[2021] EWHC 3499(KB)

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

No. CC-2020-NCL-000004

The Moot Hall
Castle Garth
Newcastle-upon-Tyne,
NE1 1RQ

Friday, 22 October 2021

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

Defendants

(Transcript received on 13.12.21 and approved by HHJ Kramer on 20 December 2021)

MR J. RODGER (Counsel) appeared on behalf of the Claimant.

THE DEFENDANTS appeared in Person.

J U D G M E N T

JUDGE KRAMER:

1 The claimant seeks the recovery of money from Mr Mehmet Tahir, the first defendant who, it says, misappropriated its money between 2011 and 2016 whilst acting as its bookkeeper and financial director. Mrs Hazel Tahir, the second defendant, is married to Mr Tahir. They live in a property called Ray Mill, Kirkwhelpington, Northumberland. The claimant seeks a charge over Mrs Tahir's interest in that property on the basis that some of the misappropriated money was used to fund extensive improvements to Ray Mill which have substantially increased its value. They say they are entitled to the charge on the basis that Mrs Tahir knew that the money had been stolen from the claimant or on the basis that, as she has given no value for the improvements, she is what is called in equity a volunteer, in respect of whom the claimant has a prior claim to recover out of the property the company money used in the improvement works or any increase in value to the property consequent upon the misuse of the monies.

2 The claimant has been represented by Mr Jonathan Rodger of counsel, and I see Mr Bartlett who is here taking judgment. The defendants represented themselves. They had solicitors and counsel until about two weeks ago. That is prior to the trial. I have provided such explanation as I could about the course of the trial and gave guidance on the purpose of cross-examination, but made it clear that I could not conduct their case for them. Nevertheless, having indicated to Mr Rodger that I proposed to ask questions to ensure that the claimant's witnesses were questioned as to the full extent of the case which appeared from the defence and the first defendant's statement, in exercising my powers under CPR 3.3(a), to which he did not demur, I have been more active in questioning the claimant's witnesses than would otherwise have been the case, including raising with them allegations of criminal wrongdoing.

3 It was not possible to deal with the tracing claim as, on the evidence, the owner of Ray Mill, which appears to be the estate of Mrs Tahir's late father and the estate was not a party to the proceedings, Mr Tahir is the named executor, but he was not joined in these proceedings to represent the estate. That claim remains to be dealt with. I gave judgment prior to final submissions on the facts and law setting out how the tracing claim, if necessary, should be dealt with and my reasons for so doing. In essence, if the claimant's case is made out, Mr Tahir who, as I have said, is an executor under the deceased's will (as yet unproved), will be appointed to represent the estate in these proceedings , the other executor, his sister Figen Yarmadici , having recently indicated that she did not wish to take a grant of probate. The Tahir's two sons, Jamie and Charlie, will be served with notice under CPR r.19.8A, as will Mrs Yamadici, so that all who could be interested in the tracing claim can take part in the arguments as they wish. If they do not, they are bound by the decision.

4 This judgment is confined to the questions as to whether Mr Tahir has taken for himself the sums alleged and in what capacity he did so, and what, if any, of those sums was spent on the improvements to Ray Mill.

The background

5 The claimant's business is the sale and supply of furniture, white goods and floor coverings to local authorities and social landlords. The directors of the company between incorporation on 11 June 2007 and 5 December 2018 were Peter Hawdon and Alan Minnikin. The company secretary was Judith Hawdon, Mr Hawdon's wife. The shares in the company were owned as to one-third each to the directors and one-third to Mrs Hawdon. Currently, the former directors each hold 40 per cent of the shareholding and the remainder of the shares are held by Tim Cottier and Chelsea Harrison (formerly Hawdon), the daughter of Peter Hawdon. They

are directors of the company along with Paul Minnikin. Mr Cottier is executive chairman and financial director.

6 The company is the successor business to a partnership known as Hawdon Contracting Services in which Mr Hawdon and Mr Minnikin were partners. Mr Tahir is an accountant, bookkeeper and tax advisor who told me he relies on his 50 years' experience in these fields but has no formal qualifications. In about 2002, Mr Hawdon was running a floor and carpet laying business called Chapel Contracts, which was a limited company. He was put in touch with Mr Tahir to look after his accounts and bookkeeping. At the time, Mr Hawdon had a problem with HMRC concerning the amount of tax owed, which Mr Tahir managed to resolve. Chapel, however, went into liquidation due to a lack of cashflow and work, and Mr Hawdon went to work for his father laying floors.

7 In about 2003, Mr Tahir says it was 2005, Mr Hawdon and Mr Minnikin discovered that there was a business to be made in supplying Your Homes Newcastle, the housing arm of Newcastle City Council, with household contents. The precise circumstances in which the business started I will look at when I consider the evidence. Mr Hawdon contacted Mr Tahir for advice as to how he should go about setting up the business. Mr Tahir recommended a partnership in which Mr Hawdon and his wife were to be the partners. He asked Mr Tahir to do his books.

8 The business quickly became a success, attracting very substantial orders from Your Homes Newcastle. In 2007, the business was incorporated as HCS (North East) Limited. Mr Tahir's role in the company was to be responsible for the financial side of the business, the banking, payment of supplies, keeping the books and dealing with its tax affairs. From the time of

incorporation, he had a mandate to operate the company bank account, along with Mr and Mrs Hawdon and Mr Alan Minnikin.

9 In the tax year 2016/17, HMRC started an investigation into the affairs of the claimant. As part of the investigation, it came to light that Mr Tahir had been charging the company VAT, notwithstanding that he was not VAT registered. Messrs Hawdon and Minnikin say that it was as a result of that investigation that they discovered that Mr Tahir had been paying large sums of money from the HCS bank account to himself and to companies which he owned, Cardscreen Limited and Properties (South Tyneside) Limited.

10 The investigation also resulted in an enquiry into the tax affairs of the two directors and Mr Tahir. In the result, Mr Tahir was convicted in 2020 on his own admission, before Newcastle Crown Court of the fraudulent evasion of VAT and the fraudulent evasion of income tax. Peter Hawdon and Alan Minnikin are due to be tried for fraudulent evasion of income tax on joint counts, to which Mr Tahir pleaded guilty in December 2021, a jury at an earlier trial having failed to reach a verdict. As a result of the charges levelled against them, they resigned as directors.

11 Ray Mill was the family home of Mrs Tahir. At that time, it was a three bedroom, one story farm cottage. Her parents lived there from the 1950s. Her father died in 2006, whereafter her mother remained in the property until her death in 2013. Thereafter, the property was very much expanded by the addition of an extra floor and the footprint of the house was much enlarged. According to Mrs Tahir, she and her husband moved into the property after the works had been completed in December 2014, though she says she stayed at the property between 2002 and 2009/10 to look after her parents, leaving Mr Tahir in a home which had been bought in her name in 2002 at Larkspur Terrace in Jesmond, Newcastle.

12 The parties have prepared a schedule and counter-schedule of loss which considerably narrows the issues. The all agree that Mr Tahir received the sum of £2,831,688.81 from HCS, and that Cardscreen Limited received £165,844.21 and Properties (South Tyneside) Limited £559,549.30 from HCS in the period over which it is said the money was taken. This makes a total of £3,557,082.32. It is common ground that these payments were effected by Mr Tahir. Where the parties disagree is as to what Mr Tahir and his companies did with the money.

13 Mr Cottier says that he has analysed the bank statements of the claimant, Mr Hawdon, Mr Minnikin and Mr Tahir and his two companies, as well as worksheets taken from a hard drive seized by HMRC, which were produced by Mr Tahir during his time with the claimant, showing the movement of the companies funds each year from the year ending 2012 to 2016. These show that, of the total sums taken by Mr Tahir, £126,200 was paid by Mr Tahir's companies to Mr Hawdon and Mr Minnikin, Mr Hawdon receiving £111,200 and Mr Minnikin £15,000. £322,025 was taken by Mr Tahir as remuneration inclusive of any VAT claimed, the claimant has treated that as the remuneration properly due to him, and £1,388,450.87 was used by Mr Tahir, from his own account, to return monies to Messrs Hawdon and Minnikin and legitimate company creditors. This produces a total of £1,836,675.87. That sum has to be reduced by the VAT wrongly claimed, Mr Tahir not being VAT registered. That leaves payments of £1,782,621.19 as representing HCS money which passed through his hands. The sums said not to be accounted for are, therefore, £3,557,082.32 less £1,782,621.19 which equals £1,774,461.13.

14 Mr Cottier has also traced through the documents, which included Mr Tahir's bank statements, hard drive, invoices and receipts relating to Ray Mill, though not Mrs Tahir's bank statements as these were not disclosed, and these were documents showing expenditure

by Mr Tahir on the building works, home improvements and furniture purchases which totalled no less, he says, than £758,009.17. This ignores smaller transactions of less than £700, which he regarded as not material, and a further £27,971.29 of invoices for which no identifiable payment can be found. That is to say they cannot be attributed to a particular cash or cheque payment.

15 Mr Tahir has put forward different figures as to the amounts that he and his companies have returned. His figures are that £500,000 from his companies has been paid to the claimant and its members. He says that is an approximate figure. £450,000 is the proper figure for remuneration to which he is entitled. He said at trial that that is exclusive of VAT, albeit he did not make that suggestion in the counter-schedule in response to figures put forward by the claimant showing what he had received inclusive of VAT. He says he returned £2 million to the members and creditors, but accepts there is £9,478 of VAT that he should not have claimed, but says this is payable by him to HMRC, not the claimant. The total sums returned as per his counter-schedule are £2,950,000 leaving an unexplained balance of £607,082.32. The counter-schedule indicates that approximately £520,000 was spent on improvements and décor to Ray Mill, of which about £104,000 was paid to Mr Robert Harrison, the now father-in-law of Chelsea Harrison, Mr Hawdon's daughter. The schedule also makes claims against the second defendant for monies spent on mutual holidays, but that was not pursued at trial.

<u>An outline of the parties' cases at trial</u>

16 The claimant's pleaded case is that Mr Tahir was a fiduciary in respect of the claimant's money because he was a *de facto* director and agent for HCS in the control of its money. In the skeleton argument for trial, the existence of such a relationship was also said to arise from

Mr Tahir's role as a thief and fraudster. The *de facto* director point underpinned claimed breaches of duties under Chapter 2 of Part 10 of the Companies Act 2006.

17 As a fiduciary, Mr Tahir was required to account to the company for the money he had received, and such money as he did not account for was to be treated as money held by him under a constructive trust for the company. This was said to include any money he had paid, from what he had taken, to Mr Hawdon and Mr Minnikin, but, at an early stage in the case, the claimant indicated that all it sought was the money kept by Mr Tahir or converted to his use. Any monies paid to Mr Hawdon and Minnikin were to be dealt with by them, and they would have to pay the tax on that. So, the sums he had paid to the directors were not subject to the claim.

18 The pleaded monetary claim against Mrs Tahir is that she had received the claimant's monies knowing that they belonged to the claimant, and an account was sought of what she had received or equitable damages. A declaration was sought that she held Ray Mill on trust for the claimant up to the extent of £700,170.25, seemingly the sum which was thought, at that stage, to have been spent on the property, or such sum as the court may find just.

19 By the end of the trial, the *de facto* director point was not pursued on the basis that there was sufficient evidence that Mr Tahir was a fiduciary in respect of the HCS monies to found the claim. There was no evidence of Mrs Tahir receiving HCS monies and she is not the owner of Ray Mill, so there is no question of her holding the property on trust for anybody. Her involvement in this action arises if there is to be a tracing claim against her late father's estate, so as to enable her, as a beneficiary under his will, to make representations on that issue.

20 Reduced to this simplified form, Mr Rodger's final submissions were that Mr Tahir's responsibility in the company was to deal with its accounts and money. As such, he was a fiduciary as regards these dealings. He accepts he has had just over £3.5 million of the company money through his hands and at his direction through his companies. The burden is upon him to account for what he has done with the money insofar as it exceeds the amount which the claimant accepts was properly spent or retained. He has failed to discharge that burden.

21 As to the amount which was spent on Ray Mill, he relies upon Mr Cottier's analysis of the documentary records and asks me to reject Mr Tahir's assertion that he financed it from a bank loan and savings. Furthermore, as Mr Tahir mixed his own money in the account with that of the claimant, it is for him to prove that any outlay on Ray Mill from that account came from his own, not the company money. Insofar as he fails to do so, the payment is deemed to have been paid out of the trust monies.

22 Mr Rodger dealt with a defence based on limitation for money taken before 16 April 2014, six years before the issue of the claim. He relies upon subsections 21(1)(a) and (b) of the Limitation Act 1980, which provides for there to be no period of limitation for an action by a beneficiary in respect of a fraudulent breach of trust (subsection (1)(a)) and for the recovery of property from a trustee of trust property or for trust property previously received by the trustee and converted to his use. He also relies upon subsections 32(1)(a) and (b) of the 1980 Act on the grounds that the facts relevant to the claimant's action were deliberately concealed by Mr Tahir and those facts were not discovered by the claimant until after February 2016, well within the six year period for bringing a claim.

23 Mr Tahir's case is that I should believe his account as to how the money was spent, from which I should conclude that he has not had a penny to which he was not entitled, save for the VAT wrongly claimed, and that is a matter for him to settle with HMRC. He did not dispute that he was responsible for managing the company's monies, accounts and bookkeeping. It was left to him to pay suppliers and make payments out of the company bank account, although he says that each and every payment he made to himself or passed through his bank account was approved by Mr Hawdon and Mr Minnikin.

24 Mr Tahir did not challenge Mr Cottier on the accuracy of the schedules he produced concerning the path taken by the company's money or the documentary reconciliation he performed which underlay the schedules, what Mr Tahir referred to as "the number work". This, of course, is work which Mr Tahir is well familiar with, having, as he said, 50 years' experience in not only tax planning, but also bookkeeping and accountancy.

25 He had an opportunity to challenge Mr Cottier's work and workings and to do so in detail, as he had permission to serve a statement in response to Mr Cottier's witness statement, and that was at a time at which he was legally represented. But any challenge to Mr Cottier's detailed evidence is notable by its absence. Neither did Mr Tahir suggest to Mr Cottier in evidence that he was not a witness of truth. He did ask him how he got involved with the claimant in a company called Jarrow Brewing, in which Alan Minnikin was an investor and Paul Minnikin, his brother, on the board, but this line of questioning and responses did not justify the suggestion made by Mr Tahir in his closing address that I should conclude that Mr Cottier's involvement with the claimant company and Jarrow Brewing did not, in Mr Tahir's words, tie up with him, Mr Cottier, being good and upstanding.

26 In fact, Mr Cottier struck me as a straightforward witness. His evidence was based on an analysis of documents. On no occasion at trial was it shown that the conclusions he drew from the documentation were wrong or that his analysis was mistaken or deliberately incorrect. Indeed, he struck me as someone who adopted a balanced approach. For example, when identifying approximately £24,000 of invoices on Ray Mill for which he could not find an identified corresponding payment from a bank account, he said that it is fair to assume that this may relate to the cash and unknown cheques and transfers in the HCS records. He did not go so far as to say that they did and, on that basis, the claimant has asked that these sums be left out of account.

27 A further example of his even-handedness is to be seen when he examined Mr Tahir's evidence that cash had been drawn to bribe a council official. He went to the documents for the relevant period and identified four cash withdrawals. He did not seek to overlook such withdrawals, albeit that the analysis for the withdrawals did not support Mr Tahir's claim as to the scheme under which the cash was withdrawn. There is also the fact that the turpitude to which Mr Tahir relies upon to explain why he cannot give a documentary account for the whereabouts of the money passing through his accounts is said to have occurred before Mr Cottier's involvement with HCS.

28 Before setting out Mr Tahir's explanation of what happened to the money, I will just mention the position of Mrs Tahir. Though, as is understandable, she has sought to defend her husband, her evidence is that she knew nothing of his dealings or the origin of the money used to improve Ray Mill. Whilst she expressed to him her preferences concerning the look and content of Ray Mill as a result of the works, the organisation of the improvements was left to him.

29 I then turn to Mr Tahir's explanation as to what happened to the money. Mr Tahir's evidence is that, in about 2007, he advised Mr Hawdon to form a company to carry on the business of supplying Your Homes Newcastle with furniture. He was asked to incorporate the business, which he did, and it became known as HCS (North East) Limited. At this stage, he had not met Mr Alan Minnikin, who was to be a director. Mr Tahir agreed to do the accounts for the business and the VAT. He said the first time he met Alan Minnikin was when he discussed the 2008 accounts with the directors.

30 The company business grew substantially and had unsatisfactory facilities, keeping its furniture in shipping containers in the east of the city, so the company took a lease of a warehouse in Newburn and that was in 2010. At that time, Mr Tahir was asked to assist with paperwork on a daily basis, spending about three hours a day on this activity. It was then that there were meetings, he said, usually in the afternoon between Mr Hawdon and Mr Minnikin and a Your Homes Newcastle manager to discuss what goods were required. He later found out that this individual was called Jason Wylie, who he said was a good friend of Alan Minnikin.

31 As the work built up, HCS became Mr Tahir's only client, and he worked for them on a self-employed basis. It took up a large part of his time. From incorporation in 2017, he said he was a signatory on the bank mandate and there were no limits on the amount for which he could issue cheques or transfer funds. He was authorised by the then directors to do all of those things. From the time he was on the mandate, he arranged for everyone to be paid by bank transfer. He says he was paid approximately £4,000 a month for his services, although this could vary. He also received bonuses if the business was doing well. He was doing everything within the company by way of paperwork as well as administration. The only

thing he did not do was speak to clients. He had weekly meetings with Mr Hawdon and Mr Minnikin to discuss the business against an agenda he prepared.

32 At a time he does not specify, Mr Tahir queried cash withdrawals shown on the HCS bank statements. He says Mr Hawdon told him that these were wages for Jason Wylie, by which he means bribes, who was described as their third partner. That is, he said, Mr Hawdon described him as their third partner. Thereafter, again, no date or year is given, he was asked to withdraw cash on a regular basis for Mr Wylie around Easter, July, September and December each year in amounts ranging between £15,000 to £20,000. At first, he took the money from the HCS account, but was later instructed to transfer the money from the HCS bank account to one of his accounts from which he was to withdraw cash to give to Paul Hawdon for him to pass to Jason Wylie. He said he put the cash in Mr Hawdon's drawer and, the following day, Mr Hawdon and Mr Minnikin would give Mr Wyle an envelope containing the cash.

33 During his time with HCS, again, no time, date or place is specified, he overheard a conversation between Mr Hawdon and Mr Minnikin in which he heard the latter say that he had a meeting with 'him' last night and, in his statement, "HIM" is spelt in capital letters to show that that is emphasised. Those words alone were enough for him to consider it prudent to say nothing, but listen. Later he discovered that "HIM" was a well-known figure from the criminal underworld, a Mr Sayers. He says that Mr Minnikin met this individual in a pub in Ponteland and that he had a few business interests in the area.

34 Further enquiry revealed that Alan Minnikin had been convicted of armed robbery. I should say that Mr Tahir said armed robbery and robbery of post offices. Mr Minnikin told me that he was convicted of one robbery of a Pritchard Security van together with Mr Sayers and that

they had both spent a considerable period in Frankland Prison together as a result. Mr Tahir also named a Mr Sandvit as a previous business partner of Mr Minnikin. His statement does not relate why this was some indication that Mr Minnikin was not averse to wrongdoing, though he suggested to Mr Hawdon in cross-examination that Mr Sandvit had also been investigated for post office and armed robbery. Mr Hawdon said he knew nothing of that.

35 Mr Tahir also referred to a conversation,(again, without saying where or when it took place, when he heard Mr Hawdon and Mr Minnikin talking about shotguns and how to hold them. Hearing these things and fearing for his family, he decided that he needed to make the authorities aware of what was going on in this company without it appearing that the information came from him. The manner in which he chose to do so was by charging VAT on his fees even though he was not VAT registered and using the VAT number of a now defunct company with which he had been involved. He thought that this would be regarded as suspicious by even the least capable of VAT officials on an inspection, which he had anticipated would happen annually, but it took another five years before there was an inspection, so the wrongdoing did not come to light.

36 Asked why he did not report the matter to the police, he said that CID were full of leaks and had associations with the criminal fraternity. He could not be confident that they would not tip off Mr Sayers. He also claimed that there was corruption in the CPS. When asked to explain the basis for this assertion, he gave as an example the fact that a prosecution of Mr Sayers had been halted because Kingsley Hyland, a senior Crown prosecutor, had failed to disclose to the defence materials which they were entitled to see. He accepted that he was aware that Mr Sayers was considering suing Mr Hyland for misconduct in a public office over this affair and his inference, which was that Mr Hyland had acted so as to enable the case against Mr Sayers to collapse, was speculation.

37 As to reporting the matter to HMRC, he said that too was full of corrupt officials who may divulge what he had told them. He said there were people in HMRC whom he did trust, but the majority of them had left by the time of these events. He did not explain why he did not report the matter to the trustworthy minority who remain.

38 He was asked why he did not report the matter to the council at the time. He said he had written at the request of Mr Minnikin when Mr Wylie was demanding more cash payments and Mr Minnikin wanted to rein him in. He was later informed by Mr Hawdon and Mr Minnikin that Mr Wylie had been pulled in by a council committee and told to watch his step, and they shredded the letter before him. He did not disclose this letter until late in this trial. Thus, there was no opportunity for the claimant to check the metadata of what appeared to be a word processed document.

39 Mr Rodger, however, did not object to the letter being put into evidence. It is dated 5 February 2017 and addressed to Nick Forbes, leader of the council. It says it was CC'd to **The Journal** newspaper, which Mr Tahir said did happen. He said that **The Journal** newspaper wanted to keep on the right side of the council and that Mr Hawdon and Mr Minnikin had said that **The Journal** did contact the council as a result of receiving the letter, but were told to mind their own business and, as Mr Tahir was said, since they depended upon the patronage of the council, they did as they were told. He said he heard this from Paul and Alan, that is Paul and Alan Minnikin, who were told by Mr Wylie that this was said at the committee meeting. Mr Tahir said he sent a chaser concerning corruption of the council to the council in 2020.

40 The relevance of the Wylie allegation, apart from to discredit the directors, is that Mr Tahir says that there will be money which was paid as cash to Mr Wylie and which will have gone through his account and has not been accounted for due to the nature of the payments. He asked me to take into account that, he says, the HCS bank statements which he had in the office in Newburn had been marked by him indicating what the payments were for. The CPS have these statements, but will not give him copies, and thus he has been handicapped in identifying the destination of the monies removed from the account. He accepted that though he had had solicitors until two weeks before trial, no application was made in these proceedings for disclosure as against the CPS. So, to that extent, he has disabled himself.

41 Mr Tahir said that he had transferred money from the company via his account and that of his companies' to Mr Hawdon and Mr Minnikin to their bank accounts abroad in Benidorm. He has not identified any payments to the directors beyond those identified by Mr Cottier. In a statement in response to Mr Minnikin stating that he did not receive cash from Mr Tahir, he replied in his statement "Can the same be said about cheques?" He does not deny Mr Minnikin's refutation of the proposition that he had received cash or explain when he is said to have been paid in cash or how much was involved.

Mr Tahir's account of the financing of the improvement of Ray Mill

42 Mr Tahir's defence says as regards Ray Mill is that he obtained a bank loan of about £185,000, which he paid into his HSBC bank account to be used towards Ray Mill and he used savings of about £70,000. That is his pleaded defence. Mr Hawdon also directed him to transfer funds to his account from HCS to be used towards Ray Mill, which he understood to be in the form of a bonus. In evidence, he said that the loan was taken out in 2013 and paid

into his HSBC account, but only drawn down in bits to pay the builder. He did not have £70,000 in savings; more like £45,000 to £50,000, and the rest came from his wife.

43 It was pointed out that there was no evidence of the loan in the bundle. He then said that the loan was to Properties (South Tyneside) Limited, which had held assets as security, and he could not explain why the defence had suggested that he had taken the loan. Having given that explanation, counsel showed him the accounts for Properties (South Tyneside) Limited for the period December 2012 to 2017, which showed that these had been signed by him and were the accounts of a dormant company with no assets and no debts. He was asked why the accounts were filed in this form if, in fact, the company had both security and a substantial loan. He said he filed accounts showing that it was a dormant company because he had received notice from Companies House that the company would be struck off unless accounts were filed. He accepted that those accounts were misleading.

44 After he had given evidence, Mr Tahir produced a statement from a loan account which he stated was evidence of the loan to which he had referred. The borrower is Properties (South Tyneside) Limited. Mr Rodger permitted the document to go into evidence. It was a loan for £157,000. It was advanced in whole at the outset, not by way of drawdown, and was repaid in 2020 with a very substantial payment. In fact, the statement was only for the period 2019 to 2020. Mr Rodger made the point that it would have been open to Mr Tahir if he wanted to prove that a loan had been taken for the renovation works to go to the lender and get a copy of the loan agreement, but that had not been done.

<u>Mr Hawdon's and Mr Minnikin's account of events</u>.

45 Mr Hawdon and Mr Minnikin accept that they have known each other for a very long time. Mr Hawdon told me that he knew Mr Minnikin before the armed robbery at the time he was

selling insurance for a living. He said that he knew that he had been to prison, but it was a surprise that it was for armed robbery. They had not kept in touch whilst Mr Minnikin was in prison and he did not know when he had come out, but they had bumped into each other at a pub in Chapel Park and he said, when he saw him, he probably put his arms round and kissed him, which, in my view, is an indication of their friendship.

46 They also accept that Mr Minnikin has got a connection with Mr Wylie. Mr Minnikin told me that Mr Wylie's wife is friends with the wife of his brother, Paul, and he, Alan Minnikin, was at Mr Wylie and his wife's wedding in 1996 or 1997. They both socialised in the pubs in Ponteland, and it was there that Mr Wylie bumped into him and they got chatting. Mr Wylie said he was having trouble with suppliers and, after a discussion about what he did and what needed supplying, Mr Minnikin said he knew someone who may be able to help and that was Paul Hawdon. He thought he may be able to help because he had a background in flooring and carpeting which is part of the sort of supply that HCS now does. He thought it looked like an opportunity, and he says he directed Mr Wylie to Mr Hawdon and they met. Meetings were not restricted to just two of them as Mr Hawdon was also put in touch with other people at the council.

47 Mr Hawdon said that Mr Minnikin told him what had happened and he enquired whether there was an opportunity. He worked out if he could obtain better and cheaper prices. The YHN tender team gave him a trial run on a small scale order, and the business grew from there. It was not Mr Wylie who was in charge of awarding contracts, says Mr Hawdon, but the tender team. In cross-examination, he said that Mr Tahir had helped him with the first tender and denied that Mr Wylie had come in to do it.

48 Further contracts were awarded following tender processes through HCS and its predecessor, though HCS and its predecessor was never given an exclusive contract. They only had 50 per cent of the supply contract. He said that Mr Tahir helped to prepare the second tender, and Mr Hawdon accepted on Mr Tahir's suggestion in cross-examination that he had paid for Mr Tahir to go on a course about public procurement which had preceded the second tender. Both Mr Hawdon and Mr Minnikin deny that bribes were paid to Mr Wylie. They say they did not ask him to pay them abroad from his own companies' accounts. Mr Hawdon says he did not know of the existence of these companies. He also says that Mr Tahir told him that receiving the payments abroad was a way of reducing his tax liability.

49 Mr Minnikin's evidence about these payments was that Mr Tahir had said that he was an overseas tax expert and had told them that he could put the two directors' money abroad and, by doing so, they would only lose 15 per cent in respect of tax and his fees as opposed to 60 per cent if they invested in a pension in the UK. Mr Minnikin said that, on 25 April 2017, Mr Tahir told the directors that they should put the claimant into administration. Mr Minnikin then had a conversation with Mr Hawdon and he said "Get the money back from abroad and see what bills do arrive." Mr Minnikin did remove his money, which was by then in Lanzarote, and bring it back to this country within five days of that discussion.

50 Both directors deny agreeing to pay Mr Tahir any bonus. Mr Hawdon said he was paid an additional amount at the year end for the accounts. Mr Hawdon said, on starting the business, Mr Tahir was paid about £1,000 a month for his services. This rose to something like £3,000 when HCS moved to its new premises in 2010, at which time he was attending for work four or five days a week. Apart from that, Mr Hawdon said he did not recall any conversation about wage increases.

51 A further common feature in the former directors' evidence is that they say that Mr Tahir was left to run the financial side of the business. They both say he treated them as less able than he was. Mr Minnikin described it as an appearance of arrogance and snobbery, and Mr Hawdon said that he was quite rude. They both gave an account of Mr Tahir telling them that only he was capable of writing letters and talking to certain parties and behaving as if he was the mainstay of the business. There is some support for that in the evidence of Tony Bannon, the warehouse manager at Newburn, who seemed perfectly straightforward with no particular reason to misrepresent, and indeed, when pressed as to what personal knowledge he had of the dealings between Mr Minnikin, Mr Hawdon and Mr Tahir, accepted that he had not seen that because he was not in the office, so he seemed to be a fair witness. He had said that Mr Tahir was often bossy towards Alan and Paul. About them, however, he would say to Mr Bannon "Take no notice of those two idiots," "they know nothing," "they have not got a clue. If you need to know anything, ask me."

52 I also detected an element of arrogance in Mr Tahir's description of the calibre of individual who will undertake a VAT inspection and his reference to deploying his scheme of falsely claiming VAT, so that even, and this is his words, the dimmest HMRC employee ("dimmest" was the word he used) would spot there was something amiss.

53 Mr Hawdon denied asking Mr Tahir to transfer company funds to pay for the Ray Mill improvements. He said that he had recommended Mr Harrison, the prospective father-in-law of his daughter, as a replacement builder when Mr Tahir told him that he wanted an alternative builder. He passed Mr Harrison's details to Mr Tahir. There was a complaint by Mr Tahir about windows installed by Mr Harrison. So, to avoid an upset in the workplace, Mr Hawdon paid to Mr Tahir out of his own Virgin Money bank account a cheque for £30,000 to be used to rectify the problem. The cheque, which he exhibits, shows that it was

cashed in 11 March 2016. He reached a separate agreement with Mr Harrison to reimburse him the money he had paid to keep Mr Tahir happy.

54 These divergent accounts give rise to the following issues:

(a) Did Mr Tahir owe fiduciary duties to the company in relation to his dealing with its money?

(b) If he was, on whom is the burden to prove what has happened to the money he has received?

(c) What is the effect of an asset being improved from an account into which money wrongfully obtained from the claimant has been mixed with the wrongdoer's own money?

(d) Has the party who has the burden referred to in (b) discharged that burden?

(e) Having regard to the above, is the court satisfied that the defendants have wrongfully taken any money from the claimant and, if so, how much?

(f) Was Mr Tahir a trustee of any money so taken?

(g) Is the claim for such money statute barred?

(h) What and how much of any monies proved to have been taken by Mr Tahir have been spent on the improvement and furnishing of Ray Mill?

55 I have not considered whether Mrs Tahir had any of the money or converted it to her own use as there is no evidence to support such an outcome, and the point, though pleaded, was not argued. The case against her at trial was that she was a recipient of the funds due to their investment into a property owned by her, where it is clear that she is not the owner.

56 Although I do not need to make findings in relation to her evidence, I will say that she seemed to me genuine and tried to help the court. She was shaky as to some of the history, partly because of the timescale over which events unfolded, I am satisfied of that, but also because she is very much affected by the death of her parents and a period of many years caring for them. She told me that she knew nothing of her husband's dealings. Indeed, he had not told her he was made bankrupt in 2002. Her recollection of his being made bankrupt was that, in the 1980s, he did not have money and her parents had to step in to pay the children's school fees.

57 It is not surprising that she would be unaware of the 2002 bankruptcy as, at the time, she was staying at Ray Mill caring for her parents and Mr Tahir was at the house in Jesmond, he says seldom leaving the premises due to an accident in which he fell from the roof of a hotel which he owned. I also formed the view that there was no significance as to her knowledge of events in the fact that she was a director of a number of his companies. She was, and I accept, a titular director, but these were his businesses. It is an aspect of Mr Tahir's business practice, which is evident from the way he dealt with the accounts of Properties (South Tyneside), that he approaches such matters on the basis that the end justifies the means and you do not let ,what he regards as, technicalities get in the way.

Was Mr Tahir a fiduciary when handling the claimant's money?

58 A "fiduciary" was described by Millett LJ in *Bristol & West Building Society v Mothew* [1998] Ch 1 at 18A, which is often taken as the classic statement this issue,

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

59 Mr Rodger also draws my attention to **Bowstead & Reynolds on Agency**, which, at para.6-33, says that an agent owes to the principal a duty of loyalty and a duty that attracts a fiduciary obligation.

60 On the facts, I find that Mr Tahir was an agent of the company to deal with its money and accounting. He was given a mandate to make unlimited payments from the company account for company purposes. Very substantial trust and confidence was placed in him as a result. There is no dispute on the evidence as to the extent of his activities in relation to the finances of the company. Both he and the two former directors referred to the extent to which he was left to make payments on behalf of the company and run its day-to-day financial affairs.

On whom is the burden of proof as to what became of the money which came into his hands and those of his companies?

61 In *Idessa (UK) Limited* [2011] EWHC 80 (Ch), approved by Norris J in *Toone v Robbins* [2018] EWHC 569 (Ch) and *Gillman & Soame Limited v Young* EWHC 1245 (Ch), Robert Miles QC sitting as a deputy judge of the High Court said:

> "I should also say something about the burden of proof. Where a person in a fiduciary position receives property of his principal, the burden is on him to

> account. This principle applies to company directors as it does to trustees. It is, therefore, for GSL to prove that Mr Young received a particular payment from the company; but, where it does so, it is for him to show that the payment was proper."

62 I have no doubt that, both on principle and authority, as Mr Tahir accepts, he received the sum of just over £3.5 million from the company; indeed, took it, the burden is on him to account to the claimant for what has happened to it, in as far as that remains an issue.

What is the effect of mixed monies being used to improve Ray Mill, if they were, and whose money does the law regard was used in such circumstances?

63 The rule in *Re Hallett's Estate* [1830] 13 Ch D 696 is that, where a defendant mixes their own money and that of the claimant in an account, the law presumes that the defendant has spent their own money first and kept the claimant's money intact.

64 Where a defendant buys an asset from mixed funds, the evidential uncertainty as to whose money was used in the purchase is resolved in favour of the claimant and the law deems the asset to have been purchased with their money. That is the case of *Re Oatway* [1903] 2 Ch 356. There are exceptions to the principle in *Re Oatway* in the case of a third situation where an asset is purchased which rises in value, but the residue in the mixed fund is such that there is enough left to reimburse the claimant. In *Turner v Jacob* [2006] EWHC 1317 (Ch), Patten J, as he then was, held that it is not open to the claimant to assert a lien on the asset purchased if the amount left in the mixed fund is an amount equal to that which was received from the claimant. **Snell on Equity**, chapter 7, para.7-53, is supportive of this approach, rather than the one taken in *Shalson v Russo* [2003] EWHC 1637, where it was held that the claimant could cherry-pick between the asset purchased or the recovery of the monies which are left in the mixed fund, and that view is replicated in **Lewin on Trusts (20th Ed)**, to which I shall later refer.

65 In the present case, there is no evidence that Mr Tahir had anything like the amount which it had been said had been expended upon Ray Mill in any account, either his own or any of his companies, and nor does he have that sort of money left in the account now. In those circumstances, whether or not he mixed his funds with those of the claimant's, the improvements are deemed to have been carried out with the claimant's money if it is found that he was a trustee of the funds, subject to him proving that the case is otherwise, which he has not done. Whether or not that permits the claimant to trace into the property, Ray Mill, for the full amount expended or the improvement in its value consequent upon such payments will be a matter to be considered in the tracing claim, and I do not need to consider now.

Is the court satisfied that Mr Tahir wrongfully took the claimant's money and, if so, what amount?

66 In considering the evidence of Mr Tahir and that of Messrs Hawdon and Minnikin, I have to take into account the fact that they are still facing criminal proceedings concerning their financial dealings as to tax, and this has gone on for some considerable time. I have to be on my guard that they tailor their evidence to put them in the best light *vis-à-vis* the criminal proceedings, and they will all have honed their accounts as to who was responsible for what many times over.

67 I am also aware that Mr Tahir has pleaded guilty to two criminal offences of fraudulent evasion of duty, which can have some bearing on his credibility, and that Mr Hawdon and Mr Minnikin have not been convicted. It would be unfair to Mr Tahir to regard this as key, given that they have faced a case sufficient to go to the jury, albeit the jury could not reach a verdict.

68 At the very least, anyone who has their earnings ,particularly UK earnings which one would expect to be taxed in this country, whether salary or dividend, paid abroad as a means of saving tax does start from the position that they are prepared to take a considerable risk as to whether what they are doing is lawful unless they have investigated the matter in the greatest depth. There is, therefore, a question-mark over their probity in matters of the payment of tax. Furthermore, it is clearly in the interests of both former directors, on one side, and Mr Tahir, on the other, to suggest that the other had more say into determining what and how the directors were paid and how the tax was dealt with and how the tax came not to be paid, and I take all that into account.

69 The key witness who is free from this taint is Mr Cottier. He is a qualified chartered accountant and a fellow of the Institute of Chartered Accountants. He tells me, and I accept, that he has spent 40 years in commercial ventures, including several directorships of publicly listed companies. I accept this because that is what he told me, he has not been challenged and I have no reason to doubt him.

70 He told me he was invited to become involved in the company by Paul Minnikin. He found that the previous four years' accounts had been misleading and took advice from Walsh and Co Accountants that, if the accounts were restated, the company would show a decent profit if the funds had not disappeared or, as he described, "went walkabout." Again, his evidence on this point has not been challenged and I accept his evidence on the point.

71 It is unlikely that Mr Cottier would have persisted with the company and taken a shareholding if he had not thought that it was a viable and worthwhile business proposition. Since his involvement as executive chairman and financial director, Tait Walker, a substantial and well-known firm of accountants in Newcastle, have acted as the company's auditors and provider

of corporation tax advice, which is an indication that, under his guidance, the company is being properly run from a financial point of view.

72 These factors reinforce my view that he was a reliable witness and that his analysis of the financial documents in this case is of considerable weight. As there has been no challenge to his analysis, I accept that the documents show what he says they show, namely that Mr Tahir has removed £1,720,406.50 from the company, in respect of which there is no record in the company documents or in the bank statements to show that he used them for the payments of HCS creditors or payments to directors or members of the company. Further, there is the sum of £54,054.68 shown in the worksheets produced by Mr Tahir which represents money he removed from the company claiming it to be VAT on his charges. The total, therefore, for which he has to account is £1,774,461.13.

73 The question as to Mr Tahir's explanation as to where the money has gone is very much dependent on what I make of his evidence and its comparison with other evidence in the case. There are several features of Mr Tahir's evidence which lead me to the view that he is an unreliable witness.

74 The explanation he gave as to why he charged VAT to which he was not entitled is implausible in a number of respects. It starts with his evidence that, as soon as he heard the directors talking about "HIM", he thought he had better keep quiet and listen. As he did not know who "HIM" was at that stage, there would be no need for such timidity on his part. Furthermore, once he knew, on his account, of Mr Sayers' involvement and Mr Minnikin's previous history, if he genuinely feared for his family in taking part in this business, the safest course was to leave at that stage. Yet, he stayed on waiting for a VAT inspection which did

not take place for a further five years. His remaining with the business for that length of time is an indication that his claims of fear are pure confection on his part.

75 I next look at the scheme he claimed would reveal the company's wrongdoing. It involved stealing £54,000 from the company, one which he claims was a front, or may well have been a front, for Mr Sayers. If that is right, what did he think Mr Sayers' view may be when he discovered that Mr Tahir was stealing from the company, an outcome which was likely once the VAT authorities queried why VAT was being charged, but not recovered from the recipient. He could hardly tell Mr Sayers that this was all a ruse to uncover a greater wrongdoing in that company, namely the bribery of Mr Wylie.

76 The scheme itself is flawed because there is no reason why the VAT inspection would reveal more than that he was claiming VAT to which he was not entitled. The inspector would have no reason to discover the payments of the bribes, as these were off the books and why should they look for this anyway? It had nothing to do with VAT. There is also the question as to why Mr Tahir would use a genuine VAT number, albeit related to a company in which he was formerly involved. If he wanted a red light to flash at HMRC, the use of a non-existent number such as one with insufficient digits would be more likely to have that effect. The fact that a real number was used is an indication that the intention was to maintain the pretence that he was entitled to VAT for as long as possible.

77 In the course of cross-examination, Mr Tahir told me that sometimes he charged VAT and sometimes he did not. I asked him how he decided when to charge. He said it was as the mood took him. In response to counsel's question, however, he said that he adopted an irregular pattern of charging in order to alert the VAT authorities to the fact that there was a problem with this company. When it was pointed out by Mr Rodger that the worksheets he

had prepared did not show an irregular pattern of payment, and he was taken to various entries on the sheets to show that, he said, for the first time in this case, that the worksheets had been doctored.

78 Mr Cottier had been using the worksheets for his accounting exercise on the basis that these were the ledgers produced by the defendant and which had been found on his hard drive. To challenge them at a late stage and after Mr Cottier had given evidence indicated to me that Mr Tahir was making the claim simply because the information on the sheets did not fit with the evidence he was then giving. In fact, at the very end of his period completing the worksheets, it was evident that he stopped charging VAT, but, by then, there had been a visit from the VAT authorities. Mr Tahir, characteristically given his other evidence in the case, suggested that the worksheets must have been doctored by friends if Chelsea Harrison, whom he did not name and did not appear to know, thus widening the circle of corruption that he relied upon to maintain his history of events beyond the police, the CPS, HMRC, the City Council and the local newspaper.

79 This attack on the worksheets resulted in a further statement being taken from Ms Papprill, the solicitor for the claimant, who could have had no forewarning that this assertion was coming. Her evidence was that the worksheets were taken from the hard drive which had been seized by HMRC and copies of these worksheets were provided by HMRC to the solicitors. That evidence was not challenged, and I find that the worksheets being used by Mr Cottier were worksheets taken from the hard drive which had been seized by HMRC. They were not doctored worksheets.

80 It should not need to be said, but I will add that the assertion that all the public bodies I have identified have been infiltrated by criminals who would report to Mr Sayers that Mr Tahir was

saying that the claimant was bribing Mr Wylie is not one I accept. It is also highly unlikely that, if an allegation of local authority corruption was brought to the attention of a local newspaper, it would desist its enquiries if told by the council to mind its own business. Such a response is more likely to have whetted the appetite for investigation. It is also unlikely that the council would deal with an allegation of corruption brought to its attention by telling the alleged perpetrator simply to watch his step and then shredding the letter containing the allegation. What would be the point of shredding the letter because, on its face, it was CC'd to the newspaper, so they would have thought at least that a third party was aware of its contents?

81 This assertion that there was an inability to report corruption also leads to another curiosity in Mr Tahir's evidence. In order to explain the fact that he did send an anonymous letter to the council leader identifying Jason Wylie as a taker of bribes, he said that he was instructed to do so by Mr Minnikin in order to warn off Mr Wylie from seeking evermore payments. Of course, he would have had to have Mr Minnikin's instruction to do so, because otherwise what he was saying would be contrary to his evidence that he was frightened that, if information was given to the council, even anonymously, they or Mr Minnikin would report to Mr Sayers that the information must have come from Mr Tahir.

82 In the wider scheme of things, however, Mr Minnikin would have had no interest in leaking to the council that Jason Wylie was taking bribes from suppliers, as this would lead back to HCS and destroy any relationship with the council that the company had. A more likely explanation for the letter is that as it is dated at the time when HMRC had started and was well into its investigation and Mr Tahir was falling out with the directors, which they told me about and seems likely in view of the problems with the finances which were being revealed

is that it was sent by Mr Tahir to the council in the hope of destroying that part of HCS's business and, as it was such a large contract, the company itself.

83 There are various reasons why such an outcome would have proved attractive to Mr Tahir; firstly, to get back at Mr Hawdon and Mr Minnikin, who had turned against him and with whom he was shortly to be in dispute in relation to these criminal matters and, if the company had come to be liquidated, there was a chance that no one would have taken the trouble to pursue him for the money he had taken. It is likely, and I say this because Mr Tahir is a highly intelligent and articulate man, that both occurred to him.

84 Mr Minnikin said that Mr Tahir had told him in April 2017 that the company should be put into administration. In the light of his attempt to derail the HCS contract, I think it is likely that Mr Minnikin is correct in what he says and that Mr Tahir was looking at a way to stop the company continuing in the hope of hiding what he had done, particularly if Mr Tahir had found a tame administrator, which is not an unheard of eventuality in such cases.

85 It is notable that I was told in evidence, and again this was not challenged, that the council still takes supplies from HCS, thus suggesting that it does not think there is any substance in the allegations made by Mr Tahir and that the company wished to maintain its contract with the council and that, given that Mr Wylie is no longer with the council which is common ground, the placing of the contract with HCS results from a proper business decision of the council and not corruption.

86 A further factor which negatives the assertion that contracts were obtained by bribery is that all contracts went through a tender process and that it was thought worthwhile paying to put Mr Tahir through a course on public procurement. There would be no need to do so if Mr

Wylie was to give them the contract anyway and was prepared to complete tender documents for the company.

87 As to Mr Hawdon and Mr Minnikin, I think I should say this. They were both warned of the privilege against incrimination, but they did not seek to exercise that in relation to any questions that they were asked, including questions from me to Mr Minnikin as to whether he had been bribing Mr Wylie. They deny that they were paying bribes to Mr Wylie. Independent of their evidence is the fact that Mr Cottier has looked into this and, for the months in which Mr Tahir has said that these cash bribes were paid of between £15,000 and £20,000, he cannot find documentary support for this assertion. Whilst there is some lesser cash drawn at these times, the accounts of HCS do not show cash drawn or transfers to Mr Tahir's accounts or that of his companies and cash payments out to match these transactions.

88 In the light of the above, I do not accept Mr Tahir's evidence that the company was paying bribes to Mr Wylie or that there was any discussion at which he heard the two directors talking about bribing Mr Wylie. Indeed, I am wholly unpersuaded by the explanation that the claim for VAT to which he was not entitled was for the purposes which he alleges.

89 Mr Rodger suggested that Mr Tahir has convinced himself of the truth of his account of events. But, in my view, that is a charitable interpretation. Seeing the dynamic between Mr and Mrs Tahir from the bench and his remark in closing that he was trying to protect the interests of his wife and the two other beneficiaries of his late father's estate, his two sons, it seems to me that, whilst he was aware that his account of events was incorrect, he was seeking to protect those who might inherit Ray Mill, so protect their interests, but also protect himself and his own position in the eyes of Mrs Tahir, who did not know what he was up to and is still supportive of him.

90 As to the evidence of Mr Hawdon and Mr Minnikin, despite my reservations expressed concerning their motive to mislead and probity, I prefer their evidence to Mr Tahir. I accept that, contrary to what Mr Tahir said in closing, Mr Paul Minnikin, this came from Mr Alan Minnikin, did report the theft of these monies to the police.

91 Mr Hawdon struck me as hardworking businessman who was prepared to put huge effort into making HCS a success by doing virtually every task in the business, save for that undertaken by Mr Tahir. In the cross-examination of Mr Hawdon, Mr Tahir sought to emphasise that it was the former who had been involved in the nuts and bolts of transporting furniture around and dealing with clients. His background was a flooring subcontractor who had built up quite a business. He was running 12 vans before it ran to ground, and the company, and this is a matter which Mr Tahir asked Mr Hawdon to point out, was brought down not by bad management, but by what Mr Tahir termed "subbie-bashing;" that is main contractors depriving subcontractors of liquidity by delaying the payment of invoices. Generally, in building circles, it also involves trying to get the subcontractor to take less money just to get paid.

92 He started the business which became HCS in a small way, but it grew very rapidly. He described doing contract work at the Royal Victoria Infirmary in Newcastle when he got a call "out of the blue" to provide 50 wardrobes to YHN, and he just had to leave the job, collect the wardrobes and get on with it. It did not seem to me that there was anything inherently improbable in his evidence, and it does tie in with that of Mr Cottier.

93 Mr Minnikin was cross-examined about continuing criminal links, which he denied. In order to explore this issue, Mr Tahir asked him about his wealth and how he had been able to amass

sufficient capital and income to afford a £1.2 million mortgage and lose money on the Jarrow brewery and invest in another brewery all within 15 to 20 years of release from prison. His answers on these points were vague. He told me that he started with renovating a flat in Heaton together with his brother and Mr Sandvit, and this property renovation business escalated to more quality projects at Darras Hall. I have to remind myself, however, that the question of the origin of his wealth only arose in cross-examination and, in those circumstances, it would not be fair to expect him to be able to produce documents and give fine detail as to how he financed his acquisition of each investment and his business grew.

94 In fact, Mr Tahir knew a great deal more about Mr Minnikin anyway because he did his tax returns from 2008, so he would probably have known if there was anything untoward, but he did not in cross-examination come up with any improper or suspicious transaction of which he had learned during his period of doing Mr Minnikin's accounts. Mr Minnikin's evidence also had the advantage that it did not conflict with the analysis prepared by Mr Cottier.

95 Therefore, as to these rival accounts of how the business was won in the first instance, I reject the assertion that there was bribery. I prefer the evidence of Mr Minnikin and Mr Hawdon that Mr Minnikin did know Mr Wylie through a connection by his brother's wife, that they saw each other in Ponteland drinking, that Mr Wylie got chatting to him and say he had a problem with a supplier, that Mr Minnikin saw a business opportunity, put him in touch with Mr Hawdon, and then Mr Hawdon was in touch with the council, not just Mr Wylie. They tendered for work. They were given a small trial to see how they did. They obviously impressed and were given further tenders and this continues.

96 Mr Tahir claims to have returned £500,000 to the claimant's directors and members via his companies and £2 million from his accounts. But, having rejected his claims concerning the

payment of bribes and having regard to the documentation and the evidence of Messrs Hawdon and Minnikin negating cash payments to them and the payments to creditors being within the documentation considered by Mr Cottier, he has not satisfied me that he has returned more than the £126,200 and the £1,388,450.87 identified by the claimant and set out in the schedule.

97 As to the sums due to the defendants for renumeration, I cannot see how Mr Tahir justifies his figure of £450,000. The amounts he has been credited with by Mr Cottier are those shown in the worksheets he prepared identifying his remuneration. I reject his claims that he was paid bonuses, both because Mr Hawdon says that no bonuses were agreed, but also because that is supported by Mr Cottier's evidence that there is only one reference to bonuses in the monthly meetings and that seems, when compared with the worksheets, to relate to staff bonuses. It is a further measure of Mr Cottier's even-handedness that he accepted the amounts in the worksheets credited as remuneration by Mr Tahir. He has not sought to calculate what he would have been entitled to if his wages had been restricted to the level which Mr Hawdon recalls agreeing of about £3,000 and which the directors accept increased gradually over time.

98 Mr Tahir's explanation as to how he only owes £9,478 for wrongly charged VAT and that that sum is due to HMRC and not the claimant is clearly wrong. As he did not always charge VAT and has paid tax on the VAT, he says, wrongly claimed, the Revenue will accept from him £9,478 to offset the VAT wrongly reclaimed by the claimant. The figure of £54,054.68 is taken from the worksheets. They are Mr Tahir's figures as to what he has had. From what he says, he clearly has not paid the VAT over to HMRC and, as Mr Cottier says, in those circumstances, it should be returned to the claimant, who may well have to repay any reclaimed VAT in respect of this sum to the Revenue.

99 Were the monies taken from the claimant trust monies in the hands of the first defendant? Mr Rodger relies on the imposition of a constructive trust on the basis that Mr Tahir stole the money from the company. As authority, he relies upon an extract from the speech of Browne-Wilkinson L in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 716 where he said:

> "Although it is difficult to find clear authority for the proposition, when property is obtained by fraud, equity imposes a constructive trust on the fraudulent recipient. The property is recoverable and traceable in equity."

100 In the course of the hearing, there was no argument about this proposition, and **Lewin on Trusts 20th Edition** at 8029 says that the proposition has been convincingly doubted in *Shalson v Russo* [2003] EWHC 1737 (Ch) and that a first instance judge is probably bound by the view that no constructive trust arises. One difficulty with the proposition is that it would be at odds with the fact that a thief cannot give good title. It is more difficult to deal with where property is obtained by fraud, if the transaction is not avoided the wrongdoer could pass good title, but, where the transaction is avoided the wrongdoer could not pass good title.

101 It is not necessary, however, to decide whether a thief becomes the trustee for the injured party as Mr Tahir was a fiduciary, as he was the agent for the company to deal with the money which he had misapplied and owed a fiduciary duty even before the wrongdoing of which complaint is made. He is a quasi-trustee (see **Lewin**, chapter 8, para.18) accountable for abusing the trust placed in him and, for the purposes of the Limitation Act 1980, he is in the same position as a trustee duly appointed with trust property vested in them (**Lewin**, chapter 50-056 and 50-060). So, as a matter of law, the money that he has failed to account for is trust monies which he has held or converted to his use, and the beneficiary is the company.

The money spent on Ray Mill

102 Mr Cottier has documented spending on Ray Mill of £758,009.17. This has been calculated by reference to Mr Tahir's bank statements and invoices and receipts relating to the work at Ray Mill. Mr Rodger indicated that the claimant is content to rely on this figure, rather than the slightly higher figure of £771,028.97 which reflects some additional invoices, the payment for which cannot be identified.

103 As to the assertion that Mr Hawdon told Mr Tahir to pay money from HCS to Mr Harrison for the building work, I prefer the evidence of Mr Hawdon. His explanations as to the dealings concerning the builder were as I have identified, and the fact that Mr Tahir did use this other builder, Mr Harrison, is an indication that he was looking for an alternative builder. That is a much more likely explanation for the sequence of events than he had a builder who he was perfectly happy with and then, because Mr Hawdon said "Use somebody else," he got rid of the original builder and replaced him with Mr Harrison. So, I do not accept that he was told by Mr Hawdon that he could have money out of HCS to pay Mr Harrison and that this was to be treated as a bonus or indeed was a bonus.

104 It is common ground that Mr Tahir received £2,831,688.81 into his bank account from HCS. That sum includes a mixture of the claimant's money and his own, for some of it was his fees for his work. But only £1,710,475.80 of that money was either remuneration to which he was entitled or returned to the claimant's directors and creditors, leaving a balance of £1,121,213 of the claimant's money which he retained. On the authority *Re Oatway* (above), the payments out of the account spent improving and furnishing Ray Mill are deemed to have been paid out of the monies belonging to the claimant. Accordingly, I find that the

£758,009.17 spent by Mr Tahir on Ray Mill was trust money for which he was and is liable to account to the claimant.

Limitation

105 Mr Tahir did not argue limitation, but it is in his defence. The general limitation period for an action by a beneficiary is six years from the date on which the right accrued. That is subsection 21(3) of the Limitation Act 1980. By virtue of subsection 21(1)(a), there is no period of limitation in respect of a fraud or fraudulent breach of trust. 'Fraud' here requires actual dishonesty. At a minimum, there must be an intention on the part of the trustee to pursue a particular course of action either knowing that it is contrary to the interests of the beneficiary or being recklessly indifferent to whether it is contrary to their interests; see **Lewin**, chapter 50, paragraph 88.

106 There is also no limitation period where the action is to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee or previously received by the trustee and converted to his use; subsection 21(1)(b) of the 1980 Act. In the present case, Mr Tahir has received the monies which are trust property and he has converted the company's money to his own use, and I infer that he did so in the knowledge that this course of action was known by him to be contrary to the interests of the company, for he could not have thought otherwise. Furthermore, this is an action by a beneficiary against a trustee for trust property which has been received by the trustee and converted to his use, so both provisions apply here and Mr Tahir has no limitation defence.

107 As a fallback position, the claimant relied upon ss.32(1) and (2) of the Limitation Act to postpone the date of knowledge for the cause of action until the claimant knew or ought to

have known of Mr Tahir's breach of duty. On the evidence, that date was no earlier than 2016, which is within six years of the issue of the claim. Section 32(1)(b) postpones the limitation period in a case where the action is based on fraud or any fact relevant to the claimant's right of action as being deliberately concealed from him by the defendant. Section 32(2) provides that a deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in the breach of duty.

108 An agent in the capacity of Mr Tahir was under a duty to disclose his own wrongdoing to the company. Since *Potter v Canada Square Operations Limited* [2021] 3 WLR 777, the duty to disclose has been widened and it has been the case that recklessness is sufficient to establish a deliberate concealment of facts. In this context, recklessness requires that the defendant realise the risk that he was under a duty to disclose and it was reasonable that he should do so. In the present case, however, there is no need to go as far as the case of *Potter*, for the taking of the money was the deliberate commission of a breach of duty in circumstances in which it was unlikely to be discovered. If there was a six year limitation period in this case, the start would have been postponed to 2016.

109 My conclusion is that there must be judgment for the claimant against the first defendant in the sum of £1,774,416.13. That leaves the question of the second defendant. It seems to me that the pleaded claim against the second defendant has not been made out. The claim against the second defendant must be dismissed.
