of HTS, attending its premises or claiming to be connected to that company.

#### Procedural History

4. The claim commenced on 25 November 2020. An application was made the same day for injunctive relief seeking, amongst other things, details of the login and password details for HTS's online bank and marketing accounts, and seeking to prevent Mr Matteo from claiming he was selling

goods on behalf of HTS or using its trading names. The broad allegation was that Mr Matteo had, secretly, set up a company to compete with HTS and had interfered with HTS' login and password details so as to interfere with its ability to trade. There was also a "hand in the till" allegation.

5. There were two hearings to deal with the application, on 26 November and 7 December 2020, at which Mr Matteo appeared, unrepresented. The application was disposed of by various orders and undertakings designed to enable HTS to continue to trade pending trial despite the disagreement between Messrs Baldudak and Matteo. A counter-application by Mr Matteo was not proceeded with. Evidence which was used by both sides in the course of the injunction application has featured in the trial.
6. There was a costs and case management hearing on 20 April 2021 before DDJ Swan at which both sides were legally represented and a number of issues were identified for my determination on 23 April 2021. At the latter hearing I ordered a trial of a preliminary issue as to the ownership of the shares and the lawfulness of Mr Matteo's removal as a director. The trial was due to take place on 8 June 2021. At the trial, however, the judge, the Vice-Chancellor, Snowden J, as he then was, gave further directions vacating the trial of the preliminary issue and making orders for amendment to the pleadings, the presentation by Mr Matteo of a petition under section 994 of the Companies Act 2006 and for the trial of both the claim and the Petition to be dealt with at the same time. Thus the trial before me has dealt with all matters in the original claim and the Petition.
7. At the start of the trial Mr Page sought to introduce a further issue as to the beneficial ownership of the property from which HTS trades. Mr Rodger objected. For reasons set out in a short judgment at the time I declined to permit the property ownership issue to be determined in this trial. I was

shown a draft set of proceedings to deal with that claim and, if issued, they will doubtless take their course.

### Background Facts

8. I set out here facts which are not contentious and can be taken as my findings on these matters.

### The parties, the companies, the introduction of funds to HTS, the transfer of shares and the directorships

9. Mr Baldudak and Mr Matteo are both from Turkey. Mr Matteo has lived in England for many years; he was formerly called Mustafa Polat. At the time that they were considering going into business together, Mr Baldudak did not have leave to remain in the United Kingdom. He and his family lived in Turkey and whilst he was in business with Mr Matteo, he continued to spend much time there.

10. Mr Matteo was married to Hava Polat but they were separated in July 2018. Divorce proceedings were instituted that year by Mr Matteo. The Decree Nisi was granted on 2 March 2019. They have two children, Zeynep and Alperen. On 6 November 2020 Mr Matteo produced his Form E setting out his income, assets and liabilities for use in Mrs Polat's financial application. On his account, the Form E contains information which he knew to be untrue at the time. In particular, he claimed to have no business interests and that he was previously a director of HTS. He elaborated on this claim in a statement, forming part of the Form E, alleging bad conduct by Mrs Polat on the basis that he has been dismissed as a co-director of HTS as a result of her spreading hate about him and Mr Baldudak, who he described as understanding and supportive until recently. The Form E also stated that he owed Mr Baldudak £91,280, which he has since denied. In April 2020 Mrs Polat issued an application for a non-molestation

injunction against Mr Matteo. An injunction order was made that day and extended by consent on 8 January 2021. A consent occupation order was made in favour of Mrs Polat at the same time. Mr Matteo produced a statement in response to the application which has been referred to in these proceedings which also contains falsehoods, as he accepts.

11. Mr Matteo has qualifications as a Gas Safe Engineer. In May 2013 he set up Newcastle Parts Centre Ltd and by 2014 was the holder of the entire shareholding in that company. The company traded under the style National Boiler Parts. The business of the company was the sale of new and refurbished gas boiler parts. Mr Matteo also formed a company PCB Centres Ltd (“PCB”) in which he held all the shares. On 30 June 2015 he incorporated National Boiler Parts Limited, later to become HTS. I shall refer to that company as HTS throughout its existence so as to avoid confusion with the second defendant. The nominal share capital of the company was 100 £1 shares. Over time, that company used a number of trade names, Heat Pack, National Boiler Parts, Amazing PCBs and Climate Parts. On 27 June 2020 Mr Matteo incorporated National Boiler Parts Limited of which he was the sole shareholder and director. The registered office of the company was his home address unlike HTS, the original registered office of which was its trading address.

12. Mr Baldudak has three sisters. They are Ezra, Berna and Nehan. They all live in Turkey. Nehan is unmarried. Their parents also lived in Turkey though their father died in 2020. Evidence concerning disagreements within this family has featured in this case. Mr Baldudak has a property business in Turkey. His father had a number of businesses in Turkey and provided substantial funds to his son in relation to his involvement in HTS. Mr Baldudak had studied at the University of Sunderland, apparently his introduction to the North East of England.

13. By 2015 Mr Baldudak and Mr Matteo were in touch with each other and discussing going into business together. Precisely how long they had known each other is not agreed but that is not significant. There was an oral agreement under which Mr Matteo was to transfer 50% of his shares in HTS to Mr Baldudak and the latter was to provide £1million to the company; there is a dispute as to whether this was to be by loan or an investment into the company in return for the shares.
14. Between 10 November 2015 and 25 January 2016, Mr Baldudak settled HTS' suppliers' pro forma invoices in the sum of £114,218. He also paid Mr Matteo £34,511.06 which, Mr Matteo says, was used for HTS' purposes. On 8 January 2016 Mr Matteo transferred 50 shares in HTS to Mr Baldudak. Between 25 January and 16 May 2016, Mr Baldudak paid £245,500 into the bank account of HTS. A business plan was produced in June purporting to set out their plans. On 27 June 2016, Mr Baldudak paid £750,000 to PCB. It is common ground that the money was paid to PCB to purchase OEM Spares Ltd, an established company carrying on the trade which ultimately was followed by HTS. The purchase of OEM did not proceed. £450,000 to £460,000 of the money paid to PCB was used to purchase a property at Tyne View Terrace, Howden, from which HTS was to trade. The property was transferred by the vendor into the joint names of Messrs Baldudak and Matteo on 22 November 2016.
15. The abbreviated balance sheet of HTS for 30 June 2016 does not refer to a loan from Mr Baldudak or show the money he introduced as part of the capital of the company or in a share premium account. The abbreviated accounts to 30 June 2017 show £811,331 owed to him by the company and that the property had been used as a security for a bank loan to HTS which stood at £270,000. The abridged accounts to 30 June 2018 show that he was owed £802,050 and the amount due on the secured loan had reduced

to £259,478. In the management accounts to 30 June 2019 the directors' loan account shows a reduction to £400,478 for amounts falling due in one year and £300,000 as being due after one year; there was evidence from Mr Duffy to explain this adjustment which will be looked at in due course. The property at Tyne View Terrace never appears as an asset of the company in the accounts, nor is there a reference to rent for the property in either the profit and loss account or as creditors falling due on the balance sheet. All these accounts were prepared upon the instruction of Mr Matteo who signed them to indicate that they had been approved by the board.

16. Mr Baldudak became a director of HTS on 1 November 2016. On 23 March 2017 Thomas Duffy, a chartered accountant who, through his company Glen C Rodger Ltd, was the HTS accountant, sent Mr Matteo paperwork for him to sign to transfer one share in HTS to Mr Baldudak for nil consideration. The email was preceded by one from Mr Matteo asking what time he should attend Mr Duffy's office that day. It is possible that Mr Matteo did not receive that documentation for on 25 May 2017 he emailed Mr Duffy to record that there had been a meeting at Mr Duffy's office in which "we" had mentioned that 1% of his shareholding was to be transferred to Mr Baldudak but he had not received anything to sign. Mr Duffy registered the transfer on 26 May 2017 but backdated it to 23 March 2017.

17. On 26 November 2018 Mr Matteo emailed Thomas Duffy, informing him that the shareholding in HTS was to be changed to "100% to Mustafa Erdem Baldudak" and he asked Mr Duffy to call him when he had time. No such transfer took place at that time. On 14 January 2019 Mr Matteo executed a document showing the transfer of one share, notwithstanding that the board minutes recording the decision to transfer refers to 44 shares. In the event, 44 shares were registered as transferred to Mr Baldudak. The

transfer was preceded by an email from Mr Matteo to Mr Duffy dated 3 January in which he said:

“Would you have a few minutes today for me to come and sign the accounts and also sign the share transfer. As per our agreement with Mr Baldudak I will keep 5% of the company shares and 95% will be on (*sic*) Mr Baldudak’s name. In return the company will not have to pay back his loan.”

18. Mr Matteo emailed Mr Baldudak on 22 February 2020. The text of the email purports to be a letter in which the latter informs the former that he proposes to dismiss him as a director on his return to the country, citing as the reason Hava Polat’s impact on the business of HTS in pursuing a vendetta against Mr Matteo. He makes it clear that he regards none of what she has done as Mr Matteo’s fault. There was no dismissal on his return.

19. On 24 February 2020 Mr Matteo transferred his remaining 5% shareholding to Mr Baldudak. He gave instructions to Mr Duffy by an email of that date in which he said:

“My remaining 5% shares will be transferred to Erdem as per his instruction as the company did not manage to repay the investment loan in agreed time. If I need to sign any documents please let me know.”

20. By this stage, therefore, Mr Baldudak had all 100 shares in HTS registered in his name. In October 2020 it appeared that this may change for on 7 October 2020, Mr Matteo wrote to Mr Duffy saying:

“...we need to see you for shares transfer and amending the amount owed to Erdem”

The meeting took place on 12 October 2020. At that meeting Mr Baldudak executed a stock transfer form for 50 shares in Mr Matteo’s favour. The



form was left with Mr Duffy for reasons which are disputed. On 6 November, there was a meeting between Mr Duffy and Mr Matteo to discuss VAT returns and Mr Baldudak's loans to HTS. That afternoon, Mr Baldudak visited Mr Duffy and collected the stock transfer forms which he destroyed by tearing off the signature. Mr Duffy was contacted by Mr Matteo on 11 November 2020 for details as to how he could register the share transfer and gave him the login details for Companies House. On that day Mr Matteo registered a notice of significant control stating that he had no less than 25% and no more than 50% of the shares in HTS.

21. Mr Baldudak instructed solicitors on 10 November 2020. He told me that he had discovered on 4 or 5 November that Mr Matteo had put the details of another bank on the eBay account used by HTS and that it belonged to another company set up by Mr Matteo called National Boiler Parts Ltd.

22. On 12 November 2020 Mr Matteo attended Tyne View House. Also there that day were Emir Coban who had been asked by Mr Baldudak to change the computer passwords; he says that this was needed in order to change them back after Mr Matteo had affected a change. What is clear is that members of staff, Mr Laidler and Ms Fisher, were unable to log on to the system that day. Mr Matteo was asked to leave and hand over his phone by Mr Baldudak. He refused and said that he would call the police. There came a time when Mr Matteo was in the car park at the front of the premises. Two security guards had arrived by this time, summoned by those acting on behalf of Mr Baldudak. A Mr Grey, who was also there to assist Mr Baldudak, grabbed Mr Matteo's mobile phone from his hand. There followed a tussle in which Mr Matteo was taken to the ground and restrained by the security guards. There is a dispute as to what was said and the precise order of events. The police arrived, eventually, and

removed Mr Matteo, having handed to Mr Baldudak the contents of Mr Matteo's bag.

23. Mr Baldudak submitted an online filing with Companies House removing Mr Matteo as a director on 13 November 2020 and registering the transfer of the last five shares to have been transferred. On the same day Mr Matteo emailed him saying he was an equal partner and could not be excluded. There was a purported board meeting of HTS on 19 November 2020 attended by Mr Baldudak and Peter Cuthbert who had been giving him advice about what should be done about Mr Matteo. The meeting resolved to dismiss Mr Matteo. That day, Mr Baldudak wrote to HSBC, HTS's bank, asking that Mr Matteo be removed from the mandate. There is an entry on the Company House register dated 3 January 2021 stating that Mr Cuthbert had been appointed as a director and Mr Matteo had resigned.

24. On 7 January 2021 there was a purported resolution of the shareholders of HTS ratifying the dismissal of Mr Matteo and the appointment of Mr Cuthbert as director. A further development in this period is that on 16 December 2020, thus following the injunction hearings in November and December where the issue as to Mr Matteo's shareholding was raised, Mr Matteo filed a new Form E in which he claims that there was an agreement that he would have a 50% shareholding in HTS but that his business partner disputed his shareholding and that he was a half owner of the business premises. He also claimed to be owed salary and that he was disputing his removal as a director. He gave his employment status as being "currently dismissed until court hearing(s)." Under benefits in kind he recorded "provision of company van and car for work and personal use."

#### Certain dealings with the company's money

25. Mr Matteo received a salary of £795 per month from HTS until September 2019 when this was increased to £27,500, backdated to April 2019. The lower figure was set at a rate which avoided the payment of national insurance and income tax, the higher rate was set in order to enable him to obtain a mortgage.
26. Cash payments to the trade counter at HTS went through the till. The cash was collected at the end of each day by Mr Matteo and sometimes Mr Baldudak. There is an issue as to what happened to it.
27. Between 6 and 10 October 2019 HTS paid into Mr Matteo's bank account a total of £3,695.02. On 8 and 9 January 2020 Mr Matteo received a total of £32,500 from HTS's bank account. He says that the lower amount was for wages and the higher for deferred salary. A further £18,750 was paid into his account from that of the company on 29 January 2020. Mr Matteo says that these sums, the two larger amounts, which total £51,250, were withdrawn to provide a deposit on a house and that Mr Baldudak knew of the withdrawal. These sums were recorded in Mr Matteo's director's loan account. On 29 May 2020 Mr Matteo paid £3,600 from the HTS account to settle a bill from Mincoffs solicitors which related to his matrimonial proceedings.

### The parties 'claims and counter-claims

#### The claimants 'case

28. Mr Baldudak's case is that the money he introduced into HTS, both into its bank account and by paying its bills to creditors, was by way of loan. As regards the introduction of the first £1 million in particular, this was a loan and not the price of 50 shares or a contribution to the assets of the company. The transfers of Mr Matteo's shares to him in three tranches were by way of security as HTS was unable to repay the loans. Had the

loans been repaid he would have returned the shares to Mr Matteo. In these circumstances, the presumption of a resulting trust arising on the gratuitous transfer of property, otherwise than by gift, has been rebutted.

29. The arrangement on 12 October 2020 was that the transfer document was produced on the basis that it would be acted upon if HTS repaid the loans but Mr Matteo was unable to come up with proposals as to how the HTS indebtedness would be repaid. The signing of the share transfer did not effect a transfer because the parties had agreed that the transfer was not to take effect unless the loans were repaid. If, however, the transfer of the last 5% shareholding is found to have been a device to hide Mr Matteo's assets from Hava Polat, the court should refuse to provide him with relief on the grounds that the transaction was undertaken for an illegal purpose.
30. The claimants allege that Mr Matteo is indebted to the company in the sum of £144,043.12 on his overdrawn director's loan account. This is based on schedule B1 to the Particulars of Claim which is a list of monies taken from the HTS bank account which are referable to Mr Matteo's own drawings but discounting £4,520.54 which are said to be the total of doubtful entries. A claim is made for repayment of the account.
31. Within the figure of £144,043.12 the claimants have included claims for breach of fiduciary duty as a director in taking company monies. These are the £3,695.02 taken in two payments on 6 and 10 October 2019, the payments totalling £51,250 in January 2020 and the £3,600 used to pay Mincoffs solicitors. The claimants point out that directors' loans are generally unlawful under Part 10, Chapter 4 of the Companies Act 2006, the sums could not have been paid as deferred salary as they do not appear on any payslip, there was no agreement to pay a salary which could justify such a conclusion and Mr Matteo accepts he never paid any tax or national

insurance on these payments. Neither has the company declared a dividend which could be treated as representing these sums.

32. A pleaded claim for the return of £8,200, said to be taken in 2019, is not pursued on the basis that there is no evidence that Mr Matteo received the money. A claim by Mr Baldudak that Mr Matteo owes him £91,280, the sum shown on his first Form E, is not pursued. There is no documentary evidence of payment to justify the claim other than the reference on the Form E.
33. The claimants allege a further breach of fiduciary duty by way of the misappropriation of money from the parts counter till. They claim that Mr Matteo took £27,215.28 and that it has not been accounted for. As he has had the money, it is for him to prove that it has been used for company purposes. He has failed to discharge that burden as there are no supporting documents and his evidence, on its own, is unreliable.
34. There are a further three allegations of breach of fiduciary duty levelled against Mr Matteo in respect of which no financial damage has been proved but upon which reliance has been placed in excluding him from the business and continuing to keep him out.
35. The most prominent allegation is that he set up National Boiler Parts Limited so that, had he not been discovered, he could compete with HTS. Mr Rodger points to the absence of evidence to support Mr Matteo's assertion that he told Mr Baldudak what he was doing, the fact that Mr Duffy was not involved in the creation of the business, the fact that he was the only shareholder and used his home address as the registered office and that he had a motive to seek to divert business from HTS for his own benefit. The setting up of the new company is also relied upon in a pleaded passing off claim but that was not evidenced at trial and did not feature in

the claimants' case at that stage; the company had been dissolved shortly after injunctive relief to prevent passing off was granted.

36. The second allegation is linked to the incorporation of National Boiler Parts Ltd. It is said that Mr Matteo took steps to interfere with the eBay account of HTS so that he could divert payments which should have gone to the HTS bank account to an account in his name or that of his new company. The interference was also designed to handicap HTS in conducting its business at a time at which Mr Matteo intended to set up under his own company.

37. The third allegation is that after the de facto termination of his directorship he refused to co-operate in unfreezing the HTS account with HSBC. Mr Rodger says that he was putting his own interests ahead of those of the company in his battle with Mr Baldudak by pursuing a "scorched earth" policy which had the capacity to destroy HTS.

38. A pleaded allegation to the effect that Mr Matteo had contacted British Gas, a major customer of HTS, to say that the company had been selling unsafe parts, thus leading to a cancellation of orders from that company, was not pursued.

#### Mr Matteo's response and claims

39. Mr Matteo's case is that the £1 million was an investment in the company, that is it became an asset of the company in return for which Mr Baldudak had received 50 shares. Mr Page argues that this issue turns upon what was agreed in 2015 when the two protagonists entered into business. He points to the fact that it is referred to as an investment in the 2016 Business Plan, which also attaches a cashflow forecast which does not provide for the repayment of any loan. He points to the absence of any document in which Mr Baldudak requests repayment of any loan. He also criticises Mr

Baldudak's evidence to the effect that he paid £120,000 for the shares by making payments to HTS suppliers. Mr Page argues this unlikely explanation points to the fact that the true consideration for the transfer of the shares was the introduction into the company of £1 million.

40. Mr Matteo's explanation for the transfer of his 50% shareholding is that this was requested by Mr Baldudak to impress his family that he had made a sound investment. It was not intended that Mr Matteo would give up his interest in the shares. Mr Page points to the timing of the transfers, the state of Mr Baldudak's relationship with his sister Berna and some of the messages between the two men. He says that in the light of this evidence Mr Baldudak's explanation for the transfer is incredible and in the absence of an explanation, and since neither side suggests that the shares were transferred by way of gift, the presumption of a resulting trust has not been rebutted. Mr Page also argued that the transfers of the 44 shares and the later transfer of 5 shares were intended to hide them from Hava. Again, he points to exchanges between the parties which, he claims, support that view.

41. As regards the transfer on 12 October 2020, Mr Page argues that the transfer was effective as Mr Baldudak has done all in his power to transfer the shares. The transfer was the property of Mr Matteo the moment it was signed and remained effective even though later destroyed. He asks that I do not accept Mr Duffy's evidence that he was to retain the papers as the transfer was not to proceed at that time.

42. The claim for repayment of the director's loan account is unfounded. First, part of the original agreement was that Mr Matteo would be remunerated by way of dividend or salary at a rate of £120,000 per annum, when the company could afford it. The true state of the loan account was that produced by Mr Duffy on 30 September 2020 which showed a debt of

£51,661. Mr Baldudak was contractually obliged to consent to declaring a dividend in these sums, save for the sum of £3,695 which Mr Matteo explained was the payment of wages. Mr Page says that there was nothing untoward about the payment of £32,500 to Mr Matteo in January 2020. Mr Baldudak knew that this was a payment towards a deposit on a house and dissembled when faced with messages evidencing his knowledge.

43. Mr Matteo has provided an explanation for what he did with the cash from the till. He used it to pay for boilers. It is common ground that there was a book in which such transactions had been recorded but it has not been produced and was either left at the premises of HTS, thus it was in the control of the claimants, or it was lost in the course of a number of burglaries at those premises. Mr Page says that there is no reasoned basis for an allegation by Mr Baldudak that the boilers purchased did not match the money taken. The claim fails for lack of evidence. Further, I should doubt Mr Baldudak's evidence on this issue in any event as in his written evidence he said that he only became aware that Mr Matteo was taking money from the till in 2020 whereas in cross-examination he said that he knew about it in 2018 and had been complaining about that for some time. He also said in evidence that he had taken money from the till and passed it to Mr Matteo.

44. The response to the allegations of breach of fiduciary duty for which no damage is claimed is as follows. The setting up of Northern Boiler Parts Ltd was done in agreement with Mr Baldudak as part of a proposal to open premises in Gateshead to take advantage of the fact that opportunities had arisen to break into the market there, including to service the provision of parts for the local authority's housing stock, due to the disappearance of potential competitors. Mr Matteo had not made a secret of a proposed opening in Birtley, which is near Gateshead, and members of staff were



aware of this fact. The redirection of the eBay account to pay a bank account other than that of HTS was a test to see if that could be done as a prelude to opening the new company to trade from Gateshead. He involved other members of staff in this activity which indicates that it was far from secret. As regards the bank account, Mr Matteo was under no duty to inform HSBC of his dispute with Mr Baldudak, which is what led to the freezing of the account. He was entitled not to assist in giving Mr Baldudak access to the HTS bank account. He had been unlawfully excluded from the company and was entitled to take such steps as were open to him to preserve his asset. Mr Page asks, why should he help Mr Baldudak at that stage.

45. Mr Page says that the events of 12 November can best be understood after a conclusion has been reached as to who changed the computer passwords. He says that the evidence points to it being Mr Coban, who was doing so on behalf of Mr Baldudak. This indicates that a decision to remove Mr Matteo from the company has been taken in advance of his visit to the premises on 12 November.

46. The purported removal of Mr Matteo as a director was clearly unlawful. Mr Baldudak did not have the power to remove him. The meeting at which the decision is said to have been taken was not quorate in accordance with article 11 of the Model Articles, nor was it properly called in accordance with article 9. Further, the purported exercise of the power was not done in good faith and in the best interests of the company. The written resolution of 7 January 2021 to ratify the termination was also ineffective as Mr Matteo had no written notice of the meeting at which the resolution was considered, contrary to section 169 of the Companies Act 2006. There is also a claim for unlawful termination of employment, but the fact of employment did not feature in Mr Page's closing arguments.

47. The unfair prejudice in this case arises from the fact that the company was a quasi-partnership in which the day-to-day management of the company was to be in the hands of Mr Matteo. If it is found that he retained a beneficial interest in his former shares, he has been prejudiced by the action of excluding him from 12 November 2020 and the injunctions which followed. Further, he has been deprived of the dividends he could have expected to recover. He asks that he be permitted to elect whether he is bought out or has the opportunity to purchase Mr Baldudak's shares once the court has determined the value of the shares.

48. Mr Matteo makes claims for deferred salary and rent. He says that as part of the 2015 agreement he was promised a salary of £120,000 annum but that payment would be deferred until the company could afford to pay. In the alternative, he claims damages based on the non-receipt of the salary for breach of the 2015 agreement together with any sum which he should have received by way of dividend. No particular basis is put forward for enforcing an entitlement to rent other than that he is a co-owner of the HTS premises, albeit Mr Rodger successfully resisted an attempt to have me decide the beneficial ownership of that property.

49. Mr Matteo complains that during the events of 12 November 2020 he was assaulted by people acting as agents of Mr Baldudak and HTS. Mr Grey snatched his phone and, on his account, he was pinned to the ground, unjustifiably, by the security men in a manner which caused him injury and difficulty breathing.

50. Mr Page points to the fact that a number of the pleaded claims have not been pursued which he says is an indication that the other claims are not well-founded. The allegation of a breach of duty by attempting to transfer an HTS telephone number to himself was never going to succeed. The phone number was that of Mr Matteo before the incorporation of HTS. The

fact that the largest monetary claim against Matteo, that relating to the loss of British Gas orders, has not been pursued is testament to the bad faith inherent in the claim.

#### The claimants' response to Mr Matteo's claims

51. Mr Rodger accepts that Mr Matteo's directorship was not lawfully terminated as he was given no opportunity to be heard, contrary to section 169 of the 2006 Act. His answer to the claim is that there should be no remedy because of Mr Matteo's breaches of fiduciary duty and small shareholding, if any; his contention is that at most Mr Matteo has a beneficial interest in five shares.

52. Mr Rodger, realistically, observes that the outcome of the unfair prejudice petition depends on the court's finding on the issues of share ownership and breach of fiduciary duty. If he has no shares there is no claim. If he took steps to damage the company he deserved exclusion. If he has a shareholding and has been opportunistically excluded he will be entitled to relief. He argues that Mr Baldudak should be the one to purchase the shares as, historically, the company has relied upon his financial support.

53. The claim for the breach of the 2015 agreement for unpaid salary and dividend is opposed on the basis that the agreement did not provide for a deferred £120,000 salary or guarantee of dividend. On the contrary, what was agreed was that each director would cap their salaries below the threshold for income tax and national insurance but would take money out by way of dividend when the company could afford it. In the event, there was no declaration of dividend. Whilst it was agreed that Mr Matteo would conduct the day to day affairs of the company this was superseded by the share transfers and Mr Matteo's fiduciary breaches.

54. There is no claim for breach of Mr Matteo's employment contract because he was not an employee but an office holder. If that is wrong, HTS was entitled to dismiss him summarily due his fiduciary breaches. Even if that were not the case, his claim would be limited to five weeks' statutory notice, but against that he would need to give credit for savings and any earnings in that period.
55. The rent claim must fail as in cross-examination Mr Matteo accepted that there was no agreement to pay rent.
56. The assault claim cannot succeed. It is pleaded that the assault was carried out on the instructions of Mr Baldudak but there is no evidence that he instructed the guards or Mr Gray to assault Mr Matteo or that they did assault him. Furthermore, what prompted the security guards to take him to the ground was his own aggressive behaviour. In those circumstances the force used by the guards was reasonable as it prevented others from being injured.

### The issues

57. The following questions fall for determination by the court:
- a. Was all the money advanced by Mr Baldudak by way of loan or was £1 million of such money an investment, in the sense of an addition to the assets of the company in return for a 50% shareholding in HTS? (For ease of reference I shall call this the loan or investment question albeit there has been some debate as to whether a loan can be termed an investment. This, and a number of other issues raise the question as to what had been agreed between Mr Baldudak and Mr Matteo when they set up in business together and any agreements they made along the way.)

- b. Does Mr Matteo have a beneficial interest in any of the shares in HTS and, if so, how many? (This issue encompasses both the effect of the three share transfers and the events of 12 October 2020.)
- c. Was Mr Matteo in breach of fiduciary duty as a director of HTS and/or in breach of his duties under sections 170 to 175 of the Companies Act 2006 by misappropriating the company's assets and/or setting up National Boiler Parts Ltd and/or interfering with the company's online trading accounts and its banking with the effect, actual or potential, of damaging the operation of the company's business?
- d. Does Mr Matteo owe an amount to HTS in respect of his director's loan account, and, if so, how much?
- e. Was the removal of Mr Matteo as a director unlawful? (I shall also deal with the issue as to whether there was an unlawful termination of employment albeit it did not feature in Mr Page's argument.)
- f. Was Mr Matteo entitled to:
  - i. A deferred salary of £120,000,
  - ii. Dividends from HTS sufficient to cover his director's loan account,
  - iii. Rent for HTS's occupation of Tyne View Terrace?
- g. Was Mr Baldudak under a contractual obligation to Mr Matteo to ensure that he was awarded sufficient dividends to cover his director's loan account?
- h. Have the affairs of the company been managed in a way which was unfairly prejudicial to Mr Matteo?

- i. Was Mr Matteo assaulted by agents of either of the claimants on 12 November 2020?
- j. If the answers to any of the questions (e) to (i) are in the affirmative, what remedy should the court award in Mr Matteo's favour?
- k. Should the court grant HTS an injunction to prevent Mr Matteo interfering in its business?

### The witnesses

58. I heard evidence from Mr Matteo. He relied upon written statements from Rory Campbell, Alan Batey and Oghuzan Ulker. The statements of the latter two witnesses were admitted on the basis that Mr Rodger did not wish to cross-examine either. Mr Campbell was too unwell to attend court. His statement was admitted as hearsay.

59. The claimants relied upon oral evidence from the following witnesses. Mr Baldudak and Thomas Duffy, the accountant. Brian Laidler, the Trade Counter Manager at HTS. Peter Cuthbert, a businessman who, subject to the validity of his appointment, was a director of HTS between 13 November 2020 and 26 February 2021. Theresa Fisher, an employee of HTS, first in customer services and later as a key accounts manager. Michelle Oliver, a former manager at HTS, dealing with day to day management, including quality management and banking; she left the company in late 2019. Wayne Bell, a head doorman at Phoenix Security who attended the HTS premises on 12 November 2020 when Mr Matteo was excluded from the business. Ilya Gryn, who is the brother of Katya, Mr Baldudak's wife. He is a web programmer and administrator who was the IT provider to HTS who managed its domain and provided technical

advice. He gave evidence by video link through a Russian speaking interpreter, Katyania Tatiana Lymar.

60.I shall look in more detail at the evidence of individual witnesses when I deal with the issues to which they are relevant. At this stage, however, it is convenient to say something about what reliance I can place on the evidence of Mr Matteo and Mr Baldudak.

61.Mr Matteo is not an honest witness in the sense that he will say whatever he feels is necessary to suit his ends. That is apparent from the fact that he lied in his original Form E, as he admits. I do not accept Mr Page's assertion that he was frank about his deception in relation to the Form E. He was forced to admit that he had lied as what he had said did not accord with his subsequent statements. The fact that he passed off his behaviour as the result of a bitter war with his ex-wife in which he was angry and desperate is an indication that (a) he approaches the giving of evidence on the basis that the ends justifies the means, even if he has to put himself in contempt of court to do so and (b) he is unrepentant for lying in a formal court document, notwithstanding that it contained a warning of the consequences should he do so. Furthermore, his behaviour was not a one-off fall from grace on his part.

62.His witness statement in the non-molestation proceedings is also inconsistent with what he says in this claim concerning the origin and nature of the proceedings between Mr Baldudak and Berna, in that in the statement he suggests that these were prompted by Hava's allegations to Mr Baldudak's family concerning HTS being left in the hands of Mr Matteo who is a thief and drug addict who consorts with prostitutes. In cross-examination about this statement he said that Hava was not one of the family's concerns. He said as to this passage in his statement "...we just said it here to make Hava look bad. That was a bit of a lie. The bit

about Erdem saying he did not want to work with me any more is a lie.” The allegation also bears no resemblance to Berna’s complaint in the Turkish proceedings.

63. In these proceedings, and in his statement in the Turkish proceedings, which bears the date of 18 February 2021, Mr Matteo claimed that Mr Baldudak had been helping himself to his shares. His position in his solicitor’s email to the claimants’ solicitor of 24 November 2020 was that the transfers were forgeries which he had never seen before. On 16 December 2020 he emailed the claimants’ solicitor to say that Mr Baldudak has asked him for the transfer of the shares on several occasions as he wanted to give his family some extra confidence that he had full control but he, Mr Matteo, did not agree. That is the opposite of his case before me.

64. Mr Matteo maintained this stance in his first formal response to the claim, but adding that the share transfer of 24 February 2020 was not authentic and cannot have been as he was in Turkey at the time. He repeated this allegation in his first Amended Defence, in which he alleged, at paragraph 11, that not only was he unaware of this transfer but that the emails which appeared to evidence that he had given Mr Duffy instructions to deal with the matter were not sent by him and insinuated that they were sent by the claimants for they had access to his email account. In cross-examination he claimed that what he meant to say in the 16 December email was that he disagreed with the request for the shares but he went along with it. That is wholly at odds with his account of Mr Baldudak helping himself to shares and the suggestion that the 24 February 2020 transfer was not his.

65. Mr Matteo’s explanation for his inconsistent accounts as to how his shares had come to be transferred was that sometime after January 2021 and after he had recovered his Samsung mobile phone, on which there were text



messages which helped him to clarify what had happened, he remembered that he had transferred the shares to assist Mr Baldudak to re-assure his family. Mr Page suggests that he thought the transfers were not important and he possibly forgot what he had done. He was a litigant in person. He may have been seeking to reserve his position, which would have been the sensible legal advice, or he was trying to protect himself from claims from his wife.

66. I do not accept any of the explanations put forward by Mr Page for the lapse of memory as they are not to be found in Mr Matteo's evidence. The reference to the wife is completely misplaced as on 16 December 2020 he produced the new Form E stating that he had a 50% holding in HTS. Further the suggestion that he had not regarded the name on the shares as important is undermined by the fact that, in the month before he first claimed the transfers were forgeries, he had met Mr Duffy and signed the transfer and in the following month himself filed with Companies House a notice that he was a person with a significant interest in the company. Indeed, these events lead me to reject his suggestion that he forgot that he had effected the transfers.

67. Mr Baldudak, unlike Mr Matteo, did not have a track record of lying to courts but significant parts of his evidence were contradicted by contemporaneous documents. On occasion he made a concession, accepting that his evidence was incorrect. An example would be his acceptance that the claim for £8,200 was not well-founded. He said that he had found a wage slip showing a monthly payment of salary in that sum on Mr Matteo's computer and assumed that he had received the sum shown without checking the company bank statements. He now accepts that the sum was not paid to Mr Matteo. The concession was, however, one he had to make in view of the evidence.

68. The wage slip exists and Mr Matteo's explanation for its existence is that it was created by a mortgage broker in connection with obtaining a house purchase mortgage. The fact that Mr Matteo should not think there was something untoward about faking a salary slip with a view to obtaining a mortgage is a further reflection of his unreliability and a lack of probity. Whilst it may be understandable that the finding of the wage slip would lead to the conclusion that the sum stated had been paid from the company and lend support to Mr Baldudak's explanation, in his first statement he said that he suspected that the wage slip was produced to induce the bank to grant Mr Matteo a mortgage, which is some indication that to make a claim based on that document was opportunistic, even though it was not pursued at trial.
69. Such opportunism was also evident in his claim for £91,280. He produced no documentary evidence to show loans in these sums, despite saying in his first statement that he had supportive bank statements in Turkey. He also said that he had demanded repayment, but there was no document to show that he had or details as to when, where and how he had made the demand until after this dispute arose. By trial, the claim was not pursued. The overwhelming inference which I draw is that the claim was based on the first Form E alone, even though there was no loan, and that Mr Baldudak was aware of that fact when he made this claim.
70. There were other parts of Mr Baldudak's evidence where he stuck to his story and was unconvincing in his attempt to explain away contradictory evidence or had no explanation. Mr Page highlighted a number of instances where this had occurred. I shall not catalogue each, it is sufficient to identify a couple of examples. Others can be considered when relevant to the issue under consideration.

71. In his 7<sup>th</sup> witness statement, Mr Baldudak said that his relationship with Mr Matteo started to break down in February 2020 when he first asked him to step down as a director, as was evidenced by his email to him of 22 February 2020, and got worse over the following months. In evidence he said that after February 2020 he did not have the same good relationship with Mr Matteo, it was more professional than as a friend.

72. These assertions do not match the WhatsApp messages between them right up to October 2020. Most notable are the brief discussions about a plan to go skiing together in August 2020 and starting a business together in Turkey and in October where they discuss socialising and going to Manchester together to watch a football game. In that month, Mr Baldudak, in a message to Mr Matteo, also referred to the Turkey business plan as a partnership which “will be in your sisters due to your divorce, then you will transfer in when everything gets back in track”, which suggests he had considerable confidence in Mr Matteo at the time. What was said in the 7<sup>th</sup> witness statement about these parties’ relationships and the content of the messages also contrasts with what was said in Mr Baldudak’s first statement, made in November 2020, where he said “...Our relationship broke down in the last few months.”

73. The messages between the parties demonstrate that what Mr Baldudak has said about the timing of the relationship breakdown is incorrect. I do not accept that this is the product of some incorrect recollection as to timing as the reference to February 2020 has been used to support the assertion that the email of 22 February was other than a sham. The date of that email is also important as it came two days before the transfer of the last five shares.

74. There are a number of oddities about this email. The first is that it was sent by Mr Matteo to Mr Baldudak and there is a WhatsApp message from the former appearing to say that he has sent it to the latter and it should be sent

back to his gmail account. On the face of it, Mr Matteo drafted and asked to receive his own letter of dismissal. The second is that though it says he was to be dismissed, he remained as a director. The third is that the email does not claim the dismissal is due the relationship between the two men having broken down, the explanation given in Mr Baldudak's 7<sup>th</sup> statement, but because of the effect Hava is having on the business by pursuing her vendetta against Mr Matteo. Indeed, the email says that no blame is to attach to him for the situation resulting in the dismissal. The email also asks for the transfer of the remaining five shares, which is not a necessary consequence of dismissal as a director. In any event, it was not open to Mr Baldudak to terminate Mr Matteo's directorship at his will, i.e. without observing the Companies Act process. There is also no documentary evidence from Mr Baldudak that he did send the email back.

75. All of the factors I have considered point to the content of the email being a sham designed to mislead the reader as to what Mr Matteo's true status in HTS was to be. It is far more likely that it was designed to provide an audit trail to explain why Mr Matteo transferred his last five shares and was to be dismissed than genuine corroboration of Mr Baldudak's evidence as to the state of their relationship. I reject his evidence that it was. Whether or not he composed the wording in a discussion with Mr Matteo, which was his evidence, or the latter was the author does not matter. It was composed in order to deceive. The likely target for the deception was Hava, given that she had a direct interest in Mr Matteo's employment status and shareholding and that it dovetails with the information contained in the first Form E.

76. A second example of Mr Baldudak's evidence departing from the contemporary documents relates to the suggestion that he was supportive of a relationship between his sister Nihan and Mr Matteo. This started as a

comment on a document which he said he had found on Mr Matteo's computer which purported to be an unsigned minute of a management meeting which recorded that the company owed Mr Baldudak £700,478 and that he agreed that Mr Matteo could use £62,500 from the business account to purchase a home. Further, as Mr Matteo was planning to marry Nihan, Mr Baldudak agreed to gift this sum to him for the family home. This differs from Mr Baldudak's description of the document's contents in his statement where he claims it spoke of him waiving the debts owed to him by HTS in return for the marriage.

77. In his first statement in support of the interim injunction, Mr Baldudak had said that there was never a relationship between his sister and Mr Matteo and he would not consider such a bizarre arrangement, which must mean the waiver of debts. In a later statement he said that it was completely out of the question that his sister would entertain such a relationship and that WhatsApp messages which Mr Matteo sought to rely upon were sent in jest.

78. In cross-examination he said that Mr Matteo was always wanting to go out with Nihan but that Mr Baldudak did not want Mr Matteo to marry her to get her on his side. His object in communicating with Mr Matteo on the subject was that he wanted him to treat her with respect. He accepted that the messages all show that he was happy for Mr Matteo to marry Nihan. Having read the messages, some of them could be described as banter but there are exchanges on 14 February 2020 where he is clearly extolling her virtues, saying that she would get on well with Mr Matteo and that she is a warm person but shy. Asked, by Mr Matteo, if she is not crazy sometimes, the reply is that "she says what she wants to my mother, but she is shy in front of you." There was also a text the previous year in which the pair are discussing giving work to Nihan and Esra in which Mr Baldudak says "you

should convince Nihan to marry you and make a child with her. This would be a great favour.” On this evidence, it may well be the case that Nihan would not entertain a relationship with Mr Matteo but I don’t accept Mr Baldudak’s further assertion that he was not trying to encourage Mr Matteo in that direction.

79. The question my conclusion poses is why should Mr Baldudak lie about a seemingly inconsequential fact? This stray thread of evidence seems to have been spun from the original complaint concerning the contents of the document said to have been found on Mr Matteo’s computer which could be seen as supporting Mr Matteo’s case that Mr Baldudak both knew, and was agreeable to, him taking a substantial sum from the company for the purchase of a house. This contrasts to what Mr Baldudak said in his witness statement that he did not know where the £32,500 removed from the HTS account by Mr Matteo went or what it was used for. To support his evidence as to want of knowledge of the matters in the minute he embellished his account by challenging the notion that he was supportive of the relationship it described.

#### My approach to the oral evidence

80. I have received considerable written submissions from Mr Rodger on the proper approach to evidence by reference to the cases of *Gestamin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560, *Lachaux v Lachaux* [2017] EWHC 385 (Fam), *Carmarthenshire County Council v Y* [2017] EWFC 36 and *Kimanthiv v The Foreign and Commonwealth Office* [2018] EWHC 2066 (QB). It is unnecessary to examine the import of those decisions or quote from the judgments. What has been said in these cases is neither novel nor without the experience of long held practice of judgecraft. I accept that I have to recognise that memories can be unreliable and can change with time. Witness demeanour is rarely a good yardstick

against which to assess truth or accuracy; a convincing performance in the witness box may result from an incorrect witness having convinced themselves or the witness may be more confident and assertive in that situation than others. Oral evidence is not irrelevant, however. The task of the court is to compare that evidence against the objective narrative to be found in contemporaneous documents and agreed facts, as well as to test it against the possible motive of the witness and the objective likelihood of the oral evidence under scrutiny. At the end of the day, the court has to look at the totality of the evidence, examined in this way, and ask itself, what picture does it paint?

81. In the case of Mr Baldudak and Mr Matteo, these matters do not require substantial consideration as they are not credible witnesses, thus I am cautious about accepting anything they say unless it is agreed or supported by some other evidence or circumstance which lends it credence.

#### Loan or investment?

82. This is a purely factual issue which depends upon what the parties agreed in 2015 concerning the introduction of Mr Baldudak's £1million. There is an unsigned document dated 30 September 2015 headed "Business Partnership Agreement" which purports to be an agreement referring to the money as a loan and makes provision for repayment in 24 months and interest in default, but Mr Matteo does not accept that it is genuine; Mr Baldudak said in evidence that it was prepared by Mr Matteo but he did not know that he had recorded that default interest was payable at 2% above base. The agreement also provides for Mr Matteo's shares to be transferred to Mr Baldudak if the loan is not repaid.

83. The witnesses who deal with this issue are Mr Baldudak and Mr Duffy, who give evidence of the money being a loan, and Mr Matteo who says it was an investment in return for 50 of his shares. Mr Matteo accepts that

Mr Duffy believes the money to have been a loan as that is how he described it to him, examples of which are Mr Matteo's communications on 3 January 2019 and 24 February 2020, which preceded the transfer of 44 and five shares respectively. This is also how it has been entered into the 2017, 2018 and 2019 accounts which were signed by Mr Matteo. There is no question, therefore, of Mr Duffy giving a false account on this issue or being mistaken in his recollection. He may, however, have been misled as to the true nature of the payment.

84. Mr Baldudak's pleaded case is that in 2015 he agreed with Mr Matteo to purchase the 50 shares in HTS for £120,000 and that he paid outstanding invoices owed by the company towards this sum. The total paid has varied from £108,000, in round figures, in the pleading, and £114,218 in a June 2016 business plan and £142,240 if one adds a payment of £34,511 on 24 November 2015 to Mr Matteo, which is not challenged though it does not appear in the business plan or pleading.

85. In cross-examination Mr Baldudak said that the first £150,000 he paid was for the shares and was based on Mr Matteo's valuation of stock at £90,000. He did not pay £1 million for the shares for the company was not worth that. He also said that it was agreed that each of them would take the maximum amount of wage without being subject to tax and national insurance. He did not agree that Mr Matteo would be paid a salary of £120,000 which would be deferred and payable in arrear when the company could afford it, or that he would not receive dividends until after his loan had been repaid; his pleading states that dividends would be paid when the company could afford it.

86. Mr Matteo's pleaded case is that he agreed to transfer 50 shares in consideration of a payment of £1 million. His written and oral evidence is that the £1 million was to be an investment in HTS, in contrast to a payment



to him. It was also agreed that he would receive a deferred salary of £120,000 pa which would be paid in arrear when the company could afford it.

87. The purported agreement of September 2015 records that a detailed business plan is to be prepared and approved by approved authorities, who are identified as “Chartered Accountants, Chamber of Commerce, Companies House, Bank etc”. The agreement identifies Glen Rodger as the accountant and it was that company who became accountants to HTS. It also says that the investment will be made with the permission of Mr Baldudak’s father, the partners will each have a 50% shareholding in the company, they were to have basic modest salaries and dividend/directors loan would be withdrawn when the loan repayment had been completed.

88. Following September 2015 a business plan was prepared and approved by Glen C Rodger Accountants Ltd , the directors initially took salaries at a level to avoid tax and national insurance and Mr Baldudak’s father produced a letter to confirm that he was supporting his son to purchase National Boiler Parts Ltd i.e. HTS and any linked companies and that there would be minimum investment of £1m. Most of this information in the 2015 document could have been inserted after the event to reflect what had happened, so as to give the agreement an air of authenticity but the fact that the only “approving authority” was the accountant points away from such a conclusion. Were it otherwise and it was prepared in the light of what had already happened, why refer to these other organisations? Further, the document does not identify other companies which are to be purchased. This is also information one might expect to see included in the purported agreement if it had been made up in the light of the current dispute. Moreover, the absence of such references would set the document at a time preceding the 2016 business plan. There is also the evidence from Mr

Baldudak that the agreement was prepared by Mr Matteo and it was overtaken by events. None of this proves that the document is genuine, but it is nevertheless one factor I can take into account in deciding where the truth lies.

89. The business plan dated June 2016 recorded that Mr Matteo had always struggled with a lack of business management skill and cash flow and that he was in a search of a partner who could put in sufficient investment to enable them to reach their goals. It says that Mr Matteo had asked Mr Baldudak to join his business in the summer of 2015 and to invest £1million in return for a 50% shareholding. After giving the idea some thought and consulting with his family he had accepted the offer and started investing by paying pro-forma invoices to manufacturers. There is reference to the company proposing to purchase OEM Spares Ltd and that Mr Baldudak had transferred £750,000 to PCB Centres Ltd, which was to hold the shares in OEM, and Mr Baldudak would get 50% of the shares in PCB when the takeover was complete; at that stage Mr Matteo held 100% of PCB.

90. In the executive summary there is a further reference stating “with the help of my new business partner we have invested over £1million in the business in the previous 9 months.” Under the heading “amounts paid directly into the group companies’ bank accounts” by Mr Baldudak there are listed £245,500 paid in instalments to HTS and £750,000 to PCB. That is followed by a list of payments direct to suppliers which total £114,218. There is a cash flow forecast which makes no provision for loan repayments and projects profits in the first year of trade of £787,200 for HTS, PCB, OEM and MKK, another company which was to be purchased, according to the plan. There is a profit and loss account for HTS which shows profits before tax of £67 in the 9 months to 31<sup>st</sup> March 2016.

91. I have dwelt on the plan because Mr Page places considerable reliance on the use of the word “investment” and the absence of any provision for repayment of a loan in the projections. Mr Duffy, who says that he read the plan but did not scrutinize it, but later accepted that it was in a format he prepared and had been discussed with Mr Matteo, said that investment could mean money introduced by way of loan or capital, but that takes the matter no further. On 26 September 2016 Mr Duffy provided to the directors and, he made it clear, to no-one else, a conclusion couched in the negative stating that “nothing had come to our attention that causes us to believe that the business plan or financial projections are unreasonable.”

92. Mr Baldudak’s evidence is that the plan was prepared to assist him to obtain a visa to enter and work in the United Kingdom. There is support for this assertion in the terms of an email Mr Matteo sent on 24 October 2016 to Mr Brar, a solicitor dealing with the Tyne View purchase, in which he said that Mr Baldudak had been granted a visa on the basis of investing “a minimum of £1m in to our business as per our mutual business plan attached. £450,000 payable to purchase former Turney Wild Building in Wallsend is part of Mr Baldudak’s £1m investment into our business.” The connection between the investment of £1m and the visa is also apparent from a letter dated 27 September 2016 from Mr Baldudak’s father. He wrote “to whom it may concern” which was directed as assisting him to gain a visa, and in which he refers to his son investing a minimum of £1 million in HTS. The timing of the letter is probably relevant as it came one day after the letter from Mr Duffy referring to the business plan.

93. On any view the plan was highly speculative. The purchase of OEM did not take place and neither did that of MKK. A cash flow based on a business which included all 4 companies, only one of which was trading and in the expectation that 2 of the other companies were to be purchased

was, of its nature, speculative. The speculative nature of the forecasts is evident when one compares the expected profits of the businesses, a suggested £<sup>3</sup>/<sub>4</sub>million by August 2017, with the profits apparent from the 2019 management accounts which show £63,309 in the year to June 2018 and £50,735 in 2019. That is on sales of £<sup>1</sup>/<sub>2</sub>million, not the almost £4million forecast for the first year of trading. A comparison of the proposed and actual turnover and profit further demonstrates the over-optimistic tenor of the plan as to the expected profit margin.

94. The speculative nature of the plan, the coincidence of the timing of the letters from Mr Duffy and Mr Baldudak's father and Mr Matteo's own words in his email of 24 October 2016, as well as the fact that Mr Baldudak was seeking a visa based upon his status as a businessman, leads me to the conclusion that he is probably correct when he says that the plan was created to assist with his visa application, albeit that it is designed to look like a document targeted at potential lenders and investors. That is not to say that the information it contains is incorrect, but it does lead me to place less weight on the terminology adopted and the content as to the projected profit and turnover. Mr Baldudak and Mr Matteo may well have wanted those considering his visa application to consider him to be someone who was investing in this country, which would make him a more attractive proposition than someone merely lending; it is likely that they did, but for the reasons given, the wording they used in this document is not determinative of the status of Mr Baldudak's statements.

95. A further document in which Mr Baldudak used the word "investment" is his email dated 12 December 2016 to Necmi asking him to pay a long outstanding debt from a transaction in Turkey. In it he says that he and his partner have established a PCB production and recycling facility in the UK in which he has invested £1.8 million and with his partner's contribution

the total investment is £3 million. I don't give the terminology used in this letter great weight because (a) it is patently untrue as to the amounts devoted to the UK business, (b) is clearly designed to impress Necmi as to his reliability and that he is in a large way of business on several fronts, and (c) there are no reasons why he should distinguish between a loan and investment when describing his affairs to Necmi.

96. The undisputed facts are that on 8 January 2016, Mr Matteo transferred the 50 shares in HTS. By that date Mr Baldudak had paid £118,729, of which £84,218 was to suppliers and £34,511 to Mr Matteo. A further £30,000 was paid by him to a supplier on 25 January 2016. In addition, he paid £245,500 into HTS between 25 January 2016 and 27 May 2016 and £750,000 to PCB centres. Mr Baldudak became a director of HTS on 1 November 2016, by which time he had obtained his visa.

97. The £750,000 paid to PCB was used, as to about £450,000, to purchase Tyne View Terrace in the joint names of Messrs Baldudak and Matteo; Mr Baldudak said that there were fees and stamp duty on top, which is likely. The abbreviated balance sheet for HTS to 30 June 2016 does not show a loan from Mr Baldudak but neither does it show the introduction of substantial capital. Net assets and the shareholder funds are £32,895. The property is never shown in the accounts of HTS as an asset of the company; it appears as a property owned by the directors which is security for a bank loan.

98. As regards the directors' loan account, the 2018 filleted abridged accounts record that the company owed Mr Baldudak £802,050 as at 30 June 2018 and the 2019 management accounts show that the directors loan account has been split between creditors due in one year, where the figure is £400,478, and creditors due over one year, the figure there being £300,000.

There is no provision for interest on the loan shown in these accounts or a reference to the fact that interest is chargeable.

99. On 3 January 2019 and 24 February 2020, Mr Matteo emailed Mr Duffy concerning the transfer of his shares. On each occasion he put forward the company's inability to repay Mr Baldudak's loan. Mr Matteo explained the terms of these emails as designed to not provoke enquiry from Mr Duffy as to the real reason for the transfer, namely to placate Mr Baldudak's family. Whether or not that be true, and I can't see why Mr Duffy would be concerned about such motivation for the transaction, the fact is that he called them loans, which indicates that he did not expect that Mr Duffy would think there was anything unusual about that designation. On the contrary, had Mr Duffy been led to believe that any of the money introduced by Mr Baldudak had been an investment, the reference to them as loans would have been highly likely to prompt his enquiry given the way he had been accounting for it in the accounts.

100. Mr Matteo gave different explanations as to why the accounts show the money was introduced as a loan. At one stage he sought to pass that off on the basis that Mr Duffy prepared the accounts but he did not pay much attention to the content when approving them. At another he said that Mr Baldudak had asked that the amounts appear as loans so that he could take money from the company without paying tax. As he accepted that it was he who had dealt with Mr Duffy in the preparation of the accounts, these responses lack consistency.

101. I compare this to the evidence of Mr Duffy. He had prepared the accounts which showed the Baldudak money as loans. He usually dealt with Mr Matteo. It was he who gave instructions regarding all the accounts and he did not have many dealings with Mr Baldudak until November 2020. He explained that the adjustment to the creditors' figure in the 2019

accounts related to loans from Mr Baldudak. It was made to improve the company's credit rating. He said that Erdem (Mr Baldudak) had agreed not to call in part of his loan for a year and he believes he saw that in writing. It was Mr Matteo whom he dealt with when producing the document.

102. An attempt was made to discredit Mr Duffy on the basis that he was still working for HTS and wanted to achieve a good result for the company in this litigation. I did not detect any bias in his approach, indeed, he made himself available to, and was interviewed by, Mr Matteo's solicitors, who sent him the notes of interview to approve. In his final submissions, Mr Page did not persist in the allegation that Mr Duffy was a partial witness, instead, he picked out two points of detail about which he said that Mr Duffy was unreliable. The first is that he claimed that the 12 October 2020 meeting was arranged only to discuss loans whereas a text to him showed it was to deal with share transfer as well. I deal with that later in relation to the 12 October meeting. It was not an error I consider to be of particular significance. The second was that his explanation about the adjustment in the accounts and the way in which cash sales were accounted for were provided in response to cross-examination and without the assistance of his working documents.

103. Against these observations I put his evidence as to Mr Matteo being the one who usually gave him instructions. That largely accorded with Mr Matteo's evidence and the fact that it was he who approved the accounts. It is further supported by the fact that Mr Baldudak was frequently out of the country and written instructions concerning the alteration of the shareholding came from Mr Matteo. In those circumstances, I accept his evidence that Mr Matteo dealt with the question of deferring loan repayments in the accounts in order to improve the company's credit score

and that it was he who instructed Mr Duffy to produce the accounts which showed the money introduced by Mr Baldudak as a loan.

104. There was criticism of Mr Baldudak's evidence that he agreed to purchase the 50 shares for £120,000, which was paid by discharging pro-forma invoices on behalf of HTS. His evidence was confusing. He had paid just over £118,000 to HTS creditors and Mr Matteo by the time he received his shares. It was impossible to follow his attempt to justify this figure by reference to a £90,000 stock valuation leaving each 50% shareholder with the equivalent of an asset worth £45,000 to which was added a sum which he said brought the value of his shares to £150,000.

105. Mr Baldudak was seeking to establish that there was a purchase price for the shares which was distinct from any other money he had paid so as to lead me to the conclusion that the latter were loans. His account, however, was so muddled that I can only conclude that this is something he thought of after the event. Indeed, some of the detail appeared to be made up in the course of cross-examination and there is no reference to the purchase or its terms in the 30 September 2015 partnership agreement document, which he claims Mr Matteo produced, which also contains a much lower stock valuation than the £90,000 he referred to in explaining the make-up of the purchase price. The fact that a part of Mr Baldudak's pleaded case as to the price of the shares is missing from the document and the lesser stock figure, said to be £16,000, supports the contention that it was created before the dispute arose, for otherwise it could be expected to mirror the case Mr Baldudak wishes to advance. Were there some convincing counter-narrative, his lack of credibility as to the purchase would count heavily against him as it could indicate that he has produced the story about the purchase as he knows that he provided money as an investment and not a loan. The counter-narrative comes from Mr Matteo,



however, and he is not a reliable witness. I have to look at this piece of evidence from Mr Baldudak against the wider picture.

### Conclusion

106. Looking at the matter in the round, I find that the money introduced by Mr Baldudak was by way of a loan. It is unlikely that Mr Baldudak was motivated to pay £1million pounds to HTS in order to acquire a 50% stake when the company was not then, and has never been, worth anything like the £2 million which such a price would suggest. Furthermore, this was an untried company. The fact that this conclusion would involve him in both lending money and obtaining a stake in its profitability is not such an unusual transaction as to point to the money being an investment.

107. The terms of the Business Plan are not determinative of this issue for the reasons I have given. The plan, however, does indicate that Mr Matteo's problem was cash flow. That is consistent with the introduction of loan money. There is also the fact that the money was not paid directly to HTS. £750,000 was paid to Mr Matteo's company PCB to enable it to purchase another company. Even when that fell through, it was not all put into HTS. £450,000 was used to buy a property in joint names which was never shown as an asset of the HTS. It is highly unlikely, therefore, that the first £1 million, or so, paid over by Mr Baldudak was an investment in HTS.

108. Added to these considerations, and of considerable significance, is that Mr Matteo clearly led Mr Duffy to believe that money introduced by Mr Baldudak was a loan and it was treated as such in the accounts. Mr Matteo's lack of credibility and his contradictory explanation as to how the money came to be shown in the accounts as a loan cause me to doubt that this was Mr Baldudak's device to hide income from the tax authorities. I am not persuaded that this was the case. Taking all the above factors into

account, and absent some adequately persuasive explanation as to why the monies Mr Baldudak paid to, and on behalf of, HTS appeared in his loan account were not what they purported to be, it is more likely than not that they were loans.

109. My non acceptance of Mr Baldudak's case as to the purchase of the shares for £120,000 largely paid in kind, does not cause me to alter that conclusion. The fact that someone embellishes his story in a misguided attempt to bolster his case does not necessarily mean that the case is not a good one. Mr Baldudak has, in this case, constructed an opportunistic narrative in reliance on documentary evidence, for example the claim for £91,280 which was not pursued was probably based on the false Form E. The likelihood is that this is another example where he has sought to rely upon recorded payments to creditors to support his story concerning an agreed purchase price when, the truth is, they were just further loan payments. There is support for this conclusion in the fact that the accounts of HTS do not show that the money paid on pro-forma invoices, or the £34,000 plus, paid to Mr Matteo, which he says were used for company purposes, were treated any differently from other monies he had paid over.

110. As regards the dispute as to the authenticity of the 30 September 2015 partnership agreement document, Mr Matteo's case is that it has been made up after the event to support his opponents' case. He relies upon a change of typeface on the second page of the document; I have not seen the original and what is called a change of type face may be enlargement of the copy or a larger font size. Mr Baldudak's evidence was that this was the original agreement between the parties albeit that some of it was overtaken by events. The fact that much of what is stated in the document came about does not prevent it from having been a later creation. I have, however, pointed out a number of features of the document which not only

locate it in time as preceding the current account given by Mr Baldudak but which suggests that it was produced before the business plan. These factors lead me to conclude that the document is what it purports to be, that is an outline agreement between Mr Baldudak and Mr Polat, as he then was, as to how they were to deal with each other through the company HTS, albeit that Mr Baldudak said that their arrangement moved on from there and was overtaken by events. That is likely to be correct as I do not detect a complete correlation between what is contained in the agreement and how the parties conducted their affairs after the business was up and running. For example, there was no charge for interest introduced into the accounts albeit that it had originally been contemplated that this would be the case and the provision for the 50:50 ownership being conditional upon the repayment of the loan by 30 September 2017 was not pursued either. Nevertheless, my findings as to the authenticity of the document further support my conclusion on the loans issue.

Does Mr Matteo have a beneficial interest in any share in HTS and, if so, what is the extent of his interest ?

111. There are three transfers to consider. They have to be looked at individually. As I cannot rely upon the evidence of either transferor or transferee, I have to compare what they say with the circumstances surrounding each transfer and what I make of the evidence of Mr Duffy, and what weight I give to the evidence of Mr Campbell to reach a conclusion as to where the truth lies. I cannot ignore, however, that the common theme which runs through Mr Matteo's evidence in relation to the transfers is that his initial response, and that of his then solicitors, to the claims of transfer and the production of documents of transfer, is that he did not accept that they had occurred or the authenticity of the documents produced.

112. The three transfers to be considered were as follows:

- a. 26 May 2017: 1 share,
- b. 14 January 2019: 44 shares,
- c. 24 February 2020: 5 shares.

26 May 2017-The transfer of 1 share

113. Mr Matteo's evidence as to the 26 May 2017 transfer is that Mr Baldudak had told him during a barbecue at work that his sister was making life difficult for him and it would be of assistance, in dealing with his sister, if he could show that he had the majority share. He told Mr Baldudak that this was no big deal as long as he knew they were both still 50-50 shareholders. This account is supported by Mr Duffy, who said that Mr Matteo had told him that he was transferring the 1% as Mr Baldudak's family were insecure because he had given money over which he did not have control and the transfer was to demonstrate that he did.

114. Mr Baldudak denies that he would discuss matters of business at a barbecue. He claims that he was offered the additional share because he was not receiving any returns for the money he had provided and he had to pay his own salary. He said that Mr Matteo gave him the share to make him happy. He said that before they went into business together they had discussed what would happen if the business failed. Mr Matteo said he would compensate him somehow. One of the ways he would do this would be to give him shares in the company.

115. The documentary evidence at the time shows that it was Mr Matteo who was instructing Mr Duffy to effect the transfer and on 26 May 2017 he even sent a chaser email to Mr Duffy to get on with the transfer. The effort expended in arranging the transfer of the one share makes me doubt that he no longer recollects the specific number of shares which were under

discussion. The company minute of the transfer, which has been backdated to 23 March 2017, states that the share has been transferred by way of gift for nil consideration.

116. Mr Baldudak's claim that he was paying his own salary is not supported by his director's loan account. In view of the fact that the company had only be trading for about six months it is difficult to credit that he had already formed the view that he was due some compensation for a want of return. Furthermore, the transfer of one share is unlikely to be a form of compensation, given the modest value of the company at the time. It is more likely that the purpose was to give him a real, or apparent controlling interest.

#### Factual conclusion

117. In view of Mr Duffy's evidence, that the purpose of the transfer was to demonstrate to Mr Baldudak's family that he had control of the company as they were insecure about what was happening to the money, and the incoherence of Mr Baldudak's explanation for the transfer, I find that the transfer was made to reassure the family. I do not, however, accept Mr Matteo's evidence that he had told Mr Baldudak that he agreed to the transfer as long as they remained 50:50 partners as it is unsupported by any other evidence. The fact that the transfer was described as a gift does not assist in reaching a conclusion as to whether the transfer was nominal as Mr Duffy said that he used the word gift because there was to be no consideration and he had not dealt with a transfer to a nominee before. There is no evidence that he was told that it was to be a nominal transfer or otherwise. The upshot is that Mr Baldudak's explanation for the transfer has been rejected and the only alternative on these facts is that it was the intention of the parties to the transfer, but more importantly Mr Matteo, that it could demonstrate to the Baldudak family that Mr Baldudak was in

control of the company. There is no evidence that the intention behind the transfer was that it was to be any more than that and no persuasive evidence that the transfer was intended to be a gift. The legal consequence of this finding will be considered in the conclusion relating to all transfers.

14 January 2019-The transfer of the 44 shares

118. Mr Matteo's evidence is that these shares were also transferred to help Mr Baldudak deal with his family disputes. The alternative account, put forward by Mr Baldudak is that when he had asked for the return of his money, Mr Matteo offered him the shares in lieu. He said he had no other option but to accept that offer. He said that he would have re-transferred the shares if his loan was paid back at a later time.

119. The documentary evidence which preceded the transfer starts with Mr Matteo's email of 26 November 2018 to Mr Duffy informing him that Mr Baldudak was to have all of the shares in HTS. The next relevant email was from Mr Matteo to Mr Duffy, dated 3 January 2019, where he referred to giving up all but 5% of the shares in return for the company not having to repay the loan. Mr Matteo and Mr Duffy met on the morning of Friday 11 January 2019.

120. On 12 January 2019 Mr Matteo emailed Mr Duffy to say he had been contacting him for some time about the share transfers and had visited him to be told that he would send the forms by the afternoon of 11 January. He said that he understood from Hava that she had been contacting Mr Duffy to gather information about the company but that Mr Duffy had not told him about this approach. In parallel with this exchange there were messages passed between the two directors in which, on 12 January 2019, Mr Matteo says that Hava has spoken to the accountant many times and that the accountant is "wasting my time about the share transfer."

121. Mr Duffy replied, on 14 January 2019, to the email from Mr Matteo. He said he enclosed the documentation to transfer 44 shares and that he was not aware of the separation from Hava but that she had visited his office to discuss matters unconnected with HTS. There is parallel communication between Messrs Matteo and Baldudak in which Mr Matteo says “This woman has made me crazy just like her We were almost done for in the Thomas thing It’s lucky I didn’t lay into him...I am going to take the share documents now I’m at the accountant Thomas panicked after getting my email...I need your signature.”

122. The board minutes of 14 January 2019 confirm the agreement to transfer the 44 shares. There is an executed transfer for one share, which Mr Duffy says was copied in error from a template used for the earlier transfer. That this was an error is likely to be correct in view of the minute, the registered transfer of 44 shares and the fact that at a later stage both directors signed the 12 October 2020 transfer referring to transferring 50 shares to Mr Matteo, following the transfer of 5 shares. Mr Duffy explained the reference to nil consideration for the transfer by saying that if there was to have been an agreement to waive the loan to the company there would need to have been a separate agreement, it would not be treated as part of the consideration to Mr Matteo.

123. Mr Page argues that what appears and does not appear in the WhatsApp messages between Mr Baldudak and Mr Matteo is instructive as to the real reason for the transfer of 14 January 2019. There is an exchange between them on 30 July 2018 in which Mr Baldudak informs Mr Matteo that his sister Berna is trying to make him, Mr Matteo, look like a thief and she is complaining and asking why is he doing business with her money. He describes her throwing herself to the floor and if she got more agitated there would have been knives and blood. On 29 August 2018

Mr Baldudak says that it feels as if all of his money is going to Hava. Mr Matteo responds that “Hava business finishing soon” and he adds “If its disturbing you so much 100% of the company shares can be in your name. I can be director and employee on paper and later we change it back depending on situation.” Mr Baldudak replied “If we can finish this in the near future without any damage there would be no problems brother, let’s not get bothered with paperwork/red tape. But if she wants to cause damage we can’t finish this with little money. Then we go into methods/ways like that.” Mr Matteo replies to the effect that the paperwork is no problem, he can instruct the accountant to deal with it.

124. Mr Page points out that there are no messages from Mr Baldudak asking for the repayment of any money and that the divorce from Hava was commenced in October 2018. He says all this points to the plan adumbrated by the messages being put into action. He contrasted Mr Baldudak’s oral evidence to the effect that Berna did not think of him as lax and irresponsible, his family were not putting pressure on him to recover the money he had obtained from his father and that he did not need to impress his family that he was doing well in England, with his description of his dealings with her set out in the July 2018 messages, which, he says, also undermines his account to me that the rift with Berna occurred in December 2019 when she visited the UK and that she had been satisfied that the business was a success until she had a discussion with Mr Matteo.

125. Mr Page also asks me to give significance to the fact that the passage concerning transfer of the shares appears to have been edited out of the claimants’ disclosed transcripts of these conversations; it only came to light in the course of the trial. There is the written statement from Mr Campbell upon which he also relies, save that whilst the statement asserts that it was in early 2020 that Mr Matteo told Mr Campbell that he was



transferring the majority of his shares while he was going through a court case with Hava, he must have meant 2019 as that is when the majority were transferred. Finally, Mr Page points to an exchange of messages on 22 October 2020 concerning a proposed venture in Turkey where Mr Baldudak suggested Mr Matteo should enter into a similar arrangement in which his shares were held by his sister until his divorce was finalised.

126. Mr Rodger relies upon the late emergence of Mr Matteo's explanation for the transfer. He says it is responsive to the claimants' provision of information which not only confirms that there was a transfer but that Mr Matteo's stated reason to Mr Duffy was that it related to a loan repayment. In the light of the emails to Mr Duffy, I would have to accept that there had been a double deception were I to accept Mr Matteo's case for it involved deceiving Mr Duffy as to the purpose of the transfer and Mr Baldudak's family as to the true ownership of the shares.

### Factual Conclusion

127. I do not accept Mr Baldudak's explanation for the transfer of the shares. It is likely that plan outlined in the messages of 30 July 2018 was acted upon and that the transfer was in name only. It is the fact that the dispute with Hava did not finish quickly so Mr Baldudak's reason for not dealing with the red tape no longer pertained. She and her former husband were still engaged in injunction and ouster proceedings in early 2020 and her financial application was ongoing as at November of that year. The messaging between Mr Matteo and Mr Duffy, taken together with the parallel messaging indicates that there was something which Mr Matteo did not want Hava to know and that this related to the share transfer. Furthermore, Mr Matteo's emails suggested urgency on his part, which, in itself, indicates that he had something to gain from the transfer. Against that background, I agree with Mr Page that it is highly suspicious that the

extract from the message transcripts which speak of the nominal transfer of shares to thwart Hava was missed out of Mr Baldudak's version of the transcripts and it is likely they were omitted because he realised that it supported the case on nominal transfer. His explanation that the software he used to extract his messages, for no apparent reason, left out this passage in the messaging is too convenient.

128. Mr Baldudak's evidence concerning the state of his relationship with Berna is also unconvincing given the content of his messages. I also accept Mr Page's observation that the absence of any documented communication calling for the repayment of the loans undermines Mr Baldudak's account. His protestation in evidence that he would not enter into a transaction to hide assets and wanted nothing to do with it does not sit with the fact that he was suggesting just such a scheme in October 2020 in relation to the proposed Turkish venture. A further, and seemingly obvious, feature of this case is that the loan appeared in the accounts to June 2019, by which time he had the 44 shares. That fact cannot sit with Mr Baldudak's explanation that he was forced to accept the offer of shares in lieu of the loan repayment. I accept that it would not be inconsistent with his alternative account to the effect that the shares were transferred by way of security. That account, however, first emerged during cross-examination.

129. What of Mr Matteo's explanation? I do not understand why he could not have told Mr Duffy that the transfer was to give confidence to Mr Baldudak's family as that is the story he gave him in relation to the first transfer. Mr Page argues that it was to hide the shares from Hava, but that is not Mr Matteo's explanation. The documents, however, point to this being the reason for the transfer and despite his evidence, that is my conclusion. Whether or not Mr Campbell's recollection of being told the reason for the transfer is accurate does not require a decision. He must have

been wrong about the year, given the number of shares transferred and has not been subject to cross-examination. His evidence is, in any event, not essential to decide this issue. It is important that I make a finding as to his real reason in view of Mr Rodger's *ex turpi causa* argument. I do not discount, however, that Mr Baldudak may well have used the nominal possession of the shares in an attempt to pacify Berna but such a conclusion is not inconsistent with what Mr Matteo proposed to achieve by the transfer.

#### 24 February 2020-transfer of 5 shares

130. Mr Matteo's explanation for the transfer was that Mr Baldudak wanted the shares to show his family that HTS was his company and as he wished to prevent Hava having any tie with the company. He said that at this stage Berna had obtained an order in a Turkish court freezing all of the bank account of Mr Baldudak's father and Mr Baldudak was worried that other members of his family would side with Berna. Mr Baldudak's evidence is that at the beginning of 2020 Mr Matteo told him that he could not repay him the loans so he offered him the five shares. He claimed that that email with the draft dismissal letter was not a concoction to cover up the real reason for the transfer of the shares. If that were correct his reason for requiring the transfer is that he could not allow Mr Matteo to remain in the business due to Hava's behaviour. I have already concluded that the text of the proposed letter in the email is a sham. Nevertheless, it is another example of Mr Baldudak giving different explanations for the same event.

131. The documentary trail leading to the transfer probably starts with Mr Baldudak messaging Mr Matteo that £50,000 in the latter's bank account and the company assets don't concern Hava. He says that he has nothing to give her as he has debts. The next relevant document is the email of 22 February 2020 relating to the dismissal. This was followed by the email

from Mr Matteo to Mr Duffy informing him that his remaining 5% shareholding was to be transferred as the company had not made repayment in time. On 15 March 2020 there was an exchange of messages between the two directors. It is apparent from the exchange that Mr Baldudak had taken offence at his wife, Katya, being likened to Hava by Mr Matteo. Mr Baldudak described Hava as a “low level disgusting person.” As part of this exchange he pointed out that Mr Matteo had been made bankrupt because of Hava, many times, and lost millions, but now had his business, his house and his car; there is a dispute as to whether the translation of “business” should be “workplace”. Looking at the comparison that Mr Baldudak was drawing, he must have meant something more than a job or place at which to work but was referring to some asset. This conclusion is reinforced by messages exchanged between them in May 2020.

132. On 17 May 2020 Mr Baldudak wrote to Mr Matteo asking if they could use the business plan on the website. There is then a discussion about an upcoming tender in which Mr Matteo said that they will be sitting at the same table as Wolsley and Travis Perkins; these are very large building materials suppliers. The directors get on to discussing the future. Mr Baldudak refers to selling 50% when the company peaks and the remaining 50% going to a new buyer. He refers to them being bought for £50 million, later increased to £85 million and asks Mr Matteo what he would buy. This may all be wishful thinking, but what is perfectly clear from this exchange is that he is treating Mr Matteo as someone with a very large stake in the business.

133. Finally, there is a complete absence of any documentary requests for the repayment of the loans or discussion that the company’s failure to repay them should result in Mr Matteo giving up his shareholding.

#### Factual conclusion

134. The message concerning assets which do not concern Hava indicates that Mr Baldudak was concerned for Mr Matteo's sake to keep these away from her. The letter proposed in the 22 February 2020 email which I have found to be a sham, is likely to have been prepared to make it appear to Hava and a court dealing with a financial dispute, that Mr Matteo had no job and no shares due to her behaviour. Mr Baldudak was complicit in the sham. That is powerful evidence that the shares were transferred to keep them out of Hava's reach. His varying explanations for the transfer, if one includes the letter, the absence of repayment requests and the absence of any agreed plan as to how the money was to be repaid and unlikelihood that either Mr Matteo or the company ever had the ability to repay suggests that it is highly unlikely that Mr Matteo was left his 5% share as an incentive to make some repayment, which was also suggested, just in case he was able to repay some undefined amount by some unspecified date. Looking at the matter in the round, it is likely that the transfer of the five shares was made for one reason alone, and that was to keep them away from Hava's grasp until the time was ripe to recover the shares. It was the same plan that had first appeared in writing in the messages of 29 August 2018.

#### The legal effect of my conclusions

135. There are two areas of learning which have to be considered. The transfer of the single share has to be considered in relation to the presumption of resulting trusts following a gratuitous transfer.

136. I do not need to consider this in relation to the two further transfers because I have found that Mr Matteo's intention was to keep them away from Hava and not to dispose of the beneficial interest. In a case where the actual intention is established there is no need to resort to the presumption;

see *Lewin on Trusts 20<sup>th</sup> Ed para 10-006*. It is his intention which is relevant; *High Commissioner for Pakistan in the United Kingdom v Prince Muffakham Jah* [2020] Ch 421 per Marcus Smith J at [244] –[245]. No particular form of expression is required, the settlor does not have to utter the word “trust”. The “question is whether a sufficient intention to create a trust has been manifested.” *Re Kayford Ltd (In Liquidation)* 1975 W.L.R. 279 per Megarry J at p.282. In view of my conclusion that the intention behind the last two transfers was to effect a nominal transfer only until such time as Mr Matteo thought it safe to retake his shares, there is clearly a sufficient intention evinced for those shares to be held on trust by Mr Baldudak for the benefit of Mr Matteo.

137. Dealing with the first transfer, the starting point is that where there is a gratuitous transfer of property containing no expressed or inferred provisions determining beneficial ownership, there is a rebuttable presumption of resulting trust; see *Lewin at paragraph 10-003*. I do not give weight to the use of the word “gift” in the transfer as Mr Duffy explained this was his template for transfers without consideration and he had no experience of nominal transfers. My finding as to the reason for the transfer was that it was to demonstrate control of the company to Mr Baldudak’s family. That could be window dressing, in the sense that it merely looked like he was in control but held the share on trust for Mr Matteo, or that he was given actual control through his absolute ownership of the share. The burden is on Mr Baldudak to rebut the presumption. Since I have rejected his explanation for the transfer and there is no reliable evidence that this was to be a gift or that it was not gratuitous, he has failed to do so. I find that since the transfer, he has held the single share on trust for Mr Matteo.

138. Mr Rodger argues that I should not recognise or enforce a trust over the final 5 shares on the basis that the court will not assist someone who founds their claim on an illegal act. On my finding as to the purpose of the transfer of the 44 shares I will need to apply the same considerations to that transfer as well.

139. The correct approach to a such a defence is set out in *Patel v Mirza*[2016] UKSC 42. In that case, the court overruled the approach adopted in *Tinsley v Milligan* [1994] 1 AC 340 which is based on the premise that the defence could only succeed if the wrongdoer had to rely on their wrong-doing to enforce their rights. If they did, they lost, otherwise the illegality was no impediment to enforcement. That would have been a simple test to apply in this case as Mr Matteo can call for his shares on the grounds that he is the beneficial owner, he would not need to rely upon the circumstances in which they came into Mr Baldudak's hands. That, however, is not the test.

140. In *Patel*, Lord Toulson, with whom the majority agreed, adopted a range of factors in his approach to deciding the issue in preference to the more mechanistic approach in *Tinsley*. He said at [120]:

“The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would

be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.”

In relation to the proportionality issue he said at [107]:

“In considering whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled, as a matter of public policy, various factors may be relevant. Professor Burrows’ list is helpful but I would not attempt to lay down a prescriptive or definitive list because of the infinite possible variety of cases. Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties’ respective culpability ...”

The reference to Professor Burrows’ list relates to his *Restatement of the English Law of Contract (2016)* where he identified a range of factors to take into account.

141. Mr Rodger says that the illegality here is Mr Matteo’s attempt to avoid his lawful obligations to his ex-wife by transferring shares so as to appear they were no longer his and the lies contained in the Form E of 6 November 2020. He says that it would be harmful to the integrity of the legal system if he could pray in aid his conduct to unwind the transfers.

142. Mr Page argues that there is no general prohibition on giving a false appearance of poverty. He relies on a passage in *Lewin*, at 6-033, where it is stated:

“The majority [in *Patel v Mirza*] considered that it would be only in a rare case that the enforcement of a claim might be regarded as harmful to the integrity of the legal system, and thus declined by the court. We consider that in practice it will, as Lord Toulson suggested, now be only an



exceptional case where the court will not entertain a claim at all, such that evidence of an illegal purpose is wholly inadmissible.”

143. He says that a refusal to recognise the trusts would be a disproportionate response as it would result in a windfall for Mr Baldudak. It would be unjust and contrary to the public interest because Mr Baldudak was aware of the purposes of the trust, had proposed a similar arrangement in 2020 concerning a partnership in Turkey and part of the purpose of the trust was for his benefit. If the trust were not enforced it would prejudice Hava in the divorce proceedings by putting the shares out of her reach. The public interest is protected by the law of contempt. The court in the financial proceedings is best placed to determine the appropriate consequences.

144. I have not been addressed upon the effect of Mr Matteo having issued a new Form E in which he admitted to the ownership of the shares. Thus the illegal purpose was abandoned before it was carried into effect, in the sense that the court in Mrs Polat’s claim was not placed in the position of determining her financial entitlement whilst unaware of his shareholding. In *Tribe v Tribe* [1996] Ch 107 a father who transferred his shares to his son to protect them from claims by his creditors was held entitled to recover them after he had settled with the creditors as, on the facts, the creditors had not been deceived so the illegal purpose had not been carried into effect. Millet LJ, at 134 considered that the policy underlying the locus poenitentiae principle necessarily encourages “withdrawal from a fraud before it is implemented.” *Chitty on Contract* (33<sup>rd</sup> Edition at paragraph 16-231) says:

“The decision in the Supreme Court in *Patel v Mirza* that, where a contract is unenforceable because of illegality, restitution should normally be

available, at least where the contract has not been fully executed, appears to endorse the outcome in Tribe v Tribe.”

### Conclusion

145. I agree with Mr Page’s submissions. The underlying purpose of the prohibition on preventing Mr Matteo giving a false impression of his assets in matrimonial proceedings is to seek to ensure that his former wife receives that which is due to her in accordance with the provisions of the Matrimonial Proceedings Act 1973, which requires the court to take into account each party’s assets and income when making a financial order. That purpose would be thwarted if the claim were to be denied. Neither side has argued that this consideration is not relevant as Mrs Polat could join Mr Baldudak in her financial claim in order to assert that he holds the shares in trust for Mr Matteo so as to be taken account in her claim. It would be a very roundabout way of vindicating her rights to financial provision and the fact that she would be put to the cost and trouble of having to do so justifies the conclusion that refusing relief would thwart the purpose of the prohibition.

146. The fact that Mr Matteo has taken steps which prevent him from relying on the false information in the original Form E is consistent with the policy because by allowing him to recover his shares in these circumstances encourages the prevention of fraud. It is likely that the change was brought about by the fact that his motive by then was to fight his exclusion from the company, but it was not forced upon him.

147. The refusal to recognise the trust would be disproportionate and unjust as it would reward Mr Baldudak for wrongdoing in which he was

complicit and put his interests, as a joint wrongdoer, ahead of Mrs Polat, who is the innocent party as regards the shares.

148. I also agree with Mr Page's point that the public interest in preventing litigants lying as to their assets is protected by the law of contempt, and had Mr Matteo persisted in his fraud, the court dealing with the financial claim is best placed to determine the consequences.

#### The 12 October 2020 share transfer

149. In the light of my conclusions as to the beneficial ownership of the shares I do not need to decide if the transfer of 12 October was effective. The events surrounding the transfer, however, have some bearing on what followed so it is necessary to establish what happened.

150. The evidence on this issue came from Mr Duffy, Mr Baldudak and Mr Matteo. Mr Duffy's evidence in chief was that the visit on 12 October 2020 was arranged to clarify the extent of Mr Baldudak's loans to the company. Whilst at the meeting, the two directors had a discussion in Turkish after which he was asked by Mr Matteo to prepare a transfer of 50% of the shares in HTS to Mr Matteo and it was only at the meeting that the question of transferring shares to Mr Matteo was raised. In cross-examination he was referred to Mr Matteo's text asking for the meeting, dated 7 October which says that they need to see him for "shares transfer and amending amount owed to Erdem." He explained his original statement as to the purpose of the meeting on the basis that there had been quite a bit of talk about Mr Baldudak's loan so that stuck in his mind. He said that as at October 2020 it was impossible for the loan to be repaid in full, meaning by the company.

151. Mr Duffy said he prepared the paperwork and both signed, but did not date, the transfer. Mr Matteo said, on signing, the he did not want it to be completed and it was to be finalised at a later date. On 6 November, Mr Matteo was back at his office to discuss the latest VAT return and Mr Baldudak's loans as he was unable to reconcile them from a schedule provided at the meeting. That afternoon, Mr Baldudak visited him. He said he was not happy with what was happening and he wanted the transfer back. Mr Duffy advised him to tear off the signature corners. On 9 November, which was the next working day after 6<sup>th</sup>, Mr Matteo called him to say that the parties had fallen out. There were no further discussions regarding the transfers. In cross-examination he accepted that Mr Matteo had, on 9 November, said that he wanted the shares registered. There was then the exchange on 11 November in which Mr Duffy told him that he was busy on a job but that Mr Matteo could do that himself and he gave him the access code for Companies House.

152. Mr Matteo said that by the time of the meeting on 12 October he and Mr Baldudak had fallen out. He objected to payments Mr Baldudak had made to a friend of his, Mr Onur, who worked for HTS, as if he was a sub-contractor, and he no longer wished to be part of these "dodgy dealings", he did not care if Hava sued him, he wanted his shares back. The purpose of the meeting was the shares, the loans were secondary. Mr Duffy had prepared the transfer document beforehand. He denies that he asked Mr Duffy not to complete the transfer. He instructed Mr Duffy to update the Companies House register straight away. After that meeting, he called Mr Duffy 3 or 4 times about the share transfers and in one of them he was told that Mr Baldudak had taken them back. Mr Duffy had said there was no hurry to get the transfer registered and that he could do it himself as he was busy with a customer. Mr Duffy denied that he had been asked to file the

transfer, when cross-examined. He said that if he had been asked to do so, he would have.

153. Mr Baldudak said that he attended with Mr Matteo on 12 October to discuss his loans and their repayment. In the days preceding the meeting he had said that he would agree to transfer 50% of the shares if his loans were repaid in full. It was after they had a discussion about the loans in Turkish that Mr Matteo asked Mr Duffy to prepare a share transfer for 50% of the shares, which he did during the meeting. They were signed but not dated as they did not intend to finalise the transfer until the loans had been repaid. In cross-examination he claimed that he was pressured into signing as he was planning to go to Turkey and this was the quickest way to deal with the situation and leave the country. After they left the office, Mr Matteo told him that he would transfer the funds but he failed to do so. As a result, on 6 November he visited Mr Duffy's office to collect the signed transfers as he had not been repaid, and at Mr Duffy's suggestion, ripped them up.

154. The messaging between the directors between 1 October and 6 November makes no reference to a share for loan repayment transaction. There is a short reference on 12 October to visiting the accountant. Further, I accept Mr Duffy's evidence, as the company accountant, that there was no prospect of the company repaying the money. Mr Baldudak has not pointed to any basis for believing that Mr Matteo could repay. When pressed about the prospect of repayment he said that it was never agreed how much should be repaid as the sum always changes. He suggested that there may be some instalment arrangement as Mr Matteo could not repay £2 million in one go, but did not say any instalments had been agreed. This account as to the basis of the transfer is, thus, unlikely. It is even more

improbable in the light of my finding that, to his knowledge, 49 of the shares had been transferred to hide them from Hava.

### Conclusion

155. I accept that Mr Duffy was instructed to retain the transfers and that they were not to be completed until further instruction. Accordingly, they were not effective to transfer the shares. Whilst it is evident that Mr Duffy was inaccurate as to when he was informed that there was to be a share transfer, I do not discount his evidence that he prepared it at the meeting. The text from Mr Matteo says no more than he is to be seen about a transfer of shares. He is not told how many or on what terms, important information as he had previously been led to believe by Mr Matteo his transfers were related to the forgiveness of loans. It is likely that he would wait to see what he was asked to do before he prepared a document. I prefer his evidence to that of Mr Matteo as to why he did not register the shares. No good reason has been put forward as to why he should hang on to the transfers and why they were left undated if he had not received an instruction that the transfers were not be brought into effect. When one looks at the relationship between the directors as mirrored in their messaging to just before the beginning of November, there is no indication of a reason for any urgency. Whilst I accept that the two directors had a disagreement as to the payment by Mr Baldudak of Mr Onur as sub-contractor, since both recall this event, I reject Mr Matteo's explanation as to why he sought the transfer. His lack of probity generally leaves me unconvinced that he found "dodgy dealing" unacceptable. Furthermore, if he had really adopted a fatalistic approach to Hava's claims on the shares by the time of the 12 October meeting, why did he try to hide them from her in his From E dated 6 November. His professed attitude to her claims

and what I can see from his actions in relation to the financial application are inconsistent.

156. The key date for Mr Matteo is likely to be 6 November 2020 when he signed his Form E. He probably thought he could sign it in safety as the shares were not in his name. The messaging transcripts show that as at 22 October 2020 he and Mr Baldudak were talking about starting a further business in Turkey in which Mr Matteo's shares would be in his sister's name till the divorce was finalised. Their falling out first appears in this part of the transcript on 30 October, and by 31 October Mr Baldudak was saying that he was accused of being on Hava's side and Mr Matteo is saying "if you hate me so much, then we can go our separate ways". In a message on 29 October 2020, Mr Matteo said that he wanted to take a break for one week and he gave the bank "FOB" to the general manager Mr Onur. Mr Baldudak responded that if he "did not show up for a week, we'll go bankrupt. Who the fuck is Onur." This exchange is some indication that Mr Onur was not as close to Mr Baldudak as Mr Matteo claimed but it also suggests that the former considered the latter essential to the running of the business.

157. There was clearly some discord by 6 November 2020 as Mr Matteo messages Mr Baldudak asking what he wants, adding that he does not want anyone to be harmed. By 8 November 2020, Mr Baldudak says to Mr Matteo that he will be lucky if he gets out of this without a prison sentence; this seems to relate to an earlier message concerning something which Mr Matteo had said to Mr Baldudak's mother. Later that evening he again accused him of acting with Hava and asks him why he is trying to ruin the business. The only response this last suggestion prompts from Mr Baldudak is that he does not care what is ruined, he will return to Turkey and live his life. The timing of this war of words between the parties

probably explains why by 6 November Mr Baldudak decided to stop the transfer and on 9 November Mr Matteo was desperate to recover his shares.

The claim for breach of fiduciary duty and ss. 170 to 175 of the Companies Act 2006.

158. The pleaded statutory duties upon which reliance has been placed are those in s.171 (the duty to act in accordance with the company's constitution and only exercise powers for the purposes for which they are conferred), s.172 (the duty to act in good faith and in a manner most likely to promote the success of the company for the benefit of its members as a whole), s. 174 (the duty to exercise reasonable skill care and diligence in carrying out the director's functions), s.175 (the duty to avoid a situation in which the director's interests do, or may, conflict with those of the company and not to exploit any property, information or opportunity of the company), s. 170(2) (the duty, after cessation of the directorship, to avoid conflicts of interest as regards the exploitation of the company's property, information or opportunity of which the director became aware whilst in office.)

159. As a director of HTS Mr Matteo was an agent of the company. He owed it fiduciary duties arising from the 'no conflict rule'. This was described by Lord Cairns LC in *Parker v McKenna (1874) LR 10 Ch App 96* at 118 in these terms:

"Now, the rule of this Court, as I understand it, as to agents, is not a technical or arbitrary rule. It is a rule founded upon the highest and truest principles of morality. No man can in this Court, acting as agent, be allowed to put himself in a position in which his interest and his duty will be in conflict. The court will not inquire, and is not in a position to ascertain, whether the bank has lost or not lost by the acts of its directors. All that the court has to do is examine whether a profit has been made by



an agent, without the knowledge of his principal, in the course and execution.”

160. The strictness of the rule is relaxed where the company gives its informed consent to the director being in a position of conflict, where the director no longer held office at the time or was excluded from all decision making in the company. For example, in *Plus Group Ltd v Pyke* [2002] 2 BCLC 201, it was held that a director who was excluded from his company, deprived of any remuneration and unable to extract money he had loaned the company, was not in breach of his fiduciary duty in setting up a rival company with which one of the customers of his former company contracted. The decision was upheld on appeal where Brooke LJ said, at [72]:

“There is no completely rigid rule that a director may not be involved in the business of a company which is in competition with another company of which he was a director.”

Jonathan Parker LJ considered that there were unusual facts in *Plus Group* which led to this conclusion.

161. The alleged breaches fall under three heads:

- a. Taking the company’s money for himself
- b. Doing acts to set up in competition with the company whilst still a director.
- c. Conduct towards the company directed at disabling it from trading.

#### The money claims

#### Cash from the till-£27,215.28

162. In his statement, Mr Baldudak said that Mr Matteo has taken cash from the till but not deposited it into the company bank account and that

this came to light in 2020. In cross-examination, however, he said that Mr Matteo did buy second- hand parts for cash. He knew that Mr Matteo was taking cash from the till to purchase boilers from 2018 and that he had “always warned him” about misusing company money. As to the amount and fact of taking he relies upon the evidence of Brian Laidler, Theresa Fisher and Michelle Oliver. When asked that in view of the concession that he was aware from 2018 that Mr Matteo was taking cash with which he was buying boilers and believed that it was not all used for this purpose, Mr Baldudak claimed that the number of boilers purchased did not match the cash taken though he provided no detail sufficient to make a precise comparison.

163. Mr Laidler’s evidence is that he has worked as a trade counter manager for 25 years and for HTS for 6 years. He prepared a schedule of money movements from the till and kept a separate system to keep track of cash because he did not want any problem coming back to him. Usually, at the end of the day, Mr Matteo would collect all the cash from the trade counter till, they would count it together and he would take it away in a bag. Once he had taken the money, Mr Matteo would leave the premises. Mr Laidler did not know what he did with the money, He, Mr Laidler, would give out cash to employees to purchase diesel for vehicles used by the company. In cross-examination he accepted that he sometimes gave the money to Mr Baldudak but said that was rare. He denied the allegation, put on behalf of Mr Matteo, that he had used the cash to purchase parts on his instructions. He told me in relation to the break-ins that the first involved little bits being taken and in the second the gates were rammed and a lot of parts and equipment was stolen. He did not say that records were lost in either.

164. Theresa Fisher also says that she saw Mr Matteo taking the cash from Mr Laidler each night and when he was not there, she used to hand him the cash. Michelle Oliver says she saw him taking money from the till and safe daily when she occasionally worked on the trade counter.

165. The claimants' pleaded case is that the cash was taken without authorisation or justification. Mr Matteo's defence denies that taking. In his response to this allegation, at the injunction application stage, he said that cash payments were kept on the business premises for cash purchases, such as scrap boilers, the cash was usually kept by Mr Baldudak or his friend Onur Kose. He only took cash with him if he was required to pay for parts of scrap boilers. In his statement of 22 September 2021, having seen Mr Laidler's statement, he says that he took charge of most of the cash from the counter though some was used for expenses by other employees. It was he, generally, who paid over cash for boilers and other HTS purchases. The cash purchase of boilers was recorded in receipt books which were used to complete the VAT returns each quarter. These were left with the claimants and have not been disclosed. Sometimes there was insufficient cash for purchases in which event cash was drawn from the company's HSBC account. He did not use cash from the trade counter for his own use. In cross-examination he added the detail that he did not pay cash into the company bank account to avoid service charges and for a period had put the money in a safety deposit box at a location in Newcastle which he could not recall.

166. Mr Duffy confirms that in the early days of producing VAT returns for the company he did see duplicate or triplicate books in which cash purchases were recorded but as there was never an issue about these payments there came a time when he no longer requested these books. He recalled that there was an HMRC investigation which looked back at cash

sales for a period of 4 years. The receipt books were at the meeting with HMRC. He believed that a lot of records were lost in a break in. He said that Mr Matteo had told him that there were large cash withdrawals from the bank to pay for these purchases. He had been told that there were very few cash sales and had the impression there was not much cash going through the till but some of it could have been used for purchases. In order to prepare the VAT return he would match the cash purchases with the money coming from the bank. He did not, however, have his working for the VAT returns to demonstrate this approach though he said he still had them.

167. Mr Rodger says that I should find that Mr Matteo has received £27,215.28 in cash from the till. It is for Mr Matteo to explain what he has done with it. He is not to be believed. Mr Duffy's evidence as to the cash purchases deriving from the bank account is to be preferred. In any event, he has not proved what he did with the money. He relies upon *Idessa (UK) Limited* [2011] EWHC 80 (Ch), approved by Norris J in *Toone v Robbins* [2018] EWHC 569 (Ch) and *Gillman & Soame Limited v Young* EWHC 1245 (Ch), where Robert Miles QC sitting as a deputy judge of the High Court said:

“I should also say something about the burden of proof. Where a person in a fiduciary position receives property of his principal, the burden is on him to account. This principle applies to company directors as it does to trustees. It is, therefore, for GSL to prove that Mr Young received a particular payment from the company; but, where it does so, it is for him to show that the payment was proper.”

168. Mr Page argues that the allegation here is one of theft and the weight of the evidence is insufficient to reach such a grave conclusion. He points to the inconsistency of Mr Baldudak's evidence as to when he discovered that the money was being taken and suggests that he was accepting that some cash from the till was used for boiler parts but not all of it. He challenges whether there is any evidence that Mr Matteo has received just over £27,000 from the till as his reading of Mr Laidler's evidence is that he was making a note of the cash going out, not that Mr Matteo took the money. He pointed to a lack of correlation between the cash withdrawals and a corresponding VAT return for the same period, which he said did not reconcile, as a reason for not accepting Mr Duffy's account as to boiler parts only being purchased with cash drawn from the bank. As regards the absence of the receipt books for the cash purchases he points to the fact that the questionnaire to the second Disclosure Review Document refers to these books. They were requested but never produced.

### Conclusion

169. Mr Laidler was a very even-handed witness. It was he who called the police in relation to the carpark incident and says he came out to protest about what was happening but one of the bouncers sent him back. He was open about knowing that there was talk of the opening of a branch in Gateshead, despite Mr Baldudak's statements indicating there was no such proposal. I regard his evidence as to how much was taken from the till as accurate. He had a good reason to record what was being taken and it was a daily record of withdrawals. He does not say, however, that Mr Matteo took all of the money, just that it was the exception that it was not him. I accept his evidence, and that of Ms Oliver and Ms Fisher that they saw Mr Matteo taking the cash from the till at the end of the day. I also accept that Mr Laidler recorded that the money taken from the till amounted to the

amount now claimed. Whilst that enables me to conclude that Mr Matteo took the bulk of what was in the till, I do not have a basis for quantifying the amount.

170. There is a difficulty in applying the *Idessa* principle in that Mr Duffy accepts that there were records of cash purchases and that these had satisfied HMRC who looked back through at least 4 years of accounts at which time the books still existed. He says that the books have disappeared due to a burglary but has no first-hand knowledge and there is no indication that he made any enquiry or anyone has made a search to find them. Mr Laidler's evidence does not support their disappearance. On the evidence, I am not satisfied that the books have disappeared. Thus, there ought to be books which would show where the money went and, depending on what they show, be capable of supporting Mr Matteo's case, but if anybody is responsible for their absence, it is the claimants. Where the evidence is in documents which are in the control of the claimants, it would be wrong in principle to apply the *Idessa* principle to a defendant who is thus disabled from discharging the burden of proving what he did with the money. Rather, the inference should be that a party who does not provide relevant documents does so because they contain information which supports the case of the other side or undermines their own case.

171. Mr Duffy's evidence about reconciling the cash from the bank in relation to purchases would be a powerful one if he had produced his workings and this had been in his statement. The account only emerged as I asked for him to be recalled after reading back the note of his cross-examination in which he had referred to the receipt books. I, therefore, have to be on my guard as to whether his recollection was accurate. In relation to the amount of money in the till, it clearly was not as we have Mr Laidler's records which show considerable quantities of cash passing

through. I am not persuaded that Mr Duffy's evidence as to what he was told, or observed, as to the source of the cash for the purchase of boiler parts is accurate.

172. The telling evidence in relation to the cash from the till is that Mr Baldudak admitted he knew Mr Matteo had been taking it since 2018, which is when Mr Laidler's record commences, yet until he was cross-examined he maintained he knew nothing about it until 2020. The inference I draw from that inconsistency is that he was not troubled by the cash removed by Mr Matteo. He only simulated objection to its removal when he sought to obtain an injunction to exclude him from the company at which point it suited him to claim that the "hand in the till" evidence had just come to light. He accepts that he knew that Mr Matteo used cash from the till to purchase boiler parts. I reject his recent assertion that he saw that the number of boilers in the yard did not match the number said to be purchased. He only put forward this account when he was being challenged about his change in evidence as to when he first became aware of cash being taken. Further, he has produced no documentary evidence to corroborate his evidence that he made complaints about the misuse of the cash. The inference I draw is that he had no objections between 2018 and 2020 as to Mr Matteo taking cash from the till because he accepted that it was being used for legitimate company purposes. The claim for £27,000 plus fails as does the allied allegation of breach of fiduciary and statutory duty.

#### The use of £3,600 to pay Mincoff's fees

173. I do not need to spend too long on this relatively small sum as Mr Rodger says that whether it is recoverable as part of Mr Matteo director's loan account or by way of damages for fiduciary duty does not matter. Mr Matteo says that he was entitled to take this sum as deferred salary. The

evidence is that he did not hide this transaction as he put his name against it on the statements seen by Mr Duffy who recorded it in the director's loan account. The question as to whether it is deferred salary is best considered when I look at the issue as to whether any salary, beyond that which was shown on Mr Matteo's wage slips, was agreed. If it was not deferred salary it falls to be recovered under the director's loan account.

#### The payment of £3,695.02 in early October 2019

174. There are entries in the company bank statement which show that on 6 October 2019 Mr Matteo was paid £1,250. The entry is marked as Mr Matteo's wages. On 10 October 2019 there is a further entry marked as Mr Matteo's wages including for September. The amount paid on this occasion was £2,445. These sums do not appear on his October wage slip, which shows a net wage of £1,766.87 paid on 31 October 2019. In his defence, Mr Matteo said that he had no record of receiving these amounts. They appear, however, in his bank statement. In evidence he said the smaller payment was for old wages and the other due to a payment he had made from his account due to a lost credit card.

175. Mr Page says that both payments are shown in the directors' loan account calculated by Mr Duffy. In fact only the £1,250 appears. Nevertheless, he accepts that they both fall within this account. How this anomaly arises is unexplained. I note, however, that there is an entry for a lost credit card in the sum of £2,618.44 which Mr Rodger has accepted should no longer be pursued. It is possible that the two entries have been confused. Nevertheless, these are small amounts and Mr Matteo made no secret of these withdrawals. In those circumstances, it is unlikely that they were intended by Mr Matteo to misappropriate the money of HTS or were obtained through the negligent conduct of the company's affairs such that



I could conclude that there has been a breach of fiduciary or statutory duty. The sums have to be accounted for within the director's loan account.

The payments totalling £32,500 on 8 and 9 January 2020.

176. There is no dispute as to the fact that on these dates sums totalling this amount were transferred from the HTS bank account to Mr Matteo. Mr Baldudak's first statement claims that he first discovered the payment on 23 November 2020 when he found a bank statement on Mr Matteo's computer. In his 7<sup>th</sup> witness statement he says that the money was taken without justification and he did not know where the money went or what he did with it.

177. In his first statement responding to this allegation Mr Matteo said that Mr Baldudak knew what the payment was for and it was shown with his and Mr Baldudak's name as the reference on the bank account. He says that the money was part of a total of £51,250 he withdrew from HTS as a deposit on a house. Mr Baldudak was aware of what it was for and they had both talked about taking out money to buy houses.

178. Mr Baldudak's evidence in cross-examination completely contradicted the claims he made in his witness statements concerning the £32,500. He said that he did not know that Mr Matteo was using £50,000 as a deposit as he was looking for a house for £150,000 with a 5% deposit. After Mr Matteo had paid the £50,000 towards the house, he found it on the bank statement and said to him that this was unfair. At that time Mr Matteo said I will look for a house for you. He said he told Mr Matteo that was fine if he arranged a mortgage for him. This resulted in him looking at a house in Byker, Newcastle, but he did not buy it.

179. The WhatsApp messages between these parties show that they were discussing the mortgage in January 2020. Mr Baldudak's replies in cross-

examination show that his knowledge of the sums drawn pre-date 2020. He said that it was in 2019 that Mr Matteo needed a house of his own. He denied the allegation that he was looking for a house at the time. His response to Mr Matteo at that stage, that is before he was looking for a house, was to say that it was unfair that he was taking so much money from the business bank account and that he should repay his loan first. In this passage of his evidence he said that Mr Matteo was buying a £300,000 house and the one in Byker was £90,000. Thus, not only was his oral evidence not consistent with his statement but it changed whilst he was being questioned.

180. Mr Baldudak was shown a letter from Nationwide dated 13 December 2019 addressed to him. He said he had never seen this before despite it being addressed to his home address. He said that a friend of Mr Matteo called Kevin had made a mortgage application on his behalf and that Mr Matteo was trying to make him happy by applying for a mortgage in his name, thus indicating that he was not party to these arrangements.

181. The WhatsApp messages between 9 January and 19 March 2020 show that Mr Baldudak was taking an active part in seeking a mortgage, for example sending Kevin documents to confirm his identity, at one stage suggesting that they consider a lender other than Nationwide, and saying that it was good news that his visa papers had been sent to Kevin. These responses beg the question as to how he knew that the proposed lender was Nationwide if the application was being made by Mr Matteo in his name and he had not seen the correspondence from that lender. All of this counters his suggestion that he was not looking for a house at the time. The only point at which Mr Baldudak's evidence accords with the WhatsApp messages is that he says that the mortgage application did not go through. This is supported by an exchange on 19 March 2020 when Mr Matteo said

that Kevin told him to “do the mortgage on you but I think we should stick with cash” to which Mr Baldudak agrees.

### Conclusion

182. I accept that Mr Baldudak knew about the drawing of the £32,500 and that it was to be used towards the purchase of a house and that he approved of it. The WhatsApp messages undermine his account which, itself, lacks consistency and has been contradictory. The messages support Mr Matteo’s evidence, as does the fact that the drawings bore a reference which showed their destination. I also accept that at the time the money was drawn, Mr Baldudak was looking to purchase a property, with the assistance of a mortgage originally but ultimately with cash.

183. Mr Baldudak’s assertion that he was allowing Mr Matteo to make a mortgage application in his name so that he could buy a house to make him happy in the light of his discovery that he had taken £32,500 from HTS for a house is wholly improbable. Why should he allow someone who he claims has been creaming money from the company to make him liable under a mortgage? The overwhelming likelihood is that he has come up with this story as he knows that he was agreeable to Mr Matteo drawing these monies for a house purchase but it served his purpose, when seeking an injunction to exclude him from the business, to point to sums taken from the company by Mr Matteo of which he claimed to be unaware and it still serves his purpose in justifying his continued exclusion from the company.

184. There is direct evidence that Mr Baldudak was agreeable to the money taken for the deposit, which, it is to be remembered, totalled just over £50,000. On 5 February 2020 he messaged Mr Matteo “That 50k in your bank...don’t concern havvati.” When it was suggested to him by Mr Page that this demonstrated that he had agreed to the payment he said that the “50k” might have referred to Turkish Lira or Euros. Given that the

reference is to 50k in the bank and the bank account into which HTS money was paid was a sterling account, the explanation is non-sensical. I shall deal with the question as to why Mr Baldudak did not complain about these type of drawings when I look at the allegation concerning an agreement to pay salary or declare a dividend.

185. It is not unusual for directors of small private companies to draw against expected dividends instead of taking substantial salaries and to record such drawings in a directors' loan account. Such arrangements undoubtedly benefit the directors due to the different tax treatment of salary and dividends. They can also, however, assist the company by preserving cash flow, for the dividends can only be declared when there are profits to distribute. In these circumstances, the drawings do not constitute a breach of fiduciary or statutory duty.

The incorporation of National Boiler Parts Limited (NBPL) and interference in HTS's eBay account.

186. It is common ground that on 27 June 2020 National Boiler Parts Ltd was incorporated with Mr Matteo as the sole shareholder and the registered office his home address. The company name is also one of the trading names of HTS. It is conceded by the claimants that there is no evidence that NBPL ever traded or transacted business so as to cause HTS loss. It is necessary to consider the allegation that the company was set up to compete with HTS together with that relating to the interference with the eBay account as it is said that the latter was undertaken to further the interests of the new company at the expense of the old.

187. The genesis of this allegation is to be found in Mr Baldudak's first statement, that used for the injunction application. He said that at the

beginning of November 2020 it had come to his attention that Mr Matteo had formed NBPL and that he was conducting himself so as to pass off his new company as if it were HTS. He gave details of the passing off. He said that HTS sold on a number of online platforms. About two weeks prior to his 25 November 2020 statement, he discovered that the account details on the three eBay accounts had been altered by changing the bank account to which they were linked from that of HTS to another one which he presumed belonged to NBPL. In cross-examination he said he discovered the change of bank on 4 or 5 November. eBay was contacted to resolve the situation with the result that the account was suspended causing financial loss to HTS. He said that only Mr Matteo had access to these accounts and it was strange that one of the eBay accounts bears the name of Hava Polat, Mr Matteo's ex-wife. He claimed that Mr Matteo had contacted one supplier with a view to re-directing business and there had been a recent instance, 14 November, when Mr Matteo had contacted Mr Caulfield of DHSS Spares. He exhibited an email from Mr Matteo to Mr Caulfield dated 14 November, i.e. after he had been excluded from the business, in which he said that all of his phones and emails had been hacked and he provided a phone number if he wanted to call him. In the course of the trial it was not suggested to Mr Matteo that he had been passing off NHBL as HTS or that he had been soliciting its customers and no evidence was produced, other than Mr Baldudak's first witness statement, to say that he had.

188. Mr Matteo said, in his first response to the interim injunction, that NBPL was set up as he and Mr Baldudak had agreed to incorporate a company together for their Gateshead trade counter in respect of which they were looking to find a suitable industrial unit. Mr Baldudak wanted his wife to be a director to assist with her visa application but Mr Matteo

had refused. He said that he had owned the eBay accounts from before HTS, which explained why one of them was in his former wife's name and he had not received any payments from the sales channels, by which he meant online platforms used by HTS.

189. In his statement for the trial, Mr Matteo said that when discussing opening in Gateshead with Mr Baldudak they had discussed bank facilities and wondered whether they could use one of the free banking Apps such as Monza or Tide. He opened an account with an App, he does not recall the name, into which he deposited £10. They were going to set up a new eBay account for the new company but eBay was moving from Paypal to its own internal system. They discussed that they would need to check if the App would work with that system. He suggested testing this and Mr Baldudak agreed. It was for that purpose that he asked an HTS employee called Mete to test whether eBay would make payment to the online account on the App. Mete could not see that App bank on the eBay list so he asked him to attempt to add the account, which he did. This was in about October 2020. The test did not work, the online account never showed more than the £10 credit and HTS continued to receive payments from eBay into its HSBC account. He can't remember if he asked Mete to remove the online account. The banking App was on his Samsung phone that was taken from him on 12 November by the claimants.

190. Mr Matteo said in his oral evidence that he and Mr Baldudak had planned to incorporate additional companies so they could have more eBay accounts and to accommodate pricing policies as one company was more for wholesale and another retail. They had hoped to open in Gateshead in the winter of 2020/21. He had been looking at property in Team Valley. A supplier called Flame Heating Ltd, which was based in Team Valley, Gateshead, had gone into liquidation. He had not included expenditure on

new premises in the business plan for 2020 as they did not know the size of premises they would be taking. The idea of opening a Gateshead Branch was parked when difficulties arose between him and Mr Baldudak. He explained that this was the background to an email he sent on 5 November 2020 to Mr Cornell of Gateshead Housing, stating that HTS was a supplier to Flame Heating Spares, who he believed had been their suppliers, that he was waiting for Gateshead Housing's tender and expressed the hope that they could discuss this further. The email says that HTS is in the middle of opening a branch in Team Valley, Gateshead.

191. Mr Baldudak responded to Mr Matteo's original account in his 7<sup>th</sup> statement. He claimed that he first discovered that NHBL had been incorporated on or about 9 November 2020 when he was checking the Companies House website to check matters regarding HTS. He denied that he and Mr Matteo had any plans to branch out into Gateshead, nor did they discuss incorporating subsidiaries. The setting up of the company was one of the main reasons for terminating Mr Matteo's directorship. As to the redirection of eBay accounts, he said that on 28 October 2020 Mr Matteo attempted to reconfigure the accounts so as to divert payments on sales to another bank account. He was not successful, but it was not until 26 November 2020 HTS was able to gain full access to its eBay accounts. He claimed that his company lost £31,712.02 due to the hiatus in the control of the accounts. Mr Laidler's evidence is that there was no dip in trade counter, telephone and internet sales since Mr Matteo left the company. The claimants now say that it is not clear that any loss resulted.

192. When cross-examined, Mr Baldudak said that in Summer 2020 he and Mr Matteo had discussed opening in Gateshead but he did not want to. Mr Matteo, but not he, had discussed the proposal with Gordon Stobbs; according to Mr Matteo and Mr Laidler, this was the individual who had

been intended to be the manager in Gateshead. He said HTS did not have the money to open in Gateshead. When shown a WhatsApp message of 28 September 2020 he conceded that the Gordon mentioned in the message was Mr Stobbs and that he had met him to discuss the Gateshead operation.

193. There was unchallenged evidence from Oghuzan Ulker, who knew both directors and was a customer of HTS. He said that they talked to him about their plans to expand their business. About four months before November 2020 he heard them discussing looking for new premises in Team Valley, as another company there had gone under. He had asked Mr Baldudak how they were going to finance the company and he said that they had plenty of money. Albeit that this was not challenged, Mr Baldudak sought to do so when this evidence was brought to his attention. Mr Ulker also said that when he heard what had happened to Mr Matteo in November he had visited Mr Baldudak to act as a go between. He asked him to explain his treatment of Mr Matteo. His replied that Mr Matteo had pinched loads of money from the business. There is no reference to a complaint of setting up in competition in his evidence concerning Mr Baldudak's explanation for removing Mr Matteo.

194. The other witness who deals with the alteration to the eBay account is Theresa Fisher. She says in her statement that "in the beginning of" 5<sup>th</sup> November 2020 Mr Matteo asked her and Mete Biyik to change the bank details on all eBay accounts to another bank account. An external contractor, Onur Kose, told Mete that the other bank account was not connected to the HTS account. It was around this time she learned Mr Matteo had opened another company. In cross-examination Ms Fisher said that she had seen that Mr Matteo had formed a new company on the Companies House website as she often looks at it and had made a search to see if he had any other businesses. She accepted that Mr Matteo had told



her that he had thought about opening a branch in Gateshead and she had discussed this with Mr Laidler. In answer to my questions she said Mete dealt with the request as she was too busy. He tried to change the bank details. Mr Matteo did not explain why he was requesting the change. After it was done, Mr Matteo did not ask for it to be changed back. She said she did not know if money had gone to this other account or whether the bank details worked when changed.

195. The only document which is said to shed light on the allegation concerning altering the eBay accounts is an undated screen shot of an eBay account where, under payment options, it states

“Bank account ending in 5331

National Boiler Parts Ltd

Used for Payouts

Paypal [i\\*\\*\\*o@nationalboilerparts.co.uk](mailto:i***o@nationalboilerparts.co.uk)

Used for checkout”

On the other side of the screen shot it says:

“Visa ending in 4814

Mark Matteo

Expires 05/22

Used for checkout.”

Mr Matteo said that PayPal account was linked to the email address, which is that of HTS. The debit card number he recognises as Mr Baldudak’s HTS card, he gave a different number for his own card. He did not know why his name was on the screen shot unless this was due to the fact that he had set up the account before HTS existed. To Mr Rodger he said that the

screen shot is probably the result of the test. He accepted that HTS did not have an account ending in 5331.

196. Before turning to my conclusions on the breach of fiduciary duty claim I need to see where the events of 12 November 2020 and those leading up to that date fit. Mr Baldudak, supported by Mr Cuthbert, claims that what sparked Mr Matteo's expulsion from the business premises that day was the fact that he had changed the passwords for the staff computers. That is not one of the pleaded allegations of breach of fiduciary or statutory duty. Nevertheless, I should deal with it as it could be said that the changing of the passwords was intended to disable the company whilst Mr Matteo launched his competitor business and collected the funds from the diverted eBay accounts.

197. The evidence of Mr Baldudak is that on 12 November 2020 at about 11.00am Onur Kose, an HTS contractor informed him, by phone, that Mr Matteo was at the company's office changing the passwords for the computers. Other employees had spoken to him on the phone to say that Mr Matteo was changing passwords for the HTS cloud system and Mr Matteo had blocked him as well from the company's system. Mr Baldudak went to see Mr Cuthbert to discuss what was to be done. Mr Cuthbert advised him to suspend Mr Matteo that day and he called some security firm to come with Mr Baldudak to the company premises as he did not think that Mr Matteo would react well to the suspension. Mr Baldudak also sought to support his account with evidence from Ilya Gryn, his brother in law, who provided IT support to HTS, who said that Mr Matteo had changed the passwords between 10 and 12 November 2020. When pressed, however, it materialised that this was not something he learnt independently as the IT technician but he had heard it from a member of

the HTS staff. He did not state who, but that description would cover Mr Baldudak.

198. Mr Baldudak went from Mr Cuthbert's office to HTS's premises where he was met by three security guards. At first Mr Matteo prevented him from entering the building. Eventually he was admitted and told Mr Matteo that he was suspended. At this Mr Matteo started shouting, saying he did not accept the suspension and tried to call the police. A security guard asked him to give back company property, which was the company phone in his possession, his car keys and cash taken from the till, which amounted to nearly £3,000, Mr Baldudak is not sure as to the amount. The security guard told him to go outside. What happened there is the subject of the allegation of assault and I shall look at Mr Baldudak's evidence on that issue in due course. It does not assist me to come to a conclusion as to who changed the passwords.

199. Mr Baldudak explained Mr Cuthbert's involvement in cross-examination. He said that he went to him for advice at the beginning of November 2020. He wanted him to help with problems with the business and he paid him as a management consultant. He said he explained all he knew about the business to Mr Cuthbert who asked him if Mr Matteo would go if asked. He responded that he would not. Mr Cuthbert's advice was to call the police and hire professional security people. Mr Baldudak was asked whether there were emails about this advice but said that most communication was not by email and he had not disclosed any as they had to do with HTS, not these proceedings. About two days before he expelled Mr Matteo he visited Mr Cuthbert who arranged for Phoenix, a security company, to put Mr Matteo out of the building. He had also instructed Sintons, solicitors, in this matter on 10 November.

200. Mr Cuthbert gave a slightly different story as to timings. He said he had been in business for 45 years and knew both directors. In late-October 2020 Mr Baldudak called him to discuss the company and how Mr Matteo was running it. Over a period of weeks he catalogued the gross misconduct of Mr Matteo and that he could not trust him. Mr Cuthbert told him that it seemed that if he was not removed as a director Mr Baldudak risked losing everything. On 12 November, Mr Baldudak came to see him at his office. He told him that the passwords had been changed on the computer and staff could not log on. He advised him to go to HTS and take control. He booked two security guards to go to Tyne View House and sent a Mr Grey to go along with Mr Baldudak, who he regarded as unworldly. He asked Mr Grey to ensure that no company property left the premises, particularly the phone. He explained that this is a computer with corporate and sensitive information.

201. On 16 November Mr Cuthbert presented a bill to the company for management consultancy services. The claim was for £3,000. Apart from his reference to advising Mr Baldudak as to what would happen if he did not remove Mr Matteo, he did not indicate what other consultancy or advice justified this bill. He said attended the premises at 3.00pm, helped Mr Baldudak to draft the letter of suspension and was a director of HTS as from 13 November. This enabled him to converse with the bank.

202. Mr Laidler was at work on 12 November. In cross-examination, but not in his statement, he said that that Mr Matteo was there early. He, Mr Laidler, told him that he could not get onto the system. He said he did not know why. He could not see much of the car park incident. He came out protesting but a bouncer told him to go inside. That caused him to call the police.

203. Theresa Fisher said she was at work. Mr Matteo arrived early, at about 8.00am and she told him that she could not get into her emails and Royal Mail/DPD sites. This description was not in her statement and only emerged during cross-examination. The significance of the fact that both Mr Laidler, and, in greater detail, Mr Fisher first gave these accounts in court is that they echo what is said by Mr Matteo in his statement about this event but he could not have known that this was their evidence until trial. Usually she left her computer on but on this occasion she had not and could not log in. Her password did not work.

204. Mr Matteo's account of that day is that at about 7.30am he awoke to see there were a large amount of security alerts on his Google accounts and mobile phone. He also saw notifications from the bank that Mr Baldudak was transferring money to himself and to Sintons; I have seen HTS' bank statements which show that on 11 November 2020, £29,800 was paid out to Mr Baldudak, marked as "Director Expenses" and £1,800 was paid to Sintons. He was panicked by this and hurried to HTS. When he arrived, at about 8.00am, he saw Mr Laidler and Ms Fisher. Mr Laidler said he could not get into Cloud Commerce and Ms Fisher said she couldn't get into her emails or Royal Mail/DPD sites. He called Rory Campbell, who worked for HTS. They tried to recover the accounts and make new security settings. Mr Campbell went into the camera room to look at the CCTV footage, which he filmed on his phone. This showed that earlier that morning Mr Baldudak had dropped off Onur Kose and Emir Coban. Mr Coban was seen on the footage changing the passwords on the computers.

205. When Mr Matteo arrived, these two individuals were no longer at the building. They turned up at about 8.30am as if all was normal. Mr Matteo spoke to Mr Coban. He looked embarrassed. Mr Matteo told him that he had seen what he had done and asked to see his phone. This was

produced and showed that he had a list of passwords. The phone was photographed and this appears in the bundle. I can see that it contains a list of names and passwords. Mr Matteo said that he also saw messages on the phone from Mr Baldudak in which Mr Coban was telling him where Mr Matteo was that morning. Mr Matteo took Mr Coban outside and asked him why he was getting involved and that is when an incident with security guards developed. I shall look at that in detail when I consider the question as to whether Mr Matteo was assaulted.

206. I have been shown the CCTV footage. This shows that Mr Coban can be seen working at various computers at a time at which there is no sign on the film of either Mr Matteo or the other staff being present. Mr Baldudak, in response to Mr Page's questions, accepted that the CCTV showed Mr Coban changing passwords at 7.30am. His explanation was that Mr Matteo was already at the office at that time, he had seen his car in the carpark and the passwords had been changed by then. What can be seen on the CCTV is Mr Coban trying to change them back. He said he told Mr Coban to take the updated passwords from Mr Matteo and change them.

207. Mr Baldudak's evidence about the activities of Mr Coban is not consistent with his witness statement in which he claims he discovered the password changes as a result of receiving a phone call at 11.00am. He said nothing in his statement about asking Mr Coban to change the passwords back or to obtain them from Mr Matteo. Further, the CCTV does not show Mr Matteo with Mr Coban or changing the passwords prior to Mr Coban. His evidence is also inconsistent with that given at trial by Mr Laidler and Ms Fisher to the effect that Mr Matteo arrived at 8.00am and they told him that they could not access their computers.

208. The account of Mr Matteo being the one to change the passwords is not consistent with the resolution to dismiss Mr Matteo dated 19 November

2020 which makes reference to a large number of allegations against him, many of which mirror that which Mr Cuthbert said Mr Baldudak had complained to him about in the lead up to 12 November, but the changing of passwords, which could substantially interfere with the running of the company, did not feature as an allegation. The decision to dismiss was taken by Mr Baldudak and Mr Cuthbert. The fact that there is no mention of the passwords allegation is some evidence that they were aware that it was not he who was responsible.

### Conclusion

209. The formation of a company with the same trading name as HTS, registered at Mr Matteo's home address and of which he was the sole shareholder and director undoubtedly excites suspicion, particularly if he kept this information from Mr Baldudak. The same may be said of the instruction to alter the eBay link to the bank account. I start from the proposition that it is for Mr Matteo to prove that he told his co-director about the company and, on its own, his word cannot be relied upon. There are parts of the evidence, however, which may give some credence to his account, which need to be considered.

210. I am satisfied that the two directors had considered opening branch in Gateshead and that this was spoken of freely with the staff. This emerges not just from Mr Matteo's evidence, but also from that of Mr Laidler and Mr Ulker. The evidence of Mr Ulker was admitted on the basis that it was not challenged and I therefore accept what he said. The existence of the Gateshead proposal is also supported by Mr Baldudak's evidence in cross-examination, albeit the concession was made in an attempt to explain why he had said in his witness statement that he and Mr Matteo had no plans to open a branch in Gateshead. As he was answering an allegation that they had discussed opening in Gateshead in connection with the new Company,

I infer that his witness statement intended to convey that the entire story concerning a plan to move to Gateshead, concluded or not, was untrue. Mr Baldudak's acceptance that there was such a discussion indicates that his statement was misleading and he knew it.

211. There was also his denial of any conversation with Gordon Stobbs, the proposed manager at Gateshead, which was retracted when he was shown the message arranging a Wednesday meeting for the two of them, and the accepted evidence of Mr Ulker, which he did not challenge until it conflicted with his explanation for not having spoken to Mr Stobbs, alleging that it was too early to open in Gateshead as HTS did not have the money. The fact that he was seeking to undermine Mr Matteo's explanation for the formation of the new company with deliberately misleading evidence is some indication that he knew it to be true.

212. There are other circumstances which are some indication that the formation of the new company was linked to the proposed move to Gateshead rather than an attempt to set up in competition with HTS. In cross-examination Mr Baldudak accepted that it was in the summer of 2020 that they had been discussing this proposal. That coincides with the timing of the formation of the company. Furthermore, there is no evidence that this company traded and it is conceded that it did not. It was also formed at a time when both directors were on good terms, as appears from their messaging. Further, in the light of my conclusion as to the beneficial share ownership in HTS, Mr Matteo still owned 50% of that company.

213. Given that Mr Matteo had over four months to operate the new company to divert business from HTS before the grant of the injunction, but did not do so, that is a further indication that it was formed to cater for some future purpose. I add to this that the pleaded case as to passing off has not been evidenced or pursued and the only document produced



concerning marketing to Gateshead Housing, the email from Mr Matteo dated 5 November, is one in which he describes himself as a director of HTS, not the new company.

214. Set against this is the fact of his sole ownership of the shares and directorship. He pointed out that he had been in a similar position with PCB yet the first £750,000 was paid into that company because the relationship between him and Mr Baldudak was that they regarded themselves as partners and did not pay attention to the paperwork of share ownership. Their mutual trust on this issue gains some support from the fact that at the time of the formation of the company Mr Baldudak was holding all the shares in HTS notwithstanding Mr Matteo's 50% beneficial ownership of the company.

215. The other aspect of this part of the case which is a counter-indicator to Mr Matteo's story is the changes to the eBay account. There is a discrepancy as to the timing of this event in that Mr Baldudak says it occurred on 28 October and Ms Fisher refers to 5 November, but in view of the lapse of time since it occurred this modest difference is not significant. It is common ground that he asked two employees to effect this change. Whether this was done as a test is not key. Some testing would have been required whether Mr Matteo's plan was to see if he could divert payment for HTS sales to his own account or he was innocently testing whether eBay would work with the banking App on his phone. The question is as to whether it was intended to be permanent. Ms Fisher said that she was not asked to switch the bank details back. She, however, did not deal with the original instruction as she was too busy. That was left to Mete, from whom I have not heard.

216. There are three features of the event concerning eBay which indicate that this was not an attempt to divert HTS payments to NBPL. The first is

that the request to change the eBay account was made openly. Indeed, both Mr Matteo and Mr Baldudak say that the latter was at the office that day, though not involved in the transfer. If Mr Matteo wanted to steal the proceeds of HTS sales it is unlikely that he would do so openly due to the substantial risk that this would have come to the ears of Mr Baldudak.

217. The second is that there is no evidence that the attempt was successful as regards causing payments to be made to the new account. Mr Baldudak says that no payments were lost as eBay suspected a fraud and froze the account. That suggests that it was not a success. This chimes with Mr Laidler's evidence that the online trade did not alter following Mr Matteo's departure. Whether or not Mr Baldudak is correct as to the reason for the freezing of the account, this highlights another feature which suggests that this is unlikely to have been an attempt at fraud. For how long could it have gone on? The NPBL name appeared on the eBay screen shot. Mr Matteo was registered as the sole director of the company. It would have been a matter of minutes before anyone wishing to check why HTS eBay sales were no longer reaching its bank to trace this back to Mr Matteo.

218. The third is that Mr Baldudak's claim to have become aware of the bank diversion on 4 or 5 November is not consistent with his dealings with him in the messages. For example on 5 November 2020, at 19.18 he says to Mr Matteo "We should plan a nice event for tomorrow brother, either at yours or here." There is an exchange suggesting some discord on 6 November, but that seems to be precipitated by a complaint by Mr Matteo. On 8 November, when Mr Baldudak makes a remark about Mr Matteo being lucky if he does not go to prison, this follows a complaint by him about something he claims Mr Matteo said to his mother. There is no reference to interfering with eBay accounts. Allied to this is the fact that until 6 November Mr Matteo cannot have been aware that Mr Baldudak

would not cooperate in the re-transfer of his 50 shares. Whilst that fact does not completely rule out the suggestion that he was trying to damage HTS, it renders it less likely.

219. In the light of the evidence of the two employees which support Mr Matteo's evidence that the passwords had been changed by the time he arrived at work, which is further reinforced by the CCTV footage and Mr Baldudak's unconvincing attempt to explain this away, I find that the passwords were changed at the request of Mr Baldudak. Whilst Mr Cuthbert seemed to be an assured witness, this is one of those instances where his evidence cannot be accepted when compared to the CCTV and corroborative evidence. A theme emerges here. First, on the messaging, it is unlikely that Mr Cuthbert was being consulted about the wrongdoing of Mr Matteo until 6 November at the earliest. That is also the day that Mr Baldudak takes back and destroys the share transfer forms. Mr Cuthbert accepts that he told Mr Baldudak that if Mr Matteo did not leave the business would be ruined. Given that Mr Baldudak had gone to him for advice, it is inconceivable that he was not asked how he could bring this about.

220. Mr Cuthbert described Mr Baldudak as not being worldly wise. It was his advice that the phone had to be removed as it gave Mr Matteo access to commercial information. He was the one to suggest employing security guards. This was advice about excluding Mr Matteo. The changing of passwords is another way of preventing him from accessing the company's information and thereby the business. It is also far too convenient that by 12 November he is asked, and agrees, to become a director of this company. If he were really just someone who had been prepared to listen to Mr Baldudak's woes and point out that there was no future whilst Mr Matteo remained, why would he agree to that level of

involvement and responsibility so quickly. He says it was so he could converse with the bank. How was either Mr Baldudak or Mr Cuthbert to know that there would be a problem conversing with the bank as at 12 November. When one looks at the bank statements money is flowing in and out of the bank throughout November 2020, and beyond. There were also receipts from eBay throughout this period. There was no cross-examination about these statements so I am wary of reading anything into this other than the suggestion that the banking and payments from eBay were frozen at any time in November 2020 is undocumented, as is Mr Baldudak's assertion that there was £500,000 in the account at the time. The balance on 12 November 2020 is shown as an overdraft of just over £76,500.

221. Furthermore, when one steps back, who was likely to benefit from changing the passwords? It would not help Mr Matteo. He was not trying to remove Mr Baldudak. The allegation against him was that he was engaged in a covert plot to syphon off the HTS work. It would become overt if he changed all the passwords and locked everyone out. Furthermore, how long could he keep it up before Mr Baldudak took steps to thwart him? The likely culprit is the person who wanted the other director out of the business and had decided, on his own evidence, to expel him two days prior, and that points directly at Mr Baldudak.

222. Looking at all these factors in the round and also taking into account that Mr Baldudak has not pursued some allegations of wrongdoing which he claimed justified Mr Matteo's removal and failed on others and my conclusion as to the changing of the passwords, on balance, I am not satisfied that Mr Matteo set up NBPL or requested the eBay account to be altered in an attempt to damage HTS or benefit himself at its expense. His

explanation for these events is to be preferred over that given by Mr Baldudak. I reject the claims of breach of duty based on these events.

Non co-operation with the company's bankers

223. It is accepted by Mr Page that HSBC froze HTS's bank account when it discovered that there was a dispute between the two directors although the date of such freezing is unclear as the bank statements show money being paid in and out. The complaint is that the accounts would have been unfrozen if Mr Matteo had responded to requests to agree to Mr Baldudak to being on the bank mandate. According to Mr Cuthbert, HTS had no access to its account from 13 November 2020 to 27 January 2021. I am told there was £500,000 in the bank but it could not be accessed. Michelle Oliver said that in this period Mr Baldudak had to use his own funds to pay for the wages and stock. That is the logical consequence of the freezing of the bank account. How she could know that to be the fact, however, is unclear as she ceased employment at HTS in October 2019 and only came back to help Mr Baldudak in May 2021 and did not explain the source of her knowledge. The bank statements show wages being paid out in December and January though not November; there are wages slips in the bundle, such as for Kateryna Hryn, now Mrs Baldudak and Suel Kerim, which correlate to the payments from the bank. Thus, the impact of the freeze is unclear. She also gave evidence, which I accept, that in Summer 2019 Mr Baldudak was putting his own money into HTS in order to meet the salaries. Her evidence of the late payment of salary in June, July and August 2019, by a matter of days, and the detail of borrowing money from her mother as a result had a ring of credibility, though its relevance to the issues I have to decide is obscure.

224. Mr Matteo accepted, in evidence, that he did withhold his co-operation to unfreeze the bank account as he had no trust in Mr Baldudak.

He said he was under attack, physically thrown out of his business and was trying to defend himself from Mr Baldudak's solicitors.

225. Mr Rodger says that Mr Matteo was, on his case, still a director, yet he was prepared to sacrifice HTS's interests for his own. It was a "scorched earth" policy he was following and is highly discreditable. Mr Page responds by saying that Mr Matteo had been asked by the claimants' solicitors to assist but he was under no obligation to do so. What has not been argued is the legal basis for the assertion that he was under a duty qua director or as a fiduciary to assist in the effective management of the company or whether, having been ousted as a director, dismissed from his post and deprived of his salary he was entitled to place his own interests over those of the company or to decide how best the company should be protected based upon his reasonable assessment of its interests as the ousted director.

### Conclusion

226. I reject the claims for breach of duty based on the lack of co-operation allegation, notwithstanding that I find that he did withhold his consent to Mr Baldudak's mandate on the account. In the position in which he was placed by Mr Baldudak, i.e having been ousted, Mr Matteo can hardly have been described as either the company's fiduciary in any sense in which the expression is commonly understood. That is to say:

"someone who had undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is loyalty. A fiduciary...must not make a profit out of his trust; he must not place himself in a position where his duty and interest may conflict. He may not act for his own benefit...without the informed consent of the principle" see

per Millet LJ in *Bristol & West Building Society v Mothew* [1998] Ch 1 at 18A

By the time he was asked to unfreeze the account, Mr Matteo was an outsider, he had been subject to a de facto removal as a director. He was not entrusted with anything.

227. As to his duties under the Companies Act 2006, Mr Rodger places some reliance on Mr Matteo's claim that on his case he was still a director, but that was neither Mr Baldudak's or the company's position at the time. Both treated him as having no directorial role to play. He was in an analogous position to the dismissed director in *Plus Group Ltd v Pyke* [2002] 2 BCLC 201. Indeed, it is difficult to follow why, having deprived him of both his status and income, the claimants should think that they have some demand over his loyalty. I should add that there are some obligations which survive directorship, such as not exploiting company opportunities of which the director learned whilst with the company, but they do not arise here.

228. There is a further reason as to why Mr Matteo cannot have been in breach of duty by refusing co-operation. Having been deprived of any control over the company's assets and information as to the running of the company, his lack of co-operation had the effect of protecting those assets from Mr Baldudak, who he could reasonably have concluded wanted to treat the company as his own given that he had reneged on the agreement to re-transfer the shares. In these circumstances, refusing to assist with the bank's requirements was legitimate self-help.

The director's loan account

229. The amount claimed to be due is £144,043.12, after the deduction of some doubtful entries on the loan account. The composition of the claim is set out in Schedule B1 to the Amended Particulars of Claim. Mr Matteo accepts that he had a director's loan account which was in deficit but says that the amount due was £51,661, based upon a balance produced by Mr Duffy in September 2020. He claims that this is to be set off against unpaid deferred salary and promised dividends. I shall deal with that allegation when considering the counter claim.

230. The evidence in support of the director's loan account comes from Mr Baldudak and Mr Duffy. The former refers to documents setting out the detail of the sums said to constitute the loan and the latter explained in evidence how he produced certain accounts, although he did not speak to them in his statement.

231. Mr Matteo was taken to the account showing his indebtedness in the sum of slightly over £148,000. He said he did not know when that account was prepared. He was also asked about the entries totalling £32,500, that taken for the deposit, as to which he said that this was a payment of deferred salary but the accountant's job was to put it into the right format. That is as much as he was asked about the amount due under the loan, notwithstanding that in his 6<sup>th</sup> witness statement Mr Matteo gave an explanation for the payments which appear in schedule B1.

232. Mr Duffy was shown a summary of the director's loan account for each year ended 30 June from 2016 to 2019. This showed a positive account in favour of Mr Baldudak which rose from £245,700 in 2016 to £700,478 in 2019. Mr Matteo's account showed an amount owed to him of £880 in 2016 but by 2019 he owed HTS £14,853. Mr Duffy said he produced this schedule after the fall out between the parties and he obtained the data from his working records. He referred to a breakdown of accounts



relating to Mr Baldudak's introduction of loans. He said that the data was typed into the account at the end of each VAT quarter. In relation to Mr Matteo he spoke to a document which was the loan account of Mr Matteo for the period 1 July 2019 to 30 September 2020. This started with the opening balance of -£14,853, seen in the account to the end of June 2019 and finished with a balance due of £51,661.09. He did not speak to the schedule now relied upon by Mr Baldudak which totals £148,563.66, or explain how the sum due had increased by just under £100,000, albeit that it covered a slightly shorter period, and did not accord with a document which he said had been prepared from his working papers from which the figures were introduced into the accounts on a quarterly basis. Nor does the document, schedule B accord with the document Mr Baldudak says he relies upon, in his 7<sup>th</sup> witness statement, which includes a further £29,000, approximately, from 1 July 2020 and includes claims, now abandoned, relating to wages for Vira Shatailova.

233. I have no reason to doubt Mr Duffy's evidence that he prepared the loan account showing £51,661.09 due from his working papers. He was an honest witness and that is what accountants do. Furthermore, that account is consistent with the earlier account in that it starts with the 2019 balance. I do not know how that much larger schedule came to be prepared. I also accept his evidence that the loan account data was taken from material submitted in order to prepare the VAT return and that every transaction on the bank statement was entered whether or not it was relevant to VAT.

234. Mr Rodger relies upon the loan schedule which Mr Duffy said was produced from his working papers. That seems to be his base claim. He says that the claim should extend to the full amount in the larger schedule, save for £4,520.54 of the entries which are doubtful, the largest being £2,618.44 marked as the loss of Mr Matteo's BS card. He says that some

entries are beyond doubt. These are the £51,250 for the house deposit, which is common to both schedules, and admitted or obviously personal expenditure, of which he can find 4 examples totalling £3,935.51, the largest being the payment of the Mincoffs bill for £3,600 and the smallest £24.94 to Nissan in Newcastle. To this he says all cash withdrawals must be added, whether from an ATM or by cheque, unaccounted for by Mr Matteo. He claims that this produces the £144,043.12 figure claimed, but it does not because there are many entries which are neither cheque or cash, such as Visa, Ms Shatilova's wages and two entries entitled "Net Charge to DLA" which total just over £15,000.

235. Mr Rodger says that Mr Matteo did not plead a positive case as to the amount due on the loan account, he denied the total and put the claimants to proof as to the balance. As a result, there was no need to cross-examine Mr Matteo as to the reasons for his denial to put to him individual items of expenditure. Mr Page points to the fact that Mr Matteo explained in his 6<sup>th</sup> witness statement what had happened to the sums shown on schedule B1 that was not used for his deposit and that this was all company expenditure. He observed, correctly, that Mr Matteo had not been cross-examined on this part of his evidence and argued that if the claimant wanted to challenge his explanation he had to put to him that the explanation given was incorrect and give him an opportunity to respond. The best evidence of the loan account is Mr Duffy's account to the end of September 2020. If it were otherwise, all cash withdrawn for purchases would be treated as part of Mr Matteo's loan account whereas there is evidence from Mr Duffy that, when preparing the accounts, cash purchases had been paid for by cash withdrawals from the bank. He thought all cash purchases were via that bank, and I have dealt with that, but he must have had supporting documentation which showed that there was a correlation

between withdrawals and purchases to reach that conclusion, certainly in the period he troubled to look at the receipt books and 4 years' worth of such books satisfied HMRC that VAT on cash purchases of second hand boilers had been accounted for correctly.

### Conclusion

236. It is for the claimants to prove the extent of Mr Matteo's director's loan account. There is almost nothing to corroborate Mr Baldudak's assertion that the schedule B1 contains drawings by Mr Matteo, beyond those shown in Mr Duffy's document. It is notable that Mr Duffy does not speak to the that schedule although Mr Baldudak said it was prepared by the company accountant. If I were to accept that the debt is as stated in the schedule upon which he relies, it would be on the basis that I had to take his word for it, but unfortunately I cannot rely upon his word. The most reliable document from which to ascertain the loan balance due from Mr Matteo is that produced from Mr Duffy's working papers, quarter on quarter, as he entered all transactions on the bank statements. It is highly unlikely that he overlooked over £100,000 of transactions when preparing each year's director's loan account.

237. The starting figure is Mr Duffy's loan account figure of £51,661.09. To this must be added the Mincoffs payment of £3,600 and the £3,695.02 which was marked as wages but Mr Page accepts should be part of the loan account. Accordingly, I find that the amount proved as owing to HTS by Mr Matteo on his director's loan account totals £58,956.11. Although unnecessary to decide the issue, I agree with Mr Page that the detail of Mr Matteo's evidence as to how the money was spent needed to be challenged if the claimants were to argue that it was untrue.

### Was the removal of Mr Matteo as a director unlawful?

238. The process used to remove Mr Matteo is not in doubt. On 12 November 2020, after Mr Matteo had been removed from the company's premises a board meeting was held by Mr Baldudak at which it was resolved "to a (*sic*) withdraw the directorship from Mark Matteo pending an investigation into financial irregularities..." and Mr Duffy instructed to update Companies House. Mr Matteo had no notice of the meeting albeit the minutes record that notice had been duly given. Mr Cuthbert says he was appointed a director on that day though the method of appointment is not in evidence. He was also charging HTS for management consultancy through his company Bernicia 547 Limited at the time. On 13 November 2020 the termination of Mr Matteo's directorship was filed at Companies House. The same day, Mr Baldudak filed the transfer relating to Mr Matteo's last 5 shares.

239. A further board meeting was held on 19 November 2020 at which Mr Baldudak and Mr Cuthbert were present. After recording that there had been a review of the evidence and Mr Matteo was guilty of wrongdoing it resolved to dismiss both Mr Matteo and Vira Shatailova, described as his girlfriend. There was a further resolution to remove Mr Matteo's banking mandate. The same day Mr Baldudak asked Mr Duffy to bring to the attention of Companies House that Mr Matteo was in breach of fiduciary duty and unsuitable to hold the role of director and asked him to inform the bank to remove Mr Matteo's mandate.

240. On 3 January 2021, entries were made at Companies House stating that Mr Cuthbert had been appointed as a director on 13 November 2020 and that Mr Matteo had resigned on the same day. There was a further board meeting on 7 January 2021 at which Mr Baldudak and Mr Cuthbert were present. The meeting resolved that Mr Matteo had been properly

removed as a director as from 13 November 2020 and that Mr Cuthbert was appointed as a director with effect from that day.

241. Mr Baldudak gave evidence that he called a board meeting on 19 November to remove Mr Matteo and that Mr Cuthbert was a director by then. He claimed that Mr Matteo had been invited to that meeting and that he attended, was rude and left the building. No notice of the meeting has been disclosed and he accepted that though he said there was one, it is possible that none existed. The 7 January meeting was called as the bank were asking for confirmatory resolutions to unfreeze the account. He accepted that Mr Matteo was not given notice of that meeting.

242. Mr Cuthbert claimed that he told Mr Baldudak to give notice to Mr Matteo of the 19 November meeting and that he sent a notice by email and hard copy by post; neither have been disclosed. He did not say anything about Mr Matteo attending the meeting. Neither witness explained how Mr Matteo came to be removed as a director with effect from 13 November when the meeting to remove him was on 19 November. Mr Matteo's evidence is that he did not receive notice of meetings to remove him as a director or to ratify such a resolution.

243. Mr Rodger, realistically, recognises that the removal of Mr Matteo as a director was not lawful. For that reason, it is unnecessary to recite the law as to the requirements for a lawful removal. It is clear that the removal was rushed. No notice of any of the meetings has been produced. There is an anomaly as to what was for consideration at the 19 November 2020 meeting as the notice of removal had already been filed, the resolution on 19 November related to dismissal and the confirmatory resolution on 7 January 2021 referred to a removal as from 13 November. There has been no challenge to Mr Page's submission that the meeting of 12 November

was not properly called in accordance with article 9 of the Model Articles (the requirement for notice), and was not quorate (article 11 which requires a minimum of 2 directors present). The director(s) presumed to exercise a power not vested in them and s. 169 of the Companies Act 2006 provides a procedural protection to a director whose removal is sought, that being notice of the meeting at which it is to be considered.

244. There is a further issue concerning the removal which appears on the pleadings but was not touched upon by Mr Page in closing and only dealt with in Mr Rodger's closing skeleton, that being the question as to whether Mr Matteo was an employee of HTS so as to support his claim for damages for the unlawful termination of employment; paragraph 63 of Mr Matteo's the Further Amended Defence and Counterclaim. There is a wall of authority as to the circumstances in which a director may also be an employee of the company, I was not referred to any.

245. *Harvey on Industrial Relations and Employment Law* puts it this way at H-120:

“A service agreement with a **director** may be express or implied. The courts seem prepared to say there is a presumption of a contract of employment if the **director** is required to work full-time for the company in return for a salary (*Trussed Steel Concrete Co Ltd v Green* [1946] Ch 115 per Cohen J, *Folami v Nigerline (UK) Ltd* [1978] ICR 277, EAT), but much depends on the actual evidence in each case.”

At H-125 *Harvey* refers to guidelines as to factors to consider when deciding such an issue. It says:

“Elias P considered the case law in *Clark v Clark Construction Initiatives Ltd* [2008] IRLR 364, [2008] ICR 635, EAT and gave the following

guidance to tribunals (at para 98) when deciding whether the contract of employment of a majority shareholder should be given effect.”

- (1) The onus is on the party denying a contract; where an individual has paid an employee's tax and NI, *prima facie* he is entitled to an employee's rights.
- (2) The mere fact of majority shareholding (or de facto control) does not in itself prevent a contract arising.
- (3) Similarly, entrepreneur status does not in itself prevent a contract arising.
- (4) If the parties conduct themselves according to the contract (eg as to hours and holidays), that is a strong pointer towards employment.
- (5) Conversely, if their conduct is inconsistent with (or not governed by) the contract, that is a strong pointer against employment.
- (6) The assertion that there is a genuine contract will be undermined if there is nothing in writing.
- (7) The taking of loans from the company (or them guaranteeing of its debts) are not intrinsically inconsistent with employment.
- (8) Although majority shareholding and/or control will always be relevant and may be decisive, that fact *alone* should not justify a finding of no employment.

When the decision of the EAT was appealed to the Court of Appeal ([2008] EWCA Civ 1446, [2009] ICR 718) it was not on this point which Sedley LJ said was 'unsurprising... in view of the comprehensive overview of the law to be found at paragraphs 61–98 of the judgment given by Elias P in the EAT, which practitioners will find of considerable assistance in this difficult

terrain'. This was also the approach of the Court of Appeal when the point arose directly before them shortly afterwards in *Secretary of State for Business Enterprise and Regulatory Reform v Neufeld* [2009] IRLR 475, [2009] ICR 1183, CA (treated by the government department as a test case to clarify the position). In this appeal in two joined cases it was held that **directors** with 90% and 100% shareholdings respectively in their companies were employees on the facts. The judgment was given by Rimer LJ who, having set out extensively the above history of this controversy, approved Elias P's guidance in *Clark* subject to two qualifications to which it must now be read:

(1) guideline (1) should not be read as constituting a formal reversal of the burden of proof on to the party denying employment status; it may still be necessary for the putative employee to do more than produce documentation to satisfy the tribunal;

(2) guideline (6) may be expressed too negatively — lack of writing may be an important consideration but if the parties' conduct tends to show a true contract of employment 'we would not wish tribunals to seize too readily on the absence of a written agreement to justify a rejection of the claim.'"

246. There has been no evidence as to whether Mr Matteo was required to work full-time for HTS, what the arrangements were as to holidays or any element of what might be termed subordination to the company. The salary he received was not intended to be a fair reflection of his labours as it was set by other considerations, the avoidance of tax and national insurance, subsequently the obtaining of a mortgage. Further, if he was an employee, damages for unlawful dismissal would be limited to his period of notice. Mr Rodger says that would be the statutory minimum of 5 weeks



in this case subject to any earnings or savings he made in this period as a result of not having to work for HTS. Whilst the claim for wrongful termination of employment is pleaded at £30,000 there has been no explanation how this figure was reached or an attempt to justify a longer period of notice on the basis, for example, of Mr Matteo's seniority in the company.

### Conclusion

247. I find that Mr Matteo was not given notice of any of these meetings, nor can any of the meetings dealing with his removal have been quorate for there was only one lawfully appointed director at any of them and that was Mr Baldudak. I am not satisfied that Mr Cuthbert was properly appointed as he could not be appointed in a meeting of directors, due to the quorum issue and he does not claim to have been appointed by ordinary resolution. The requirements of Article 17, therefore, have not been complied with in his case. I rule that Mr Matteo's removal as a director was not lawful and is voidable and following *Stobart Group Limited v Tinkler* [2019] EWHC 258 this is an instance in which the court can interfere in the internal affairs of a company. Insofar as he has suffered loss as a result of the termination, he is entitled to damages. I have yet to hear argument on the level and what other relief he seeks following my ruling as to his removal.

248. As regards the claim for wrongful termination of employment, the burden is on him to prove that he was an employee. The only fact to which he can point, on the evidence before me, is that he was paid what was described as a wage, which following the increase to £27,500 pa was subject to tax and national insurance. In view of the fact that the wage was not intended to be a true measure of reward for Mr Matteo's work, but was

set at the rate it was for other reasons and I must look at the substance of the transaction rather than its form. It has not been proved that Mr Matteo was an employee of HTS. He was a director, which on its own does not constitute him an employee. His claim for wrongful dismissal must, therefore, fail.

Was Mr Matteo entitled to a deferred salary of £120,000, dividends sufficient to cover his director's loan account and rent for HTS's occupation of Tyne View Terrace? Was Mr Baldudak under a contractual obligation to ensure that such an entitlement was honoured?

249. These are largely factual matters, save for that in relation to the dividend. A shareholder is only entitled to a dividend when, in accordance with the Model Articles adopted by HTS, it has been approved by the board and shareholders. There is no entitlement to a distribution which, in any event, can only be paid out of accumulated realised profits; see s. 830 Companies Act 2006.

250. The claim that Mr Baldudak agreed that Mr Matteo would receive a dividend sufficient to cover his drawings is not made out. I accept, as a matter of logic, that Mr Baldudak cannot have expected Mr Matteo to survive on his modest earnings, particularly if he was to house himself, and for that reason was likely to take a benevolent attitude to his drawings. I also accept that in the light of the modest salary they will have discussed that it was their intention that the drawings could be written off against dividend when the company was in a position to declare one. That was, however, the hope. If the company did not have accumulated profits from which to declare a dividend, the debt on the loan account remained. The

fact is that the company has not declared a dividend since Mr Baldudak's involvement.

251. It is unlikely that Mr Baldudak would guarantee that there would be sufficient dividend to cover drawings. Indeed, Mr Matteo does not say there was such a guarantee. His case is that he was told he would be paid a deferred salary of £120,000 per annum and it is against this that he made his drawings. Mr Page suggests that Mr Matteo just meant that he would get some money, by way of salary or dividend, but that is not what he says in his statement. He is very specific in stating that he was entitled to be treated as a creditor of the company at the rate of £120,000 per annum. He cannot have been confusing this with dividend as he could not possibly expect that the company would declare a dividend at that level every year. If he was to be so entitled, the other 50% shareholder would be as well. Thus, he would be contemplating a £240,000 annual dividend from a company with no track record. That is an entirely fanciful proposition.

252. The rent claim can be dealt with in short order. Mr Matteo accepted in cross-examination that there was no tenancy agreement in respect of the premises used by the company and no rent payable. That is consistent with Mr Duffy's evidence that there was no rent provided for in the accounts and he was not told a rent was due. Whilst Mr Page asks for an account of rent due, there is no factual basis upon which to base an account. He asks for an account due to a breach of the 2015 agreement. There could not possibly have been an agreement for a rent on Tyne View Terrace as at that stage the property had not been purchased. The pleading of this claim is also contrary to Mr Matteo's evidence, for there it alleges that the property had been let to the company for a deferred rent of £65,000. In the light of his evidence, I can only conclude that this is a fictitious claim. Mr Matteo does not even say in his statement that there was an agreement to pay rent.

He talks about a financial advisor having suggested a rent be paid into a trust which Mr Duffy said would save tax. Mr Duffy explained that a financial adviser had suggested the property being put into a self-invested pension which could rent the property to the company but this never happened. That is an explanation which is plausible and I accept. It was never the case that it was agreed that Mr Baldudak and Matteo would let the property to the company.

253. There is a pleaded claim for a deferred salary of £120,000 but no pleaded case as to the terms of deferment other than it would be paid when the company could afford it. Mr Matteo says that Mr Baldudak agreed to this in 2015. There was a further agreement in 2016 at which they again discussed salary. Mr Baldudak said that Mr Matteo was worth more than £120,000 and they agreed that they would split profits after his salary was deducted but that it would only be paid when the company was successful. How “success” was to be defined is unexplained. He says that it is because of this arrangement that he drew from the company more than his salary as it would be sorted out in due course. Mr Baldudak denies there was any such agreement

### Conclusion

254. Both the dividend and rent claim fail for the reasons given as do the claims that Mr Baldudak agreed to ensure that they would be met. As to the claim for a salary, there is no documentary evidence to support the claim that the parties agreed a salary. In particular, the accounts, which were produced at the instruction of Mr Matteo make no provision for a very substantial creditor who will be due salary, either within or beyond the year. If a debt of the magnitude he suggests was racking up year-on-year, these accounts substantially understate the liabilities of the company.

255. Mr Matteo's evidence is set against an allegation that the money introduced by Mr Baldudak was an investment not a loan. As I have found against him on that point, his allegation that there was an agreement to deduct his salary before sharing the profits is implausible. Mr Baldudak had an interest in recovering his loan and is unlikely to have accepted a proposal whereby it not only came second to a £120,000 salary but also the profit share. It is also implausible that Mr Baldudak would commit the company, and thus the chance of recovering his loan, to pay a salary of £120,000 when the company was completely untested. Further, there is no reference to this salary in the September 2015 partnership agreement document which I have found was produced at that time and set out the basis of the arrangement between the parties as they then intended, but there is to loan repayments before profit share. The claim to a salary also fails as does the claim that Mr Baldudak is obliged to ensure that he received a salary at that level, deferred or otherwise.

Have the affairs of the company been managed in a way which is unfairly prejudicial to the interests of Mr Matteo?

256. Section 994(1) of the Companies Act 2006 provides:

“A member of a company may apply to the court by petition for an order under this Part on the ground-

(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself)...

Section 996 of the Act provides:

- (1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.
- (2) Without prejudice to the generality of subsection (1), the court's order may...
  - (c) provide for the purchase of the shares of any members of the company by other members or by the company itself...

I have only made reference to 2(c) as in this case both sides argue that this is the proper remedy, albeit each contends that they should be the purchaser. Whilst the court is not bound to restrict the remedy granted to the form of relief claimed by the parties, as the statute permits it to make such order as it thinks fit, in the case of small private companies a buy-out is the usual remedy so as to bring about a clean break between the parties, thus enabling the company to continue to trade free of the friction which gave rise to the Petition. There are both social and commercial benefits in such an outcome.

253. Much of the law on this unfair prejudice petitions is conveniently set out in *Grace v Biagioli* [2005] EWCA Civ 1222, a case dealing with s.459 of the Companies Act 1985, the predecessor to s.994. There, at paragraph [61] Patten J, as he then was, summarised the speech of Lord Hoffman in *O'Neill v Phillips* [1999] 1 WLR 1092. He said:

“From Lord Hoffmann’s speech one can deduce the following principles:

(1) The concept of unfairness, although objective in its focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually take the form of the articles of association and any collateral agreements between shareholders which identify their rights and obligations as members of the company. Both are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable;

(2) It follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann's words, "consist in a breach of the rules or in using rules in a manner which equity would regard as contrary to good faith": see p.1099A; the conduct need not therefore be unlawful, but it must be inequitable;

(3) Although it is impossible to provide an exhaustive definition of the circumstances in which the application of equitable principles would render it unjust for a party to insist on his strict legal rights, those principles are to be applied according to settled and established equitable rules and not by reference to some indefinite notion of fairness;

(4) To be unfair, the conduct complained of need not be such as would have justified the making of a winding-up order on just and equitable grounds as formerly required under s.210 of the Companies Act 1948 ;

(5) A useful test is always to ask whether the exercise of the power or rights in question would involve a breach of an agreement or

understanding between the parties which it would be unfair to allow a member to ignore. Such agreements do not have to be contractually binding in order to found the equity;

(6) It is not enough merely to show that the relationship between the parties has irretrievably broken down. There is no right of unilateral withdrawal for a shareholder when trust and confidence between shareholders no longer exist. It is, however, different if that breakdown in relations then causes the majority to exclude the petitioner from the management of the company or otherwise to cause him prejudice in his capacity as a shareholder.

and at paragraph 64, he said :

“The use by the majority of the powers and voting rights conferred by the articles cannot be regarded as contrary to good faith where they are invoked to protect the company from conduct which is itself either in breach of a relevant agreement, or otherwise detrimental to the well-being of the company and its assets.”

254. It is common ground that HTS was set up as a quasi-partnership in which Mr Matteo would be a director with responsibility for the day-to-day management of the business and that he would be remunerated by dividend when the company was in a position to do so. In the light of my findings, that common understanding did not change until he was removed as a director. Mr Rodger submits, correctly, that the question as to whether he has been unfairly prejudiced by his removal turns upon my findings as to the ownership of the shares and the allegations of breach of fiduciary



duty. If I find in favour of Mr Matteo on both, he has been opportunistically forced out of HTS and is entitled to relief. If I accept Mr Baldudak's case on the shareholding and/or breach of fiduciary duty the relief must be refused because either Mr Matteo had no standing to bring the Petition or his removal was justified to protect the company.

255. I should add that the s.944 Petition identifies other behaviour by Mr Baldudak in relation to the company and Mr Matteo which could amount to management of the company which could be characterised as prejudicial, for example, the paying wages to 11 people who were not employed by HTS and using the company to fund this action for the benefit of Mr Baldudak. Many of the allegations were not pursued in cross-examination and in final submissions the only argument on the unfair prejudice issue was the interference with his legitimate expectation of participating in the management of the company. Accordingly, I have not made findings on the other allegations of unfair prejudice.

256. As I have found that Mr Matteo is the beneficial owner of 50% of the shares in HTS, on Mr Rodger's argument he clearly has standing to bring the Petition. I have rejected the allegations of breach of fiduciary duty alleged against him. All that is left is the question of remedy.

257. Both parties recognise that it is impractical to restore the parties to the position they were in before the prejudicial conduct as they can no longer work together. The only realistic option is for one to buy out the other..

258. Mr Page argues that the question as to who is to purchase should await the relevant valuation evidence at which time his client should be given the option of electing whether he wishes to be purchaser or vendor. He said that even a majority shareholder can be required to sell to the minority. He relied upon *Re Brenfield Squash Racquets Club Ltd* [1996] 2

BCLC 184 where an 86% shareholder was ordered to sell to the holders of 14% of the shares. He also referred me to *Martin Boughtwood v Oak Investment Partners XI1, Limited Partnership* [2010] EWCA Civ 23 a case concerning a quasi-partnership in which Mr Boughtwood, the holder of 68% of the issued share capital in a company called QED, a parent of another company PML, was ordered to sell his holding to Oak Investments, the holders of 30% of the issued share capital. A factor which weighed heavily in favour of the making of this order was the seriously underhand and unconstitutional misconduct of Mr Boughtwood in seizing control of the QED/PML group thereby damaging the group and its business and destroying the trust and confidence between the quasi-partners.

259. Mr Rodger submits that Mr Baldudak should be the purchaser in any buy out. He starts from the proposition that Mr Matteo only retained 5% of the shares at best, but that is no longer a viable contention. He also suggested that this may be a case where winding-up may be appropriate as the company has been run lawlessly and there was wrongdoing in relation to the share transfers and unlawful drawings, but that is not what he is asking for. His weightier points are that Mr Baldudak is the most substantial creditor of HTS and the history of the company is that it is only viable because of his financial backing. Mr Baldudak should not be put in a position where he is bought out at a price reflecting the considerable indebtedness of the company and have no control over how his debt is to be repaid. He would be at considerable risk that his loans would never be repaid due to the ill-will between the parties and the opportunity for Mr Matteo to put the company into an insolvent liquidation whilst retaining for himself the goodwill in some future venture or entering a pre-pack administration. Furthermore, Mr Matteo still owes considerable sums to the company.

260. The case of *Re Brendfield* is not apposite to the situation here. I am not dealing with a minority shareholder. The order in that case, which Rattee J considered exceptional, was made on the basis that the directors of the majority shareholder, FMR, were, by their management of Brendfield, damaging the company itself and entering into arrangements which could have that effect. In essence, they were running it for the benefit of FMR, not the company. This is not a feature of this case. There are allegations in Mr Matteo's witness statement suggesting that Mr Baldudak was engaged in "dodgy business" but they were not canvassed with him in cross-examination and I have not been asked to make, and have not made, any finding that he was. My only observation as to the allegation is that Mr Matteo's professed distaste for such behaviour was synthetic.

261. The case of *Boughtwood* is more in point as what was done to Mr Matteo was unconstitutional and high handed. The judgement in that case, however, recognises at paragraph [121] that all the facts have to be looked at and taken into account. It would be a misdirection for the court to construe s. 996 narrowly as requiring that the relief has to be geared to the wrong of which complaint is made; see *Grace* per Patten J at paragraph [76]. I am not required to thwart Mr Baldudak's wrongful expulsion by making an order which enables Mr Matteo to resume some control of the company, which would inevitably require that he comes in and Mr Baldudak leaves. I have to look at the question of what order is fit having regard to all the circumstances of the case.

### Conclusion

262. I am dealing with quasi-partners with an equal share of the company who cannot co-exist in the same venture. The company is viable. The directors' behaviour in trying to hide the shares from Hava has no bearing

on the question as to whether it was run lawfully and it is not a reason for winding up. There is no commercial or other justification for ordering its liquidation.

263. Mr Baldudak's behaviour was unconstitutional and underhand, but there is no finding that his stewardship of the company involved any damage to its assets or future wellbeing. On the contrary, as seen in the evidence of Ms Oliver, he has frequently had to inject funds to keep the company going, not only when the bank account was frozen but also in mid-2019 when wages were not being paid on time. The fact that he still has very substantial loans sitting in the company indicates that he is motivated by seeking to make it successful. I don't doubt that he wants the loans repaid and probably sees that this is more likely if the company continues to trade, so there is a personal interest in keeping the company afloat.

264. The following factors persuade me that the proper order to make is for Mr Baldudak to purchase Mr Matteo's shares at a value and on terms which will need to be decided after further directions.

265. First, HTS has throughout its life been dependent on the financial support of Mr Baldudak; it is to be recalled that the 2016 Business Plan indicated that Mr Matteo's difficulty had been his lack of cash flow. That is not a problem that has gone away as much of Mr Baldudak's loans have yet to be repaid and there have been instances when he has had to introduce more funds.

266. Second, given the mistrust between the two, any outcome which puts Mr Matteo in control but dependent on the support of Mr Baldudak's loan is a recipe for disaster. The latter may demand repayment of the loan as he will be aggrieved at the outcome of these proceedings, or simply because he does not want to support Mr Matteo any longer, in which case the

company is likely to fail or Mr Matteo may decide to liquidate the company, leaving Mr Baldudak as a substantial unsecured creditor, and start a new gas boiler business to exploit the gap in the market left by HTS or enter into a pre-pack administration to acquire the goodwill and assets and ditch the liabilities. There is little likelihood of Mr Matteo raising the funds to meet a demand for repayment of the loan. Not only has he had cash flow problems before, but according to him, he has what any lender would regard as a chequered past, having been bankrupt twice with six company liquidations behind him. Furthermore, he needed to draw from the company for his house deposit and a solicitor's bill and has had a very modest income since the inception the business of HTS.

267. Third, the history of HTS to date is that it is a viable business. Its employees numbered in the tens and it has an established client base. It is desirable that jobs can be preserved and existing goodwill maintained. The best chance of achieving such an end is to leave Mr Baldudak in control.

268. Fourth, Mr Matteo can be suitably compensated by the receipt of a fair value for his shares. I recognise that he loses the benefit of owning part of a company which has a substantial financial backer but there is no reason why he should be entitled to demand that Mr Baldudak continue to fund him in business.

269. Fifth, whilst I am not seeking to restrict the relief to rectify wrong of which complaint is made, i.e. unfair exclusion from the company, if Mr Baldudak had acted properly towards Mr Matteo he would have told him he wanted to take on the company alone, explained, as was the case, that he was the only one of the two who was in a financial position to do so and offered to pay him a fair value for his 50% stake in the company. That is the position in which Mr Matteo will find himself if I order that Mr Baldudak buy his shares. I fully recognise that such an order may be seen

as rewarding Mr Baldudak for forcing out the co-owner, but that is not entirely correct. Mr Baldudak will not have a free hand in the price or terms on which the shares are to be acquired. That will be for the court. He will be unable to exploit Mr Matteo's weaker financial position as would be the case had he taken the proper course at the outset.

Was Mr Matteo assaulted by agents of the claimants on 12 November 2020?

270. Mr Matteo claims that he was assaulted by people acting on behalf of the claimants on 12 November 2020 and had £210 taken from him which he said was his son's money. He claims damages for assault and the repayment of £210.

271. I have dealt with the events up to the incident said to give rise to the assault when dealing with his expulsion on 12 November 2020. Mr Matteo's complaint of assault starts at the point when he was outside the HTS building with Mr Coban asking why he was involving himself in the password change. He said he turned to see two security men, Mr Baldudak and another big athletic man with gold teeth, dressed in black. He asked if he could help the man in black but he pushed past him, told him that he was the one who needed help. Mr Matteo said this was his company and the man replied "no, everything is his now. Give him your phone", pointing to Mr Baldudak. There was an attempt to get him into the building but he moved away and called 999 and spoke to the police, whom he did not find helpful. As soon as he got off the phone, the man in black jumped on him and grabbed the phone. He reacted by kicking the man in the thigh. The security men intervened, pushing Mr Matteo to the ground, twisting his arm and crushing his ribs with their knees, he regards this as the deliberate infliction of pain. He was held on the ground for about half an hour during which time he said he was calm and wished to be released, but the security

men refused, claiming he was not calm. He told them he could not breathe but they said if he could talk he could breathe and kept him pinned to the ground.

272. Whilst he was on the ground a security man called the police, he assumed that was the case from the conversation. They said that he was an aggressive person and had attacked people. After the call they talked amongst themselves and discussed what they were to say to the police and the man in black was told that he has seen Mr Matteo attack Mr Baldudak. When the police arrived, they took his bag with his personal possessions, which were given to Mr Baldudak as he claimed they were his, notwithstanding this included Mr Matteo's driving licence, passport, V5 vehicle registration document and £300, of which £90 was HTS money and £210 was that of his son. He asked the police to check the cameras but they said they would do that later. Mr Laidler came out of the building to protest but one of the bouncers turned him back. That is a detail which is supported by Mr Laidler's oral evidence, though not his witness statement and is thus likely to be true as Mr Matteo cannot have known that this is what Mr Laidler was to say till he gave his evidence. The police were going to leave him in the car park but he persuaded them to take him to safety. They escorted him to Howden Metro.

273. As a result of these events Mr Matteo had bruising and pain in his ribs. He attended hospital that night and later his GP who told him that he had probably fractured his rib and prescribed him codeine. He produced the letter from the hospital to the GP dated 13 November 2020. It records a history of chest pain following an alleged assault. The description of the incident is that he was pushed on the ground and "knelt on back". His symptoms were chest pain to the left side of the chest, worse on movement,

palpation and deep inspiration. There is no prognosis and Mr Matteo has not said how long the symptoms persisted.

274. Mr Baldudak's account is that once Mr Matteo had gone outside following having been told of his suspension he became argumentative. He called someone on the phone and said he would not leave unless the police escorted him off the premises. The security guards then called the police. When he had finished on the phone, one of the guards tried to snatch it from him and Mr Matteo reacted by punching and kicking the guard. At that point the two other guards restrained him and the police were again called and took him away.

275. In cross-examination Mr Baldudak said that he had to have the phone as all the passwords are linked to it for internet banking, the cameras and eBay. He asked Mr Matteo to give it to him and he refused and rang the police. Mr Grey also asked him for the phone, he heard a sound, and the next thing he saw was Mr Matteo on the ground. He claimed that he and Mr Matteo told the police that the contents of Mr Matteo's bag belonged to the company and the police gave them to him.

276. One of the two security men employed by Phoenix Security, who attended, also gave evidence. That was Mr Bell. He said that on 12 November 2020 Mr Cuthbert asked him to attend HTS to assist in the potential removal from the premises of a company director. The incident took place in the car park at HTS premises. Mr Matteo was using his phone, someone called Chris, that would be Mr Grey, kept asking Mr Matteo for the phone. In his statement he said that Chris tried to get the phone but Mr Matteo refused to hand it over and in response became aggressive, kicking and punching Chris. When cross-examined he put it slightly differently in that he said that Chris grabbed the phone and Mr Matteo reacted. When Chris got the phone he "went crackers." He was verbally aggressive to



Chris, Erdem (Baldudak) and Peter (Cuthbert); the reference to Mr Cuthbert must be an error as he is not on the CCTV and there is other evidence that he arrived later in the day. At that point he detained Mr Matteo to avoid further injuries. He and his colleague took him down and kept him on the ground. He would not calm down but was spitting and trying to bite Mr Bell. He threatened to stab him, in evidence he said the threat was to Chris, and to come back to the business and cause damage. The police were called and they took Mr Matteo away due to his aggression.

277. An incident report form was produced by Mr Bell's colleague which says nothing about threats about stabbing or anything else. It records that Mr Matteo became aggressive towards the person trying to take the phone. When the security men tried to restrain him he tried to attack them. There is also CCTV footage but it is not particularly clear. It shows the security men tackling Mr Matteo and some interaction between him and another person.

278. It is common ground that the phone belonged to Mr Matteo and no-one else had a right to take it. It is also common ground that he is entitled to defend his property.

279. Mr Page says that the snatching of the phone was an assault in itself. The security men and others were present to see that his resistance to having his phone removed was futile and they did so by putting him on the ground and keeping him there as a result of which he suffered injuries, the description of which was unchallenged. Both Mr Grey and the security personnel were acting on the claimants' instruction and they are thus liable for the assault.

280. Mr Rodger argues that the pleaded allegation is against Mr Baldudak, not the company. That, however, is not what the pleadings say.

He says that the evidence does not support the conclusion that Mr Baldudak instructed the security guards and Mr Gray to do anything or to assault Mr Matteo or that they did in fact assault him.

### Conclusion

281. As the phone belonged to Mr Matteo, Mr Grey had no right to snatch it from him. That did constitute an assault. Mr Matteo was entitled to fend off Mr Grey with reasonable force, the level of which he could not be expected to judge whilst Mr Grey was in the act of taking his phone. Whilst I have not heard argument on this issue, I do not find that Mr Matteo was using unreasonable force by kicking and punching Mr Grey to stop him taking his phone. The actions of the security men may have seemed to them a protective action to prevent an assault on Mr Grey by Mr Matteo, but they were mistaken. What they were doing was preventing him from protecting his property and by putting him to the ground and holding him there were continuing the assault. He was entitled to try to defend himself, even if that required trying to bite and spitting at his assailants. It must have been a frightening experience for Mr Matteo and I have no doubt he was angered by the way he had been treated that morning. This is likely to have fuelled his aggression, but he was under no obligation to continue to submit to an assault. For these reasons I find that he was assaulted by Mr Grey and the security men.

282. The next question is as to whether they did so as agents of Mr Baldudak and HTS. The evidence of Mr Baldudak was that he had to have the phone. The incident report records that the owner of the business, which must have been Mr Baldudak, pointed out Mr Matteo. They approached him and asked him to hand over any company property. Someone must have asked them to convey this message. That is likely to have been Mr Baldudak given his desire to obtain the phone. Mr Grey was at HTS to

assist him. His successful attempt to snatch the phone was one aspect of his assistance. Mr Baldudak was present whilst this was going on and took no steps to prevent it. Indeed, on his evidence, he was the first to ask for the phone. I agree with Mr Page's analysis of the evidence that the security men and Mr Grey were at HTS, sent by Mr Cuthbert, but with the agreement of Mr Baldudak, to prevent Mr Matteo resisting being forced off the premises and giving up his phone. As such, they were agents of Mr Baldudak when they assaulted Mr Matteo. Further, as he was a director of the company purporting to act on its behalf, they were also agents of the company.

283. That leaves two matters, the quantum of damages for assault and the claim for the confiscated £210. As to the former, unless agreed, I will hear argument on the amount at the remedy hearing to deal with the share purchase. As to the latter, there is no dispute that there was money in Mr Matteo's bag which was taken from him and given to Mr Baldudak. There is a difference as to the amount. I do not accept Mr Baldudak's evidence that Mr Matteo told the police that the contents of the bag belonged to HTS as most of the contents I have heard about clearly belonged to Mr Matteo, e.g. his passport and driving licence. I will accept Mr Matteo's evidence that there was £300 in the bag in preference to Mr Baldudak who has misled me as to what Mr Matteo said concerning the ownership of the bag's contents and has a history in this case of making bogus claims as to amounts of money taken by Mr Matteo. It is also unlikely that Mr Matteo would have come up with such a precise figure as £210 or admitted that there was a further £90 of HTS money in the bag if it had contained £3,000. The position in which I am left is that there was £300 in the possession of Mr Matteo. Possession is evidence of title. He accepts that £90 was not his. It is for Mr Baldudak to prove that he, or HTS, had a better title to the

remaining £210 that was taken from him. In view of the shortcomings in his evidence, he has failed to do so. The £210 must be returned to Mr Matteo. I should add that the fact that he said it was his son's money is irrelevant, he was entitled to possess it at the time and to have it returned.

Is HTS entitled to an injunction to prevent Mr Matteo interfering in its running?

284. The pleaded basis of this claim has completely fallen away as I have not been persuaded that there was interference as alleged. The claimants have sought to bolster this claim by reference to interference following the grant of the injunction which kept Mr Matteo out of the business to demonstrate that he will keep up his disruptive campaign. Without being able to make out the claim on the pleaded allegations, however, there is nothing to bolster. In case I am wrong about that, I will consider what factual findings I can reach on the post-injunction evidence.

285. Putting to one side allegations justifying the grant of an injunction which have not succeeded, the only other allegation advanced by Mr Rodger in closing was that Mr Matteo repeatedly interfered with HTS's website and email in respect of which he relied upon the evidence of Ilya Gryn.

286. Mr Gryn gave evidence by video link from the Dnipro region of Ukraine with the assistance of an interpreter. Apart from his received account concerning the changing of passwords, his evidence was to the effect that Mr Matteo had not complied with orders of the court which would enable HTS to operate under a newly created domain, nationalboilerspares.co.uk by causing nationalboilerparts.co.uk, which was a domain he had owned before entering business with Mr Baldudak, to point to HTS's website. He said that Mr Matteo had said he had done so but the website and email accounts of the new domain worked for a time but then stopped; the evidence was the correlation between solicitor

correspondence and the re-starting of the website he had obtained from Mr Baldudak. Each time the claimants' solicitors took this up with Mr Matteo they would work for a period then fail. He explained that the results in the search engine did not work because Mr Matteo had not purchased a security certificate, SSL, when asked. There was no evidence, however, that he was asked or ordered to purchase such a certificate. He also claimed that Mr Matteo and removed certain DNS records though later replaced them but changed passwords for the nationalboilerparts website.

287. There were some parts of Mr Gryn's statement that cause me to question his impartiality. In his statement he said that Mr Matteo kept control of HTS's Facebook page and after his departure did not allow changes. In cross-examination he accepted that Mr Matteo was removed as an administrator at 10.56 on 12 November 2020 by Tigran Ambarcumyan on his instructions. He appeared to be contradicting himself. Furthermore, this was done at about the time, or shortly before, Mr Baldudak claimed he was informed that Mr Matteo was changing the passwords. It is unlikely that before, or within minutes of discovering this fact, an instruction was sent to Mr Gryn, who then passed it to Mr Ambarcumyan, to remove his Facebook status. This timing places Mr Gryn temporally within the scheme to remove Mr Matteo. On 19 November, Mr Ambarcumyan changed Katerina Gryn, now Baldudak, from editor to administrator of the page. Mr Gryn said he could not recall who instructed him to do that and added that he could not be certain it was Mr Baldudak.

288. The other piece of evidence which raises questions as to whether he was partial was his denial that he had interfered with Mr Matteo's email. Its settings had been changed from the Dnipro region of Ukraine and his sister's email substituted as the backup. That is to say, a request to change the password on his account prompted a request for authorisation from the

email of Mrs Baldudak. Mr Gryn said he did not do it but it could have been Tigran, but Mr Gryn went on to say that Tigran only takes action when Mr Gryn asks him to do so.

289. The fact that the settings had been changed so that a password change required authentication from an account in the name of Katya Baldudak indicates that not only had the claimants somehow taken control of Mr Matteo's email settings but that they also blocked him from recovering control as in order to authenticate any change, such as an alteration to the password, the person with control of Mrs Baldudak's email account would have to authorise that change.

290. These features of Mr Gryn's evidence together with the fact that he has made claims based on what he was told, whilst not making that clear in his statement, lead me to be cautious about his evidence. To this, I add the fact that he accepted that websites do break down intermittently but then took the role of advocate in arguing that this had not happened before Mr Matteo had changed the passwords, thus he must have been the culprit. In his written statement he had said that it was the changing of the passwords and the battle for access to email which had led Google to block access to the emails. As it was not Mr Matteo who changed the passwords and his mobile phone had been confiscated by the claimants who had also taken control of the website settings, Google's reaction must have been in response to that which the claimants had done. Furthermore, Mr Gryn, drawing on his technical expertise placed emphasis on the changing of DNS settings by Mr Matteo as being the cause of internet disruption. In cross-examination he accepted that he did not know that it was Mr Matteo who had changed the settings only to row back on that after a question from me. I am not persuaded by Mr Gryn's evidence that Mr Matteo had been attempting to sabotage the smooth running of HTS's IT systems.

291. Quite apart from the absence of a basis for enjoining him from interfering in the affairs of the company, Mr Page makes the very valid point that there is a good reason not to do so. He is entitled to 50% of the shares and was unlawfully removed as a director with no justification.

### Summary

292.

- a. The money introduced into the company by Mr Baldudak has been by way of loan repayable on demand.
- b. Mr Baldudak holds 50% of the shares in HTS on trust for Mr Matteo as the beneficial owner.
- c. The claims of breach of fiduciary duty against Mr Matteo are not proved.
- d. Mr Matteo owes HTS £58,956.11 on his director's loan account.
- e. The termination of Mr Matteo's directorship was unlawful and he is entitled to damages for such loss as has resulted. The quantification of such loss will be determined alongside the further proceedings in relation to the unfair prejudice Petition. It has not been proved that he was an employee.
- f. The claim for the deferred salary, rent and dividend against the company and to set off such claim against the director's loan account fails.
- g. The claim against Mr Baldudak for failing to ensure that Mr Matteo received salary and dividend sufficient to repay the director's loan account fails.
- h. The exclusion of Mr Matteo from HTS since 12 November 2020 amounts to unfair prejudice.

- i. Mr Baldudak must purchase Mr Matteo's shares at a price and on terms which will need to be determined and there will need to be a further hearing to give directions to that end.
- j. Mr Matteo was assaulted by agents of the claimants on 12 November 2020 for whose acts they are liable, suffering the injuries he described.
- k. The claimants are liable to Mr Matteo in the sum of £210, being money had and received.
- l. HTS's application for a perpetual injunction against Mr Matteo is refused.

293. There will need to a hearing to give a direction as to outstanding matters and for hand down once the judgment is approved. An issue which may arise in the valuation of the shares is as to whether there was an agreement that Mr Baldudak's loans should carry interest. I heard no argument on that issue, indeed it was not identified as an issue. Any such determination would have to be left over to the remedy stage of the s.994 petition.