Neutral Citation Number [2022] EWHC 291 (Ch)

CR-2015 001785

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF BROTHERS PRODUCE LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 21/02/2022

Before :

ICC JUDGE BARBER

- -

Between :

(1) BROTHERS PRODUCE LIMITED (IN LIQUIDATION)
(2) IRVIN COHEN (As Joint Liquidator of Brothers Produce Limited)

Applicants

- and –

(1) TYDENE (WESTERN) LIMITED
(2) MR ERCIN TARIM **Respondents**
(3) MR UMAR AKHTAR
(4) MR ERDAL YALCINKAYA

- -

Ms Faith Julian (instructed by Devonshires LLP) for the **Applicants**
Mr Robert Salis (instructed by Applerose LLP) for the **First and Second Respondents**

Hearing date: 26-29 October 2021

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 9.30 am on 21 February 2022

ICC Judge Barber

1. This application is brought by Brothers Produce Limited and its liquidators for relief following an assignment which was void under s.127 of the Insolvency Act 1986 ('IA 1986').

Background

2. Brothers Produce Limited ('the Company') was incorporated on 3 February 2011. At all material times prior to its liquidation, the Company carried on business as a wholesale and retail supplier of fruit and vegetables from a market stand known as Unit P61b-P62, Western International Market, Hayes Road, Heston, Southall, Middlesex UB2 5XJ ('the market stand') under the name 'Western International Market' ('the Business Name'). The Company occupied the market stand pursuant to a 10-year lease dated 27 February 2009 made between the Company and the London Borough of Hounslow ('the Lease').

3. At all times material to this application, the directors of the Company were Mr Akhtar and Mr Yalcinkaya, the Third and Fourth Respondents (hereafter collectively 'the directors'). Mr Akhtar had a relatively short involvement with the Company (7 months) prior to its entry into liquidation. In contrast, Mr Yalcinkaya had been a director of the Company since 3 October 2011.

4. The Company filed three sets of accounts at Companies House during its trading life, for the financial years ending 31 March 2012, 2013, and 2014 respectively. The profit figures for those years (in round terms) were respectively £114,000, £141,000 and £185,000.

5. Whilst profitable, however, by 2014, the Company was experiencing serious cashflow difficulties. It was extending too much credit to its customers and as a result was in difficulty paying its own suppliers.

6. On 28 January 2015, one of the Company's suppliers, NV Vergro SA, obtained default judgment against the Company in the sum of £83,257.12.

7. On 13 February 2015, NV Vergro SA presented a petition for the winding up of the Company ('the petition'). The petition was served on the Company on 16 February 2015 and advertised on 10 March 2015.

8. On 12 March 2015, after presentation and advertisement of the petition, the Company assigned the Lease for £5000, its fixtures and fittings ('the fixtures and fittings') for £25,000 and its goodwill ('the goodwill') for £5000 (collectively 'the Assignment' and 'the Assets') to Mr Ercin Tarim, the Second Respondent ('Mr Tarim').

9. At Mr Tarim's instigation, on 17 March 2015, Tydene (Western) Limited, the First Respondent ('TWL') was incorporated. Mr Tarim's unchallenged evidence was that he 'transferred everything' to TWL on 17 March 2015 (Tarim (1) para 21). On 21 March 2015, shortly after its incorporation, TWL commenced trading as a wholesale seller of fruit and vegetables from the Company's market stand. Mr Tarim was at all material times sole director and sole shareholder of TWL. A director of the Company, Mr Yalcinkaya (the Fourth Respondent) and a former employee of the Company, known as Mr Huseyin, were hired by TWL to work at the market stand.

10. On 30 March 2015, the Company was wound up by the Court on the petition of NV Vergro SA. There were two supporting creditors.

11. The Applicants maintain the Assignment is void by reason of section 127 IA 1986.

12. Restitutio in integrum is no longer possible. Trading at the market stand ceased in or by January 2019 and Mr Tarim has surrendered the Lease.

13. As against the directors, the Applicants maintain that the Assignment was entered into in breach of their duties to the Company, and that such breach caused the Company loss. They seek compensation for that loss.

14. The directors have played no part in these proceedings and, following non-compliance with an unless order, are debarred from defending the same.

15. As against Mr Tarim and TWL, the Applicants seek:

    (1) damages in lieu of return of the goodwill, on a restitutionary basis (to be payable jointly and severally);

    (2) an order for the taking of an account in respect of profits derived from the Assets, and received by Mr Tarim and TWL respectively, on a restitutionary basis;

    (3) damages in lieu of (1) and/or (2), on the basis that Mr Tarim and TWL have been unjustly enriched at the Company's expense.

    (together, 'the restitutionary claims')

16. Further or in the alternative, the Applicants maintain that Mr Tarim is liable in knowing receipt. They contend that the Assets were assigned in breach of the directors' fiduciary duties and represented trust property in Mr Tarim's hands. They argue that Mr Tarim had actual or constructive knowledge of that breach and is liable to account to the Company for the value of the goodwill as assigned and/or the profits derived from the Assets since the Assignment. The Applicants further maintain that TWL is liable in knowing receipt (on the grounds that Mr Tarim had knowledge of the directors' breach and his knowledge is attributable to TWL) and seek similar relief against TWL. No separate remedy is sought in respect of the assignment of the Lease and the fixtures and fittings, save insofar as those assets assisted in the generation of profit: (the 'knowing receipt claims'): A's skeleton argument, paragraphs 20 (c) and 21 (c).

17. As a third alternative, the Applicants maintain that Mr Tarim held the Assets on trust for the Company, contingently whilst the petition was outstanding, and absolutely once a winding up order had been made. They contend that Mr Tarim was under a duty to return the Assets and/or to account for profits derived from the Assets and that he has breached both duties. They seek from Mr Tarim equitable compensation, in the sum of the value of the goodwill as assigned, and/or an account of profits derived from the Assets by Mr Tarim and/or TWL since the Assignment. Corresponding claims are also made against TWL. Again, no separate remedy is sought in respect of the assignment of the Lease and the fixtures and fittings, save insofar as the

assignment of those assets assisted in the generation of profit: ('the constructive trust claims): A's skeleton argument, paragraphs 20 (a) and (b) and 21 (a) and (b).

18. Mr Tarim and TWL accept that the Assignment is void and do not seek a validation order. They do however oppose any claim for financial relief arising from the Assignment.

19. In relation to the restitutionary claims:

(1) Mr Tarim and TWL are 'content' for 'any of the assets transferred to Mr Tarim' on the date of the Assignment to be 'returned to the Applicants' (1R and 2R's skeleton argument, para 9 and 18). This is a puzzling position for them to adopt in circumstances where, by the time that the points of defence were finalised, a return of goodwill was impossible, the Lease had been surrendered, and certain of the fixtures and fittings (such as the freezer unit) had been disposed of.

(2) They oppose an order for compensation in lieu. They maintain that the true value of the goodwill at the date of the Assignment was at most £5000 (the price paid) and in this regard rely upon the expert report of Mr Aslin;

(3) They oppose any order for an account of profits on a restitutionary basis, whether by TWL or Mr Tarim. Whilst accepting that a proprietary interest in given assets attaches not only to the assets themselves, but also to any property which is *directly traceable* to the assets, they maintain that no proprietary claim can attach to any of the profits made by TWL or Mr Tarim after 12 March 2015, as trading profits are not directly traceable to the assets but are instead an accounting concept: Ultraframe (UK) Limited v Fielding and others [2005] EWHC 1638 (Ch) per Lewison J at [1470] to [1475]. They maintain that the only circumstances in which they could be required to account for any profits made through the use of the Assets would be if the circumstances were such as to impose a *personal* liability to account; and that, unlike proprietary remedies, personal remedies '*are exclusively fault-based*': Rs' skeleton, paragraph 24-28.

20. In relation to the knowing receipt claims, Mr Tarim and TWL accept that a third party who receives for his own benefit trust property transferred to him by a trustee in breach of trust with knowledge of the trust and of the breach will be liable to account for the trust assets and for any profits derived therefrom on the grounds of knowing receipt: El Ajou v Dollar Land Holdings plc [1994] 2 All ER 685 at 700: R's skeleton, paragraph 29 and 30. They deny, however, that they had knowledge of the directors' breach of duty. They say that they cannot be fixed with constructive notice because (1) the Company warranted that it was solvent; (2) Mr Tarim acted on the advice of his solicitors, Arlington Crown (3) Mr Tarim was never provided with a business valuation; and (4) at no point was Mr Tarim informed that the petition had been presented.

21. In relation to the constructive trust claims, the position of Mr Tarim and TWL is as follows:

(1) it is admitted that Mr Tarim (and later TWL) held the Assets on constructive trust; but

(2) any claim for equitable compensation based on the alleged true value of the goodwill and any claim for an account of profits is opposed.

The Evidence

22. For the purposes of this application, I have considered

(1) the first, second and third witness statements of Mr Cohen, dated respectively 27 November 2019, 6 April 2021 and 31 August 2021; and

(2) the witness statement of Mr Tarim, dated 7 May 2021

together with their attendant exhibits. I have also considered the documents contained in an agreed set of trial bundles, to which reference will be made where appropriate.

23. I have considered the expert reports of Mr Brewer, Mr Rose and Mr Aslin.

24. I have had the benefit of hearing Mr Tarim, Mr Rose and Mr Aslin in cross examination. Mr Cohen's attendance for cross-examination was excused by agreement.

Mr Rose and Mr Aslin

25. As expert witnesses, Mr Rose and Mr Aslin each assisted the court honestly and to the best of their ability.

Mr Tarim

26. Mr Tarim's written and oral evidence was peppered with inconsistencies, to which fuller reference will be made in the course of this judgment where appropriate. At this stage I shall simply list a few examples.

27. At paragraph 8 of his statement, Mr Tarim stated that 'I was only interested in buying the stand, not the business.' Yet he explained giving Mr Yalcinkaya a job with TWL 'because he was already working at the stand and I thought that it would be beneficial as it would maintain the continuity of the business' (para 25).

28. At paragraph 9, Mr Tarim stated that during the negotiations for the purchase of the stand, he was 'not aware whether or not the Company was solvent or owed any large debts'. Yet in the same paragraph he stated that he knew that 'the Company was in difficulties', that the Company 'had a cash flow problem' and that the Company 'had acquired large debts to suppliers' (one of which was TL, a company he worked for).

29. He blamed the downturn in TWL's fortunes (which conveniently dovetailed with the liquidators stepping up their inquiries into the Assignment) on 'our sales persons giving credit to customers, which affected the cash flow', and in turn 'meant that it was more difficult for the Company to get credit with suppliers, and therefore made it more difficult to acquire stock' (paragraph 27), yet had earlier explained that TWL had a great advantage as a start-up as it 'had a confirmed supplier in [TL], which was my brother's company and where I had already worked since 2010…. because I had a supplier which was another company with which I was involved, there would be no problems with obtaining stock on credit' (paragraph 10).

30. Mr Tarim's oral testimony also contained numerous inconsistencies. He initially denied that the Company had traded extensively with TL, for example, then had to accept that it had. He denied that the Assignment had included the Company's laptop and desktop computers, but later accepted that it had. As put by Ms Julian in closing, Mr Tarim was a witness who 'wanted it every which way'. He did not hesitate to deviate from the truth when it suited his purposes and seemed to have no sense of how utterly implausible some of his responses were. One example was his claim in cross-examination not to have realised that he had purchased the goodwill of the business until after issue of these proceedings. As put by Ms Julian, it was inconceivable that his own solicitors would have drawn up the deed of assignment of goodwill without instructions to do so.

31. Overall, having considered the evidence at length, I have come to the conclusion that, save where supported by contemporaneous documentation, Mr Tarim's evidence, both written and oral, should be treated with caution.

Missing Documentation

32. On the evidence which I have heard and read, it is clear that Mr Tarim took possession of the Company's books and records on or by 21 March 2015. Notwithstanding repeated requests from the liquidators of the Company, he has failed to deliver them up.

TWL's Accounts

33. TWL's accounts have been something of a moving target. According to its accounts as originally filed, TWL recorded a profit of £146,294 in 2016, £375,955 in 2017, and £360,637 in 2018. The 2019 accounts, however, then recorded a trading loss of £83,930. This loss was recorded after the First and Second Respondents were on notice of the liquidators' claim.

34. Similarly, after notice of this claim, amended accounts for the year ending 28 February 2018 were filed on 28 August 2020, showing a dramatically reduced profit of £71,516. No adequate explanation for that amendment has been proffered. The amended accounts were filed after service of both (a) these proceedings and (b) the single joint expert evidence referred to below.

35. Mr Tarim has since produced a letter from TWL's accountant, which states that TWL made a profit of £146,294 in 2016, a profit of £289,661 in 2017, a loss of £304,439 in 2018, and a loss of £160,446 in 2019. Again, no adequate explanation has been put forward for these further revisions, which were entirely unsupported by documentary evidence.

36. Even if one were to take these latest figures at face value, however, it is clear that TWL was very profitable for at least two years after the Assignment.

Procedural History

37. For some time, the liquidators wrote to TWL, Mr Tarim and the Directors, seeking information relating to the Assignment. None of the parties engaged, and accordingly

the liquidators issued an application on 5 December 2019 seeking remedies against all four respondents.

38. It was only after service of the application that Applerose Solicitors ('Applerose') replied on behalf of TWL and Mr Tarim, asserting that Mr Tarim had paid the Company £25,000 for the fixtures and fittings, £5000 for the goodwill, and £5000 for the Lease. Applerose enclosed some supporting documentation. The application was stayed on the 23 January 2020 for three months to allow the liquidators time to conduct further investigations, including obtaining the file from the Company's conveyancing solicitors, Simon Noble.

39. After these investigations were complete, the liquidators concluded that the Assignment was void and was very likely to have been effected at a significant undervalue, in particular in relation to the goodwill.

40. At the next hearing of the application, directions were sought for written evidence from a single joint expert as to the market value of the company's business and goodwill in March 2015. By paragraph 1.1 of the order dated 1 May 2020, the parties were granted 'permission to rely on the jointly instructed written evidence of a valuation expert on the following issue: 'the sale value of the business and goodwill of [the Company] .. as at March 2015'.

41. None of the Respondents engaged with the process of selecting a single joint expert in accordance paragraphs 1.2 to 1.5 of the order of 1 May 2020. The Applicants were left to select an expert themselves.

42. The single joint expert, Mr Ian Brewer, was duly instructed and reported to the parties on 11 August 2020. He valued the business and goodwill at around £1,397,000 in March 2015.

43. The application came before the court again on 28 September 2020. At that hearing, directions were given for pleadings. The directors were ordered to file and serve points of defence on unless terms. As they failed to do so, they are now debarred from defending these proceedings.

44. Mr Tarim and TWL, however, did file points of defence, and purported to issue two Part 20 claims, one against the directors for a contribution ('the contribution claim') and one against Arlington Crown solicitors, alleging professional negligence ('the negligence claim'). The negligence claim has been stayed pending the outcome of the main application. A directions hearing was ordered in the contribution claim, by order of ICCJ Prentis dated 19 April 2021, but I am told that this has not yet taken place.

45. On 11 December 2020, Mr Tarim and TWL applied for permission to rely on additional expert evidence. Permission was granted by an order of 22 March 2021 and corresponding permission was granted to the applicants. The applicants instructed Mr Daniel Rose. Mr Tarim and TWL instructed Mr Tom Aslin. The parties exchanged expert reports on 11 June 2021. Mr Rose valued the goodwill at the date of the Assignment at between £400,000 and £500,000. Mr Aslin valued the goodwill at between £0 and £5000. The experts subsequently prepared a joint statement, dated 21 July 2021.

Legal Principles

46. Counsel for the Applicants and for the First and Second Respondents were largely agreed on the legal principles applicable to this case. Accordingly, I will address them fairly briefly.

Section 127 IA 1986

47. Section 127 provides that:

> 'In a winding up by the court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the court otherwise orders, void'

48. Where a company is compulsorily wound up by the court, the 'commencement of the winding up' is the date that the petition is presented: s.129(2) IA 1986. The courts will ordinarily only 'otherwise order' (ie make a validation order) where the transaction in question has been or will be for the benefit of the general body of unsecured creditors.

49. Unlike its bankruptcy counterpart (s.284 IA 1986), there is no saving for dispositions made to parties in good faith, the value, and without notice that the winding up petition had been presented. I consider it legitimate to proceed on the basis that the drafting of s.127 is, in this respect, a conscious decision on the part of the legislature; absent a validation order, all dispositions made between the presentation of a petition and a winding up order being made, are void: Officeserve Technologies Ltd (in liquidation) v Annabel's (Berkeley Square) Ltd [2018] EWHC 2168 (Ch) at [17], [21].

50. There is no statutory remedy for dispositions rendered void by section 127 IA 1986. The court must instead look to the general law.

Restitutionary Claims

51. It is clear that when dealing with void dispositions of property, officeholders may look to the law of restitution; see by way of example Hollicourt (Contracts) Ltd v Bank of Ireland [2001] Ch 555 at 563B-G; Rose v AIB Group (UK) Plc [2003] 1 WLR 2791 at [30]; Re D'Eye [2016] BPIR 883 at [49]; Officeserve at [32]; Clark v Meerson [2018] EWHC 142 (Ch) at [47]; and re MKG Convenience Ltd (in liquidation) 2019 EWHC 1383 (Ch) at [42].

52. Whilst most of the examples in the case law concern a return of money, the law of restitution extends to intangible property. The property must simply have financial value, such that the disponee is 'enriched': Goff & Jones: The Law of Unjust Enrichment, 9th ed, at 8.39.

53. To make out a claim in unjust enrichment, a claimant must show:

(1) that the defendant was enriched;

(2) that his enrichment was gained at the claimant's expense, and

(3) that his enrichment was unjust.

See Benedetti v Sawiris [2013] UKSC 50 at [10] and the cases cited therein.

54. The court will then ask itself (4) whether there are any defences available to the defendant. In this regard, it is not for the claimant to prove the absence of a defence: see Officeserve at [34]. Once a claim is made out, it is for the defendant to defend it.

55. Enrichment by a disposition of property rendered void by the insolvency regime is necessarily unjust: see Re D'Eye at [54], a bankruptcy case, but the reasoning applies equally to corporate insolvency. See too Officeserve at [32] and Goff & Jones at 24-40.

56. The defence of receipt in good faith, for value and without notice of the petition is unavailable in a corporate insolvency context: see Officeserve at [35] – [36] and re D'Eye at [54]. Change of position is not pleaded or relied upon in this case, but to the extent that it may still be relied upon at all in answer to s.127 (see Conway [2019] UKPC 36 at [106], [116] and Bucknall v Wilson [2021] EWHC 2149 (Ch) at [86], [90] [91], [94]), its limits are now constrained to circumstances where the court would also be prepared to make a validation order: see MKG Convenience per HHJ David Cooke, sitting as a Deputy High Court Judge at [65] – [70], in particular [69]: see too Colchester Estates (Cardiff) v Carlton Industries Plc 1986 Ch 80 per Nourse J at p84-86.

57. Where a defendant is unjustly enriched at a claimant's expense and no defence is made out, the claimant has a right to restitution from the defendant. Restitutionary remedies are gain based: the claimant is entitled to recover the value of the defendant's gain. The gain, or enrichment, is valued at the date of receipt: Benedetti v Sawiris at [13] – [14]. The claimant is entitled to a personal restitutionary award; an order that the defendant pay the claimant a sum of money representing the value of the benefit that he received at the claimant's expense: Goff & Jones at 36-03 to 36-5. He is not required to accept a return of the benefit in specie.

58. Proprietary restitutionary remedies are also available in some cases, such as an order declaring that the claimant has a new ownership or security interest in an asset held by the defendant, usually accompanied by consequential orders such as an order that the assets should be conveyed to the claimant, or an order that the assets should be sold and a share of the proceeds remitted to the claimant: Goff & Jones at 37-01.

Constructive Trust Claims

59. As an alternative to a claim based on the law of restitution, an officeholder may look to equity. The Court of Appeal held in Ahmed v Ingram [2018] EWCA Civ 519 at [45] that the effect of s.284 IA 1986 upon a disposition of property is that it is held by the recipient (i) contingently for the bankrupt, in the event that a bankruptcy order is made against him; and (ii) subject thereto (i.e. in the event that no such order was made) for himself (the recipient) absolutely. Clearly the same analysis must apply to transactions caught by s.127.

60. What duties that imposes on the trustee will depend, in part, on the circumstances (see Ahmed at [47]), but there can be no doubt that the beneficiary is entitled to call for the return of trust property, and claim equitable compensation in respect of any loss that the beneficiary has suffered as a result of a breach of those duties: Ahmed at [33].

61. Loss will not necessarily be calculated on or from the date of breach, however. Quantum is fixed at the date of judgment and assessed at the figure then necessary to put the trust estate or the beneficiary back into the position it would have been in had there been no breach: Ahmed at [56].

Knowing Receipt Claims

62. Directors are trustees of a company's property. Where a third party receives company property in breach of trust, and it is unconscionable for him to retain the benefit of his receipt, he will be liable in knowing receipt: BCCI (Overseas) Ltd v Akindele [2001] Ch 437 at 455D-F. It will usually be unconscionable for him to retain the benefits if he has knowledge of the breach of trust. Knowledge may be (i) actual, or constructive by (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such enquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; or (v) knowledge of circumstances which would put an honest and reasonable man on enquiry: Baden and Others v Societe Generale Pour favoriser le developpement du Commerce et de L'industrie en France S A [1993] 1 WLR 509 at [250]. The knowledge of a company's directing mind and will can be imputed to the company he controls: El Ajou v Dollar Land Holdings Plc (No 1) [1994] BCC 143 at 150-151.

63. A knowing recipient is under a duty to restore the trust property immediately, and is accountable for profits, or any loss that would have been avoided if the property had remained in the hands of the true trustees and had been dealt with according to the trust: Williams v Central Bank of Nigeria [2014] UKSC 10 at [31].

Section 212 IA 1986

64. The claim against the directors is brought under s.212 IA 1986. This provides (inter alia) that if, in the course of the winding up of a company, it appears that a person who is or has been an officer of the company has been guilty of misfeasance or breach of any fiduciary or other duty in relation to the company, the court may, on the application of the liquidator, examined his conduct and compel him to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of duty as the court thinks just.

65. A director of a company owes the general duties specified in sections 171 to 177 of the Companies Act 2006 ('CA 2006'), which include:

(1) a duty to act in accordance with the company's constitution and to exercise the powers only for the purposes for which they were delegated: s.171 CA 2006. The proper purpose of exercising the power to manage a company's business and to deal with its assets is to advance the company's business and commercial interests: Re HLC Environmental Projects Ltd (in liquidation) [2014] BCC 337 at [99].

(2) a duty to act in the way he considers, in good faith, to be most likely to promote the success of the company for the benefit of its members as a whole having regard to the factors set out in s.172(2) and, in circumstances where the company is or is likely to become insolvent, a duty to act in the interests of the company's creditors: s.172(3). The duty to act in the interest of creditors is engaged when a director knows or should know that the company is or is likely to become insolvent and, in this context, 'likely ' means probable: BTI 2014 LLC v Sequana SA, Sequana SA v BAT Industries Plc [2019] EWCA Civ 112 at [220]. The duty under s.172 is ordinarily subjective, but where there is no evidence that the director actually considered the company's or the creditors' best interests, the test is necessarily objective: Re HLC Environmental Projects at [92].

(3) a duty to exercise independent judgment: s.173 CA 2006.

(4) a duty to exercise the care, skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by him in relation to the company, and with the general knowledge, skill and experience that he has: s.174. The director is therefore judged both objectively and subjectively. He is judged, at the very least, by the objective minimum standard: that of a reasonably diligent person having the general knowledge, skill and experience that would be expected of a person in the director's position. If he is more experienced, the standard against which he will be judged is higher.

Key Issues

66. The legal backdrop is largely agreed. Ultimately, this case turns on the facts and the valuation evidence. For the purposes of determining this application, I have therefore identified certain key issues, which it is convenient to address at this stage. In summary, the issues are as follows:

(1) what assets were transferred from the Company to Mr Tarim/TWL;

(2) was the transfer of such assets an arms-length transaction;

(3) was the transfer at an undervalue;

(4) was the transfer in breach of the duties owed by the directors to the Company;

(5) what was the state of Mr Tarim's knowledge at the date of the transfer;

(6) can Mr Tarim's knowledge be attributed to TWL;

(7) what are the consequences of the findings made under (1) – (6)

67. I shall deal with these in turn.

(1) What assets were transferred from the Company to Mr Tarim/TWL

68. The transactional documentation relating to the Assignment comprised

(1) an agreement between the Company and Mr Tarim dated 12 March 2015 ('the 2015 Agreement'), prepared by the solicitors acting for the Company;

(2) a deed of assignment of goodwill between the Company and Mr Tarim, dated 12 March 2015 ('the Goodwill Assignment'), prepared by the solicitors acting for Mr Tarim, Arlington Crown Solicitors and

(3) a deed of assignment of the Lease between the Company and Mr Tarim, dated 12 March 2015 ('the Lease Assignment'), prepared by Mr Tarim's solicitors, Arlington Crown.

The 2015 Agreement

69. Clause 1 of the 2015 Agreement provides as follows:

> '1. The Seller will sell and the Buyer will buy the Seller's leasehold interest in the property, all fixtures and fittings and goodwill at the premises and Property for a total price of £35,000 apportioned as follows:
>
> (a) the Leasehold property known as Unit 61B-P62 New Western International Market, Heston in the London Borough of Hounslow, ('the Property') for the price of £5000
>
> (b) the goodwill of the business of 'Western International Market' wholesalers and retailers of fruit and vegetables and items of food carried on by the Seller at the Property ('the Business') for the price of £5,000
>
> (c) the fixtures and fittings, trade equipment and items used in connection with the Business set out in the attached Schedule for the price of £25,000 …'

70. The copy of the 2015 Agreement in evidence before me did not include a copy of the schedule referred to in Clause 1(c).

71. Clause 5 of the 2015 Agreement continues:

> '5. Possession
>
> a. The Property is sold with vacant possession, and all items on an inventory attached to this Agreement.
>
> b. There are no employees which will be transferred subject to the Transfer of Undertakings (Protection of Employment) Regulations 1981.'

72. The copy of the 2015 Agreement in evidence before me did not have attached to it an inventory as provided for by Clause 5a.

73. Clause 7 of the 2015 provides for a deposit to be paid 'on exchange'. The amount of the deposit was left blank. From the evidence as a whole I consider it legitimate to

conclude that no deposit was paid, exchange and completion having occurred on the same day.

74. Clause 11 of the 2015 Agreement provided as follows:

> '11.1 the Seller shall not, for a period of 2 years after the Completion Date, either alone or together with any other person or as principal director partner manager or agent or a firm or company carry on or be employed, engaged or interested in any Business which would be in competition with any part of the Business as the Business was carried on at the Completion date within a two-mile radius of the Property.
>
> 11.2 The Seller shall not for a period of 12 months after the Completion Date:
>
> (a) offer employment to, enter into a contract for the services of, or attempt to entice away from the Business any individual who is at the time of the offer or attempt, and was at the Completion date, any Employee; or
>
> (b) procure or facilitate the making of any such offer or attempt by any other person.
>
> 11.3 The Seller shall not, for a period of 12 months after the Completion Date, solicit or entice away from the Business any supplier to the Business who has supplied goods and/or services to the Business at any time during the 12 months immediately preceding the Completion Date if that solicitation or enticement courses or would cause such supplier to cease supplying, or materially reduce its supply of, those goods and/or services to the Business.
>
> 11.4 The Seller shall not, for a period of 12 months after the Completion Date, solicit customers or former customers of the Business with the intention of taking the custom of the Business nor divert or seek to divert any custom from the Buyer…'

75. Clause 12 of the 2015 Agreement provides that the book debts of the Business are not included in the sale.

76. Clause 13 of the 2015 Agreement provides that

> '(a) The sale of the Business shall include the right to represent the Buyer is carrying on the Business in succession to the Seller and the benefit of any pending contracts, engagements and orders of the Seller in connection with the Business, which are capable of assignment.

> (b) The Seller will carry on the Business until the date fixed for completion for his own benefit and at his own risk and will use his best endeavours to maintain the Business.
>
> (c) The Seller will discharge, and covenant to indemnify the Buyer against, all business debts (if any) due and owing at the date of completion. After the date of completion the liabilities of the Business (accrued after the date of completion) shall be the liability of the Buyer who shall in the Assignment covenant to indemnify the Seller… from and against all actions, proceedings, costs, claims or demands in respect of the Business and shall further covenant in the Assignment not to hold out the Seller as continuing to be associated with the Business.
>
> (d) All profits and receipts and all losses and outgoings in respect of the Business up to the date of completion shall belong to and be paid and discharged by the Seller respectively and all profits and receipts and all losses and outgoings arising after the date of completion shall belong to and be discharged by the Buyer.
>
> (e) The books of accounts relating to the Business shall remain the property of the Seller on completion.'

77. Clause 18 of the 2015 Agreement provides for a given date to be fixed for completion, but the date chosen is left blank in the copy of the agreement n evidence before me. Clause 18 then continues:

> 'The latest time for completion is 1 pm provided that if the valuation of the stock in trade has not been agreed or settled and payment made as provided for in Clause 14 above the Buyer shall pay the Seller an 'on account' payment of 75% of the estimated stock valuation'

78. The reference to Clause 14 in Clause 18 is an error. The reference to stock is, however, pertinent.

79. Clause 19 of the 2015 Agreement provides:

> '(a) For Value Added Tax purposes the Business shall be transferred as a going concern….

80. Clause 20 of the 2015 Agreement provides that:

> 'On completion the Buyer will be entitled to sole use of the Business name 'WESTERN INTERNATIONAL MARKET' to the exclusion of the Seller. The Seller undertakes that after completion the Seller will not open up a new business using the same name or a name sufficiently similar to cause confusion or be misleading among the customers of the Business.'

81. Clause 24 of the 2015 Agreement provides, inter alia, as follows:

> '24.1 The Buyer enters into this agreement on the basis of, and in reliance on, the Warranties set out in Schedule 1.
>
> 24.2 The Seller warrants and represents to the Buyer that each Warranty is true, accurate and not misleading.'

82. Under Clause 24.8 of the 2015 Agreement is provided:

> 'The Seller warrants:
>
> 1. That there is no pending or anticipated litigation involving the business, the business name or the premises;
>
> 2. The Seller has not received any notice of claim, threat of action or court proceedings from any third party involving the business or premises in any way;
>
> 3. The Seller will indemnify the Purchaser in respect of any claim, action or proceedings that may arise relating to any period of the Seller's occupation of the premises.'

83. Clause 25 of the 2015 Agreement goes on to provide that the terms of the agreement 'shall not merge at completion but shall continue to have effect in so far as they remain to be performed.'

84. Schedule 1 to the 2015 Agreement is in three parts.

85. Part 1 of Schedule 1 provides inter alia as follows:

> 1.1 All information contained in this agreement and all other information relating to the Business and Assets (the Property, fixtures and fittings, rights and assets of the Business) given in writing by or on behalf of the Seller to the Buyer …. are true, accurate and complete in every respect and are not misleading.
>
> 1.2 There is no information that has not been disclosed which, if disclosed, might reasonably affect the willingness of the Buyer to buy the Business and the Assets on the terms of this agreement.'

86. It will be noted that in clause 1.1, 'the Business and Assets' are defined as 'the Property, fixtures and fittings, rights and assets of the Business'.

87. By Clause 4.1 of Schedule 1, the Seller goes on to warrant that:

> '[t]he Assets comprise all assets now used in the Business and that are necessary for the continuation of the Business as it is carried on at the Completion Date without assistance from any other person'

88. I shall set out Clause 5 of Schedule 1 in full. This provides as follows:

> 'Where relevant, the Assets
>
> (e) are and will be a[t] Completion in good repair and condition and in working order
>
> (f) have been regularly and properly maintained;
>
> (g) are not surplus to the requirements of the Business; and
>
> (h) are used exclusively in connection with the Business'

89. Clause 7 of Schedule 1 provides inter alia:

> '7.3 Neither the Seller nor any of its officers, agents or employees has done or omitted to do any act or thing which is or could be in contravention or breach of or the subject of enquiry, investigation or proceedings under the provisions of any law, order, regulation or the like, whether made in or pertaining to the United Kingdom or elsewhere, giving rise to any fine, penalty, default, proceedings or other such liability in relation to the Business or any of the Assets'.

90. Clauses 8 and 9 of Schedule 1 go on to provide:

> '8. Litigation
>
> 8.1 Neither the Seller, nor any person for whose acts or omissions he may be vicariously liable, is engaged in or subject to any:
>
> (i) litigation, administrative, mediation or arbitration proceedings in relation to the Business or the Assets or any of them ; or
>
> (ii) investigation, enquiry or enforcement proceedings by any governmental, administrative or regulatory body.
>
> 8.2 No such proceedings, investigation or enquiry as are mentioned in paragraph [8] have been threatened or are pending by or against the Seller or against any such person and there are no facts or circumstances likely to give rise to any such proceedings.
>
> 8.3 There are no existing or pending judgements or rulings against the Seller which affect or may affect the Business or any of the Assets. The Seller has not given any undertakings arising from legal proceedings to a court, governmental agency or regulator or third party which could affect the Business or the Assets.

> 8.4 Details of all material claims, complaints or returns relating to the Business that have occurred during the 12 months preceding the date of this agreement have been Disclosed
>
> 9. Insolvency of the Seller
>
> 9.1 The Seller is solvent and able to pay his debts as they fall due.
>
> 9.2 No order has been made or petition presented, meeting convened or resolution passed for the bankruptcy of the seller nor has or any distress, execution or other process been levied in respect of the Business or the Assets or any of them and no events have occurred which would justify any such proceedings.
>
> 9.3 No distress, district, charging order, garnishee order, execution or other process has been levied or applied for in respect of the whole or any part of the Business or the Assets.
>
> 9.4 No event has occurred causing, or which on intervention or noticed by any third party may cause, any floating charge created by the Seller to crystallise over the Business or the Assets or any of them, nor any charge created by it to become enforceable over the Business or the Assets or any of them, nor has any such crystallisation occurred and not is such enforcement in process'

91. Clause 10.2 of Schedule 1 provides:

> 'All necessary licences, consents, permits [etc]… have been obtained to enable the Seller to carry on the Business effectively in the manner in which it is now carried on and all such licences, consents, permits [etc]… are valid and subsisting. ….'

92. In a section of Schedule 1 immediately after clause 10.2, which in context it would appear was intended to be Part 2 of Schedule 1, it is provided as follows:

> 'Completion obligations
>
> The Seller shall deliver, or procure delivery to the Buyer of, or make available to the Buyer:
>
> 1.1 physical possession of all the Assets capable of passing by delivery, with the intent that title in such Assets shall pass to the Buyer by and on such delivery;

> 1.2 The Assignment of Lease to the Buyer, duly signed receipt for fixtures and fittings and duly executed assignments to vest the Goodwill in the Buyer;
>
> 1.3 the title deeds (if any) relating to the [Property] and all invoices, policies, premiums, receipts, maintenance contracts, health and safety files and other accounts relating to the Property (if any);
>
> 1.4 all such Third Party Consents (if any) as the Buyer may require to invest in the Buyer, or as the Buyer may direct, the full benefit of the Assets (other than the Property);
>
> 1.5 all documents of title and all service documents (if any);
>
> 1.6 the books, accounts, and all other documents, papers and records in the possession or under the control of the Seller relating to the Business (if any) or any of the Assets duly written up to the Completion date;
>
> 1.7 all records referred to in section 49 of VATA 1994'

93. Part 3 of Schedule 1 goes on to provide inter alia as follows:

> 'All correspondence, information, orders, enquiries and other documentation, items and all money relating to or connected with the Business or the Assets received by the Seller, on or after Completion shall be immediately passed or paid (as the case may be) to the Buyer or as it may direct.
>
> On and at any time after Completion, the Seller shall give, or procure to be given, to the Buyer all such information and other assistance (including particulars of Customers, suppliers and others who have dealt with the Seller in connection with the Business) that the Buyer may reasonably require for the conduct of the Business and for the purpose of implementing the provisions of this agreement.
>
> Not later than two Business Days after the Completion Date, the Seller shall send to each of the Employees a letter, in the agreed form, explaining that their employment has been transferred to the Buyer pursuant to the Regulations
>
> The Seller shall give to the Buyer reasonable access, during hours, to the books, accounts, records and returns of the Seller relating to or in connection with the Business and the Records as the Buyer may require (including the right to take copies and extracts on reasonable advance notice) and shall keep them in good order…

> The Seller shall permit and assist the Buyer to consult any of its employees, on reasonable notice and during normal business hours at the office at which the relevant employee is employed, for the purpose of obtaining knowledge, know-how or any other information possessed by such employee in relation to the activities and operations of, and the products and services supplied or to be supplied by, the Business at Completion Date and the Seller shall ensure that any such employee shall disclose all such information to the Buyer.
>
> The Seller shall ensure that it maintains adequate insurance cover in respect of any loss or liability it may suffer or incur (whether to the Buyer under this agreement or otherwise) in connection with any act, event, omission or circumstance relating to the Business and occurring or arising at or before Completion Date..'

The Goodwill Assignment

94. The Goodwill Assignment, also dated 12 March 2015, is a much shorter document, executed by deed. The recitals provide as follows:

> 'Background
>
> (A) The Assignor now carries on, and has for some years been carrying on, as the beneficial owner the business of wholesalers and retailers of fruit and vegetables and items of food (Business) under the style or name of Western International Market (Business Name) at Unit P61b-P62 Western International Market Hayes Road Southall (Premises).
>
> (B) By an agreement dated (Agreement), the Assignor has agreed with the Assignee for the sale to the Assignee of, among other things:
>
> (a) the goodwill, custom and connection of the Assignor in relation to the Business, including the exclusive rights for the Assignee and its successors and assigns to represent themselves as carrying on the Business in continuation of and in succession to the Assignor and to use the Business name; and
>
> (b) the benefit of the contracts, engagements all other contracts, engagements and orders to which the Assignor is entitled at the date of this deed in connection with the Business and all claims and rights now subsisting in relation to any of the assets under any express or implied agreement, warranty, representation, guarantee or indemnity.'

95. The operative parts of the deed are set out in Clauses 1 and 2. These provide as follows:

‘Agreed Terms

1. Assignment

In consideration of Five Thousand Pounds (£5,000.00) now paid by the Assignee to the Assignor (the receipt of the Assignor hereby acknowledges) the Assignor hereby assigns to the Assignee with full title guarantee the following property, rights, claims and liberties:

(a) the goodwill, custom and connection of the Business;

(b) the exclusive rights for the Assignee and its successors and assigns to use the Business name and respectively to represent that the Business as hereafter carried on by the Assignee or its successors and assigns, whether under the Business name or otherwise, is and has been carried on in succession to the Assignor; and

(c) the full benefit of the contracts, engagements and orders the Agreement and all other the before recited contracts, engagements and orders, claims and rights;

(d) to hold the same unto the Assignee absolutely.

Further Assurance

2.1 At the request and cost of the Assignee, the Assignor shall, at all times after the date of this deed, do all acts and execute all documents as may be necessary or desirable to secure the vesting in the Assignee of the goodwill, custom and connection of the Business free from all liens, charges, options, encumbrances or adverse interests of any kind.

2.2 The Assignor hereby covenants with the Assignee that for a period of two (2) years from the date hereof he will not within a radius of two (2) miles from the Premises either alone or together with any other person or as principal employee director partner manager or agent or a firm or company or save as authorised hereunder directly or indirectly

(a) solicit customers or former customers of the Business with the intention of taking the custom of the Business nor divert or seek to divert any custom from the Assignee

(b) induce or attempt to induce any supplier of the Business to cease to supply or to restrict or vary the terms of supply to the Business

(c) carry on or be engaged in competition with the Business as carried on from the Premises

> (d) seek or procure orders from or do business with any person who at any time has been a customer of the business during the period of 24 months prior to the Completion date (as defined in the Agreement)
>
> (e) engage employ or solicit for employment or enticed to any other business any employee or former employee of the business
>
> 2.3 The Assignor warrants to the Assignee that they will not at any time hereafter use or disclose confidential information held by the Assignor relating to the Business its customers or suppliers
>
> 2.4 The Assignor acknowledges that the restrictions contained clause 2.2 are fair and reasonable and necessary for the protection of the interests of the Assignee having regard to the acquisition by the Assignee of the Business…
>
> 2.6 The Assignor covenants with the Assignee to pay and discharge all existing debts liabilities and outgoing[s] including but not limited to VAT of the Business and the Premises arising up to the date hereof and indemnify and keep indemnified the Assignee and his estate and effect from against all actions claims or demands in respect thereto'.

96. The Goodwill Assignment concludes with Clause 3, a governing law provision.

The Lease Assignment

97. The Lease Assignment dated 12th March 2015 is in conventional terms. Nothing turns on its wording for present purposes. It was common ground that the assets transferred from the Company to Mr Tarim included the unexpired residue of the 10-year term granted by the Lease. The term under the Lease commenced on 7 July 2008 and (subject to any renewal under the 1954 Act) was due to expire on 6 July 2018.

98. The 2015 Agreement, the Goodwill Assignment and the Lease Assignment were all executed on behalf of the Company by Umar Akhtar, the Third Respondent.

99. Extracts from the files of Simon Noble solicitors relating to the Assignment include a typewritten list headed 'The list of Fixtures and Fittings'. The list provided as follows:

> '1 x Laptop
>
> 2 x Desktops
>
> 2 x Printers
>
> 4 x Chairs
>
> 3 x Tables

1 x Safe Box

1 x CCTV system & tv

1 x Till'

100. Mr Tarim's written testimony was that the fixtures and fittings transferred 'consisted mainly of the refrigerator' (a large refrigeration storage unit used for storing fruit and vegetables at the market stand). In cross-examination however, after initial denials, Mr Tarim ultimately accepted that the items set out in the list of fixtures and fittings (including the Company's laptop and two desk top computers) were also among the assets transferred.

101. One issue which generated a degree of debate at trial was the issue of what was comprised in the 'goodwill' assigned by the Goodwill Assignment. According to the International Valuation Standard 210 paragraph 20.6 (which both Mr Aslin and Mr Rose agreed to be the correct starting point in this regard), the definition of goodwill is as follows:

> 'Generally, goodwill is any future economic benefit arising from a business, an interest in a business or from the use of a group of assets or from the use of a group of assets which has not been separately recognised in another asset. The value of goodwill is typically measured as the residual amount remaining after the values of all identifiable tangible, intangible and monetary assets, adjusted for actual or potential liabilities, have been deducted from the value of a business. It is often represented as the excess of the price paid in a real or hypothetical acquisition of a company over the value of the company's other identified assets and liabilities'.

102. At paragraph 5.2.2 of his Report, Mr Aslin opined that he would 'typically expect' goodwill to include some or all of the following:

> (1) business name and/or brand;
>
> (2) reputation and standing in the market in which a business operates;
>
> (3) relationships with customers, which may include a customer database, contracts, credit terms, trading history, potential target customers;
>
> (4) relationships with suppliers, which may include a supplier database, contracts, credit terms, trading history, potential target customers
>
> (5) existing staff and their knowledge of the business; and
>
> (6) IT and related systems.

103. As noted by Mr Aslin at paragraph 5.2.3 of his report:

> '[a]ll of the above are features of a business which are not represented by tangible assets such as stock, debtors and cash, and are elements which together contribute towards a company's ability to continue operating its business.'

104. Mr Tarim asserted, by paragraph 15 of his witness statement, that 'Mr Yalcinkaya did not supply any customer list during the negotiations, and the cost of acquiring existing customers was not something which was factored into the price'. By paragraph 26 of Mr Tarim's statement, he also stated:

'26. No existing contractual relationships between Brothers Produce Limited and their customers or suppliers were passed on…...'

105. I reject Mr Tarim's evidence on this issue. Mr Tarim's written testimony on this issue does not accord with the contemporaneous transactional documentation in evidence; see by way of example the 2015 Agreement clauses 11.4 and 13(a) and Part 3 of Schedule 1: see also references in the Goodwill Assignment to the transfer of the goodwill, custom and connections of the Assignor, and to assignment of the benefit of contracts, engagement and orders.

106. Mr Tarim also asserted, at paragraph 24 of his witness statement, that 'the stand did not have regular customers'. He went on to state (at para 24) that:

> 'There were many stands in Western Market selling fruit and vegetables wholesale, and customers would come to the market and buy from whichever stand had the best products and best prices, and did not have any loyalty to any particular stand'.

In cross examination he claimed that in the world of wholesale fruit and vegetables, there was 'no such thing as a particular customer base'. He claimed that whilst reputation was important when *buying* products, it was unimportant when *selling* products. In re-examination he put the matter thus:

> 'RXQ: Miss Julian asked about reputation in your line of business. She suggested reputation was important in your business. You answered, it is important when buying products, that's the main thing. What about reputation as a seller?
>
> A: when buying, it is important, as won't be able to get all products. In order to sell, have to be able to buy
>
> RXQ: reputation in relation to customers?
>
> A: customer comes and looks at product; looks at the goods. Main thing for customer is the product that we sell'

107. The clear implication of Mr Tarim's responses to these questions was that, in the world of wholesale fruit and vegetables, there was no such thing as customer loyalty or a customer base. On the evidence as a whole, I reject Mr Tarim's evidence on this issue. Given his long-standing close involvement in his brother's company, TL, which also traded in the wholesale of fruit and vegetables, and as an experienced businessman in his own right, I am satisfied that Mr Tarim knew his evidence on this issue to be untrue. In his brother's strategic report for TL for the year ended 31 March 2021 (forming part of accounts filed at Companies House), for example, it is stated that:

> 'The company's main strategy is to provide a complete service to customers … The company's aim is to focus on specific markets (and customers) to ensure that *a clear strategy to win and maintain customers* is implemented and sustained.' [emphasis added]

108. Moreover, the aged debt mailshot exercise undertaken by TWL in respect of the Company's old customers in 2015, when considered in the context of the evidence as a whole, supports the conclusion that the Company had a customer base. In September 2015, TWL sent out 41 statements of account, headed with TWL's logo, addressed to the Company's old customers by name and address, actively chasing the Company's book debts relating to various periods spanning back to 2011, long before the date of the Assignment. The statements of account were clearly drawn from detailed records compiled by the Company. Each statement listed the invoices relating to the customer in question, by date, invoice number and invoice total, gave particulars of any payments received by date and amount, and in a final column, gave a cumulative total of the amount outstanding. The customers to which the statements of account related each had their own account code in the Company's records (suggesting regular business) and it is clear from the statements of account themselves that many placed repeat orders over an extended period of time.

109. Mr Salis sought to play down the significance of the statements of account, suggesting that at best they comprised a 'list of bad payers'. Whilst some were undoubtedly 'bad payers', however, many were clearly loyal customers who had placed (and paid for) repeated orders with the Company over several years and had, in relative terms, only modest sums outstanding at the time of the aged debt mailshot. Hadi Cash & Carry, based in Southampton, for example, placed regular orders with the Company from October 2012 to November 2014, with a total value of £70,137.70, of which only £5871.57 remained outstanding at the date of the mailshot. Medina Foods & Halal Meat Centre, based in Southampton, placed regular orders with the Company from September 2012 to January 2014, with a total value of £49,528.63, of which only £1445.70 remained outstanding. LNB G5 Ltd, based in Southall, Middlesex, placed repeated orders with the Company from December 2012 to May 2014, with a total value of £151,705.30, of which only £14,041.47 remained outstanding at the date of the mailshot. Majliss Restaurant, based in Cowley, Oxford, placed regular orders with the Company from August 2012 to October 2014, with a total value of £12,660.21, of which only £685.60 remained outstanding. Padma UK Ltd, based in Croydon, had placed repeated orders with the Company from October 2012 to July 2014, with a total value of £19,736.49, of which only £771.50 remained outstanding. These are simply a selection of examples drawn from the statements of account in evidence. In

the interests of brevity, I will not cite them all. In my judgment, these examples clearly evidence an established customer base. It will also be noted that these statements of account relate only to customers with sums outstanding. It is in my judgment legitimate to conclude that the Company had other regular customers who, at the date of the Assignment, were up to date with payments in respect of their custom.

110. Mr Tarim had no persuasive explanation for these statements of account, or the mailshot, when asked about the same in oral testimony.

111. The mailshot may go some way to explaining the very poor recovery achieved by the debt collection specialists, Credebt, instructed by the Company's liquidator. According to the statement of affairs provided by the directors, the Company's debtor ledger had an estimated realisable value of £950,000. In the liquidators' progress reports, it is confirmed that Credebt had limited success in recovering monies, as 'many debtors have disputed their indebtedness on various grounds': one of those grounds being that payment has been made to a third party: see by way of example Annual Progress Report for year ending 21 May 2017, para 4.1.2. As misappropriation of book debts was not specifically pleaded, however, I shall leave the issue of book debts to one side.

112. Suffice it to state that, on the evidence as a whole, I am satisfied that details of existing customers and suppliers of the Company were passed on to Mr Tarim as part of the Assignment and were thereafter shared with TWL on its incorporation. The transactional documentation makes clear reference to customers and suppliers being passed on. On a balance of probabilities I am satisfied that details of existing customers and suppliers were stored on the Company's laptop and two desktops transferred to Mr Tarim as part of the Assignment. I am further satisfied that one of the purposes of taking an assignment of the laptop and the desktops was to have access to information regarding existing customers and suppliers. On Mr Tarim's own evidence, which in this regard was unchallenged, he set up a new accounting system for the business when he took it over. He therefore had no need for the Company's old laptop and desktops to access the old accounting system. On the evidence as a whole, it is in my judgment legitimate to conclude that the laptop and desktops were taken on for the valuable information stored on them in relation to the Company's customers and suppliers.

113. Mr Tarim claimed not to know the passwords for the laptop and computers. He may not have memorised such passwords, but I am satisfied that at all material times he has had access to the laptops and desktop computers via the staff that he took on to run TWL on a day-to-day basis following the Assignment. After the Assignment, he took on the Fourth Respondent and another former employee of the Company, Mr Huseyin, to run the business. On the evidence as a whole, I am satisfied on a balance of probabilities that both the Fourth Respondent and Mr Huseyin knew the access codes for the Company's laptop and desktop computers. Mr Tarim accepted as much in oral testimony.

114. Mr Tarim demonstrated knowledge of the Company's customers and suppliers in his witness statement.

115. At paragraph 29 of his witness statement, for example, he listed certain products and claimed that 'Brother [sic] Produce Limited could not supply these products at the same price and quality as Tydene Limited.' He also claimed that 'Tydene Western Limited also secured better deals with the suppliers from other countries such as the Netherlands than Brothers Produce Limited'. This raises the question of how Mr Tarim would know of such matters if he did not have details of the Company's suppliers and the terms upon which the Company did business with such suppliers. He did not state the source of his knowledge in his witness statement. He only attended the stand a handful of times after purchasing it. In my judgment, on the evidence as a whole, the most likely (and correct) explanation is that he received supplier details as part of the Assignment.

116. Mr Tarim also demonstrated knowledge of who the customers of the Company were. At paragraph 24 of his witness statement, for example, he stated that '[s]ome of the customers who purchased supplies from my stand had already been customers of Brothers Produce Limited before I started trading there'; an assertion which begs the question of how Mr Tarim would know, if he did not have a customer list for the Company and rarely attended the stand. Mr Tarim's attempts to explain this away in oral testimony were unconvincing. In answer to my question, he suggested that his reference to 'existing' customers was a reference to existing customers of TL. Reading paragraph 24 of his statement, this is clearly incorrect.

117. Mr Tarim also demonstrated knowledge of the products sold by the Company. Whilst it was correct that TL, Mr Tarim's brother's company, was a supplier of the Company (and so Mr Tarim might be taken to know the products which TL supplied to it), TL was not the Company's only supplier.

118. Mr Salis submitted that the aged debt mailshot of itself did not establish that a complete customer list was passed on as part of the Assignment; at best, he argued, it might demonstrate that an aged debt list was passed on. The question whether a customer list was passed on, however, does not rest simply on the evidence of the aged debt mailshot, but on the evidence as a whole, which includes (i) the 2015 Agreement and the Goodwill Assignment, each of which contain provisions consistent with and/or supporting the conclusion that a customer list was passed on (ii) latterly admitted evidence that the Company's laptop and two desktop computers formed part of the Assignment and (iii) Mr Tarim's own knowledge, demonstrated in his written evidence, of the difference between new and existing customers.

119. The fact that Mr Tarim selected the Company's market stand to purchase, when there were plenty of other stands (on Mr Tarim's evidence of equal size) standing empty at the time, is also significant. In my judgment it is utterly implausible to suggest that Mr Tarim would want to buy a stand associated with a company which he contended had a bad track record with suppliers (and hire two individuals who previously worked for that company to front the stand), if the only assets of value which he was purchasing were a stand and a modest selection of fixtures and fittings.

120. The fact that the business name of the Company formed part of the Assignment is also of relevance in this regard. The business name is expressly referred to in the transactional documentation. Mr Tarim and TWL sought to play down the significance of this, claiming that the Company 'did not have a logo or any other

branding' and that there was 'no brand loyalty'. I reject their evidence on this issue. No persuasive explanation was put forward for the express inclusion of the business name in the 2015 Agreement. This was not, as Mr Salis sought to suggest, simply a 'boilerplate' provision; the business name itself is set out, in terms. On the evidence which I have heard and read, I am satisfied that the business name was a significant asset; together with the continuity of staff, the same trading premises, and the customer information stored on the Company's laptop and desktop computers, it was the means by which Mr Tarim and TWL could tap into the Company's existing customer base.

121. On the evidence which I have heard and read, I am satisfied that the Company's customer base was of material financial value and was important to Mr Tarim. Mr Tarim clearly needed a customer base if TWL was to 'drop to the ground running'. TWL may have had the support of TL for supplies (and to guarantee its obligations to other suppliers), but it needed customers. There would be no commercial sense in TL handing its own customers to TWL, and in fairness Mr Tarim did not suggest in his witness statement that it had; the support that TL gave TWL was said by Mr Tarim in his written evidence to be the supply of some goods at cost and latterly the guarantee of obligations incurred by TWL when placing orders with suppliers other than TL. The question thus arises: where did TWL get its custom from, in order to achieve the flying start that it achieved in its first year of trading? I reject the suggestion that the wholesale traders based at the market depended simply on 'footfall' custom. I also reject Mr Tarim's attempts in oral testimony to suggest that TL itself supplied TWL with customers. On the evidence which I have heard and read, I am satisfied that TWL started trading with the benefit of the Company's name, market presence, continuity of staff and custom base. Whilst much was made of the Company's poor reputation with suppliers, nothing was said of its reputation with buyers. On the evidence as a whole, which includes the Company's trading figures and clear evidence of loyal custom, I consider it legitimate to conclude that the Company had a good reputation with buyers.

122. I am fortified in my conclusions by the trading performance of TWL as a start-up company. Its profits in its first year of trading were (at least) £146,000 from a standing start. There was no evidence before me that TWL advertised its own launch and in the absence of such evidence I conclude that it did not. Yet TWL got off to a flying start and its trading figures were close to those previously achieved by the Company. On the evidence before me, I am satisfied that this would not have been possible without the benefit of an established custom base.

123. I am also satisfied that the goodwill of the Company was transferred to Mr Tarim in March 2015 on a 'going concern' basis. Numerous provisions in the 2015 Agreement and the Goodwill Assignment support this conclusion. These provisions include but are not limited to clause 13(a), 19(a) and 20 of the 2015 Agreement, Clauses 4.1 and 5 of Schedule 1 to that Agreement and Part 3 of Schedule 1. Recital B(a) to and Clauses 1 and 2 of the Goodwill Assignment also support this conclusion. Mr Salis invited me to place little weight on the transactional documentation, claiming that 'boilerplate' provisions had been included. I reject that invitation. Whilst it is correct to state that both the 2015 Agreement and the Goodwill Assignment are poorly drafted in certain respects, both parties to this commercial arrangement were professionally represented

and the parties' respective solicitors were selective in the precedent provisions which they employed. The transactional documents cannot simply be ignored.

124. Moreover, the transactional documents themselves are not the only evidence which point to a sale as a going concern.

125. Mr Tarim confirmed at paragraph 25 of his witness statement that he gave Mr Yalcinkaya a job with TWL 'because he was already working at the stand and I thought that it would be beneficial *as it would maintain the continuity of the business*' (emphasis added).

126. Mr Tarim also stated at paragraph 21 of his witness statement that the Company did not cease trading at the stand on the completion date of 12 March 2015 but instead continued to trade from the stand until 21 March 2015. In oral testimony, Mr Tarim confirmed that there was no break in trading at the stand; the Company continued to trade there until TWL took over. Mr Tarim's written and oral evidence on this issue was unchallenged and I accept it. The most likely (and in my judgment correct) explanation for the continued trading at the stand by the Company post-completion was that it was in order to preserve the business as a going concern whilst Mr Tarim set up TWL.

127. The remaining stock owned by the Company was also transferred to TWL on 21 March 2015, when TWL started trading from the stand. I so find. At paragraph 26 of his witness statement, Mr Tarim stated that

> 'I cannot remember whether Brothers Produce Limited sold any of its stock to me under the assignment; if it did so this is not documented. I believe, however, that when the company ceased trading and left the stand it must [have] left behind some of the stock. This stock would have been sold through Tydene Western Limited.'

128. Mr Tarim gave evidence to similar effect in oral testimony. To keep the stand open and to maintain the business as a going concern, the Company would need to maintain stock levels rather than run them down. The stock figures provided for in the Company's professionally drawn annual accounts were fairly consistent; £45,933 for the year ended 31 March 2012, £41,122 for the year ended 31 March 2013 and £40,236 for the year ended 31 March 2014. These figures are in my judgment a reliable guide to the value of stock levels maintained by the Company at the stand when trading.

129. Whilst the 2015 agreement makes reference at clause 18 to existing stock being valued and paid for at the time of completion. I was taken to no evidence that the Company's stock was valued and paid for as envisaged by the 2015 agreement and consider it legitimate to conclude that it was not.

130. On the evidence as a whole I am satisfied on a balance of probabilities that the Company left its stock at the market stand on cesser of trading on 21 March 2015, that neither Mr Tarim nor TWL paid the Company for such stock, and that TWL thereafter sold such stock from the stand without accounting to the Company for the same.

131. Turning back then, to the factors listed at paragraph 5.2.2 of Mr Aslin's report, on the evidence which I have heard and read, I am satisfied that included in the goodwill assigned by the Goodwill Assignment dated 12 March 2015 from the Company to Mr Tarim (and thereafter used and enjoyed by TWL on its incorporation) were the following:

(1) the business name of the Company;

(2) reputation and standing in the market in which the Company operated;

(3) relationships with customers, including a customer database, details of any ongoing contracts with such customers, credit terms and trading history;

(4) relationships with suppliers, including a supplier database, details of any ongoing contracts with such suppliers, credit terms, and trading history;

(5) existing staff (comprising a long-standing director of the Company and a past employee of the same) and their knowledge of the business; and

(6) IT and related systems (as stored on the Company's laptop and two desktop computers).

I so find.

132. Given the incomplete transactional documentation (see for example paragraphs 70 and 72 above; Simon Noble's file was also incomplete in other respects), it is not possible to list comprehensively the assets transferred on the Assignment. On a balance of probabilities, however, on the evidence which I have heard and read, I am satisfied that the assets which were transferred to Mr Tarim on the Assignment (and which were thereafter used and enjoyed by TWL on its incorporation) at the very least *included*:

(a) the unexpired residue of the term granted by the Lease;

(b) goodwill (incorporating the components listed at paragraph 131 above),

(c) chattels described as fixtures and fittings, which included the freezer unit and the items listed at paragraph 99 above; and

(d) the stock left by the Company at the stand on 21 March 2015 when the Company ceased trading at the stand and TWL started trading from it.

(2) Was the Assignment an arms-length transaction

133. On the evidence as a whole, I am satisfied that the Assignment was not an arm's length transaction.

134. Mr Tarim's evidence about how he knew Mr Yalcinkaya was guarded and opaque. He stated that he knew Mr Yalcinkaya 'as he had previously worked for [TL] in about 2007'. Yet this was before Mr Tarim had started working for TL. His evidence was that he came to live in the UK in March 2008 but did not start working for TL until 6 April 2010. No further details are provided in Mr Tarim's written evidence as to the

relationship between Mr Yalcinkaya, Mr Tarim and his brother. Yet there was plainly an ongoing relationship or friendship between Mr Yalcinkaya, Mr Tarim and his brother in the period after Mr Yalcinkaya had ceased to work for TL. TL traded extensively with the Company and, at the time of the Company's liquidation, was one of its largest creditors. Even after the Assignment on 12 March 2015, the Company paid TL £15,000 on 24 March 2015, at a time when it was just about to be wound up on the petition of a different supplier. I was taken to no evidence that the Company paid any money *to the petitioner* in the run up to being wound up on 31 March 2015. The fact that the Company chose to pay TL this sum at such a time, after the Company had ceased trading and when it was about to be wound up, strongly supports the conclusion that there was an ongoing special relationship between one or more of those running the Company (on a balance of probabilities, Mr Yalcinkaya) and those running TL, namely, Mr Tarim and his brother.

135. Mr Tarim's evidence of the circumstances in which he and his brother decided to look at purchasing a stall in a market in Uxbridge in 2014 was also opaque. He said that in about 2014, his brother and he started to talk about expansion. His evidence was that TL was doing good business in East London and that he and his brother believed that they could be 'just as successful in West London if we opened up a stand there'. (para 5). I was taken to no evidence of any market research undertaken during the course of these plans for expansion and I consider it legitimate to conclude that there was none. Mr Tarim's evidence was that in the second half of 2014/early 2015, he visited the Western International Market a few times and noted that whilst there were one or two other stands in the market doing good business, such as Jay Star and Fruit of Lebanon, 'generally the business in the market was not particularly good. There were a number of empty stands in the market' (Tarim (1) para 13). This begged the question of why Mr Tarim and his brother would select the Western International Market, rather than any other market, in which to purchase a stall.

136. The timing of Mr Tarim's interest in purchasing a stall in the Western International Market (which on his evidence was in the latter half of 2014) is also telling. On the evidence as a whole, I am satisfied that the timing is far from coincidental. It tallies with the point at which the storm clouds were gathering for the Company; the Company could not pay its suppliers (including TL). One of its suppliers had issued (or was just about to issue) proceedings against the Company, proceedings which would lead to a default judgment a few months later and thereafter a winding up petition. On the evidence as a whole, I am satisfied that by the second half of 2014, the directors knew that the Company was or was likely to become insolvent.

137. There was no documentary evidence before me suggesting that the Company's stall was ever placed on the open market for sale. In the absence of any such evidence, on the evidence as a whole I consider it legitimate to conclude that it was not.

138. Mr Tarim does not state, in terms, in his witness statement, how he came to learn that the Company's stall was up for sale, or how he came to select the Company's stall, rather than any other of the many vacant stalls at the market, to purchase. His evidence, which in this regard I accept, was that the market stalls were all of identical size.

139. At paragraph 6 of his statement, he stated that 'We … started to look around for units in West London which were for sale. Sometime during the second half of 2014, we heard about a unit in the Western International Market in Southall which had been put up for sale [ie the Company's stand]'.

140. There was no evidence that Mr Tarim or his brother had ever considered any other stalls at the market prior to deciding to purchase the Company's stall. In the absence of any such evidence, considered in the context of the evidence as a whole, I consider it legitimate to conclude that they did not. There was no persuasive explanation of why the Company's stand was selected for purchase, rather than any one of the numerous empty stands at the market.

141. Mr Tarim does not state in his witness statement how, or from whom, he and his brother 'heard' that the Company's stall was up for sale. His reluctance to state in his witness statement the source of that information is in my judgment telling. His written evidence is totally silent on the issue. I reject his attempts in oral testimony to suggest that he and his brother heard that the Company's stand was up for sale from other stall-holders at the market. On the evidence I have heard and read, I am satisfied that the Company's stall was not placed on the open market for sale. It was not 'marketed' for sale at all. On the evidence which I have heard and read, I am satisfied on a balance of probabilities that it was Mr Yalcinkaya who told Mr Tarim and his brother that he wished to sell the stall. This was a private arrangement.

142. Mr Tarim claimed that initially he had simply wanted to purchase the market stand and the fixtures and fittings for £30,000 and not 'the business'. In that regard he relied upon a short attendance note of Arlington Crown dated 27 November 2014 (which states 'no business Lease and F & F') and their retainer letter dated 28 November 2014, which confirms their instructions 'in relation to the assignment of the lease'. Whilst such contemporaneous documentation must undoubtedly be taken into account, however, it must be considered in context of the evidence as a whole. On the evidence as a whole, I am satisfied that at all material times Mr Tarim intended the Assignment to include the elements listed at paragraph 131 above which I have found to be comprised in the Company's goodwill, including the Company's customer base. Whether he knew of 'goodwill' by name is irrelevant; he wanted the components listed at paragraph 131 above; there was no other reason for selecting that particular market stand in a market with numerous vacant stands of equal size. The most likely (and in my judgment correct) explanation for Mr Tarim's initial instructions to his solicitors is that he wished to make clear that he was not buying the Company (ie by share sale). On a balance of probabilities I am satisfied that Mr Tarim initially proceeded on the assumption that the assignment of the market stand, coupled with his retainer of key members of the Company's staff, such as Mr Yalcinkaya, to continue working at the stand, would be enough to secure for him, in practice, the other elements of goodwill which he required, such as knowledge and custom base; and that it was only at some point after his initial telephone conversation with Arlington Crown of 27 November 2014 that the need for an assignment of goodwill was recognised and an extra £5000 was agreed to cover it. It was at that stage that the purchase price was increased from £30,000 and £35,000.

143. The global sale price of £35,000 was agreed by 22 January 2015 at the latest. A file note dated 27 November 2014 on Simon Noble's file for the transaction referred to

that price, although it did not in terms confirm that the price was agreed on that date. On 6 January 2015 Simon Noble communicated a sale price of £30,000 to Hounslow in respect of the Lease and the fixtures and fittings, suggesting that the remaining £5000 had been earmarked for goodwill. An email dated 22 January 2015, from Alton & Co, who acted as accountants for the Company and TL, referred to an agreed global price of £35,000 and to a breakdown of that price as follows: £5000 (business), £5000 (Lease) and £25,000 (chattels).

144. Overall, this was an extremely informal arrangement. There was no evidence that any of the usual enquiries ordinarily undertaken when taking an assignment of a lease and purchasing the goodwill of a trading business were undertaken in this case. There were no 'enquiries before contract' in relation to the Lease. There were no local authority searches. No meaningful 'due diligence' was undertaken in respect of the business; Mr Tarim's evidence, which in this regard I accept, was that he spent about 5 minutes looking at the Company's sales figures for the past year on the Company's computer when visiting the stall in the run-up to purchasing it.

145. I was taken to no evidence of any valuations undertaken prior to the Assignment in respect of the Lease, the fixtures and fittings, or the goodwill. In the absence of any such evidence I consider it legitimate to conclude that no such valuations were undertaken.

146. Save for the adjustment of price from £30,000 to £35,000 to cover goodwill, I was taken to no evidence of any meaningful negotiations between the two firms of solicitors, or between the Company and Mr Tarim, over the sale prices agreed for the Lease, the fixtures and fittings, and the goodwill respectively; in the absence of any such evidence, I consider it legitimate to conclude that there were none.

147. The intended speed of the transaction is also significant. As confirmed in Simon Noble's email to Hounslow dated 27 November 2014, the parties had originally intended to compete the Assignment 'within the next two weeks'; it was only as a result of Hounslow's concerns as to the evidence produced by Mr Tarim of his ability to pay the rent (by then £45,000 per annum) that the transaction took several months. The tone of the correspondence between the Company's solicitors and Hounslow became increasingly urgent as time went on (see by way of example emails from Simon Noble to Hounslow dated 21 January 2015 and 5 February 2015, around the time that default judgment was entered by NV Vergro SA against the Company on 28 January 2015, and generally the number of emails headed 'very urgent' thereafter); reading between the lines, it is clear (and I so find) that the directors knew that they were in a race against time to get the transaction completed before the Company was wound up. The ostensible reason given for the urgency in correspondence (that one of the directors was ill and could no longer manage the business) was plainly not the real reason; Mr Akhtar had only been a director for a few months and was not essential to the business: this much is apparent from the fact that after the Assignment, Mr Yalcinkaya carried on running the business on a day to day basis with another former employee of the Company, Mr Huseyin, achieving very similar trading results for the first year or two to those previously achieved by the Company. I consider it legitimate to conclude from this that Mr Yalcinkaya had not been rendered incapable of managing the business by any medical condition.

148. Mr Tarim's involvement with the business post-assignment was minimal. At paragraph 5 of his statement, Mr Tarim had stated that 'My brother and I decided that once the stand in West London was up and running, I would be responsible for running it. To have better control of the business my brother and I therefore decided that the West London business should be purchased in my name.' (para 5). Yet at paragraph 22, he stated: 'After the purchase I visited the stand only three or four times, and left the job of running the business to others. I did not spend any real-time working for [TWL] after the transfer by [the Company], because of my commitments to my brother's company [TL]'. In oral testimony Mr Tarim explained that his brother, the sole director of TL, suffered from debilitating manic depression for a few months running from the spring of each year and that, when he did suffer such bouts of depression, Mr Tarim would have to take over running TL. This begs the question of how Mr Tarim and his brother could possibly have thought that Mr Tarim could be based in West London running a new stall in the spring of 2015. He was needed in East London. I reject Mr Tarim's oral evidence that it was only after purchasing the stand that he realised that he would not have time to run the business in West London. On the evidence which I have heard and read, I am satisfied that the plan all along was for Mr Yalcinkaya and one or more former employees of the Company known to Mr Tarim and his brother to continue to run the business on a day to day basis following the Assignment.

149. A further factor which I take into account in considering whether the sale was at arms-length are the unconventional arrangements immediately after completion. Completion took place on 12 March 2015, yet the Company stayed in occupation and continued trading until TWL was up and running on 21 March 2015. The business did not miss a beat. The Company left stock behind for no consideration, which TWL then sold.

150. For all of these reasons, I am satisfied that the sale was not an arms-length transaction.

(3) Was the sale at an undervalue

151. The Applicants do not raise a positive case of undervalue in relation to the Lease or the fixtures and fittings. They do however maintain that the Goodwill Assignment was at an undervalue. Mr Tarim and TWL dispute this.

152. Whilst it is clear on the evidence that I have heard and read that the Company assets transferred to Mr Tarim included more than goodwill as defined in IVS 210, the 'undervalue' case, as presented to me at trial, focussed simply on the value of the goodwill of the Company's business, as defined in IVS 210.

153. I find this curious. The order dated 1 May 2020 initially granting permission for a single joint expert, and the subsequent order dated 22 March 2021 granting permission for the parties each to instruct separate experts, each provided for evidence on 'the sale value of the business and goodwill' of the Company. Yet the following then seems to have occurred:

(1) Mr Brewer, the expert initially instructed as a single joint expert, was by his letter of instruction dated 3 July 2020 instructed to produce an expert report 'on the sale

value of the business and goodwill of Brothers Produce Limited (together forming 'the Goodwill')…' ;

(2) In what is described in Mr Rose's report dated 17 June 2021 as his 'letter of engagement' dated 25 May 2021, as attached at Appendix 1 to his report, Mr Rose is said to have been instructed to value 'goodwill'. Whilst at times in his report, Mr Rose makes reference to 'business' rather than 'goodwill', in the experts' joint statement he confirms that he has used the terms 'goodwill' and 'business' interchangeably. Reading Mr Rose's report as a whole, together with the summary of his responses set out in the joint statement, it is clear that he has valued the goodwill of the business, rather than the business as a whole (see, by way of example, point 3 of the joint statement);

(3) Whilst Mr Aslin's letter of instruction was not included in the trial bundles, it is clear from paragraph 1.12 of his report (and his report read as a whole) that he was instructed to value 'goodwill' only.

154. Overall, therefore, as far as the issue of 'undervalue' is concerned, it seems that there has been a narrowing of focus from the Applicants' opening position on commencement of these proceedings. Having considered this aspect with some care, I have come to the conclusion that I must confine myself to the Applicant's narrowed case on undervalue, as presented to me, and thus focus on the value of the goodwill of the Company's business, as defined in IVS 210 para 20.6.

155. By their joint statement, Mr Rose and Mr Aslin are agreed that the components of goodwill (as so defined) may include those listed at paragraph 5.2.2 of Mr Aslin's report. They are also agreed that the elements of goodwill actually acquired by Mr Tarim/TWL from the Company are a matter of factual rather than expert evidence. I have summarised my findings on this issue at paragraph 131 of this judgment. I shall proceed on the basis of those findings.

The Brewer Report

156. Mr Brewer assessed the value of 'the Goodwill' (as defined in his letter of instruction) in March 2015 at £1,397,000. He did so by applying a multiple of 3 to what he considered to be the Company's maintainable earnings (or EBITDA), basing himself largely on the Company's management accounts for the year ended 31 March 2014 (which suggested a profit figure substantially higher than the profit figure in the filed accounts). He then deducted the book value of the Lease and Stock to arrive at a figure of £1,397,000.

157. By their joint statement, Mr Aslin and Mr Rose have since agreed that the Company's management accounts for the year ending 31 March 2014 (on which the Brewer valuation was based) are unreliable. On the evidence which I have heard and read, I am satisfied that Mr Aslin and Mr Rose are correct to conclude that the Company's management accounts for the year ended 31 March 2014 were unreliable.

158. In the light of that consensus (along with other criticisms raised by Mr Aslin of the Brewer Report), Mr Salis invited me to disregard the Brewer Report in its entirety. I decline that invitation. The Brewer Report remains expert evidence directed by this court. It is included in the trial bundles agreed by the parties. It is referred to by Mr

Aslin in his report and is referred to by both experts in their joint statement. Whilst in my judgment Mr Brewer's ultimate figure of £1,397,000 for Goodwill must be rejected, on the ground that it is based on figures drawn from unreliable management accounts, I accept Ms Julian's submission that Mr Brewer's choice of an income-based method of valuation (and his choice of a multiple of 3) remain relevant when considering the approaches adopted by Mr Aslin and Mr Rose in their respective reports.

Mr Rose

159. On 17 June 2021, Mr Daniel Rose of Carter Backer Winter LLP served his valuation report on behalf of the Applicants. In broad summary he concluded as follows:

(1) The Company should be valued on the basis of its past financial performance, the traditional method for valuing a trading business. The Company's financial difficulties on the date of the Assignment did not necessarily mean that its value was negligible.

(2) The EBITDA ratio method is an appropriate method of valuation, as it is focused on the Company's earnings. Other methods, such as asset valuation, dividend yield valuation, discounted future earnings valuation and turnover multiple valuation, are not appropriate as a method for valuing the Company on the date of the Assignment.

(3) It is not possible to obtain a price/earnings ratio figure by reference to industry standards, as insufficient information is known about the Company. On the basis of the trading performance, 2.0 to 2.5 is considered appropriate.

(4) In the absence of any other reliable accounting documentation, the movements of reserves shown in the balance sheets of the statutory accounts filed with Companies House in the years 2012 to 2014 have been used as the basis for calculating annual profit. On this basis, the average profit figure for these years was £202,000. The Company is assumed to have generated similar profit in the year 2014-2015 (for which no statutory accounts were available). Applying the multiplier of 2.0 to 2.5 to the £202,000 figure results in a valuation of £400,000 to £500,000.

Mr Aslin

160. On 10 June 2021, Mr Tom Aslin of Moore Kingston Smith LLP served his valuation report on behalf of TWL and Mr Tarim. In broad summary, he concluded as follows:

(1) It would not be appropriate to use the income-based method for the purposes of valuing the Company's going concern status, as the petition and any financial difficulties would be of concern to any potential buyer. The equitable value (the estimated transfer value between identified and willing parties that reflected their interests) or the liquidation value (the value of the business if sold on a piecemeal basis) was more appropriate.

(2) If Mr Tarim's evidence is correct, none of the usual elements of goodwill, in the sense of non-tangible assets which contribute to a Company's ability to continue its business, were transferred, other than two out of the seven or eight employees of the Company, one of whom was later dismissed.

(3) If Mr Tarim's evidence is correct, the transaction took place at arms- length. On this basis, the price actually paid would be the best indicator of the market value of the goodwill, if this method of valuation is to be used.

(4) In view of the Company's financial difficulties, there would be no economic benefit to be derived from its assets, so its liquidation value would be nil.

(5) If Mr Tarim had been aware of the Company's financial difficulties, he might have negotiated the purchase price for the goodwill downwards. The equitable value of the goodwill is therefore between nil and the £5000 actually paid.

The Experts' Joint Statement

161. The Joint Statement, prepared by Mr Rose and Mr Aslin, is dated 15 July 2021. The matters agreed include the following:

(1) The Company's management accounts are unreliable.

(2) The IVS definition of goodwill, as set out at paragraph 3.2.17 of Mr Aslin's report.

(3) The components of goodwill will include, but may not be limited to, those set out at paragraph 5.2.2 of Mr Aslin's report.

(4) The elements of goodwill actually acquired in this case, as discussed at section 5.2 of Mr Aslin's report, are a matter of factual rather than expert evidence.

(5) The definitions of the valuation bases as set out in paragraph 4 of Mr Aslin's report.

(6) Where a transaction takes place at arms-length between a willing buyer and a willing seller, after proper marketing on the open market, with both parties acting knowledgeably, prudently and without compulsion, the price actually obtained is usually the most reliable indicator of market value. Where any of these factors is absent, the price actually obtained may not be a reliable measure but may still be informative of value.

(7) Whether there was any relationship between the directors and shareholders of the Company and Mr Tarim/TWL is a matter of factual rather than expert evidence.

(8) The EBITDA multiple method is the most commonly used method in the valuation community for valuing a business which is a going concern.

(9) One would not normally use hindsight in a valuation exercise; information only up to and including the valuation date would normally be used in valuing a business. However in the circumstances of this case, where the accounting information available to the experts on the Company was extremely limited, TWL's financial statements provide a 'further reference point'. That said, TWL's results may not be comparable to the Company's, as the two are different entities under different ownership and control.

162. The matters not agreed include the following:

(1) Mr Rose considers that the open market value is the most appropriate basis for a valuation. The circumstances surrounding the sale of the goodwill are unknown and the motivations of both buyer and seller are equally unknown. The Company's business continued to trade until TWL took over trading at the stall. Mr Aslin believes that as the Company was subject to a winding up petition at the time of the Assignment and went into compulsory liquidation soon afterwards, the liquidation or equitable bases are the most appropriate methods of valuing the goodwill in the present case.

(2) Mr Aslin believes that the material used for the multiple EBITDA valuation is severely limited, as it is based on movements in the profit figures recorded in the Company's statutory abbreviated accounts. There is no information as to how the profits are calculated. He also considers that Mr Rose's calculations are based on a number of unsupported assumptions summarised at paragraph 1.7 of the Rose report, in relation to the business relationships between the Company and suppliers or customers, in relation to whether any dividends have been drawn or whether the directors have been paid a salary, in relation to whether the movement in reserves correctly reflects profits and in relation to whether the Assignment would be subject to any anticompetition agreement, all of which could have a significant impact on the market value of the business. Mr Rose maintains that the use of the EBITDA basis and multiple in his report is reflective of the unknown elements as set out and stresses that the EBITDA basis is 'commonplace' when valuing the goodwill of a company.

(3) Mr Aslin believes that if the EBITDA multiplier valuation method is to be used, consideration needs to be given to the value of net assets, as the valuation is of goodwill alone. For this reason, the net assets figure of £440,000, which appears in the Company's last financial statements, should be deducted from any figure reached using the multiplier valuation method. Mr Rose believes that no adjustment in respect of net assets needs to be made, as he has already adjusted the multiplier.

(4) There is disagreement in relation to the extent of the relationship between the Company and Mr Tarim prior to the assignment, but both agree this is a question of fact.

(5) There is disagreement as to the elements of goodwill transferred. Mr Rose refers to the elements of goodwill set out in the deed of assignment of goodwill. Mr Aslin refers to Mr Tarim's witness statement, in which Mr Tarim claims that the only element of goodwill utilised by TWL was the retention of two of the Company's employees, one of whom was later dismissed. Both experts agree that the question of what elements of goodwill were acquired as part of the sale is a question of fact.

Discussion and Conclusions on Valuation

163. Subject to certain caveats addressed at paragraph 187-188 below, I accept Mr Rose's approach to the *basis* of valuation over that of Mr Aslin. This valuation related to the goodwill of a trading business consistently making six figure profits. In my judgment the goodwill of the business should be valued on the basis of past financial performance. In my judgment the EBITDA ratio method is the appropriate method of valuation.

164. Two out of three of the experts instructed to produce valuation reports in these proceedings have adopted the EBITDA ratio method. In their joint statement, Mr Rose and Mr Aslin agree that the EBITDA method is the most common method for valuing a business as a going concern.

165. The Company was producing a steady six figure profit each year. None of the accounts in evidence showed it running at a loss. As put by Mr Rose in the experts' joint statement: 'It would seem unlikely that the goodwill of a company who was reporting continual profits in its statutory accounts for a few years previous to the goodwill sale would not be valued at something higher than that represented in Mr Aslin's report.'. The goodwill of the business was assigned to Mr Tarim, who then, trading through TWL, also produced steady six figure profit at a similar level for at least the first two years of trading. Mr Aslin accepted that there was some continuity. Both experts ultimately agreed that TWL's profit figures were a useful 'sense-check'. As Ms Julian put it in closing, 'if you bought a business for £5000 and immediately started turning a profit of over a hundred thousand pounds, you would think you had done a very good deal'.

166. I reject the contention that the best indicator of the value of goodwill in this case is the price actually paid. As I have found, this was not a sale on the open market after proper marketing and it was not a sale at arm's length.

167. I also reject Mr Aslin's contention that the value of goodwill should be assessed on the liquidation basis. The liquidation basis is not appropriate for valuing the goodwill of a trading profitable business. The fact that a company carrying on a given business is cash-flow insolvent and/or about to go into a formal insolvency process does not lead inexorably to the conclusion that its assets are worthless. In this regard I refer to the components listed at paragraph 5.2.2 of Mr Aslin's report which both Mr Rose and Mr Aslin agree may form part of the goodwill of a business. In the present case, I have found that a number of such components were included in the goodwill assigned to Mr Tarim.

168. I further reject Mr Aslin's contention that the value of goodwill should be assessed on the equitable basis. Again, Mr Aslin sought to justify use of the equitable basis rather than a more traditional method of valuing a trading business on the grounds that the Company was subject to a winding up petition at the time of the Assignment and went into compulsory liquidation shortly thereafter. I am not persuaded by his reasoning on this issue. As Ms Julian put it in closing, Mr Aslin was 'blinkered by the petition'. Again, Mr Aslin's approach ignored the fact that the assets of a company can have value even if the company itself is facing liquidation.

169. Mr Aslin's valuation of the goodwill at between £0 and £5000 was also based on a number of premises which I have found to be false. He proceeded on the basis that the sale of the goodwill was an arms-length sale, when it was not. This led him to place undue weight on the price paid in what he described as a 'recent transaction'. Mr Aslin also relied unquestioningly on the description set out in Mr Tarim's witness statement of how the wholesale fruit and vegetable trade operated and its dependence on footfall on any given day, when I have found Mr Tarim's account to be materially inaccurate. Mr Aslin also proceeded on the footing that none of the elements of goodwill summarised at paragraph 3.2.17 of his report passed on the sale, save for

two former employees of the Company. In the light of my findings as summarised at paragraph 131 above, this was incorrect. In cross-examination, Mr Aslin stated that 'if I assume that elements of goodwill include trading name and repeat customers go to that name, IT system retained and used, supplier relationships – I accept that I would need to look at it differently.' He went on to state that if the 'recent transaction' was arms-length, he would still have regard to the recent transaction when arriving at a valuation, but if the recent transaction was not arms-length, he would have adopted the EBITDA basis of valuation.

170. For all these reasons, I reject the equitable and liquidation bases of valuation relied on in Mr Aslin's report. I further reject Mr Aslin's valuation of the goodwill at between £0 and £5000, as (bases aside) it is based on a number of premises which I have found to be false.

171. On the evidence which I have heard and read, I am satisfied that the appropriate basis of valuation of the goodwill is the EBITDA method.

172. Having established the appropriate basis of valuation, I shall now turn to consider the other criticisms raised by Mr Aslin in his report in relation to Mr Rose's valuation.

173. To give context to the points raised, I set out the factors and assumptions summarised by Mr Rose at section 1.7 of his report. For ease of reference, I have put them in a slightly different order to the order in which they appeared in his report. They were as follows:

(1) 'the movement in reserves is equal to the profits and the only add backs required to define the adjusted EBITDA are those relating to depreciation and tax';

(2) 'the director/shareholder has withdrawn a market salary or dividend, which is reflected within the movement of the reserves';

(3) 'the Company's contractual arrangements with both customers and suppliers are unknown and therefore based on the assumption they are at an arms length basis with no fixed term clauses';

(4) 'whether [the Company] is supplied by a related company, as TWL is, is unknown'; and

(5) 'a sale of the business would be subject to .. standard anti-competition provisions on the directors/shareholders behalf.'

174. By the Joint Statement, Mr Aslin challenged (1) and (2) on the basis that the material used for the multiple EBITDA valuation was 'extremely limited'; it was based on movements in the profit figures recorded in the Company's statutory abbreviated accounts and there was no information, such as a profit and loss account, to demonstrate how the profits had been calculated.

175. In my judgment, these concerns are over-stated. Salary and dividend are conventionally deducted before calculation of retained profit. Mr Aslin himself accepted (when comparing the reliability of management and statutory accounts at paragraph 3.2.10 of his report) that

> 'the financial statements of a company to its year end are preferable to management accounts for valuation purposes, for (inter alia) the following reasons:
>
> a. The financial statements are more reliable as, according to section 393 of the Companies Act 2006, the directors of a company are not permitted to approve the financial statements unless they are satisfied that the financial statements present a true and fair view….
>
> b. Management accounts … are not required to adhere to any financial reporting standards, unlike financial statements.
>
> c. The financial statements will include a number of year end adjustments ..'

176. At paragraphs 3.2.12 to 3.2.14, Mr Aslin continues:

> 3.2.12 …. Abbreviated accounts do not provide an annual profit and loss account, and so do not include details of the Company's trading results. They do, however, include the balance sheet, which includes the profit and loss reserve, which is the cumulative net profit achieved by a company since incorporation (and after payment of any dividends, as these are distributions of profit, rather than an expense).
>
> 3.2.13 By looking at the movement in the profit and loss reserve from one year to the next one can thereby ascertain the profit achieved and retained each year.
>
> 3.2.14 the profit and loss reserve balances at FY12, FY13 and FY14 were £114k, £255k and £440k, respectively. Accordingly the retained profits for FY13 and FY14 were £141k and £185k respectively…'

177. I also note that the statutory abbreviated accounts for these years were professionally prepared for the Company by Alton & Co, a firm of chartered accountants. In this regard I remind myself of the guidance given in Burnden Holdings (UK) Ltd v Fielding [2019] EWHC 1566 (Ch) at [201] and [202], where Zacaroli J, referring to opinions of Lord Hoffmann and Lady Arden, stated:

> '[201] …. The earlier opinions (which Mr Moore QC described as having "almost iconic status") concluded that in determining whether accounts satisfied the legal requirements that they show a true and fair view, the Courts relies heavily upon the ordinary practices of professional accountants and that compliance with generally accepted accounting principles would be prima facie evidence of satisfaction with the standard (and vice versa). The earlier opinions also concluded that reasonable businessmen and accountants differed over the degree of accuracy or comprehensiveness, and that there may

> be more than one view of a financial position, any of which could be described as true and fair.'

178. I was taken to no evidence to suggest that any of the abbreviated statutory accounts prepared by Alton & Co for the Company do not comply with the ordinary practices of professional accountants. On the evidence as a whole I consider it legitimate to conclude that the Company's statutory abbreviated accounts for the years ending 2012, 2013 and 2014 present a 'true and fair view'. I so find.

179. In my judgment, it was legitimate for Mr Rose to proceed on the basis that the movement in reserves was equal to the adjusted EBITDA and that the only significant add backs were the depreciation charge present in the statutory accounts and the corporation tax per annum.

180. Mr Aslin also challenged assumptions (3) and (4), namely:

(3) 'the Company's contractual arrangements with both customers and suppliers are unknown and therefore based on the assumption they are at an arms length basis with no fixed term clauses'; and

(4) 'whether [the Company] is supplied by a related company, as TWL is, is unknown',

contending that these assumptions undermined the reliability and/or accuracy of Mr Rose's conclusions. I reject this criticism. Assumption (4) is essentially part and parcel of assumption (3). In my judgment in the absence of any evidence to the contrary, it was perfectly legitimate for Mr Rose to proceed on the basis that the Company's contractual arrangements with customers and suppliers were arms-length and with no fixed term clauses. I would add that I was taken to no evidence suggesting that the Company's contractual arrangements with customers and suppliers were anything other than arms length and with no fixed term clauses.

181. Moreover assumption (5), that 'a sale of the business would be subject to … standard anti-competition provisions', was not only reasonable and legitimate but demonstrably correct on the evidence; both the 2015 Agreement and the Goodwill Assignment contained standard anti-competition provisions.

182. By the conclusion of the trial, it was accepted by Counsel for Mr Tarim and TWL that Mr Rose's calculation of the average annualised profits to 31 March 2014 (which were assumed to be the same to 12 March 2015) as £202,000 was 'about right'.

183. By the conclusion of the trial, the multiple of 2.0-2.5 adopted by Mr Rose for the purposes of his valuation was not the subject of serious dispute either. In cross examination, Mr Aslin stated that 2.5 was 'a reasonable starting point', adding that an appropriate multiple 'could be 2 or 3'. At a later stage in cross-examination Mr Aslin accepted that a multiple of 2 or 2.5 was 'probably about right', adding '2.5 doesn't seem too far off the mark to me'. In this regard I note that Mr Brewer had used a multiple of 3.

184. In cross-examination Mr Rose gave evidence that his starting point was 4, from his experience of multipliers used for 'other businesses in similar industries' where 'net

working capital would move with'. He went on to explain that as in this case no assets were 'moving with' (he was valuing goodwill only), he had reduced the multiplier to a conservative 2-2.5.

185. In my judgment, a 'starting point' of 4 for a relatively new company based on three years' trading figures was too high, even allowing for the strength and stability of the Company's profits. On the evidence as a whole, I am satisfied that the appropriate multiplier is 2.5, at the higher of the range ultimately employed by Mr Rose.

186. Applying a multiple of 2.5 to the average annualised profits figure of £202,000 results in a figure of £505,000.

187. In my judgment however Mr Aslin is correct in stating that a deduction in respect of net assets is then required against the figure arrived at on an EBITDA multiple basis. This is because the figure of £505,000 represents the value of the business as a whole, rather than the value of the goodwill as defined in IVS paragraph 20.6. Mr Rose maintained in the joint statement and in cross-examination that he had already adjusted for this by reducing the multiple. As noted by Mr Aslin, however, this is an unconventional use of the multiple. That aside, as I have found, the 'starting point' multiple of 4 was too high for a relatively new company; in my judgment, the appropriate multiple was 2.5. It follows that a deduction in respect of net assets must still be made in order to reflect the fact that the valuation is of goodwill as defined in IVS paragraph 20.6 rather than of the business as a whole.

188. The figure given for net assets in the abbreviated balance sheet forming part of the statutory abbreviated accounts for the Company for the year ended 31 March 2014 is £439,755. This includes fixed tangible assets of £50,402, which it appears to be common ground comprised the book value of the Lease and attendant Fixtures and Fittings (see Mr Aslin's report at paragraph 3.2.16, referring to Mr Brewer's report at paragraph 8.3 and 8.4). The price actually paid for the Lease and Fixtures and Fittings respectively was £5,000 and £25,000; a total of £30,000. The Applicants have not alleged that the Lease and the Fixtures and Fittings were sold at an undervalue. In the absence of any such challenge, in my judgment, for present purposes, the court should proceed on the basis that the Lease and the Fixtures and Fittings were sold at market value. On that basis the net assets figure falls to be adjusted by the sum of £20,402, bringing the net asset figure down to £419,353. Absent any further adjustments which the parties may invite me to make following receipt of this judgment, the value of goodwill as at March 2015 was therefore £85,647 (£505,000 minus £419,353).

189. It will be noted that even absent the adjustment of £20,402, the value of goodwill would stand at £65,245 (£505,000 minus £439,755); considerably more than £5000.

190. For all of these reasons, I find that the transfer of goodwill was at an undervalue.

(4) Was the transfer in breach of the duties owed by the directors to the Company?

191. In the light of my earlier findings, I can deal with this issue fairly briefly. Both directors knew of and participated in the Assignment; Mr Akhtar instructed the solicitors and signed off the transactional documentation, whilst Mr Yalcinkaya dealt

with Mr Tarim. As I have found, both directors knew by the second half of 2014 that the Company was or was likely to become insolvent. On the evidence which I have heard and read, I am satisfied on a balance of probabilities that by the time of the Assignment, both directors knew that a substantial judgment had been entered against the Company, that a winding up petition had been presented and that liquidation was imminent. Section 172(3) of the Companies Act 2006 is therefore engaged.

192. In my judgment, the directors plainly acted in breach of their duties to the creditors of the Company as a whole in selling off assets of the Company, at a price which they must have known to be an undervalue, at a time when they knew that the Company was insolvent, knew that a winding up petition had been presented and knew that liquidation was imminent. In the absence of any evidence suggesting that the directors considered the interests of the Company's creditors as a whole when entering into the Assignment, I consider it legitimate to conclude that they did not. It follows that for the purposes of s.172 CA 2006, the objective test is engaged: Re HLC Environmental Projects at [92]. The court must ask itself whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the creditors as a whole. The answer is plainly no. I find both directors acted in breach of s.172(3) CA 2006. I also find that both directors used their powers for improper purposes, contrary to s.171 CA 2006. Accordingly, the claim in misfeasance brought against them is made out.

(5) What was the state of Mr Tarim's knowledge at the date of the transfer

193. By his witness statement and in oral testimony, Mr Tarim claimed that he did not know at the time of the Assignment that he was purchasing the goodwill of the Company. I reject his evidence on this issue. It was not pleaded that Mr Tarim didn't know that he was buying the goodwill. It was not mentioned in correspondence. In 2020, Mr Tarim's solicitor in these proceedings, Mr Ahsak, filed a witness statement stating, on instruction, that Mr Tarim did know that he bought the goodwill but just thought that he had paid the right price for it (Ahsak (1) 11 December 2020 paragraph 6). The passage merits quoting. By this stage Mr Ahsak had been instructed by Mr Tarim on the case for about a year:

> '6. Mr Tarim's instructions in relation to the business of the company are that when he originally decided to enter into the transactions which form the subject matter of these proceedings, he was principally interested in acquiring the lease of the premises from which the company had been trading and the fixtures and fittings attached to the premises: as far as he was concerned, the business being carried on by the company did not have any significant value, and the requirement that he purchased the goodwill of the business of the company together with the lease and the fixtures and fittings was something upon which the company was insisting. He did not object to paying the extra £5000 which the company was asking for as the consideration for the goodwill of the business, and believed that the price of £35,000 which he was being asked to pay for the assets, consisting of £5000 for the transfer of the lease, £25,000

> for the fixtures and fittings and £5000 for the goodwill of the business being carried on by the company, was a fair price'

194. I would add that Mr Tarim's own conveyancing solicitors, Arlington Crown Solicitors Limited, drafted the Goodwill Assignment. It is inconceivable that they would have done so without instructions.

195. Moreover this was not, as Mr Salis sought to suggest, simply a mis-recollection due to the passage of time. Mr Tarim went on to claim (at paragraph 32 of his witness statement) that when he found out that he had purchased the goodwill (which in context he claimed to be in late 2019), he contacted his previous solicitor at Arlington Crown Solicitors Limited and that his solicitor had agreed 'that there was a mistake and that I had only wanted to purchase the lease and the fixtures and fittings, and not the business'. As put by Ms Julian in closing, it is inconceivable that Mr Tarim's own solicitors were 'on a frolic', drafting a deed of assignment of goodwill without instructions to do so. It is also inconceivable that Arlington Crown would later tell Mr Tarim in late 2019 that they had drafted up a deed of assignment of goodwill *by mistake*. On the evidence as a whole, I am satisfied that this was a further untruth on the part of Mr Tarim – and an untruth about fairly recent events (late 2019) which could not be airbrushed out as simply a misrecollection due to the passage of time.

196. In closing Mr Salis accepted that it was 'obvious' that Mr Tarim must have known of the assignment of goodwill at the time. He submitted however the failings of Mr Tarim's evidence on this issue were of 'no real relevance in assessing culpability'. I reject that submission. Mr Tarim was clearly seeking to distance himself from the assignment of goodwill. The untruths he told around this issue had a consistency to them. I have already mentioned the alleged conversation with Arlington Crown in late 2019. In oral testimony Mr Tarim also initially denied that the assets assigned to him had included the Company's laptop and desk top computers, stating 'as I didn't get the business, I was not interested in their system'. He later had to admit that he *had* taken an assignment of the Company's computers.

197. The question is why Mr Tarim was so keen to distance himself from a purchase of the goodwill. On the evidence which I have heard and read, I am satisfied that he sought to distance himself from a purchase of the goodwill because he knew by the date of the Assignment that the price agreed for goodwill was considerably less than market value and that the Company was insolvent and about to go into liquidation.

198. In cross-examination, he stated that he knew that the Company was not doing well. He said that he 'knew some of the suppliers' and knew that 'they were not keeping up payments on time'. He added 'If a company is not paying on time, there is a problem with the company.' He said that when he visited the market stand in the lead-up to the Assignment, 'they said we are going to close the business'. He said that 'they were already in a bad situation. I could see that'. Later in cross-examination he stated 'Erdal Yalcinkaya told me that the company had too much on credit and could not collect money. Don't remember when but it was around time I was trying to buy the place'

199. His pleaded reliance upon provisions of the 2015 Agreement warranting solvency (et al) fell apart in cross examination when he admitted that he hadn't read the

transactional documentation and was not aware of these provisions at the time of the Assignment.

200. When it was put to him that he always knew that he had acquired more than just the market stand, he responded: 'if I had known, I wouldn't have signed the document. What happened later on is my solicitor's fault' adding 'how can you transfer goodwill of a company in liquidation?'

201. At a later stage in cross examination, paragraph 6 of Mr Ahsak's statement was read to him, Ms Julian putting:

> "Your solicitor doesn't say: 'Mr Tarim didn't know until he instructed me that he purchased the goodwill'"

202. My note of Mr Tarim's response reads:

'A: didn't know it was for the goodwill. Learned from Mr Ahsak. Learned that company had gone into liquidation in February 2015, so why would I buy the business?'

203. It was at about this stage of the cross-examination that Mr Salis interrupted, in what appeared to be an inappropriate attempt to steer Mr Tarim away from any damaging admissions, suggesting that Mr Tarim had prefaced his remark with an 'if'. Mr Tarim then sought to 'correct' himself, asserting that he had found out that the Company had gone into liquidation after he spoke to Norri Ahsak (in context late 2019, which I find was untrue), adding '*if* I'd known I wouldn't have gone close to it' (emphasis added)

204. Even if the testimony summarised at paragraphs 202 to 203 above is left out of account, however (and in this regard I should say that Mr Salis's note of the responses does not accord exactly with mine), on the evidence (bar paragraphs 202-3) as a whole, I am satisfied on a balance of probabilities that Mr Tarim knew in February 2015 (or at the very latest early March 2015, prior to the Assignment) that a winding up petition had been presented against the Company.

205. Mr Tarim admitted that Alton & Co, (who acted as the accountants of both the Company and TL and were known to Mr Tarim), had warned him not to buy the business. He said that 'Alton did tell me not to buy the business because it was not in a good position'. When I asked him whether he had told Arlington Crown that the Company was not in a good way, he responded:

> 'A: yes. I got permission from Alton and then told the solicitors. I knew from Alton … before buying place, Alton told me not to buy it as it would be a headache'.

206. He then gave evidence that when he spoke to his solicitors, Arlington Crown, about it, they had told him that the purchase 'would not cause any trouble' because he was 'just buying the stand'. I reject Mr Tarim's evidence on this issue. Arlington Crown knew full well that Mr Tarim was buying more than the stand; it was they who drafted the Goodwill Assignment. Moreover, the advice that Arlington Crown is said to have given makes no sense. On the evidence as a whole, I am satisfied that Mr Tarim has

fabricated the advice he claims to have received in a conversation with Arlington Crown prior to the Assignment, in an attempt to lay the blame on them.

207. In re-examination, Mr Tarim was again asked when he first heard about the winding up petition. He said that it was 'probably from suppliers we work with' but that he did not remember the exact date. When asked 'which year', he replied 'must be around 2015, March or February'.

208. Mr Tarim was adamant that Mr Yalcinkaya had not mentioned the petition to him. He said that they had 'never talked about it'. I reject his evidence on this issue. For reasons already explored, it is clear that the Assignment was not at arms-length and that the timing of Mr Tarim's interest in the Western International Market was far from coincidental. I refer to paragraphs 133-150 above. On the evidence as a whole, I am satisfied that Mr Tarim knew the petition was coming long before it was presented.

209. On the evidence that I have heard and read, I am further satisfied that Mr Tarim knew in February 2015 (or at any rate, prior to the Assignment) that the petition had been presented. On a balance of probabilities, I am satisfied that Mr Yalcinkaya told him. Mr Tarim mentioned February 2015 not once, but twice, in unguarded moments in his oral testimony. Again, I also refer to paragraphs 133-150 above.

210. I am further satisfied that Mr Tarim knew of the winding up order at or around the time that it was made. I reject Mr Tarim's evidence that he was unaware of the winding up order until much later. A sealed copy of the winding up order was sent to the market stand as the registered office of the Company. Even if Mr Tarim did, as he suggested in evidence, simply throw away any correspondence addressed to the Company without reading it, Mr Yalcinkaya continued to work at the market stand after the Assignment; in my judgment it is inconceivable that Mr Yalcinkaya would not have mentioned the fact that a winding up order had been made. Moreover, TL, for whom Mr Tarim worked, was one of the Company's largest creditors: and Mr Tarim's evidence was that he knew a number of the Company's other suppliers owed money by the Company. I also refer to paragraphs 133-150 above. Taking all such matters into account, it is in my judgment inconceivable that Mr Tarim would not have known of the winding up order at or around the time that it was made. On the evidence as a whole, I am satisfied that he did.

211. For all these reasons, on the evidence as a whole I am satisfied that Mr Tarim knew prior to the Assignment (i) that the Company was insolvent (ii) that a winding up petition had been presented against the Company and (iii) that liquidation of the Company was imminent. I am further satisfied that Mr Tarim knew of the winding up order at or around the date that it was made. I so find.

212. On the evidence as a whole, I am also satisfied that at all material times both prior to and at the time of the Assignment, Mr Tarim knew that the price of £5000 agreed for goodwill was materially less than market value. Again I refer to paragraphs 133-150 above. By the time of the Assignment, Mr Tarim was an experienced businessman. On the evidence which I have heard and read, I am satisfied that the reason that he did not trouble himself with any meaningful due diligence or obtain a professional valuation of goodwill before agreeing a price was that he knew that on any footing,

the assets to be transferred on the goodwill assignment (which included the business name and customer list for a business consistently turning a six figure profit) were worth considerably more than he was paying for them.

213. Mr Salis urged against this conclusion, pointing to the fact that Mr Aslin, an expert valuer, had valued the goodwill at between £0-£5,000. Mr Aslin's valuation, however, does not assist Mr Tarim in this regard, as it is based on a number of premises introduced by Mr Tarim in his witness statement which I have found to be false, including several that I am satisfied that Mr Tarim knew to be false, such as the premise that (i) there is no such thing as an established customer base in the wholesale fruit and vegetable trade (ii) the Company had no established customer base (iii) no customer or supplier databases were included as part of the assignment of goodwill (iv) the Company's business name had no value.

214. Mr Salis also sought to rely upon the breakdown of the sale price prepared by Alton & Co. In my judgment little turns on this. Alton & Co were not instructed by Mr Tarim or TWL to advise them on value and, by the time that the breakdown was prepared, a global value of £35,000 had already been agreed. I also take into account the fact that Alton & Co actively warned Mr Tarim not to go ahead with the purchase.

215. Overall, on the evidence which I have heard and read, I am satisfied that at all material times prior to and at the time of the Assignment, Mr Tarim had actual knowledge that in selling the Company's goodwill to him (i) at an undervalue (ii) after presentation of a winding up petition (iii) at a time when the Company was insolvent and liquidation was imminent, the directors were exercising their powers for an improper purpose and were not acting in the best interests of the Company's creditors as a whole.

216. Moreover even if I am wrong and Mr Tarim did not have *actual* knowledge that the directors were exercising their powers for an improper purpose and were not acting in the best interests of the Company's creditors as a whole, on the evidence which I have heard and read, I am satisfied that Mr Tarim had *constructive* knowledge of the same by (i) wilfully shutting his eyes to the obvious (widely known cashflow difficulties, haste, Mr Yalcinkaya's relationship with TL, the Company's relationship with TL, no proper marketing, low price, no valuation, transfer of the Company's computers/ customer and supplier databases, Mr Yalcinkaya's wish to continue working at the stand) (ii) wilfully and recklessly failing to make such enquiries as an honest and reasonable man would make (company search, professional valuation, legal advice on s.127) and/or or (iii) by knowing of circumstances which would put an honest and reasonable man on enquiry (see factors listed at (i) above): Baden and Others v Societe Generale Pour Favoriser le Developpment du Commerce et de L'industrie en France SA [1993] 1 WLR 509 at [250].

(6) Can Mr Tarim's knowledge be attributed to TWL

217. In my judgment, Mr Tarim's knowledge can and should be imputed to TWL. At all material times, he was sole director and sole shareholder of TWL. On the evidence which I have heard and read, I am satisfied that at all material times, Mr Tarim was the directing mind and will of TWL: El-Ajou v Dollar Land Holdings Plc (No.1) [1994] BCC 143 at 150-1.

(7) What are the consequences of the findings made and conclusions reached on issues (1) – (6)

218. For reasons already explored, the claim in misfeasance against the directors is made out. Pursuant to s.212 IA 1986, they shall be ordered to contribute a sum to the Company's assets together with interest at a rate to be determined. Absent any further adjustments which the parties may invite me to make following receipt of this judgment, I propose to order that they pay the sum of £80,647 (the value of the goodwill as at March 2015 less £5000) together with interest at a rate to be determined. I will hear submissions on any further relief sought against the directors on the handing down of judgment.

219. As against Mr Tarim and TWL, the Applicants have made out their claim in knowing receipt. On the evidence which I have heard and read, I am satisfied that both Mr Tarim and TWL received and benefited from property of the Company in breach of trust, with either actual or constructive (blind-eye) knowledge of the breach, in circumstances in which it is unconscionable for them to retain the benefit of their receipt: Baden [1993] 1 WLR 509 at [250]; BCCI (Overseas) Ltd v Akindele [2001] Ch 437 at 455D-F. For these purposes I am satisfied that the knowledge of Mr Tarim, as the directing mind and will of TWL, falls to be imputed to TWL. A knowing recipient is under a duty to restore the trust property immediately: Williams v Central Bank of Nigeria [2014] UKSC 10 at [31].

220. Under the 'knowing receipt' head of their application, therefore, the Applicants are entitled, as against each of Mr Tarim and TWL on a joint and several basis, to equitable compensation in the sum of the value of the goodwill at the date of receipt, less £5,000. Subject to any further adjustments which the parties may invite me to make following receipt of this judgment, such compensation will comprise the sum of £80,647 (the value of the goodwill as at March 2015 less £5000) together with interest at a rate to be determined. For these purposes I am satisfied that there was no material difference in the value of the goodwill as at 12 March 2015 and as at the date of receipt of the same by TWL shortly thereafter.

221. Under the head of knowing receipt, the Applicants are also in principle entitled to seek from Mr Tarim and TWL an account of the profits which they derived from the Assets.

222. In closing submissions, Ms Julian confirmed that the Applicants would await my findings before electing on which head or heads of relief to pursue.

223. Whilst strictly unnecessary, in the light of my conclusions on knowing receipt, I would add that on the evidence which I have heard and read, subject to one caveat, the Applicants have also made out their restitutionary claim against Mr Tarim and TWL for damages in lieu of the return of the goodwill: Relfo Ltd (in liquidation) v Varsani [2014] EWCA Civ 360 at [69-84] and [96-97]. The one caveat, upon which I will require further submissions in the event that final relief is sought under this head, is whether restitutionary relief may be sought against *both* Mr Tarim and TWL, in light of Henderson J's observations in Investment Trust Companies v HMRC [2012] EWHC 458 (Ch) at [68](b), when considered against the backdrop of the 'direct providers only' rule. In light of my earlier conclusions, the point is likely to be

academic, but I mention it for the sake of completeness. Again, subject to any further adjustments which the parties may invite me to make following receipt of this judgment, damages in lieu of return under this head would stand in the sum of £80,647 (the value of the goodwill as at March 2015 less £5000) together with interest at a rate to be determined.

224. In the light of my findings and conclusions, it is unnecessary for me to address the Applicants' remaining heads of relief, including those sought in respect of the constructive trust claim.

225. It remains for me to thank Counsel for their helpful submissions.

226. I shall hear from Counsel on the handing down of this judgment on the consequential relief sought.

ICC Judge Barber