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[2022] EWHC 2407 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN NEWCASTLE
CIRCUIT COMMERCIAL COURT

No. CC-2020-NCL-000004

Moot Hall
Castle Garth
Newcastle upon Tyne
NE1 1RQ

Tuesday 12 July 2022

Before:

HIS HONOUR JUDGE KRAMER

(Sitting as a Judge of the High Court)

B E T W E E N :

HCS (NORTH EAST) LIMITED — Claimant

- and -

(1) MEHMET TAHIR
(2) HAZEL TAHIR
(3) THE ESTATE OF JAMES WILLIAM MARSHALL CHAPMAN (DECEASED)
(by its representative Mehmet Tahir)
(4) CHARLES TAHIR
(5) JAMES TAHIR — Defendants

MR J. RODGER (instructed by Jacksons Law Firm) appeared on behalf of the Claimant.

THE FIRST DEFENDANT appeared in person and also representing the Third Defendant as Executor.

J U D G M E N T

JUDGE KRAMER:

1 I am asked to determine a tracing claim and make consequential orders. This follows the trial of an action in which I found that Mr Tahir had acted in breach of his fiduciary duty to the claimant company in misappropriating £1,774,416.13 of its money of which he spent £758,009.17 in improving a property, Ray Mill, Kirkwhelpington, in Northumberland and providing it with some furnishings. A full account of the background to this claim and key findings relevant to its outcome are set out in my judgment dated 21 October 2021 reported at [2021] EWHC 3499 (KB), to which reference should be made.

2 It was not possible to deal with the tracing claim in the first judgment as not all interested parties were before the court. During the course of the trial, it became apparent that the owner of Ray Mill was not Hazel Tahir, the first defendant's wife, as had been the claimant's understanding; the property is not registered and no title deeds have been disclosed. Instead, it was discovered that the property was owned by James Chapman, the father of Hazel Tahir. He made a will on 12 January 2006 in which he appointed Mr Tahir and Ken Smith as his executors and Figan Yardimici, Mr Tahir's sister, to fill any vacancy in the executors as happened as Mr Smith has since died. By his will, he left Ray Mill to his daughter Hazel and his grandsons Jamie and Charlie Tahir in equal shares. Mr Chapman died in 2006 but the executors have never sought probate of his will.

3 As regards Ray Mill, Hazel Tahir moved in to look after her parents in the period 2002 to 2009/2010. Her mother continued to live in the property following the death of Mr Chapman until her death in 2013. Thereafter, the property underwent the extensive

improvements which were financed by the money taken from the claimant. Mr and Mrs Tahir moved into the property after the works had been completed in December 2014. At trial, Mrs Tahir gave evidence as to the timings of her stay at the property and the date when she moved in following the improvement works. I consider her to be an honest witness who, for understandable reasons which are identified in [56] of my judgment, was shaky as to some of the history. There was, however, no other evidence to contradict her concerning these timings. Indeed, they are consistent with evidence I received from Mr Tahir and his pleaded case. I find she is likely to be accurate on the timings and accept that part of her evidence.

4 The parties interested in the tracing claim were the estate of Mr Chapman and the beneficiaries under his will. As Mr Tahir had not been joined in the proceedings in his capacity as an executor and Mrs Tahir was only one of the beneficiaries of the will, I adjourned the tracing claim to give an opportunity for those interested to be joined. Mrs Yardimici was contacted during the trial but indicated that she did not want to take part in the administration of Mr Chapman's estate and so can be taken not to have accepted her executorship. Nevertheless, I directed that she, together with the other non-party beneficiaries, Jamie and Charlie Tahir, be served with the proceedings, pleadings, a copy of my order on the claim, a note of judgment, and modified acknowledgement of service under CPR 19.8A(2).

5 Jamie and Charlie Tahir sought to be joined and they are the fourth and fifth defendants. Mrs Yardimici did not. The new defendants filed a defence dated 11 March 2022 in which they take a neutral stance as to the tracing claim and asked to be excused from attending all further hearings. They were, at the time, instructing Ward Hadaway Solicitors. Since then, they have filed notices indicating that those solicitors are no longer acting for them and they are now in person.

6 At a directions hearing on 13 May 2022 in respect of the tracing claim, Mr Tahir indicated that he was subject to a claim under the Proceeds of Crime Act 2002 concerning Ray Mill. In 2017, he had pleaded guilty to tax and VAT frauds and he is awaiting sentence. Indeed, he was due to be sentenced on the first day of the hearing of this claim. As a result, I directed that copies of my judgment in the claim, which indicated that there was an adjourned tracing claim regarding Ray Mill to be heard, and my directions order be served on the CPS Proceeds of Crime Unit in Newcastle. Email correspondence in the bundle shows that these have been sent to both the CPS officer dealing with the case and HMRC have been informed of these proceedings. This has elicited no more than a provision of a copy information questionnaire to Mr Tahir under the Act and neither the CPS or HMRC have sought to take part in this claim or inform the court that a restraint order under the Act is to be sought or has been granted. I am told by counsel for the claimant that enquiries have revealed that there is no restraining order in place concerning this property. In those circumstances, there is no basis to exercise the court's power under s.58(5) of the Act to stay or impose terms in the continuance of these proceedings.

7 At the hearing of the tracing claim, Mr Tahir attended in person but none of the other parties attended save for one of his sons on the aborted hearing on the first day. The claimant was represented by Mr Rodger of counsel as it has been throughout these proceedings. The only additional evidence subsequent to the trial was a report from a single joint expert surveyor Mr Entwistle, a partner in George F White, and his answers to questions in respect of which I had given directions. I had also given directions on 13 May 2022 for all parties to provide to the court and opposing parties any witness statements upon which they proposed to rely, but none did.

THE ADDITIONAL EVIDENCE

8 Mr Entwistle's report is dated 14 April 2022. It is apparent he has made a thorough investigation of the issues he was asked to address, namely what is the open market value of Ray Mill at the date of his report and what is the proportion of that value that is attributable to the works of improvement paid for by the claimant's funds as identified in my earlier judgment. He inspected the property in so far as he was permitted by Mr Tahir. He said the latter did not permit inspection of the solar tracker panel albeit that that is part of the renovation work, field parcels, field building, or water courses. He looked at photographs taken before the renovation and plans showing the alteration. He described the property as being 24 miles from Newcastle upon Tyne and it sits in 33.72 acres of land. I do not need to go into detail as to the improvements as these are not in issue. In essence, the footprint of the house has been much enlarged. The interior layout has been re-ordered and thoroughly modernised, and there has been substantial renovation work on the outbuilding, yet to be completed, which has created garages and a further reception/bedroom, a kitchenette, and toilet.

9 Mr Entwistle has considered a large number of comparators, narrowing them down to three he considered of particular assistance. Based on these comparators, he values Ray Mill as at the date of his report at £850,000, i.e. in its improved state. This is broken down as to £550,000 for the dwelling, £75,000 for the outbuilding, £25,000 for the solar tracker, and £6,000 per acre for the land, tracks, and streams. In its original state, he said it would be worth £400,000, allowing £270,000 for the house, £14,000 for the buildings, and the land at £6,000 an acre. The additional value created by the improvements financed by the claimant's money he calculated by deducting the unimproved value from the improved value giving a figure of £450,000.

10 That is the only evidence on valuation. It indicates that the improvements account for 45/85ths of the current value of the property. In closing submissions, Mr Tahir sought to

argue that the value should be reduced by £35,000 as he has been told it will cost this to install some machinery in the septic tank which will be required by English Heritage should the property be sold. There is no evidence that this is the case and until he made a submission, there had been no application to permit the introduction of witness statements about this at a late stage or to ask Mr Entwistle's opinion on the point. The directions order as to the evidence was perfectly clear as to what evidence was to be produced and that permission would be required for late witness statements. I therefore approach the issue of the valuation on the basis of Mr Entwistle's report alone.

THE PARTIES' CONTENTIONS

11 Mr Rodger asked that Ray Mill be charged with a lien for 45/85ths of its value to secure the sum of over £1.7 million for which Mr Tahir is personally liable. He also asks for an order for sale and possession so that the sale can be affected. The claimant is prepared to allow three months for possession to give Mr Tahir and those interested in the property an opportunity to discharge the lien. It is argued that the claimant is entitled to such a remedy in the light of my finding that Mr Tahir:

(a) Was a fiduciary;

(b) In breach of duty stole over £1.7 million from the claimant;

(c) Spent a figure of over £750,000 improving Ray Mill;

(d) The property was vested in him as executor when he spent the money and now; that is to say it is still vested in him;

(e) There is evidence from Mr Entwistle that should lead me to find that the works of improvement paid for with that money increased its value by £450,000;

(f) The increase in the value of Ray Mill represents the claimant's asset, namely the stolen money. Thus, it is easy to identify the substitute asset for the purposes of tracing. There is a clear nexus between the two in the light of my finding that the claimant's money was used to pay for the renovation and my rejection of his evidence that he had paid for work from a loan which he had taken;

(g) As a matter of law, there is no impediment to tracing. Either, as the executor with title, the money can be traced into the hands of Mr Tahir as the wrongdoer, or if the estate is to be treated as a distinct innocent entity, the authority which could be relied upon for preventing tracing into the improved value of a property owned by an innocent volunteer (*Re Diplock* [1948] CH 465*)* does not have this effect on the facts of the case. Mr Rodger says that was a case where the trust asset could not be disentangled from that of the property owner, which is an evidential difficulty with identifying the substitute property, and it was unjust to trace in that case whereas here, tracing would be just. The alternative, he says, would be to give the estate of the late Mr Chapman an unjustifiable windfall. He points to criticism of the decision of *Re Diplock* at paras.740 - 742 in *Goff & Jones: The Law of Unjust Enrichment (9th ed.)*. He also relies upon supportive obiter dicta in *Foskett v McKeown* [2001] 1 AC 102 and the judgment given by Millett LJ (as he then was) in *Boscawen v Bajwa* [1996] 1 WLR 328. He also relies upon a decision of the Royal Courts of Jersey in *Grupo Torras SA v Al Sabah* [2002] JLR 53. He says these are all persuasive authorities which should lead me to recognise the equitable lien by imposing the charge requested.

(h) As regards the order for sale, Mr Rodger says that the relevant factors to apply are those set out in the Trusts of Land and Appointment of Trustees Act 1996. None of the factors set out in s.15 of the Act should prevent a sale. Rather, it would further them, as it would serve the purpose of Mr Chapman's will trusts, by realising the value of his estate so that it can be

distributed. He pointed to the fact that none of the defendants had produced witness statements setting out a factual basis for denying the claimant possession and sale.

12. Mr Tahir told me that he would not spend much time responding to Mr Rodger's summation of the tracing claim. He did not disagree with the logic of what was said about tracing. His fundamental objection to an order to trace the proceeds taken from the claimant and to Ray Mill is that he disagrees with my judgment on the matter. He says that the claim should be stayed pending his appeal. I told him that he will need to ask the Court of Appeal to stay this claim and seeking permission to appeal. Outside of that, he accepted that there were no grounds to challenge the tracing claim other than his point about the cost of modifying the septic tank with which I have already dealt.

13. Mr Tahir asked that he be given six months before possession be required to give his family more time to come to an arrangement, by which I took him to mean so that they could raise money to discharge the lien. He said one of his sons was waiting to see what happened in his claim before looking into raising the money. He added that allowing six months would also enable his criminal proceedings to take their course. In essence, he would know whether he is to be sent to prison and for how long, or whether he will retain his liberty.

DISCUSSION AND CONCLUSION

14. My findings following the original trial give the claimant a right to trace, namely Mr Tahir, in breach of fiduciary duty, appropriated slightly over £1.7 million of the claimant's money and he used just over £750,000 of that sum to finance the improvements and refurnishing of Ray Mill. Further, he proved no other source of funding for those works. Consequently, I concluded that he had used the claimant's money for the improvements. Mr Entwistle's report is thorough, his reasoning logical and uncontroverted. I am satisfied that the sums

wrongfully taken from the claimant have been used to increase the value of Ray Mill by £450,000.

15. Tracing and its limits were considered by Millett LJ in LJ in *Boscawen v Bajwa* in this way at p.334, C2, F. He said:

> "Equity lawyers habitually use the expressions 'the tracing claim' and 'the tracing remedy' to describe the proprietary claim and the proprietary remedy which equity makes available to the beneficial owner who seeks to recover his property in specie from those into whose hands it has come. Tracing properly so-called, however, is neither a claim nor a remedy but a process. Moreover, it is not confined to the case where the plaintiff seeks a proprietary remedy; it is equally necessary where he seeks a personal remedy against the knowing recipient or knowing assistant. It is the process by which the plaintiff traces what has happened to his property, identifies the persons who have handled or received it, and justifies his claim that the money which they handled or received (and if necessary which they still retain) can properly be regarded as representing his property. He needs to do this because his claim is based on the retention by him of a beneficial interest in the property which the defendant handled or received. Unless he can prove this, he cannot (in the traditional language of equity) raise an equity against the defendant or (in the modern language of restitution) show that the defendant's unjust enrichment was at his expense."

16. At H, he says:

> "If the plaintiff succeeds in tracing his property, whether in its original or in some changed form, into the hands of the defendant, and overcomes any

> defences which are put forward on the defendant's behalf, he is entitled to a remedy. The remedy will be fashioned to the circumstances. The plaintiff will generally be entitled to a personal remedy; if he seeks a proprietary remedy he must usually prove that the property to which he lays claim is still in the ownership of the defendant. If he succeeds in doing this, the court will treat the defendant as holding the property on a constructive trust for the plaintiff and will order the defendant to transfer it in specie to the plaintiff. But this is only one of the proprietary remedies which is available to a court of equity. If the plaintiff's money has been applied by the defendant, for example, not in the acquisition of a landed property but in its improvement, then the court may treat the land as charged with the payment to the plaintiff of a sum representing the amount by which the value of the defendant's land has been enhanced by the use of the plaintiff's money."

So, I am concerned to ascertain, there being no dispute that it was the claimant's money anymore that was used in this improvement, what asset represents the stolen money.

17. I was taken to *Snell on Equity,* para.30-05 where the process of tracing is described in this way:

> "Tracing is the process of identifying a new asset as the substitute for an original asset which was misappropriated from the claimant. Where one asset is exchanged for another, the claimant may elect to treat the substituted asset as representing the value contained in the original asset. He is said to trace the value represented in the original asset into the substitute."

18. I am, therefore, required to to be satisfied that the claimant has retained the beneficial interest in the money which was taken from it, that it was the defendant who took it and

identify a new asset, if such be the case, that has been exchanged for the claimant's money. In this case, that is straightforward given my findings as to the ownership and taking of the money, the breach of duty, and its use in the improvement of Ray Mill, and the evidence of the consequent increase in value of that property. I find that the increased value represents the original asset, i.e., the stolen money, or certainly the money that has been used to improve Ray Mill.

19. Ray Mill is currently vested in Mr Tahir. This arises from the fact that he was a named executor at the time of Mr Chapman's death (see *Williams, Mortimer & Sunnucks - Executors, Administrators and Probate* (21st ed.) chapter 35, para.2). The beneficiaries under the will do not own or have any interest in any specific asset in the hands of the executor. Their right is to have the estate properly administered (see *Williams, Mortimer & Sunnucks,* chapter 35, para.5). Thus, the asset which represents the stolen money is, in every sense, in the hands of the wrongdoer albeit he is under an obligation to deal with it in accordance with the proper administration of the estate. The remedy in such circumstances, that is to say where property has been improved by stolen money, is that of an equitable lien which, subject to an order of the court, can be enforced as an equitable charge. I shall look at the nature of the lien and charge when I consider the claim for possession.

20. My conclusion as to the existence of the lien arises from the obiter dicta to which I have just referred from *Boscawen* and the further dicta relied upon by Mr Rodger to be found in the speech of Lord Browne-Wilkinson in *Foskett v McKeown* [2001] 1 AC 102. I will come to the facts of *Foskett* in a moment, but at p.109, D to F, he said:

> "Can then the sums improperly used from the purchaser's moneys be traced into the policy moneys Tracing is a process whereby assets are identified... The question of tracing which does arise is whether the rules of tracing are those regulating tracing through a mixed fund or those regulating the

position when moneys of one person have been innocently expended on the property of another. In the former case (mixing of funds) it is established law that the mixed fund belongs proportionately to those whose moneys were mixed. In the latter case it is equally clear that money expended on maintaining or improving the property of another normally gives rise, at the most, to a proprietary lien to recover the moneys so expended. In certain cases the rules of tracing in such a case may give rise to no proprietary interest at all if to give such interest would be unfair: see *In Re Diplock* [1948] (Ch) 465, 548."

He was, of course, talking about the case before the court there which was a case between two innocent parties.

21. The differing benefits of an equitable lien and tracing into a mixed fund are apparent from the facts of *Foskett*. The simplified facts of that case are that Mr Murphy, the wrongdoer, affected a whole life insurance policy in the sum of £1 million. In breach of trust, he used the claimant's money to pay two of the annual premiums. There came a time when he appointed the policy to be held largely for his three children.He took his life two years later. Had the claimant only been able to assert an equitable lien, their rights would have been limited to an equitable lien for the recovery of the £20,440 of their money used to pay the premiums. In the event, they were entitled to recover on the basis that they were tracing into a mixed fund so that they recovered such proportion as their premiums bore to the pay out on the policy, a sum just over £500,000. Hence, Lord Browne-Wilkinson's explanation as to the difference of tracing into a mixed fund where you are entitled to a proportion of the whole amount and tracing by way of equitable lien to secure the money that has been improperly taken.

22. It is now convenient to look at the impact of *Re Diplock*. The simplified facts of that case were that Caleb Diplock, by his will, directed his executors to apply his residuary estate to such charitable institutions as they saw fit. They made distributions to 139 charities, including Guy's Hospital, which spent the money on the reconstruction of existing childrens wards. One was called the "Caleb Ward" and the other the "Diplock Ward". There were other bequests to charities which had used them to improve their properties as well. After the distributions, the validity of the bequest was challenged by the next of kin. They were successful as the House of Lords held them to be invalid. They brought claims against institutions which had participated in the distribution. The claimant against Guy's was dismissed at first instance by Wynn-Parry J. That decision was upheld by the Court of Appeal which held that tracing was not available in these circumstances. The reasons for that decision are to be found in the judgment given by the Lord Green MR at p.546. Starting at the bottom of p.546, the first reason was this:

> "In the present cases, however, the charities have used the Diplock money, not in combination with money of their own to acquire new assets, but in the alteration and improvement of assets which they already owned. The altered and improved asset owes its existence, therefore, to a combination of land belonging to the charity and money belonging to the Diplock estate.
>
> The question whether tracing is possible and if so to what extent, and also the question whether an effective remedy by way of declaration of charge can be granted consistently with an equitable treatment of the charity as an innocent volunteer, present quite different problems from those arising in the simple case above stated.
>
> In the case of the purchase of an asset out of a mixed fund, both categories of money are, as we have said, necessarily present throughout the existence

of the asset in an identifiable form. In the case of adaptation of property of the volunteer by means of trust money, it by no means necessarily follows that the money can be said to be present in the adapted property. The beneficial owner of the trust money seeks to follow and recover that money and claims to use the machinery of a charge on the adapted property in order to enable him to do so. But in the first place the money may not be capable of being followed. In every true sense, the money may have disappeared. A simple example suggests itself. The owner of a house who, as an innocent volunteer, has trust money in his hands given to him by a trustee uses that money in making an alteration to his house so as to fit it better to his own personal needs. The result may add not one penny to the value of the house. Indeed, the alteration may well lower its value; for the alteration, though convenient to the owner, may be highly inconvenient in the eyes of a purchaser.

Can it be said in such cases that the trust money can be traced and extracted from the altered asset? Clearly not, for the money will have disappeared leaving no monetary trace behind: the asset will not have increased (or may even have depreciated) in value through its use."

So that is the first reason.

23. *Goff & Jones* criticises this passage, indeed all three reasons, but I am just dealing with this one at the moment, at chapter 7, para.40, on the basis that the example given leaves out of account the fact that even an unmaintained property falls in value so that the maintenance of its value by repair using the funds of a third party leaves a residuum into which one should be able to trace. That may well be the case, but the reason there given by the Master of the Rolls has, at its heart, an evidential issue, that being: what evidence is there to support a

finding that there is a substitute asset into which the stolen fund can be traced? The example given illustrates the problems that can arise in such a case and very much mirrors the position with an account containing a mixed fund, although I accept that tracing to a mixed fund is different but there is this similarity. If the fund is in surplus from the time of the introduction of the stolen monies, they can be traced into the fund as they retain their identity. If, however, after they have been paid in the fund goes into overdraft and is replenished by funds from another source, the ability to trace into those funds is exhausted as there is no nexus between the claimant's money and that now standing in the account. In common with what the Master of the Rolls said, the money will have disappeared leaving no monetary trace behind. It is notable that the Master of the Rolls said that it no means <u>necessarily</u> (my emphasis) follows that the money can be said to be present in the adapted property which suggests that there may be circumstances where it can.

24. The second reason given by the Master of the Rolls, which is on p.547, reads as follows:

> "But the matter does not end here [*so I can take it that these are not cumulative reasons but each stands on its own*]. What, for the purposes of the inquiry, is to be treated as 'the charity property'? Is it to be the whole of the land belonging to the charity, or is it to be only that part of it which was altered or reconstructed, or on which a building has been erected by means of Diplock money? If the latter, the result may well be that the property, both in its original state and as altered or improved, will, when taken in isolation, have little or no value. What would be the value of a building in the middle of Guy's Hospital without any means of access through other parts of the hospital property? If, on the other hand, the charge is to be on the whole of the charity land, it might well be thought an extravagant result

> if the Diplock estate, because Diplock money had been used to reconstruct a corner of it, were to be entitled to a charge on the entirety."

25. *Goff & Jones* in chapter 7, para.41, correctly categorises this as an evidential problem which can be dealt with by making robust findings of fact. It seems to me to largely repeat the first reason, save for the addition that the alternative outcome to finding which part of the defendant's property is to be charged, i.e. a charge on the whole of the defendant's property, must be unjustifiable when the money has been used to reconstruct only one corner of Guy's estate.

26. Looking at the third reason, pps.547/548, the Master of the Rolls goes on:

> "But it is not merely a question of locating and identifying the Diplock money. The result of a declaration of charge is to disentangle trust money and enable it to be withdrawn in the shape of money from the complex in which it has become involved. This can only be done by sale under the charge. But the equitable owner of the trust money must in this process submit to equality of treatment with the innocent volunteer. The latter too, is entitled to disentangle his money and to withdraw it from the complex. Where the complex originates in money on both sides there is no difficulty and no inequity. Each is entitled to a charge. But if what the volunteer has contributed is not money but other property of his own such as land, what then? You cannot have a charge for land. You can, it is true, have a charge for the value of land, an entirely different thing. Is it equitable to compel the innocent volunteer to take a charge merely for the value of the land when what he has contributed is the land itself? In other words, can equity, by the machinery of a charge, give to the innocent volunteer that which he

has contributed so as to place him in a position comparable with that of the owner of the trust fund? In our opinion it cannot."

27. There is no explanation within this reason as to why it is inequitable for the volunteer to take a charge for the value he has contributed, for example by the presentation of various scenarios identifying the undesirable outcome of such an approach. There is no discussion as to why the landowner/the volunteer should take, as would be the position in this case, a windfall of 100 per cent increase in the value of their property. *Gough & Jones*, at chapter 7, para.41, suggest that the problem of unfairness to the volunteer landowner is in the defence of change of position. The availability of such a defence was first recognised by the House of Lords in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 which, it is trite to observe, significantly postdates *Re Diplock*. Thus, there is now a mechanism to remediate unfairness to the owner of the land. Further, it is clear from the speech of Lord Browne-Wilkinson in *Foskett* that he was treating this reason as establishing that there may be circumstances where an unfair outcome would make the tracing remedy unavailable. The extract which I have read from his judgment at p.109E. Although he talks in terms of proprietary interests rather than a lien, it is firstly clear that he is dealing with equitable liens, in this part of the judgment, and that he was dealing with the third reason in *Re Diplock* because the citation that he relies upon is that at p.548 to which I have just referred.

28. On the facts of *Diplock*, it is easy to see why it was difficult to identify which part of the improved asset was the result of the distribution and whether it had made any difference to the value of Guy's Hospital or that corner of the site. It is also apparent that it would have been unfair to have imposed an obligation which could have disrupted the running of the arrangements for childrens provision in the hospital, which had been embarked upon in reliance upon what they thought to be a valid gift.

29. Mr Rodger says that I should follow the approach taken by the Royal Court in Jersey in *Grupo Torras SA*. The court there decided not to follow *Re Diplock*, explaining that the region was illogical. That, of course, is a prerogative of that court but I am bound to follow the decision of the Court of Appeal in this jurisdiction. That being said, *Re Diplock* is not authority for the proposition that one can never trace into improved property in the hands of volunteers. It decides that there are circumstances where this is not possible, namely when no substitute property can be identified or because to do so would be unfair.

30. The facts of the case before me are distinguishable from those is *Re Diplock*. First, the person whom the property is vested is not innocent. He is the wrongdoer. Thus, on that basis, *Re Diplock* would not apply at all. Even if that were not the case, the substitute asset is clearly evident in the increase in value due to the improvements to Ray Mill. There is no unfairness to the potential beneficiaries under the will for their entitlement is to see the estate properly administered. They have an equal share in the value of Ray Mill. There is no reason, in fairness, why they should have expected to receive a value enhanced by the proceeds of Mr Tahir's debt. It may be said that there is a potential for unfairness in that Mrs Tahir and her sons may have wished to keep the property as a family home and that there are good reasons why it should be protected from sale, but no evidence has been forthcoming to support such a conclusion and the sons have said they are neutral as to the outcome of these proceedings.

31. In the result, and in the light of the findings set out in para.14 of this judgment, the claimant is entitled to an equitable lien over 45/85ths of the value of Ray Mill to secure the personal liability of Mr Tahir for the suns wrongfully taken and expended on that property.

32. The claimant's claim for possession does not sit with the nature of an equitable lien. Where property is made answerable to the payment of a specific debt, an equitable charge is

created. *Megarry and Wade* at chapter 23-003 talks of an equitable lien in this way. The writer says:

> "An equitable lien is not dependent upon continued possession of the property and, in this respect, resembles a mortgage. It is also within the definition of mortgage in the Law of Property Act 1925. However, it differs from a mortgage per se in that a mortgage is intentionally created by contract whereas an equitable lien arises automatically under some doctrine of equity. Thus, a vendor of land has an equitable lien on it until the full purchase price is paid even if the vendor has conveyed the land to the purchaser and given the purchaser possession. This lien has no right to possession of the land that enables the holder to apply to the court for a declaration of charge and for an order for sale of the land under which the money due will be."

33. The claimant's remedy, as the holder of a lien, is a declaration as to the charge and an order for sale or the appointment of receiver. There is no right to possession.Because I had not received any submissions on the rights of a lien holder, I circulated to the parties before I gave judgment, and invited parties to make any further submissions they wished, a copy of chapter 6, para.1 of *Fisher & Lightwood's Law of Mortgage*. There, referring to the case of *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd (In Liquidation)* [1985] Ch 207, Peter Gibson J said at [169]:

> "...Such a charge is created by an appropriation of specific property to the discharge of some debt or other obligation without there being any change in ownership either at law or in equity, and it confers on the chargee rights to apply to the court for an order for sale or for the appointment of a

receiver, but no right to foreclosure (so as to make the property his own) or take possession..."

34. Thus, there is no right to possession. The sale is ordered as the property is security for the debt. The claimant's reliance upon the Trusts of Land and Appointment of Trustees Act 1996 on the considerations there is misplaced and unnecessary. An equitable lien is not a trust of land. It is because the claimant does not have an interest in the land that it must rely upon the equitable lien to recover its money.

35. In the light of my findings, I grant a declaration that Ray Mill is subject to an equitable charge over 45/85ths of its value in favour of the claimant as the money is clearly owed and there is no evidence that there is any prospect that it will be repaid other than by the sale of the property. I will therefore order a sale and give directions as to its conduct, having heard submissions, as to when the marketing period is to start, any date before which a sale is not to take place, and who is to have conduct of the sale. There may also be a direction as to what is to be the minimum sale price.

L A T E R

36. I now deal with what order should be made. Before I do so, however, something has arisen when I heard submissions on the order which does need to be dealt with in a form of judgment.

37. Mr Rodger, following on from what I said in the judgment, asked that I make orders that, there be a declaration as to the existence of a charge, there be a sale with a marketing period starting in three months' time so that the marketing start on 12 October, the claimant have conduct of the sale, and the defendants are to cooperate in the sale, permit viewings, and give up possession on completion. Immediately prior to the agreement for the sale, there be vested in the claimant a term of 3,000 years. The price is to be the best reasonable price

achievable after a marketing period of three months but no less than £850,000 unless otherwise ordered. Out of the proceeds of sale be paid the costs of sale and then the balance divided 45/85ths in favour of the claimant up to £758,009.17.

38. Mr Tahir, when he was asked to respond to this, put forward an argument which was really an argument which should have been dealt with in the submissions before me in the trial. What he says is that you must leave out of account the 37 also acres of farmland, because there is no evidence that he spent money on the farmland, he only spent money on the house, therefore the lien should only attach to the latter, not the former. As a result, I have to look at how much the house and outbuildings have increased in value take from that their unimproved values. It is the proportions that this bears to the current value that should form the subject of the lien and they should not touch the land at all. He says, and this was not in evidence because he did not produce evidence about it, but as regards the land, he has allowed a farmer to keep his sheep there. I do need to deal with that point because it would require me to change my judgment, if that is correct.

39. Mr Rodger, in response, says that it is not open to Mr Tahir to argue the point now because throughout the tracing proceedings, a substantial question has been: what is the property? It makes sense to consider Ray Mill, he says, as one parcel. That is how it has always been treated. It has been described as whole and has been valued as a whole. He says it is not like Guy's Hospital and the Caleb and Diplock wards which constituted just one corner of the hospital. Neither is it like a a stately home with a park and tenant farms. Up to now, Mr Tahir has not suggested that the property should be dealt with other than as a whole or should be dealt with in distinct parts. Mr Entwistle's report was premised on the basis that it was one property which was being valued. He has not valued what this house would be worth if all the surrounding land was in other ownership, which would require that he look

at the question as to easements, way leaves and the like to enable the house to be operating independently of the surrounding land.

THE FIRST DEFENDANT: I think, your Honour, if I may just interrupt there, and I'm sure Mr Entwistle will confirm this point, when he arrived, one of the reasons why I told him that he couldn't go round and survey the fields was because they were not part of the area in which monies had been spent on.

JUDGE KRAMER: Thank you. Yes. Well----

THE FIRST DEFENDANT: So the only area that he was there to survey and value was the house and the outbuildings.

JUDGE KRAMER: Yes.

THE FIRST DEFENDANT: And I think in his report he says I didn't -- I didn't give him permission to wander round----

JUDGE KRAMER: He does. Yes.

THE FIRST DEFENDANT: -- the rest of the site.

JUDGE KRAMER: Yes, he does.

THE FIRST DEFENDANT: And that was the reason why.

JUDGE KRAMER: Yes. Yes.

THE FIRST DEFENDANT: This isn't something that I've just dreamt up last night and came up with.

JUDGE KRAMER: Thank you. Yes.

40. Just in case it has not been picked up, Mr Tahir has said that when Mr Entwistle visited the property, Mr Tahir says he told Mr Entwistle, "I am not allowing you to view anything else because I have not spent any money on improving anything else and so you just inspect what I have improved." Indeed, Mr Entwistle does say that he was refused permission to inspect anything else than the house and the new outbuilding.

41. So how am I to treat this? There is force in what Mr Rodger says, or the question he poses, as to whether it is open to Mr Tahir to argue this point as to the identity of the benefited land given that that was a subject for the trial in which judgment has already been given and there has to be some finality to litigation. It does seem to me that to allow Mr Tahir to reopen this would not be in accordance with the overriding objective because it would cause the case to be dealt with inefficiently and at greater expense than would otherwise be the case because if one is going to go down the road of asking questions about dividing up the estate, there may be questions as to how it has been dealt with in the past. After all, the evidence so far is that the whole was bought by Mrs Hazel Tahir's father. He bought it as a whole and he did not buy it in parts. Secondly, there would clearly need to be further evidence from the surveyor as to what would be the value if you excluded all of the surrounding land and what you were selling was a house surrounded by other land , in other ownership, with issues as to the essential services to be supplied to the house to be dealt with. That would be a good reason not to permit Mr Tahir to raise this matter after the event, not just because it is after the event given that there was a trial last week and judgment has been given, but because the process of valuation took place sometime ago and that would need to be looked at all over again. That is the first point.

42. The second point, and it follows from the first point, that throughout these proceedings, Ray Mill has been treated as one property. That has been the focus of the discussion and the expenditure on, although it improved the value of the housing, improved the value of the

property as a whole and that is how it has been treated. Given that the way in which the property has been treated since these works have been done in that it has been the family home of the Tahirs with the adjoining land around it, whoever they allow to go on that land, it has been treated up to now as one property. It does seem to me artificial to start slicing it up and picking on those parts which have been improved and excluding those which have not been improved.

43. So, for those reasons, I am not going to treat Ray Mill as a house with unconnected land and I am going to treat it as one property to which the security attaches and in respect of which the improved parts give the claimant the lien which I have already indicated which is 45/85ths. Accordingly, I am not altering my judgment in the light of those most recent submissions.

44. There then comes what should the order be. Obviously, Mr Tahir is concerned to gain time to see whether he can raise money to discharge the lien. The overall time requested by the claimant is fairly lengthy when you bear in mind that marketing on Mr Rodger's scheme is not to start for three months ,until 12 October, and the price to be obtained is the best price reasonably achievable after a marketing period of three months at no less than £850,000 unless otherwise ordered. That is a total of six months for Mr Tahir of his family to either discharge the lien or for there be a sale. So I take the view that the timings are not oppressive and are reasonable given the balance that one has to strike between Mr Tahir and his desire to try and pay off the money and save the property, and the rights of the claimant which is substantially out of pocket despite a valuable judgment in its favour.

45. There does not seem to be an objection to the claimant having the conduct of the sale and it clearly seems to me that it should . There are good reasons for that which, if put forward, I would accept and those reasons seem to be that in the face of somebody who has taken money from the claimant, it cannot be expected to trust that the defendant is going to see to

it that it get their money back out of a sale and, of course, the defendant does not want a sale, if possible.

46. The defendants will need to cooperate and there is no objection to an order that they cooperate in the sale, permit viewings, and give up possession on completion. The order concerning the granting of a 3,000 years term is so that the equitable chargee can give a good title. As I have said a three-month marketing period seems to be a reasonable. The minimum sale price of £850,000 unless otherwise ordered enables the property to be sold at the price which the single joint expert has advised. If a party is not content about that, for instance, you cannot get purchases coming in at that figure, they can always return to court for a further decision supported by evidence as to what the figure should be. Finally, out of the proceeds of sale there is to be a division. The cost of sale will have to be paid out of the proceeds and the balance divided 45/85 in favour of the claimant up to £758,009.17. So that will be the order.

L A T E R

47. There are two issues here, firstly, whether I should conduct a summary assessment of costs, and, secondly, whether these costs are reasonable.

48. Mr Tahir, although he does not say so in terms , he feels he should have more detail about these costs. He should have an itemised bill of costs so that he can see whether these costs have been properly incurred.

49. The claimed costs are £32,289.17. This is a multi-track trial, but the trial itself took one day and judgment was today. That has made it into a second day. Generally, multi-track trials are dealt with a detailed assessment of costs but one has to look at proportionality. There is a substantial cost associated with costs proceedings and it does seem to me proportionate that I should summarily assess rather than put this matter over to detailed assessment given

the level of costs claimed. Indeed, at this level of costs , you would not have a detailed assessment hearing in the first instance. It would be an assessment on papers anyway. So that is one reason for supporting summary assessment.

50. Another one is, I am afraid, that in the main proceedings, the claimant did serve a detailed bill of costs and the result was there was no response to that bill. As a result, they issued a default costs certificate. Thus, even given the opportunity to go through a detailed bill, tMr Tahir did not take it. I have no confidence that the same would not happen here.

51. A third consideration is Mr Tahir's approach to the issue of costs, which he told me on the last occasion and repeated today He said, "I have not got money to pay the costs. So there you are." Really, his big issue is not actually as to these costs. He says that in the previous proceedings he gave a particular account in relation to monthly meetings and he complains as to how the claimant's solicitors have handled documentation relating to those meetings, which is not germane to whether or not there should be a summary assessment of these costs.

52. Taking all these factors into account points positively towards a summary assessment and that is what I propose to do.

53. As regards the amount of the costs, Mr Tahir says he cannot tell what work has been done which generates these costs, but it is the nature of summary assessment. One looks at the figures and asks are they proportionate for the work in hand having regard to its importance, complexity, the values involved, the importance of the parties, and any other public interest, and is the time spent reasonable, the benefit of the doubt being given to the paying party.

54. That is how I propose to approach this summary assessment.

L A T E R

55. Looking at the bill, the hourly rate is a very reasonable rate for this type of litigation. It is actually less than the guideline rate which is very reasonable.

56. Attendances on clients seem to be modest. Attendances on opponents, there is no challenge to that as you have to deal with your opponent and your opponent deals with you. Attendances on others seems reasonable and this will be attendance on counsel and the court, I have no doubt.

57. Work done on documents; the only really substantial work is in the preparation of bundles for the CMC and bundles for the tracing application which I accept takes time. In the ordinary course, I would say preparation of the schedule of costs, three hours is a lot but this is an attempt to avoid having to go to the costs of detailed assessment and, of course, a lot more will have had to have been done than one would usually expect on just an application. So, time spent on documents seems to be reasonable.

58. I am told that as regards attendance at hearings it is accepted that there should be some leeway on that and ten hours are suggested. There was the first day where people were at court and there is a question as to what was going to happen concerning Mr Tahir's sentence. Then there was the second day when Mr Rodger attended and Mr Tahir was present for me to give directions as to how we were going to deal with the trial. The trial did get underway for a day and the parties are here today. So ten hours is reasonable for that and so that becomes £2,000 instead of £2,800.

59. As regards travel, I am told by Mr Rodger that some leeway is accepted on that and I will say £600 for that because there does need to be travel by the solicitors to get to court and go from court. So that takes off £500.

60. As regards the brief fee, I am told the brief fee was £10,000 for the brief and £3,000 a day but the figure here is less than would be justified by that and includes Mr Bartlett's fee for

the previous hearing. So for a trial, which has taken about three hours, attendance for the giving of judgment and attendances at court on two other days, because of the peculiar circumstances affecting Mr Tahir, it does not seem to me what is claimed there is not an unreasonable amount and it takes into account Mr Bartlett's fee.. So I will leave that as it is. So what comes off is----

MR RODGER: My Lord, the new total is £30,989.17.

JUDGE KRAMER: £30,989.17. All right.

61. I summarily assess the costs of the tracing claim at £30,989.17. Those seem to me reasonable and proportionate because there was considerable complexity in this case particularly in the light of the case of *Re Diplock* and what was to be made of that.

MR RODGER: My Lord, in my submission, that order will be against D3.

JUDGE KRAMER: Against?

MR RODGER: The estate.

JUDGE KRAMER: Yes, against the estate. D3, yes.

L A T E R

62. I take the view there should be a proper application for a charging order. I have in the past made a charging order very quickly in the circumstances when it looked like the defendant was going to dispose of the property but this is not such a case.

63. So I will leave you to make your charging order application in the usual way. It is the execution of a judgment and so it is to a district judge.

L A T E R

JUDGE KRAMER: You are not saying what your grounds of appeal are. I could just formally refuse it and then you can renew your permission to appeal to the Court of Appeal in relation to the tracing judgment.

THE FIRST DEFENDANT: Okay.

JUDGE KRAMER: Do you want to do it that way?

THE FIRST DEFENDANT: Yes.

JUDGE KRAMER: So I will just---- I will refuse it. No grounds given. So the draft---- The order will have to include a provision at the bottom explaining what the route of appeal is.