Neutral Citation Number: [2022] EWHC 86 (Ch)

Case No: BL-2020-001098

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

21st January 2022

Before :

MR JUSTICE EDWIN JOHNSON

- -

Between :

UMBRELLA CARE LIMITED
(In Liquidation)

Claimant

and

(1) KHAIR UN NISA
(2) USMAN KHALID RAJA
(3) EMIL CERVENAK
(4) DYNAMIC INT LIMITED
(5) UNIVERSAL REAL ESTATE (PVT) LIMITED
(6) UNIVERSAL TOTAL CARE LIMITED
(7) FIRST INTERNATIONAL HOLDINGS LIMITED
(a company incorporated in the United Arab Emirates)
(8) FI HOLDINGS LIMITED
(a company incorporated in the British Virgin Isles)

Defendants

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Christopher Brockman and **Anna Lintner** (instructed by **Wedlake Bell LLP**) for the Claimant
Timothy Becker (acting on a direct access basis) for the First, Second, and Fourth to Seventh Defendants

Hearing dates: **24th and 25th November 2021**

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APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic

THE HONOURABLE MR JUSTICE EDWIN JOHNSON

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down are deemed to be 10.30am on Friday 21st January 2022.

Mr Justice Edwin Johnson:

Introduction

1. This is the hearing of an application ("the Application") for summary judgment and interim payments made by the Claimant in this action, Umbrella Care Limited, a company in liquidation. I will refer to the Claimant as "the Company". The joint liquidators of the Company are Louise Brittain and Stephen Grant.

2. The Company, as its name suggests, operated as an umbrella company, principally or exclusively in the healthcare field. It employed or retained workers and supplied those workers to recruitment agencies providing medical staff. Essentially therefore, the Company acted as employer or retainer of the relevant staff, and was responsible for the payroll functions for those staff, including the payment of their wages, and the accounting to HMRC ("the Revenue") for the PAYE tax and National Insurance contributions which fell to be deducted from these wages. The Company also charged VAT to its customers, and was thus liable to account for VAT on payments received from

its customers. The evidence is that the Company operated on a substantial scale, with a large number of clients and a substantial turnover.

3. My reference to employment or retainment takes account of the fact that one matter which is said to be in dispute in this case is the status of some of the medical staff provided by the Company. It has been suggested that some of the staff were in fact self-employed, as opposed to being employed by the Company. I will return to this particular point later in this judgment.

4. The Company's case is that it has been involved in what it refers to as a large scale labour supply fraud. It is alleged that the Defendants, against whom summary judgment is sought, acted dishonestly and in concert to defraud the Revenue of tax ("PAYE") and national insurance ("NIC") contributions, and VAT. The Company's case is that the PAYE and NIC contributions were deducted from employees' wages, and that payments of VAT were received from customers, but that no, or only minimal accounting was then made to the Revenue for any of these funds. Instead, so it is alleged, the relevant funds were removed from the Company and then either ended up in the hands of other parties or were used to buy properties in the names of certain of the Defendants.

5. The figures involved are substantial. In its final proof of debt in the liquidation, the Revenue claims to be owed £36,418,026.45 in unpaid PAYE, NIC, and VAT. The previous figure assessed by the Revenue for unpaid PAYE, NIC, and VAT, was £26,797,492.74. The debt on which the petition for the provisional liquidation of the Company was based was the figure then claimed by the Revenue as unpaid VAT, together with interest thereon and a small amount of PAYE which had been declared but not paid by the Company, in the total sum of £5,200,810. In the final proof of debt the sum now claimed by way of unpaid VAT (including surcharges and interest) has increased to £14,492,661.85.

6. According to evidence from the Revenue, as at 15th July 2020 the Revenue had received, in the period since May 2017, PAYE returns from the Company totalling £344,182.86 and payments in this respect of £165,648.33. In terms of VAT, and according to the same evidence, the Company was registered for

VAT on 27th March 2017. In the period from April 2017 to April 2020, according to the Company's evidence, the VAT returns submitted by the Company showed sales of £186,136 and VAT payable of £24,691.

7. To state the obvious, the discrepancies between what is said to be due to the Revenue, and what is said to have been paid to the Revenue are very substantial. The Company's case is that the missing funds have been wrongfully and, the Company also alleges, dishonestly abstracted from the Company.

8. There were fifteen Defendants to the action, but the claims against the Ninth to Fifteenth Defendants have been settled by way of consent orders. Of the remaining eight Defendants, summary judgment is now sought against the First and Second Defendants, who are wife and husband, and the Fourth to Sixth Defendants.

9. The case against those of the remaining Defendants against whom summary judgment is sought ("the Application Defendants") is that they are each liable to the Company in respect of the funds removed from the Company or some of them, on the basis of various legal duties and obligations said to have been owed and to be owed to the Company. It is also said that various of the Application Defendants hold either part of those funds or properties purchased with those funds on trust for the Company.

10. At the hearing of the Application the Company was represented by Mr. Christopher Brockman and Ms. Anna Lintner, both counsel. The Application Defendants were represented, on a direct access basis, by Mr. Timothy Becker, also counsel.

11. At the outset of the hearing a question was raised by Mr. Brockman as to the ability of Mr. Becker to act on behalf of the Fourth Defendant, Dynamic Int Limited ("Dynamic"), which has no directors. Mr. Becker confirmed that his instructions to act on behalf of Dynamic came from the Second Defendant (Mr. Usman Khalid Raja), as was the case with his representation of the Fifth and Sixth Defendants; namely Universal Real Estate (PVT) Limited ("Universal

Real") and Universal Total Care Limited ("Universal Total"). On the same basis Mr. Becker also stated that he represented the Seventh Defendant, First International Holdings Limited, although this latter company is not a respondent to the Application.

12. I am most grateful to all counsel for their assistance on the hearing of the Application. I should however pay a particular tribute to Mr. Becker who, as I understand the situation, had only been instructed for the hearing at a relatively late stage, and was therefore required to master the documents in the Application, which are extensive, in a short space of time, and to present what was, in certain respects, a difficult case on behalf of the Application Defendants. Notwithstanding these circumstances Mr. Becker made an effective presentation of his clients' case.

The Company

13. The Company was incorporated on 9th March 2017. The director of the Company, from the date of its incorporation until 10th September 2019 was the First Defendant, Mrs Khair Un Nisa ("Mrs Nisa"). As I have said, Mrs Nisa and Mr. Raja are wife and husband. Mrs Nisa was replaced as sole director of the Company on 10th September 2019 by the Third Defendant, Emil Cervenak ("Mr. Cervenak"). Mr. Cervenak resigned as a director on 15th February 2020. On 15th February 2020 Mrs Nisa was re-appointed as director and, on 24th February 2020 Mr. Raja was appointed as a director. Mr. Raja subsequently filed a notice of termination on 27th January 2021, which stated that his directorship had terminated on the same day as his appointment; that is to say 24th February 2020. On the basis of this notice of termination therefore, Mr. Raja was a director of the Company only for a single day. Also on 27th January 2021 a notice of termination was filed which stated that Mrs Nisa's directorship had terminated on the same day as her re-appointment; namely 15th February 2020. On the basis of this notice of termination therefore, Mrs Nisa's second period as a director of the Company lasted only a single day.

14. The Company went into provisional liquidation on 29th July 2020, on the application of the Revenue. The Company went into liquidation on 4th

November 2020. The Company's sole shareholder, from incorporation until 10th September 2019, was Mrs Nisa. Her shareholding in the Company was transferred to Mr. Cervenak on 10th September 2019. The Company's case is that Mr. Raja and Mrs Nisa were de facto directors of the Company, even at those times when they were not de jure directors of the Company. For the purposes of the Application however, the Company has only pursued its case that Mr. Raja was a de facto director of the Company.

Dynamic (Dynamic Int Limited)

15. Dynamic was incorporated on 12th September 2016. Mrs Nisa was a director of Dynamic from 12th September 2016 to 10th September 2019, and was then re-appointed as a director from 15th February 2020. On 25th February 2021 a notice was filed at Companies House stating that her appointment as director had terminated on 1st April 2017. Mr. Cervenak was a director of Dynamic from 10th September 2019 to 15th February 2020.

16. As matters stand Dynamic has no de jure directors. The Company's case is that Mr. Raja was the de facto director of Dynamic at all times from its incorporation, and remains the de facto director of the Company. As I have already recorded, Mr. Becker's instructions to act on behalf of Dynamic came from Mr. Raja.

Universal Real (Universal Real (PVT) Limited)

17. Universal Real was incorporated on 9th July 2018. Mrs Nisa was appointed as a director of Universal Real from 9th July 2018, but resigned the same day. Mrs Nisa was re-appointed as a director on 15th February 2020. Mr. Raja was appointed as a director on 9th July 2018 and resigned on 15th February 2020. The Company's case is that Mr. Raja was a de facto director of Universal Real at those times when he was not a de jure director.

Universal Total (Universal Total Care Limited)

18. Universal Total was incorporated on 14th December 2018. Mrs Nisa was appointed a director of Universal Total from 14th December 2018, and has remained a director since then. Mr. Raja was a director of Universal Total from

14th December 2018 to 31st March 2019, and again from 13th May 2019 to 15th February 2020. The Company's case is that Mr. Raja was a de facto director of Universal Real at those times when he was not a de jure director

The relief sought in the Application and the basis for that relief

19. It is not in dispute between the parties to the Application that funds were taken out of the Company, at least to a certain amount. Nor is there a dispute as to the route taken by those funds, following their payment out by the Company, again at least to a certain amount. I will refer to the funds, taken out and alleged to have been taken out of the Company, by the neutral expression "the UCL Funds". For the avoidance of doubt this expression encompasses both the total amount of the UCL Funds, and any particular part of the UCL Funds to which reference is made.

20. In summary, the relief which is sought against the Application Defendants on the Application, and the basis on which that relief is sought are as follows.

21. As against the First Defendant, Mrs Nisa, a judgment is sought for damages or equitable compensation to be assessed, together with an interim payment on account of those damages/equitable compensation. The claim to damages/equitable compensation is made on the basis that Mrs Nisa breached duties which she owed to the Company, during those periods when she was a de jure director of the Company, in causing or permitting the relevant parts of the UCL Funds to be paid out by the Company.

22. As against the Second Defendant, Mr. Raja, a judgment is sought for damages or equitable compensation to be assessed, together with an interim payment on account of those damages/equitable compensation. The claim to damages/equitable compensation is also made on the basis that Mr. Raja breached duties which he owed to the Company, by causing or permitting the UCL Funds to be paid out by the Company. Mr. Raja was only officially a director of the Company, at least so far as the Company records are concerned, for a short period of time. It is however the Company's case that Mr. Raja was, at all times from the Company's incorporation, a de facto director of the

Company, and thus owed the duties of a director to the Company. The Company also claims to be entitled to trace into three properties held in the name of Mr. Raja, which are said to have been purchased using UCL Funds wrongfully taken from the Company. It is said that these three properties are held by Mr. Raja on constructive trust for the Company. In this respect the Company seeks a declaration that these properties are held on constructive trust for the Company, and an order for their transfer into the name of the Company.

23. As against the Fourth Defendant, Dynamic, the Company's case is that Dynamic was in knowing receipt of a substantial part of the UCL Funds, on the basis that the relevant part of the UCL Funds was paid to Dynamic in breach of fiduciary duties owed to the Company by Mr. Raja. The Company's case is that Mr. Raja was the de facto director of Dynamic during the relevant period and, as such, the knowledge of Mr. Raja that the relevant part of the UCL Funds was paid out to Dynamic in breach of fiduciary duties can be attributed to Dynamic. On this basis the Company's case is that Dynamic held the relevant part of the UCL Funds on constructive trust for the Company, and that Dynamic was thereby in breach of trust in paying away the relevant part of the UCL Funds to third parties. It is also the Company's case that Dynamic, by Mr. Raja as its alleged de facto director, dishonestly assisted Mr. Raja's breaches of the fiduciary duties which he owed to the Company, pursuant to which Dynamic received and dealt with the relevant part of the UCL Funds. In terms of relief sought on the Application, the Company seeks judgment against Dynamic for equitable compensation to be assessed, and a declaration that a sum remaining in Dynamic's bank account plus any interest earned on that sum is held on trust for the Company, together with an order that the relevant sum be paid over to the Company. No interim payment is sought against Dynamic.

24. As against the Fifth Defendant, Universal Real, the Company's case is that Universal Real was in knowing receipt of a part of the UCL Funds, which it received in part from the Company and in part from Dynamic. The case in knowing receipt is put on the basis that the relevant part of the UCL Funds which was received direct from the Company was paid to Universal Real in breach of fiduciary duties owed to the Company by Mr. Raja. So far as the UCL

Funds were received from Dynamic, the case in knowing receipt is put on the basis that the relevant part of the UCL Funds was paid to Dynamic in breach of fiduciary duties owed to the Company by Mr. Raja, and was paid by Dynamic to Universal Real in breach of the constructive trust upon which Dynamic held those UCL funds. The Company's case is that Mr. Raja was either the de jure director or the de facto director of Universal Real during the relevant period and, as such, the knowledge of Mr. Raja that the receipt of the relevant part of the UCL Funds by Universal Real was the consequence of breach of fiduciary duties on the part of Mr. Raja can be attributed to Universal Real. It is also the Company's case that Universal Real, by Mr. Raja as its de jure and alleged de facto director, dishonestly assisted (i) Mr. Raja's breaches of the fiduciary duties which he owed to the Company, pursuant to which UCL Funds were paid by the Company to Universal Real and (ii) Dynamic's breach of trust pursuant to which Universal Real received and dealt with the relevant part of the UCL Funds paid to it by Dynamic. The net result of all this is said to be that Universal Real holds such of the UCL Funds as remain in its possession and any assets acquired using UCL Funds on constructive trust for the Company. In terms of relief sought on the Application, the Company seeks judgment against Universal Real for damages and/or equitable compensation to be assessed, pursuant to its claim against Universal Real in dishonest assistance and knowing receipt, together with an interim payment on account of those damages/equitable compensation. The Company also seeks a declaration that various properties held by Universal Real, and purchased with UCL Funds, are held on constructive trust for the Company, together with an order that the relevant properties be transferred to the Company.

25. As against the Sixth Defendant, Universal Total, the Company's case is that Universal Total was in knowing receipt of a part of the UCL Funds, paid to it by Dynamic, on the basis that the relevant part of the UCL Funds was paid to Universal Total in breach of fiduciary duties owed to the Company by Mr. Raja and in breach of the constructive trust upon which Dynamic held those UCL funds. The Company's case is that Mr. Raja was either the de jure director or the de facto director of Universal Total during the relevant period and, as such, the knowledge of Mr. Raja that the receipt of the relevant part of the UCL Funds

by Universal Total was the consequence of breach of fiduciary duties on the part of Mr. Raja can be attributed to Universal Total. It is also the Company's case that Universal Total, by Mr. Raja as its de jure and alleged de facto director, dishonestly assisted Dynamic's breach of trust pursuant to which Universal Total received and dealt with the relevant part of the UCL Funds paid to it by Dynamic. In the case of the claim in knowing receipt, the claim for damages/equitable compensation is also extended to a VAT refund in respect of two properties purchased by Universal Total using UCL Funds. The net result of all this is said to be that Universal Total holds such of the UCL Funds as remain in its possession and any assets acquired using UCL Funds on constructive trust for the Company. In terms of relief sought on the Application, the Company seeks judgment against Universal Total for damages and/or equitable compensation to be assessed, pursuant to its claim against Universal Total in knowing receipt and dishonest assistance. No interim payment is sought against Universal Total. The Company also seeks a declaration that two properties acquired or intended to be acquired by Universal Total, and purchased with UCL Funds, are held on constructive trust for the Company, together with an order, in the case of one of the properties, that the property be transferred to the Company. In the case of the other property Universal Total has not yet been registered as proprietor of the property, and an order for such registration is sought.

The evidence in the Application

26. The evidence in support of the Application was contained in a lengthy witness statement of Ms. Louise Brittain who is, as I have said, one of the joint liquidators of the Company and an insolvency practitioner in the firm of Azets. The witness statement is dated 24th August 2021.

27. Included in the exhibits to this witness statement was a substantial quantity of further evidence which was filed in connection with the earlier applications of the Company for freezing orders, which remain in place, against various of the Defendants. This evidence included first and third affidavits of Ms. Brittain, and affidavits from Mrs Nisa, Mr. Raja, and various solicitors and other parties

who had dealings with the property acquisitions which were made using the UCL Funds.

28. Also included in the exhibits was a lengthy witness statement from Andrew Siddle, a Senior Officer of the Revenue employed by the Proceeds of Crime Unit within the Revenue's Fraud Investigation Service. This witness statement, which is dated 23rd July 2020, was made in support of the original application for the appointment of provisional liquidators. The principal importance of this witness statement, at least so far as the Application is concerned, is that Mr. Siddle sets out the results of his investigations into what is said to have been the substantial and serial failure of the Company to make proper declarations of PAYE, NIC, and VAT due to the Revenue. It is from Mr. Siddle's witness statement that one learns the detail of the Revenue investigations, the results of those investigations, and the methods used by the Revenue to calculate what are said to be the unpaid amounts of PAYE, NIC, and VAT.

29. Mr. Raja also filed a document, described as a Defence, which sets out his response to the claims made in this action. This document ("the Defence") was also stated to be served on behalf of his wife, Mrs Nisa and *"the companies"* (italics have been added to all quotations in this judgment). I take this reference to *"the companies"* to include the corporate Application Defendants; namely Dynamic, Universal Real, and Universal Total.

30. The Defence was one of several documents filed by Mr. Raja in support of an application to set aside an order in this action made by Master Clark on 25th August 2021. One of the other documents filed by Mr. Raja, which I should mention specifically, is a document which was described as a rebuttal of Ms. Brittain's witness statement in support of the Application ("the Rebuttal Document"). The Rebuttal Document substantially comprised an attack on the integrity and competence of Ms Brittain. The Rebuttal Document was accompanied by a further rebuttal document, challenging the certificate of urgency filed by the Company's counsel, for the purposes of securing an early hearing of the Application.

31. At the hearing itself Mr. Becker sought permission to introduce, on the morning of the second day of the hearing, a second witness statement of Mr. Raja dated 24th November 2021. Mr. Brockman opposed the grant of this permission, not surprisingly given the lateness of the arrival of this evidence. Nevertheless, and for the reasons which I set out in a short judgment delivered in the hearing, I gave Mr. Becker permission to introduce this second witness statement and an associated bundle of documents, save only for one paragraph of the witness statement (paragraph 4) and any documents in the associated bundle which related to the content of paragraph 4. Ironically, my excision of paragraph 4 became somewhat redundant when Mr. Brockman, in his reply to Mr. Becker, found it expedient to refer to paragraph 4 and a related document in the associated bundle.

32. There was also one further document produced on behalf of the Application Defendants in the course of the hearing, which was a lengthy document, prepared by Mr. Raja and described as a Case Comment Sheet. I did read this document, but it was not, in the event, expressly relied upon by Mr. Becker. I assume that this was because the essential points made in this document could also largely be found in the Defence, the Rebuttal Document, and Mr. Raja's second witness statement.

The issues to be resolved in the Application

33. In terms of the issues to be resolved in the Application, and subject to what I say in the next section of this judgment, it seems to me that it is necessary to proceed in the following fashion, in terms of resolving the issues which arise in the Application.

34. The starting point is to determine what funds were removed from the Company and, following their removal and to the extent that this can be established, to determine what then happened to those funds.

35. The next step is to consider the position of Mr. Raja. By this I mean specifically that the next step is to consider whether it is correct that Mr. Raja was, at the material times, a de facto director of the Company and/or Dynamic and/or

Universal Real and/or Universal Total. This point matters considerably because, if Mr. Raja was not a de facto director of any of these companies at any material time, this is capable of having a material effect upon the outcome of the Application.

36. It seems to me that it is then necessary to take the Application Defendants individually, and to see whether and, if so, to what extent the Company's case against each of the Application Defendants, as it is pursued on the Application, is established.

The jurisdiction

37. The previous section of this judgment sets out the issues, as if this hearing constituted the trial of this action. This hearing is however not the trial of this action, but the hearing of an application for summary judgment on certain parts of the Company's case in the action, together with ancillary applications for interim payments.

38. I will deal with the jurisdiction to order interim payments later in this judgment. For present purposes, and given the ancillary status of the applications for interim payment, it is convenient to concentrate on the application for summary judgment.

39. What this means, in terms of the issues raised in the Application, is that the position is governed by CPR Rule 24.2, which provides as follows:

> *"The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—*
>
> *(a) it considers that—*
>
> *(i) that claimant has no real prospect of succeeding on the claim or issue; or*
>
> *(ii) that defendant has no real prospect of successfully defending the claim or issue; and*
>
> *(b) there is no other compelling reason why the case or issue should be disposed of at a trial.*

(Rule 3.4 makes provision for the court to strike out a statement of case or part of a statement of case if it appears that it discloses no reasonable grounds for bringing or defending a claim.)"

40. The question on the Application is therefore whether the Application Defendants (or any of them) have any real prospect of successfully defending the claims for the relief (or any of that relief) which is sought in the Application. If they do not, then the question arises as to whether there is any other compelling reason why the relevant claims should be disposed of at a trial, rather than on this hearing.

41. The most often cited summary of the law in this area is to be found in *EasyAir Ltd v Opal Telecom* [2009] EWHC 339 (Ch). In his judgment in that case, at [15], Lewison J. (as he then was) summarised the correct approach on applications for summary judgment by defendants in the following terms:

"15. As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550 ;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63 ;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is

> *likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725 ."*

42. This summary sets out the correct approach to applications for summary judgment made by defendants. In the present case it is the Company, that is to say the Claimant in this action, which is making the application for summary judgment. Nevertheless, it seems to me that the bulk of the summary of Lewison J. is equally applicable to an application for summary judgment made by a claimant, which is made on the basis that the defendant has no real prospect of a successful defence to the relevant action or some issue in the relevant action.

43. There are two other points which emerge from the authorities on the exercise of the summary judgment jurisdiction, which seem to me to be particularly applicable in the present case.

44. First, and while the court should avoid conducting a mini-trial, on the hearing of a summary judgment application, the court is not barred from some evaluation of the evidence in a summary judgment application. As Cockerill J. explained in *King v Stiefel* [2021] EWHC 1045 (Comm), at [21] and part of [22]:

> *"21. The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be*

cases where the Court will be entitled to draw a line and say that -even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial.

22. So, when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up."

45. Second, where the court is dealing with claims in fraud or dishonesty the court should be very cautious in granting summary judgment. As Cockerill J. explained in *King v Stiefel* at [23] and [24], albeit in the context of an application to strike out a claim in conspiracy:

"23. I should deal specifically with the law on summary judgment and claims in fraud, not least because it was at least implicit in the submissions for the Kings that such serious allegations were not suitable for summary determination.

24. The reality is that while the court will be very cautious about granting summary judgment in fraud cases, it will do so in suitable circumstances, and there are numerous cases of the court doing so. This is particularly the case where there is a point of law; but summary judgment may be granted in a fraud case even on the facts. I have done so in a case heard very close in time to this application: Foglia v The Family Officer and others [2021] EWHC 650 (Comm), where at [14] I gave some examples of other cases in which this course was also followed. In other cases, such as AAI Consulting Ltd v FCA [2016] EWHC 2812 (Comm) and Cunningham v Ellis [2018] EWHC 3188 (Comm) fraud claims were struck out on the basis that the particulars of claim were inadequate in themselves to support the claims being made."

46. These last two points are particularly relevant in the present case because one of the causes of action, in respect of which I am asked to grant summary judgment, is dishonest assistance. This requires, among other things, a finding of dishonesty against Mr. Raja on a summary basis, without the benefit of oral evidence. Beyond this, and looking at the Application more generally, the

Application may be said to be an ambitious one. The Application has required, even allowing for some interruptions to the hearing, the best part of two days to be heard. The documents for the Application are voluminous, running to some 1500 pages. The claims in respect of which I am asked to grant summary judgment involve serious allegations of dishonesty against various parties, and are not the kinds of claim which, at first sight, appear suitable for summary judgment. There is, at least at first sight, some merit in Mr. Becker's opening observation in his skeleton argument for this hearing, which was to the effect that with over 1100 pages of evidence brought to the Application, it is difficult to understand how the case lends itself to a summary judgment application in any event. All of this emphasizes the need for a cautious approach to the Application.

47. In summary therefore, and with the possible exception of issues of law not requiring factual investigation, it is essential to keep in mind, in relation to each issue raised by the Application, that the question for me is not who, on the balance of probabilities, is right on that issue. The question for me is whether it can be said that the Application Defendants have no real prospect of success on that issue. If I am able to say that there is no real prospect of success on a particular issue, the question which then arises is whether there is no other compelling reason why the issue should go trial. In answering these questions I must take into account not only the evidence actually placed before me on this hearing, but also any evidence which might reasonably be expected to be available at trial.

48. With all of the above guidance in mind, I turn to the matters and issues raised on the Application.

What funds were removed from the Company, and what happened to them?

49. These questions are not as difficult to answer as they might be, because there was no dispute concerning a substantial quantity of the funds removed from the Company; that is to say a substantial quantity of the UCL Funds.

50. I should also stress that my use of the word *"removed"*, to refer to the payment out of the UCL Funds which left the Company, is intended as a neutral phrase. It implies no presumption or finding that such removal was unlawful, which is a question for the later stages of this judgment.

51. The evidence of the funds removed from UCL is summarised in the witness statement of Ms. Brittain. This summary does however itself derive from the first affidavit of Ms. Brittain, made on 28th July 2020 in support of the original application of the Company for freezing injunctions against the Application Defendants and First International Holdings Limited. What follows is only a partial summary of the detailed evidence in Ms. Brittain's first affidavit, which is itself the product of the detailed forensic analysis of the Defendants' financial records which Ms. Brittain has instructed.

52. Starting with the Company itself, during the period between 12th May 2017 and 16th May 2020, the following cumulative sums were paid out by the Company:
- £41,204.04 to Mrs Nisa;
- £16,032,303.17 to Dynamic (Ms. Brittain, in her witness statement, also identifies £2,187,418 as coming to Dynamic indirectly from the Company, and further identifies the sum of £125,751.83 as coming to Dynamic as rent from properties purchased using UCL Funds);
- £1,933,430.22 to Universal Real.

53. As can be seen, the bulk of the money removed from the Company was paid to Dynamic. Turning to Dynamic itself, during the period between 1st February 2017 and 16th May 2020, Dynamic caused the following cumulative sums to be paid to the following parties:
- £546,607.09 to Mrs Nisa;
- £430,928.29 to Mr Raja;
- £1,723,895.44 to Universal Real;
- £2,231,000 to Universal Total (Universal Total also received a VAT refund of £374,276.90 in respect of properties purchased in the name of Universal Total using UCL Funds);

- £6,961,934.47 to Imperial Law Limited (this is understood to be a firm of solicitors with an office in Wolverhampton, trading as Imperial Law Solicitors) and/or to Imperial Law Legal Services Limited (this is understood to be a legal services business or consultancy);
- £4,252,500 to Bond Adams LLP (a firm of solicitors);
- £29,854 to Shafay Usman (one of the children of Mrs Nisa and Mr Raja);
- £16,140 to Countrywide Residential (an estate agency);
- £29,500 to Bagshaw Auction House (a property auction company);
- £50,990.72 to Universal Rainbow of Care Limited (a company incorporated on 19th February 2018 of which Mrs Nisa was and remains sole director and shareholder, and of which Mr. Raja was previously a director);
- £19,845 to Universal Accountants Limited (a company incorporated on 24th December 2014, of which both Mrs Nisa and Mr. Raja were, at times, directors and shareholders, and of which Mrs Nisa remains the sole director and shareholder).

54. The forensic analysis carried out on the instructions of Ms. Brittain does not identify any sources for the money paid out by Dynamic other than the money paid to Dynamic by the Company.

55. What also happened during this period was the acquisition of a series of properties in the names of Mrs Nisa, Mr. Raja, Universal Real, and Universal Total, using various firms of solicitors for the conveyancing work. As there are a number of these properties, I have set them out in a schedule to this judgment ("the Schedule"), where outline details are given of each property. I will refer to the properties listed in the Schedule as "the Properties".

56. I note three specific points in relation to the Schedule:

(1) The Schedule includes a Property known as 29 East Street, which is categorised by Ms. Brittain in her evidence as one of the Properties acquired and registered in the name of Universal Total. The office copy entries for this property show the Property as still being registered in the name of Chevin Asset Management Limited, which I assume to be the vendor of this Property. Ms. Brittain says that the Property has been

registered in the name of Universal Total, but this has yet to be demonstrated in the evidence.

(2) The Schedule includes a Property known as 14 Sydney Houses (the plural reference appears on the registered title for this Property and does not appear to be an error). This Property is categorised by Ms. Brittain in her evidence as having been acquired in the name of Universal Real. The office copy entries for this Property, as included in the evidence, show the Property as still being registered in the joint names of David Jackson and Judith Jackson, who I assume to have been the vendors of this Property. Ms. Brittain describes the purchase of the Property as having been completed in the sole name of Universal Real. In terms of completion by registration of Universal Real as proprietor of 14 Sydney Houses, this has yet to be demonstrated on the evidence.

(3) The Schedule includes a Property known as 6 Leopold Street, which was purchased at auction in the name of the Seventh Defendant. The deposit payable on the purchase was provided by the Company, and the balance of the purchase price was provided by Dynamic. Ms. Brittain herself acknowledges in her evidence that this particular acquisition has not yet been completed by registration.

57. The important point, in relation to each of the Properties, is that Ms. Brittain has exhibited a series of flow charts ("the Flow Charts"), one for each Property, which show the movement of the money used to acquire the relevant Property, from the original source or sources through to the acquisition of the relevant property. The immediately relevant point is that the original source of the purchase money, in each case, was either Dynamic, or the Company, or a combination of both. As such, the original source of the purchase money, in each case, was the Company, and the purchase money was part of the UCL Funds.

58. In her witness statement Ms. Brittain identifies a bank account in the name of Dynamic ("the Dynamic Account"), which was opened on 31st October 2016. The evidence of Ms. Brittain, which was not challenged, is that the Dynamic Account held the sum of £833,546.09 as at 15th June 2020. On the basis of the

investigation work carried out by the Revenue, Ms. Brittain explains that the money held in the Dynamic Account is wholly, or almost wholly traceable to the Company.

59. Also to be mentioned in this context are a series of payments referred to as the Pakistan Payments (I will use the same expression) which are illustrated in a flow chart exhibited to Ms. Brittain's witness statement. In summary, and by reference to this flow chart and the relevant part of Ms. Brittain's witness statement, what happened was as follows:

(1) As part of the payments recorded above, Dynamic paid £987,524.22 to Imperial Law Legal Services. The payment was made on 10th February 2020.

(2) Of this sum £528,000 was paid to Shabnam Sarfaraz, who lives in Pakistan and is understood to be the aunt of Mr. Raja. In paragraph 17.2 of his affidavit sworn on 7th September 2020, Mr. Raja gives the following evidence:

> *"At one point Imperial Law advised me that a little over £500K (I cannot recall the exact amount) remained. Coincidentally this coincided with a long-term refurbishment project my Aunt was undertaking on her property in Pakistan. Rather than have those funds refunded to me I asked that those funds be transferred to her as a loan to enable her to complete her works. My aunt is Shabnam Sarfaraz. Her phone number is* [not included in quotation] *and her address is* [not included in quotation] *Pakistan."*

(3) Included in the exhibits to Ms. Brittain's witness statement are two witness statements of Ieva Bogdanova, who describes herself as the manager of Imperial Law Legal Services Ltd. Imperial Law Legal Services Limited ("Imperial LLS") is a company which was also involved in at least one of the property transactions which took place using UCL Funds, although Ms. Bogdanova explains that the person who dealt with such transactions was a Mr. Syed Gous Ali, who has since been jailed for mortgage fraud. Imperial LLS does not appear to be the same entity as Imperial Law Limited (trading as Imperial Law

Solicitors), the firm of solicitors with an office in Wolverhampton who acted on some of the property acquisitions. The registered address for Imperial LLS is the same as the address which is or has been the registered address of the Company, Dynamic, Universal Real, Universal Total, and Universal Accountants. Ms. Bogdanova was a director of Imperial LLS between 21st May 2017 and 16th September 2019. For present purposes, the directly relevant point is that, in her second witness statement, Ms. Bogdanova identifies the following payment:

> *"On 28th February a foreign payment of £528,000 was made in relation to Company restructuring carried out by Mr Syed Ali."*

(4) On the basis of the evidence to which I have referred to in sub-paragraphs (2) and (3) above Ms. Brittain concludes in her witness statement, correctly as it seems to me (and I so find), that the transfer of the sum of £528,000 is the same transfer as that referred to by Mr. Raja and Ms. Bogdanova, which took place on 28th February 2020.

(5) On 29th May 2020 the Company transferred the sum of £148,524 to Ms. Sarafaz.

(6) On 8th June 2020 Universal Total transferred the sum of £298,665 to Ms. Sarafaz.

(7) Accordingly, the above payments (the Pakistan Payments) totalled £975,189.00.

60. There are three important points to record, in relation to the above summary of the movement of UCL Funds:

(1) The above summary is not a comprehensive record of the identified movement of UCL Funds from the Company through, and to other parties. The above summary deals only with the movement of UCL Funds relevant to the relief sought on the Application.

(2) There was no challenge to the evidence given by Ms. Brittain, both in her witness statement and in her earlier affidavits, concerning the movement of UCL Funds. Mr. Raja was at pains to point out that Mr. Ali (the individual referred to by Ms. Bogdanova in her evidence) was a convicted fraudster. Mr. Raja's case was that the movement of the UCL Funds was part of an investment strategy devised and recommended by

Mr. Ali, Ms. Bogdanova (who was said by Mr. Raja to be the wife of Mr. Ali), and Mr. Cervenak, in respect of which Mr. Raja was duped by these individuals. Mr. Raja's case was not that Ms. Brittain had, in her evidence, wrongly recorded the movement of the UCL Funds, so far as that movement is identified in Ms Brittain's evidence. In particular, the evidence of the Flow Charts has not been challenged by the Application Defendants.

(3) It follows that I am able to deal with the Application on the basis that the movement of the UCL Funds was as set out in the Company's evidence in support of the Application. I have summarised the relevant evidence in this section of this judgment. In this context there is no issue raised which requires me to consider whether the conditions for obtaining summary judgment are satisfied.

61. In the remainder of this judgment I will use the expression "the Relevant Period" to mean the period of time, during which (i) the UCL Funds (both identified and unidentified) were removed from the Company, and (ii) the UCL Funds (both identified and unidentified) passed through or into the hands of third parties, and (iii) the UCL Funds (both identified and unidentified) were used to acquire assets (both identified and unidentified). In chronological terms, I identify the Relevant Period as running from February 2017 to the provisional liquidation in July 2020.

Was Mr. Raja a de facto director of the Company?

62. I move next to the question of whether Mr. Raja was a de facto director of the Company. If he was not, and by reference to the notice of termination filed by Mr. Raja, Mr. Raja was only ever a director of the Company for a single day.

63. I start with the law in this area. There is no hard and fast rule for determining whether a person is a de facto director of a company. As Lord Hope explained, in *Re Paycheck Services 3 Limited* [2010] UKSC 51 [2010] 1 WLR 2793, at [38] and [39]:

> *"38 The remedy that is provided by section 212 of the Insolvency Act 1986 may be sought only against persons to whom that section*

applies, as described in section 212(1). The description that applies to this case is that set out in para (a) of the subsection: "is or has been an officer of the company." The word "officer" includes a director, but it is accepted that the section does not apply to shadow directors because the statute does not provide for this. It follows that HMRC must plead and prove against Mr Holland that he was a de facto director of the composite companies.

39 How is this to be done? It is plain from the authorities that the circumstances vary widely from case to case. Jacob J declined to formulate a single decisive test in Secretary of State for Trade and Industry v Tjolle [1998] 1 BCLC 333, as he saw the question very much as one of fact and degree. He was commended by Robert Walker LJ in In re Kaytech International plc [1999] 2 BCLC 351, 423 for not doing so, and I respectfully agree that there is much force in Jacob J's observation. All one can say, as a generality, is that all the relevant factors must be taken into account. But it is possible to obtain some guidance by looking at the purpose of the section. As Millett J said in In re Hydrodam (Corby) Ltd [1994] 2 BCLC 180, 182, the liability is imposed on those who were in a position to prevent damage to creditors by taking proper steps to protect their interests. As he put it, those who assume to act as directors and who thereby exercise the powers and discharge the functions of a director, whether validly appointed or not, must accept the responsibilities of the office. So one must look at what the person actually did to see whether he assumed those responsibilities in relation to the subject company."

64. The court must take all relevant factors into account, in considering this question, as Lord Hope explained earlier in the same judgment, at [31]:

"31 In Secretary of State for Trade and Industry v Tjolle [1998] 1 BCLC 333 Jacob J was referred to what was said in In re Hydrodam (Corby) Ltd [1994] 2 BCLC 180, including a passage

> *at p 182 where Millett J pointed to the purpose of any test as being to impose liability for wrongful trading on those persons who were in a position to prevent damage to creditors by taking steps to protect their interests, and to In re Richborough Furniture Ltd [1996] 1 BCLC 507. He said [1998] 1 BCLC 333, 343—344:*
>
> *"For myself I think it may be difficult to postulate any one decisive test. I think what is involved is very much a question of degree. The court takes into account all the relevant factors. Those factors include at least whether or not there was a holding out by the company of the individual as a director, whether the individual used the title, whether the individual had proper information (e g management accounts) on which to base decisions, and whether the individual had to make major decisions and so on. Taking all these factors into account, one asks "was this individual part of the corporate governing structure", answering it as a kind of jury question. In deciding this, one bears very much in mind why one is asking the question. That is why I think the passage I quoted from Millett J is important. There would be no justification for the law making a person liable to misfeasance or disqualification proceedings unless they were truly in a position to exercise the powers and discharge the functions of a director. Otherwise they would be made liable for events over which they had no real control, either in fact or law."*
>
> *In that case the individual in question was given the courtesy title of deputy managing director but did not form part of the real corporate governance of the company. There was no function that she performed that could only be properly discharged by a director."*

65. In *Re Mumtaz Properties Ltd* [2011] EWCA Civ 610 [2012] 2 BCLC 109 Arden LJ (as she then was) approached the question of whether a person had been the de facto director of a company in the following manner, at [47]:

> *"There is undoubtedly force in Mr Chaisty's submissions. It is a serious matter for a person to be found liable on the basis that he was a de facto director. Taken on its own, the fact that Zafar dealt with local authorities or with the occasional supplier did not make him a director as opposed to a manager. The fact his status in his tax return was changed did not, of itself, amount to an admission that he regarded himself as a director. The fact was that the judge was satisfied, looking at the evidence as a whole (including, no doubt, the evidence that he had a company credit card, which he was able to use for his own purposes and the fact that, unlike an ordinary employee, he had left moneys with the company for investment by him in his own properties at a later date), that he was also part of the corporate governance structure of the company. He was (and these are my words) one of the nerve centres from which the activities of the company radiated. The judge clearly drew inferences from the absence of documentation which he has not articulated in detail. In my judgment, he was entitled to come to his conclusion on the totality of his findings as to how the company's affairs were run. He was not bound to accept Zafar's denials which were not corroborated by other independent evidence."*

66. Finally, where a company's affairs have been conducted on an informal basis, without an observed formal corporate governing structure, a focus on corporate governance is of less assistance. As HH Judge Hodge QC explained, in *Ingram v Singh* [2020] EWHC 2473 (Ch), at [104] and [105]:

> *"104. In the present case, only one of the three tests identified by Lord Collins at [91] of his judgment is directly relevant. That, it seems to me, is the first of those tests. Here, there was never any holding out by the company of Surjit as a director, and he never used the title. However, I find that that is explicable by reference to Surjit's past criminal convictions and disqualification from acting as a company director. Here, there was no formal corporate governing structure. Mrs Basi was only ever a director in name only. After 6 June 2011, MSD had no director at all, and there was no corporate governing structure. The focus*

upon participation in corporate governance is understandable in Holland, where the relevant defendant had done no more than discharge his duties and responsibilities as a director of the corporate director. The facts of the Holland case are very different from those of the instant case.

105. In the context of the present case, where there was never any observed formal corporate governing structure, and where, after 6 June 2011, there were no directors at all for MSD, I find a focus on corporate governance to be of less relevance and assistance. I find some assistance from Arden LJ's focus in the Mumtaz case upon the identification of one or more "nerve centres" from which "the activities of the company radiated"."

67. Turning to the facts of the present case, there is no evidence of the Company having had any observed formal corporate governing structure. The de jure directors, for certain periods, were Mr. Cervenak and Mrs Nisa. Of these two, Mr. Cervenak was only a director for a short period of time (10th September 2019 - 15th February 2020), and there is no evidence of his involvement in the running of the Company. Turning to Mrs Nisa, she swore an affidavit on 7th September 2020, which was described as having been made in response to an order of Miles J. made on 29th July 2020, which required Mrs Nisa to make disclosure of her assets, and in response to a judgment of Falk J. dated 28th August 2020. In paragraphs 6 and 7 of that affidavit, Mrs Nisa stated as follows:

"6. Day-to-day, I am a stay-at-home mother to our four children. I do not speak or read English. My native language is Urdu. I have never been actively involved in, nor have any knowledge of, the companies for which I am, or have been, named a shareholder or director.

7. From time-to-time, my husband would place documents before me and ask me to sign them. I was never aware of their content or objective(s) and followed my husband's direction at all times."

68. There is nothing to contradict this evidence of Mrs Nisa, which depicts Mr. Raja as having control of the companies, including the corporate Application Defendants, in respect of which Mrs Nisa was recorded as a director and shareholder.

69. The best evidence of the Company's control comes however from Mr. Raja himself.

70. On 7th September 2020 Mr. Raja swore an affidavit, which was also described as being made in response to the order of Miles J., made on 29th July 2020, which required Mr. Raja to make disclosure of his assets, and in response to the judgment of Falk J. of 28th August 2020. At paragraph 8 of this affidavit, Mr. Raja stated as follows:

> *"I also set out below the assets held by wife, Mrs Khair Un Nisa, pursuant to paragraph 12(1) of the Order. This is because in reality I manage and control the assets of our family and the business of the companies in which she is a shareholder or director. Please also consider this affidavit as a reply on behalf of the other limited company defendants to the best of my recall given my limited and restricted access to the relevant data."*

71. This evidence is confirmed by Mrs Nisa, in the extract from her own affidavit which I have quoted above. Mrs Nisa was, for at least part of the Relevant Period, a director and a shareholder of the Company. As such, I read Mr. Raja's affidavit as confirming that one of the assets of his family which he managed and controlled was the Company itself.

72. In her first affidavit Ms. Brittain gives details of the Company's banking arrangements. The Company originally banked with HSBC, but the Company's accounts with HSBC were later closed and an account was opened with Santander on 5th November 2018. The account opening documents for the HSBC accounts demonstrate that both Mr. Raja and Mrs Nisa were signatories, and the only signatories on the HSBC accounts. The contact details provided to HSBC included an email address in Mr. Raja's name. HSBC's identification

and money laundering summary form, dated 6th April 2017, stated that both Mr. Raja and Mrs Nisa were the beneficial owners and principal controllers of the Company. In relation to the Santander account, the applicants for the opening of the account were Mr. Raja and Mrs Nisa. The main applicant in the application form was described as Mrs Nisa, but the email address given for her was the email address in Mr. Raja's name.

73. At the outset of the hearing, and as I have recorded earlier in this judgment, a question was raised by Mr. Brockman as to the ability of Mr. Becker to act on behalf of the Fourth Defendant, Dynamic, which has no directors. Mr. Becker confirmed that his instructions to act on behalf of Dynamic came from the Second Defendant (Mr. Raja), as was the case with his representation of the Fifth and Sixth Defendants; namely Universal Real and Universal Total. On the same basis Mr. Becker also stated that he represented the Seventh Defendant, First International Holdings Limited, although this latter company is not a respondent to the Application.

74. It seems clear to me, from the evidence which I have seen, that Mr. Raja was the nerve centre (to borrow the phrase of Arden LJ) from which the activities of the Company radiated, for the entirety of the Relevant Period. It also seems clear to me, on the same basis, that Mr. Raja was the controlling mind of the Company for the entirety of the Relevant Period.

75. All this was confirmed, if confirmation was required, by the fact that, at this hearing, it was Mr. Raja who gave the instructions to Mr. Becker, on behalf of all the Applicant Defendants. As I have already noted, at the outset of the hearing a question was raised by Mr. Brockman as to the ability of Mr. Becker to act on behalf of Dynamic, which has no directors. Mr. Becker confirmed that his instructions to act on behalf of Dynamic came from Mr. Raja, as was the case with Universal Real and Universal Total. While I am, in this section of this judgment, concerned with the position of Mr. Raja in respect of the Company, the position in relation to the Application Defendants was entirely consistent with Mr. Raja having the same level of control over the Company, prior to the Company's entry into provisional liquidation.

76. I have to bear in mind, of course, that this is an application for summary judgment, so that the question for me is whether there is any real prospect of Mr. Raja succeeding in an argument, at trial, that he was not the de facto director of the Company for the entirety of the Relevant Period. This requires me to consider both the evidence and arguments which are before the court on the Application, and any further evidence and/or arguments which may reasonably be expected to be available at trial. In this context however it is difficult to see what further evidence and/or arguments might be expected to turn up at trial. As I have already noted, Mr. Becker did not contend, on behalf of Mr. Raja, that Mr. Raja was not the de facto director of the Company. This was not the consequence of any oversight on the part of Mr. Becker. It was clear that Mr. Becker simply did not have the material with which to argue that Mr. Raja was not, or might not have been the de facto director of the Company during the Relevant Period. Indeed given, in particular, the evidence of Mr. Raja, it is difficult to see how Mr. Becker could have run any such argument.

77. In these circumstances, it seems to me that I am in a position, notwithstanding that this is a summary judgment application, to decide the question of whether Mr. Raja was the de facto director, or a de facto director of the Company during the Relevant Period. Drawing together all of the above discussion, and applying the relevant guidance in the authorities cited to me, I conclude and find that Mr. Raja was the de facto director of the Company for the entirety of the Relevant Period. I can see no issue in this respect which needs to go to a trial. Nor can I see any other reason, compelling or otherwise, why this question should go to a trial.

Was Mr. Raja, at the material times, a de facto director of Dynamic and/or Universal Real and/or Universal Total?

78. I move on to the question of whether of whether, at the material times, Mr. Raja was a de facto director of Dynamic and/or Universal Real and/or Universal Total. If Mr. Raja was not ever a de facto director of Dynamic, the consequence is that he was never a director of Dynamic. If Mr. Raja was not ever a de facto director of Universal Real, the consequence is that he was still a de jure director

of Universal Real between 9th July 2018 and 15th February 2020. If Mr. Raja was not ever a de facto director of Universal Total, the consequence is that he was still a de jure director of Universal Total from 14th December 2018 to 31st March 2019, and from 13th May 2019 to 15th February 2020.

79. In relation to all three of these companies, there is the evidence which I have already mentioned, in the affidavits of 7th September 2020 made, respectively, by Mr. Raja and Mrs Nisa. That evidence is not confined to the Company, but applies equally to the corporate Application Defendants. There is also the evidence of what happened at the hearing itself, in terms of Mr. Raja's giving of instructions on behalf of all of the Application Defendants, which I have already recorded in this judgment. Again, this applies equally to the corporate Application Defendants. There is also the point that the Defence, which was prepared by Mr. Raja, was expressed to be filed on behalf of Mr. Raja and Mrs Nisa, and *"the companies"*, which is an expression which I take to include the corporate Application Defendants.

80. In relation to Dynamic, the banking arrangements were similar to those of the Company, in the sense that Dynamic originally banked with HSBC, and then moved to Santander. The only signatories to these accounts were Mr. Raja and Mrs Nisa. The contact email address was in the name of Mr. Raja. The Business Customer KYC Header form for HSBC, dated 4th October 2016, recorded Mr. Raja as the sole beneficial owner and controller of Dynamic. The sole user of internet banking on the HSBC records was Mr. Raja, while the telephone banking record had Mr. Raja as the primary user. Turning to Santander, the relevant records show Mr. Raja as an employee of Dynamic and Mrs Nisa as director, but the contact email address and telephone number remained as they had been for HSBC. Both Mr. Raja and Mrs Nisa were described as needing bank cards for the Santander account.

81. Mr. Raja was also responsible for registering Dynamic for VAT. In the relevant form the business of Dynamic was described as *"Wholesale, selling items online. Professional hair dressing scissors."*. There is no evidence that Dynamic ever conducted any business of this kind.

82. Turning to Universal Real and Universal Total, I have already noted that, as the Flow Charts demonstrate, those companies were used as vehicles to acquire properties, using money which had originally come from the Company; namely UCL Funds. These acquisitions involved a number of different firms of solicitors who dealt with the conveyancing of these properties. The person, or at least the principal person who gave instructions to these firms in these transactions was Mr. Raja. By way of example I refer to the witness statement of Mr. Patel, of Bond Adams LLP, the firm of solicitors who acted on the acquisition of one of the Properties (Forester House) acquired by Universal Total. In paragraph 2 of this witness statement, which is dated 3rd August 2020, Mr. Patel identifies that instructions came from *"Principally a person named Raja Usman"*. By way of further example, I refer to the witness statement of Mr. Akbar, of Imperial Law Limited (trading as Imperial Law Solicitors), the firm of solicitors who acted on the acquisition of several properties by Universal Real. In paragraph 7 of this witness statement, which is dated 1st August 2020, Mr. Akbar identifies that instructions came from Mr. Raja, and dealings were with Mr. Raja in relation to the two property transactions referred to in this paragraph (14 Sydney Houses and 8 Leopold Street).

83. It is of course the case that Mr. Raja was a de jure director of Universal Total and Universal Real for a substantial part of the Relevant Period, which could be said to explain how he came to be the principal person acting in the instruction of the relevant solicitors. The overarching point however is that the evidence from the various firms of solicitors who acted on the acquisition of properties in the names of Universal Real and Universal Total is that the principal person giving instructions was Mr. Raja. There is no suggestion that this changed at any point because Mr. Raja was not, at the relevant time, a de jure director of either company.

84. Once again, it seems clear to me, from the evidence which I have seen, that Mr. Raja was the nerve centre from which the activities of the corporate Application Defendants (Dynamic, Universal Real, and Universal Total) radiated, for the entirety of the Relevant Period. Once again, it also seems clear to me, on the

same basis, that Mr. Raja was the controlling mind of the corporate Application Defendants for the entirety of the Relevant Period.

85. Once again, I have to bear in mind that this is an application for summary judgment, so that the question for me is whether there is any real prospect of Mr. Raja succeeding in an argument, at trial, that he was not the de facto director of the corporate Application Defendants for the entirety of the Relevant Period. Again, I must consider both the evidence and arguments which are before the court on the Application, and any further evidence and/or arguments which may reasonably be expected to be available at trial. As with the Company however, it is difficult to see what further evidence and/or arguments might be expected to turn up at trial. As with the Company, Mr. Becker did not contend, on behalf of Mr. Raja, that Mr. Raja was not the de facto director of the corporate Application Defendants. Again, this was not the consequence of any oversight on the part of Mr. Becker. It was clear that Mr. Becker simply did not have the material with which to argue that Mr. Raja was not, or might not have been the de facto director of the corporate Application Defendants during the Relevant Period. As was the case with the Company, and given, in particular, the evidence of Mr. Raja, it is difficult to see how Mr. Becker could have run any such argument.

86. In these circumstances, it seems to me that I am in a position, notwithstanding that this is a summary judgment application, to decide the question of whether Mr. Raja was the de facto director, or a de facto director of the corporate Application Defendants during the Relevant Period. As with the Company, and applying the relevant guidance in the authorities cited to me, I conclude and find that Mr. Raja was the de facto director of Dynamic for the entirety of the Relevant Period, and was also the de facto director of Universal Real and Universal Total during those parts of the Relevant Period when he was not a de jure director of these companies. As with the Company, I can see no issue in this respect which needs to go to a trial. Nor can I see any other reason, compelling or otherwise, why this question should go to a trial.

The relief sought on the Application against the individual Application Defendants

(1) The relevant causes of action

87. The claims of the Company against the Application Defendants are set out in the Amended Particulars of Claim. It is convenient to start by identifying the causes of action which are relied upon by the Company, in the Application, as the basis for the relief sought against each of the Application Defendants in the Application.

88. The causes of action which are relied upon against Mrs Nisa and Mr. Raja in their personal capacities are the claims that they were in breach of the duties which they owed to the Company, in their capacity as directors of the Company. These duties are identified in paragraph 58 of the Amended Particulars of Claim in the following terms:

> *"Each of Mrs Nisa, Mr Raja and Mr Cervenak has when a de jure director of UCL (and in the case of Mrs Nisa and Mr Raja, a shadow and/or de facto director) owed UCL the general duties specified in sections 171 to 175 of the Companies Act 2006 including:*
>
> *(a) Fiduciary duties to:*
>
> *(i) Only exercise his/her powers for the purposes for which they were conferred;*
>
> *(ii) Act in the way he/she considered in good faith would be most likely to promote the success of UCL for the benefit of its members;*
>
> *(iii) Consider or act in the interests of creditors of UCL;*
>
> *(iv) Exercise independent judgment;*
>
> *(v) Avoid a situation in which he/she had or could have a direct or indirect interest that conflicted or may possibly have conflicted with the interest of UCL;*
>
> *(b) A duty to exercise the reasonable care, skill and diligence that would be exercised by a reasonably diligent person with:*
>
> *(i) The general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions they each carried out in relation to UCL; and*

(ii) The general knowledge, skill and experience that each of them had."

89. It is not necessary to discuss these duties in extensive detail, because it was not in dispute before me that Mrs Nisa and Mr. Raja did, respectively, owe these duties to the Company, to the extent that they were de jure directors of the Company and, in the case of Mr. Raja, also if and to the extent that he was a de facto director of the Company. The Company's case that Mrs Nisa was a de facto director of the Company at those times when she was not a de jure director of the Company was not relied upon for the purposes of the Application. While, as I have said, this was not disputed before me, I should say that it is clear that the duties relied upon by the Company, as against Mr. Raja, are duties which applied to him in his position as a de facto director as much as they applied to him in his position as a de jure director; see the definition of a director in Section 250 of the Companies Act 2006. The definition *"includes any person occupying the position of director, by whatever name called."*.

90. The Company relies upon the duties of directors which have been given statutory codification in Sections 171-175 of the Companies Act 2006. In the interpretation and application of these statutory duties however, it is still necessary to have regard to the common law rules and equitable principles on which the statutory codification is based; see Section 170(4) of the Companies Act 2006. In the remainder of this judgment, for ease of reference, all references to Sections mean, unless otherwise indicated, Sections of the Companies Act 2006.

91. It will be noted that the Company also relies upon these codified duties, to the extent specified in paragraph 58(a) of the Amended Particulars of Claim, as fiduciary duties owed by Mrs Nisa and Mr. Raja to the Company. It is well-established that a director owes fiduciary duties to the company of which he is a director. The practical effect of the statutory codification of director's duties in the Companies Act 2006 is that directors are still subject to these fiduciary duties, to the extent that the Companies Act 2006 so provides.

92. In terms of the basic content of such fiduciary duties, the position was summarized in the following terms by Butcher J. in *Iranian Offshore Engineering and Construction Company v Dean Investment Holdings SA* [2019] EWHC 472 (Comm), at 144:

> *"144. There are two key aspects of fiduciary duties, which are reflected in this summary, which may be described as the no-conflict and no-profit rules. As Lord Neuberger stated in FHR European Ventures v Cedar Capital Partners LLC [2015] AC 250 , a fiduciary '"must not make a profit out of his trust" and "must not place himself in a position in which his duty and his interest may conflict"-and, as Lord Upjohn pointed out in Phipps v Boardman [1967] 2 AC 46 , 123, the former proposition is "part of the [latter] wider rule"'. Further, as Cockerill J noted in FM Capital Partners Ltd v Marino [2018] EWHC 1768 (Comm) : '77. Because a director's duty of loyalty requires him to act in what he in good faith considers to be the best interests of his company (see s.172 CA 2006), he is required to disclose his own misconduct: Item Software (UK) Limited v Fassihi [2004] BCC 994 at [41], [63-68].'"*

93. In his submissions Mr. Brockman identified the primary fiduciary duty of a director as the duty to promote the success of the company. This duty is now contained in Section 172, which is in the following terms:

> *"(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to–*
>
> *(a) the likely consequences of any decision in the long term,*
>
> *(b) the interests of the company's employees,*
>
> *(c) the need to foster the company's business relationships with suppliers, customers and others,*
>
> *(d) the impact of the company's operations on the community and the environment,*
>
> *(e) the desirability of the company maintaining a reputation for high standards of business conduct, and*

(f) the need to act fairly as between members of the company.

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

94. The duty imposed by Section 172 (and its common law predecessor) is ordinarily regarded as a subjective one. The position was explained by Jonathan Parker J in *Regentcrest plc (in liq) v Cohen* [2001] 2 BCLC 80 at [120]:

> *"The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test."*

95. There are however qualifications to the general principle that the duty under Section 172 is a subjective one. These qualifications were explained by John Randall QC (sitting as a Deputy Judge of the High Court) in *Re HLC Environmental Projects Limited* [2013] EWHC 2876 Ch, at [92]. The qualifications are as follows:

> *"(a) Where the duty extends to consideration of the interests of creditors, their interests must be considered as "paramount"*

when taken into account in the directors' exercise of discretion (per Mr Leslie Kosmin QC in the Colin Gwyer case (above) at [74]). Although I note the contrary view expressed by Owen J. in the Supreme Court of Western Australia that although "the directors must 'take into account' the interests of creditors [i]t does not necessarily follow from this that the interests of creditors are determinative" (Bell Group Ltd v Westpac Banking Corp [2008] WASC 239 at [4438]–[4439], applying the judgment of Mason J. in Walker v Wimborne [1976] HCA 7; (1976) 137 C.L.R. 1), so far as English law is concerned I respectfully agree with Mr Kosmin QC that his use of "paramount" was consistent with the judgment of Nourse L.J. in Brady v Brady (1987) 3 B.C.C. 535 (CA) at 552, where he observed that "where the company is insolvent, or even doubtfully solvent, the interests of the company are in reality the interests of existing creditors alone". I also note that this passage from Mr Kosmin QC's judgment was cited with apparent approval by Norris J. in Roberts (Liquidator of Onslow Ditchling Ltd) v Frohlich [2011] EWHC 257 (Ch); [2012] B.C.C. 407 at [85].

(b) As Miss Leahy submitted, the subjective test only applies where there is evidence of actual consideration of the best interests of the company. Where there is no such evidence, the proper test is objective, namely whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company (Charterbridge Corp Ltd v Lloyds Bank Ltd [1970] Ch. 62 at 74E–F, (obiter), per Pennycuick J.; Extrasure Travel Insurances Ltd v Scattergood [2003] 1 B.C.L.C. 598 at [138] per Mr Jonathan Crow).

(c) Building on (b), I consider that it also follows that where a very material interest, such as that of a large creditor (in a company of doubtful solvency, where creditors' interests must be taken into account), is unreasonably (i.e. without objective

justification) overlooked and not taken into account, the objective test must equally be applied. Failing to take into account a material factor is something which goes to the validity of the directors' decision-making process. This is not the court substituting its own judgment on the relevant facts (with the inevitable element of hindsight) for that of the directors made at the time; rather it is the court making an (objective) judgment taking into account all the relevant facts known or which [2014] B.C.C. 337 363 [2014] B.C.P., Release 358 180 ought to have been known at the time, the directors not having made such a judgment in the first place. I reject the respondent's contrary submission of law."

96. I should also set out Section 175, which contains, in statutory form, a key fiduciary duty owed by directors to their companies: namely the no-conflict rule identified in *Iranian Offshore Engineering*:

> *"(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.*
>
> *(2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).*
>
> *(3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.*
>
> *(4) This duty is not infringed–*
>
> *(a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or*
>
> *(b) if the matter has been authorised by the directors.*
>
> *(5) Authorisation may be given by the directors–*
>
> *(a) where the company is a private company and nothing in the company's constitution invalidates such authorisation, by the matter being proposed to and authorised by the directors; or*

> *(b) where the company is a public company and its constitution includes provision enabling the directors to authorise the matter, by the matter being proposed to and authorised by them in accordance with the constitution.*
>
> *(6) The authorisation is effective only if–*
>
> *(a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and*
>
> *(b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.*
>
> *(7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties."*

97. There is one other point to record in this section of the judgment. Where a person in a fiduciary position receives property of his principal, the burden is on him to account; that is to say to prove that the receipt of the relevant property was a proper receipt. This principle applies to company directors as it applies to trustees; see *Gillman & Soame Limited* [2007] EWHC 1245 (Ch), at [82].

(2) The remedies sought

98. The next step is to consider what remedies may be available to the Company, if it can establish any of the causes of action against any of the Application Defendants which it pursues in the Application.

99. So far as the direct claims against Mrs Nisa and Mr. Raja are concerned, those claims are based upon the alleged breaches by Mrs Nisa and Mr. Raja of the duties which they owed to the Company as directors of the Company. In general terms the Company is entitled, as against Mrs Nisa and Mr. Raja, to be compensated for any losses which it has been caused by any breaches by Mrs Nisa and Mr. Raja of their duties as directors of the Company. The precise basis of this general entitlement to compensation, that is to say whether it is a right to damages at common law or compensation in equity or both, was not the subject of debate at the hearing.

100. So far as claims for compensation against Mrs Nisa and Mr. Raja are concerned, the precise basis of the Company's entitlement to compensation, if established, may not be that important. What is however important in the Application, in terms of remedies, is that the Company's claims for relief against the corporate Application Defendants, and part of the Company's claims for relief against Mr. Raja depend upon the Company establishing that Mr. Raja, at least, was in breach of fiduciary duties which he owed to the Company.

101. It is therefore relevant, if the Company is able to establish breach of fiduciary duty in the Application, to set out what remedies may be available as a result of a breach by a director of his fiduciary duties to a company. In broad terms, the position is summarised in Mortimore, Company Directors: Duties, Liabilities, and Remedies, 3rd Edition, at 19.04 (page 462). First, the relevant company may avoid a transaction entered into as a result of the breach of fiduciary duty or it may obtain an injunction to prevent the transaction from occurring or being carried into effect. Second, and relevant in the present case, the company may pursue a proprietary claim to recover its property from a director or third party. Third, and also relevant in the present case, the company may pursue personal claims against a director or third party for compensation (meaning equitable compensation) or an account of profits.

102. In relation to the remedies sought in the Application, based upon alleged breach of fiduciary duties, it is relevant to add the following explanation to the general summary of the position in Mortimore.

103. Directors are not trustees of the company's property, but a breach by a director of a fiduciary duty owed to the company is treated as a breach of trust. As Chadwick LJ explained in *JJ Harrison (Properties) Limited v Harrison* [2001] EWCA Civ 1467 [2002] 1 BCLC 162, at [25]:

> *"25. I start with four propositions which may be regarded as beyond argument: (i) that a company incorporated under the Companies Acts is not trustee of its own property; it is both legal and beneficial owner of that property; (ii) that the property of a company so incorporated cannot lawfully be disposed of other*

> *than in accordance with the provisions of its memorandum and articles of association; (iii) that the powers to dispose of the company's property, conferred upon the directors by the articles of association, must be exercised by the directors for the purposes, and in the interests, of the company; and (iv) that, in that sense, the directors owe fiduciary duties to the company in relation to those powers and a breach of those duties is treated as a breach of trust. If authority for those propositions is required it can be found in In re Lands Allotment Company [1894] 1 Ch 616 — see the judgments of Lord Justice Lindley, at page 631, and Lord Justice Kay, at page 638 — Cook v Deeks [1916] AC 555 — see the advice of the Privy Council delivered by Lord Buckmaster, Lord Chancellor, at page 564 — and Belmont Finance Corporation v Williams Furniture Ltd and others (No 2) [1980] 1 All ER 393 — see the judgment of Lord Justice Buckley (with whom the other members of the Court agreed), at page 405c–f."*

104. The consequence of this is that remedies applicable to a breach of trust become available in the case of breach by a director of a fiduciary duty owed to the relevant company. By way of example, a person who receives that property with knowledge of the breach of duty is treated as holding the relevant property upon trust; see Mortimore at 19.05 (page 463).

105. In particular, this may mean that a proprietary claim lies against a third party to whom the property of the relevant company has been transferred and who still retains that property or its traceable proceeds; see Mortimore at 19.25 (page 469). The basic principle is that the relevant company, in the same way as the beneficiary of a trust, is entitled to a continuing beneficial interest not merely in the trust property, but in its traceable proceeds. As Mortimore explains, at 19.25:

> *"Tracing in equity depends upon the existence of a fiduciary duty, a condition that is necessarily satisfied in the case of directors where the company seeks to trace property transferred away as a consequence of*

> *the director's breach of fiduciary duty. Although often referred to as a proprietary claim or remedy, tracing properly so-called is neither a claim nor a remedy, but a process for identifying what has happened to the claimant's property. There are three aspects to the process of tracing; first, identifying the property belonging to the company in the hands of the wrongdoer; secondly following the asset into the hands of subsequent recipients of it; and thirdly, tracing into the proceeds of the misappropriated property which remain in the hands of the wrongdoer after the property has been transferred on. So far as the second of these aspects is concerned, the company may follow its property into the hands of subsequent recipients unless and until the property is acquired by a bona fide purchaser for value without notice of the company's claim."*

106. As against Dynamic the Company's case in the Application is that Dynamic was in knowing receipt of the UCL Funds which it received from the Company, and holds such of the UCL Funds as remain in its possession on constructive trust for UCL (paragraph 72 of the Amended Particulars of Claim). On the same basis it is alleged that Dynamic was in breach of this constructive trust in making the payments which I have set out earlier in this judgment (paragraph 74 of the Amended Particulars of Claim). It is also alleged that Dynamic dishonestly assisted Mr. Raja in the breaches of the fiduciary duties which Mr. Raja owed to the Company (paragraph 75 of the Amended Particulars of Claim).

107. Against Universal Real and Universal Total the Company's case in the Application is essentially the same.

108. As against Universal Real the Company's case in the Application is that Universal Real was in knowing receipt of the UCL Funds which it received, and holds such of the UCL Funds as remain in its possession and any assets acquired using the UCL Funds on constructive trust for the Company (paragraph 76 of the Amended Particulars of Claim). It is also alleged that Universal Real dishonestly assisted Mr. Raja in the breaches of the fiduciary duties which Mr. Raja owed to the Company (paragraph 79 of the Amended Particulars of Claim).

109. As against Universal Total the Company's case in the Application is that Universal Total was in knowing receipt of the UCL Funds which it received, and holds such of the UCL Funds as remain in its possession on constructive trust for UCL (paragraph 76 of the Amended Particulars of Claim). It is also alleged that Universal Total dishonestly assisted Mr. Raja in the breaches of the fiduciary duties which Mr. Raja owed to the Company (paragraph 79 of the Amended Particulars of Claim).

110. So far as knowing receipt is concerned, a third party who receives property as a consequence of a director's breach of fiduciary duty may be liable to pay compensation to the company. This is a personal liability which is dependent on receipt of the relevant property, but not upon the retention of that property. For such a liability to arise, the following three things must be established (see Mortimore at 19.79 (page 486)):

(1) A disposal of assets of the relevant company in breach of fiduciary duty.

(2) The beneficial receipt by the relevant defendant of assets which are traceable as representing the assets of the company.

(3) The relevant defendant acted with knowledge that the assets are traceable to a breach of fiduciary duty.

111. In terms of the knowledge which the relevant defendant must have, the defendant's state of knowledge must be such as to make it unconscionable for the defendant to retain the benefit of the receipt of the relevant property; see the discussion in Mortimore at 19.80 (pages 486-488) and see the decision of the Court of Appeal in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch. 437. Nourse LJ explained the knowledge required for a claim in knowing receipt in the following terms, at 455D-F:

> *"What then, in the context of knowing receipt, is the purpose to be served by a categorisation of knowledge? It can only be to enable the court to determine whether, in the words of Buckley LJ in Belmont Finance Corpn Ltd v Williams Furniture Ltd (No 2) [1980] 1 All ER 393 , 405, the recipient can "conscientiously retain [the] funds against the company" or, in the words of Sir Robert Megarry V-C in In re Montagu's*

> *Settlement Trusts [1987] Ch 264 , 273, "[the recipient's] conscience is sufficiently affected for it to be right to bind him by the obligations of a constructive trustee". But, if that is the purpose, there is no need for categorisation. All that is necessary is that the recipient's state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt.*
>
> *For these reasons I have come to the view that, just as there is now a single test of dishonesty for knowing assistance, so ought there to be a single test of knowledge for knowing receipt. The recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt. A test in that form, though it cannot, any more than any other, avoid difficulties of application, ought to avoid those of definition and allocation to which the previous categorisations have led. Moreover, it should better enable the courts to give commonsense decisions in the commercial context in which claims in knowing receipt are now frequently made, paying equal regard to the wisdom of Lindley LJ on the one hand and of Richardson J on the other."*

112. So far as dishonest assistance is concerned, three matters must be established, before liability can be imposed upon a defendant (see Mortimore at 19.74-19.78 (pages 485-486)):

(1) The fiduciary must have committed a breach of fiduciary duty, although it is not necessary to show that the breach was committed dishonestly.

(2) The defendant must have assisted in that breach. This requires more than the mere receipt of the trust property.

(3) The defendant must have acted dishonestly. This requires it to be shown that the defendant had knowledge of the elements of the relevant transaction which rendered his participation contrary to ordinary standards of honest behaviour. It does not require that the defendant did actually reflect on what those ordinary standards of behaviour were.

113. The matters which have to be demonstrated, in relation to a claim of dishonest assistance in a breach of fiduciary duty have been helpfully summarised by

Cockerill J. in *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm). The extract is lengthy, but should be set out in full, at [82]-[85]:

> *"82. In this area, too, the law was not seriously in issue. The ingredients of liability in dishonest assistance are:*
>
> *i) There must be a trust or fiduciary obligation owed by the trustee/fiduciary to the claimant. It suffices if the trust in question is a constructive or resulting trust: McGrath, Commercial Fraud in Civil Practice (2nd ed.) at [9.34].*
>
> *ii) Because dishonest assistance is a type of accessory liability, there must be a breach by the trustee/fiduciary: Royal Brunei Airlines v Tan [1995] 2 AC 378 , 382, Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908; [2015] QB 499 . That is common ground for the purposes of my decision. However, I should note that Mr Ohmura reserves the right to argue, if this matter were to go to a higher court, that liability for dishonest assistance would not arise in relation to a breach of the kind that is alleged in this case.*
>
> *iii) The breach by the trustee/fiduciary need not be dishonest: because liability of the third party is fault-based, what matters is the nature of their fault, not that of the trustee/fiduciary: Royal Brunei Airlines , 384-5, 392, Twinsectra Ltd v Yardley [2002] UKHL 12; [2002] 2 AC 164 at [109].*
>
> *iv) The third party must have assisted in, induced or procured the breach. It is necessary to show that the relevant assistance played more than a minimal role in the breach being carried out, but there is no requirement to show that the assistance provided would inevitably have resulted in the beneficiary suffering a loss: Baden v Société General pour Favoriser le Development du Commerce et de l'Industrie en France SA [1993] 1 WLR 509 at [246].*

v) The third party must have acted dishonestly in providing the assistance. The test in its modern incarnation derives from Royal Brunei Airlines at 386-7 and is now set out in Ivey v Genting Casinos (UK) t/a Crockfords [2017] UKSC 67 at [74]:

> *"When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."*

vi) However, the standards in question are those of an ordinary honest person in the circumstances of the defendant. Thus, in applying the test of dishonesty, the Court must have regard to all the circumstances known to the defendant at the time, and have regard to the defendant's personal attributes, such as their experience and the reason why they acted as they did: Royal Brunei Airlines v Tan at 391.

83. Accordingly:

i) There is no need to prove that the defendant was aware of the details of the underlying fraud, that there existed a trust, and/or they knew the facts which give rise to the

trust: McGrath at [9.133]. It suffices if they simply know that they are assisting the fiduciary to do something he or she is not entitled to do: Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch) at [1505], Twinsectra v Yardley at [24] per Lord Hoffmann.

ii) The defendant has the requisite dishonest state of mind if they deliberately close their eyes and ears, or deliberately refrain from asking questions, lest they learn something they would rather not know, and then proceed regardless: Royal Brunei Airlines , 389. Or as it was put by Lord Scott in Manifest Shipping Co v Uni-Polaris Insurance Co [2003] 1 AC 469 :

"In summary, blind-eye knowledge requires, in my opinion, a suspicion that the relevant facts do exist and a deliberate decision to avoid confirming that they exist. But a warning should be sounded. Suspicion is a word that can be used to describe a state-of-mind that may, at one extreme, be no more than a vague feeling of unease and, at the other extreme, reflect a firm belief in the existence of the relevant facts. In my opinion, in order for there to be blind-eye knowledge, the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe. To allow blind-eye knowledge to be constituted by a decision not to enquire into an untargeted or speculative suspicion would be to allow negligence, albeit gross, to be the basis of a finding of privity."

iii) However, a defendant does not have the requisite dishonest state of mind if he merely suspects what is going on: Heinl v Jyske Bank (Gibraltar) Ltd [1999] Lloyd's Rep Bank 511 where (in the context of a case with

a distinct factual parallel to this one) Colman J put the matter with characteristic clarity and good sense:

> *"it is not enough that on the whole of the information available to [the defendant] he ought as a reasonable man to have inferred that there was a substantial probability that the funds originated from the Bank. It must be established that he did indeed draw that inference…. If third parties are to be held accountable on the basis of accessory liability for breaches of trust committed by others the standard of proof of dishonesty, although not as high as the criminal standard, should involve a high level of probability."*

84. If the requirements above are satisfied, the third party is liable to: (a) compensate for the losses resulting from the trustee/fiduciary's breach of duty; and/or (b) personally account for his or her profits: Snell's Equity [30-079] to 30-081; McGrath [9.137] to [9.138].

85. The defendant's liability is not limited to the loss caused by his assistance, but extends to the loss resulting from the relevant breaches of fiduciary duty. It is inappropriate to become involved in attempts to assess the precise causative significance of the dishonest assistance in respect of either the breach of trust or fiduciary duty or the resulting loss: Otkritie at [456]; Snell's Equity [30-081]."

(3) The jurisdiction to award an interim payment

114. Awards of interim payments are sought against Mrs Nisa, Mr. Raja, and Universal Real, in respect of what is said to be their liability to the Company for damages or equitable compensation. The conditions which must be satisfied, before an order for an interim payment can be made, are set out in CPR Rule 25.7. The material parts of Rule 25.7, for present purposes, are to be found in paragraph (1), as follows:

> *"(1) The court may only make an order for an interim payment where any of the following conditions are satisfied—*
>
> *(a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;*
>
> *(b) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (other than costs) to be assessed;*
>
> *(c) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for an interim payment whether or not that defendant is the only defendant or one of a number of defendants to the claim;"*

115. In the Application the Company seeks judgment for damages or equitable compensation to be assessed against Mrs Nisa, Mr. Raja, and Universal Real. As such, and assuming that such judgment is granted, sub-paragraph (b) of paragraph (1) becomes relevant. Sub-paragraph (c) is also potentially relevant. So far as sub-paragraph (c) is concerned, the burden on the claimant, in terms of establishing a right to an interim payment, is a substantial one. The court has to be satisfied, on the balance of probabilities, that if the relevant claim went to trial, it would succeed and would result in a judgment for a substantial sum of money. A mere likelihood that a substantial sum of money will be obtained is not sufficient; see *British & Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] Q.B. 842, and see also, for specific consideration of the jurisdiction under CPR Rule 25.7(1)(c), the decision of the Court of Appeal in *Test Claimants in FII Group Litigation v Revenue & Customs Commissioners (No. 2)* [2012] EWCA Civ 57 [2012] 1 W.L.R. 2375 and, in particular, the discussion and analysis of the jurisdiction under sub-paragraph (c) by Aikens LJ at [32]-[43]. The guidance which I have looked at in relation to CPR Rule 25.7 does not identify whether the position is different under sub-paragraph (b), where a judgment has been obtained for damages or some other sum to be assessed. It seems to me however that the burden is still upon the claimant obtaining such a

judgment to satisfy the court that the relevant assessment will produce, at least, the award of a sum of money equal to that claimed by way of interim payment under sub-paragraph (b). As with sub-paragraph (c) it seems to me that the mere likelihood that this will occur is insufficient.

116. It follows that if liability is established against the relevant Application Defendants in the Application, it by no means follows that there is an entitlement to an interim payment. The Company must still show that it will recover a substantial sum of money following the assessment.

(4) The defences to the Application put forward by Mr. Raja

117. The defences to the Application put forward by Mr. Raja were expressed to be put forward on behalf of all the Application Defendants. It is therefore convenient to deal with these defences in a separate section of this judgment, before coming to the claims for relief, made in the Application, against each of the Application Defendants. In dealing with these defences I have not recorded everything contained in the defence documents or in the submissions of Mr. Becker. I have taken all of this material into account, but I deal expressly with the principal defences to the Application put forward by Mr. Raja.

118. In describing these defences as put forward by Mr. Raja I intend no discourtesy to Mr. Becker, who ably summarised these defences in his arguments at the hearing. I use this expression because it is in the documents prepared by Mr. Raja, comprising a mixture of arguments and evidence, that one finds the raw material of what is said in answer to the Application.

119. In the Defence and the Rebuttal Document, and in his second witness statement, Mr. Raja attacked the calculations of unpaid PAYE, NIC, and VAT made by the Revenue, as set out in Mr. Siddle's witness statement. Mr. Raja suggested that the Revenue had extrapolated the results of looking at a sample of individuals employed by the company in order to arrive at an overall figure for liability which took no account of differences in the tax liabilities relating to different employees. As such, so Mr. Raja contended, the Revenue's figures were unreliable.

120. There are however two obvious problems with this criticism.

121. The first is that I am not asked, on the Application, to quantify the amount of the Company's indebtedness to the Revenue. Nor am I asked to quantify the liability to the Company of any of the Application Defendants, should I be prepared to make a finding of liability against any of the Application Defendants. The Company seeks damages/equitable compensation to be assessed, if liability is established. Quantification of such liability will be for the assessment hearing. The only exception to this is that the Company does seek interim payments against some of the Application Defendants, but those interim payments, which require separate consideration, are not sought in respect of the entirety of what the Company says is the liability of the Application Defendants.

122. Second, the Revenue's figures for the unpaid PAYE, NIC, and VAT are very substantial. They are also, very clearly, not the product of a back of the envelope calculation. It is clear from Mr. Siddle's witness statement that they are the product of a careful and exhaustive analysis. What also bears repeating is the massive discrepancy between what the Company has paid to the Revenue, and what is said to be due from the Company to the Revenue. I repeat what I have said earlier in this judgment. According to the Revenue's evidence, as at 15th July 2020 the Revenue had received, in the period since May 2017, PAYE returns from the Company totalling £344,182.86 and payments in this respect of £165,648.33. The Revenue's evidence is that the unpaid PAYE and NIC for this period amounted to £21,596,682.74. In terms of VAT, and according to the same evidence, the Company was registered for VAT on 27th March 2017. In the period from April 2017 to April 2020, according to the Company's evidence, the VAT returns submitted by the Company showed sales of £186,136 and VAT payable of £24,691. The Revenue's evidence is that the unpaid VAT for the same period amounted to £5,200,810. There was no challenge, on behalf of the Application Defendants, to the Revenue's figures for what the Revenue had in fact been paid by the Company during the Relevant Period.

123. Even bearing in mind that this is a summary judgment application it is, in my view, completely impossible to accept that, at a trial of this action, the Application Defendants will be able to demonstrate that the discrepancy between what the Company has paid, and what the Revenue has said is due is the consequence of errors in the Revenue's calculations. I accept that it is not possible, on a summary judgment application, to subject the Revenue's calculations to detailed forensic scrutiny. I also accept the possibility that, as a result of such forensic scrutiny, there might be some adjustment required to the Revenue's calculations. What I do not accept is that this process would eliminate or come anywhere near eliminating the millions of pounds of unpaid PAYE, NIC, and VAT due to the Revenue from the Company.

124. Mr. Raja also sought to argue that some of those persons classified as employees of the Company by the Revenue were in fact working as self-employed contractors who were outside the IR35 regime. Again, the problems with this argument are obvious. First, this point cannot apply to the unpaid VAT, payable in respect of fees paid by customers of the Company. Second this point, even if taken at face value, cannot possibly explain away all of the liability of the Company to the Revenue for unpaid PAYE and NIC. Third, as Mr. Brockman pointed out, the evidence demonstrates that, as a matter of fact, the Company did make deductions from what it paid to those treated as its employees, regardless of whether IR35 applied or not, in respect of PAYE and NIC. What the Company did not then do was to account to the Revenue for these deductions.

125. Mr. Raja also sought to characterise this case as one where it had been entirely unnecessary for the Revenue and the Company to take the pre-emptive legal action which they had taken in this case, including the putting of the Company into liquidation, and the obtaining of a freezing injunctions and associated relief against the Defendants. Mr. Raja suggested that matters could have been resolved by the Revenue sitting down with Mr. Raja and sorting out the outstanding liabilities of the Company to the Revenue, such as they might be. Mr. Raja complained that, by putting the Company into liquidation, the Revenue had put it out of the power of Mr. Raja to retrieve the situation on behalf of the

Company. This seems to me, even on a summary judgment basis, not to be credible. The funds removed from the Company, as they have been identified to date, amount to many millions of pounds. The liability of the Company to the Revenue, even if one assumes that some adjustment might be required to the Revenue's figures at a quantum trial, amounts to many millions of pounds. The suggestion that this is all an unfortunate misunderstanding, which could have been resolved and could now be resolved by negotiation with the Revenue seems to me completely unrealistic, and not a matter which needs to be gone into at a trial.

126. There is also the case put forward by Mr. Raja, which I have mentioned earlier in this judgment, that he was duped by Mr. Cervenak, in combination with Mr. Syed Gous Ali and Ms. Bogdanova, into agreeing to the UCL Funds being re-invested into commercial and residential properties which would generate rental income and/or capital returns for the Company; see in particular sections 4-7 of the Defence. Mr. Raja claimed that all this investment took place on the basis of loans with specific terms and conditions applied, but that the evidence of these loans had been lost. Mr. Raja's case in this respect was summarised in paragraph 9 of his second witness statement, in the following terms:

> *"Conclusion*
>
> *9. As explained above, I do not consider there to be any realistic grounds* [o]*n which liquidator would be entitled to making the summary judgment. Evidence obtained by several third parties clearly evidences that liquidator and HM Revenue & Customs has failed to properly account for HMRC VAT, PAYE & NIC. Further it has been proven that profits of Umbrella Care Ltd were invested to grow the company as all assets were bought inside the UK. Recent evidence confirms that Mr Saunders have lost the important evidence and in fact trying to rebuild computers. Against this background it is essential for the summary judgment to be dismissed and discuss this complex case involving 14 defendants and large sums to be discussed in full trial."*

127. Again, the notion that this was all an investment scheme, whereby the UCL Funds were invested into the Properties is simply not credible, even allowing

for the fact that this is a summary judgment application. It is clear from the evidence that many millions of pounds of UCL Funds were simply removed from the Company. If this was all legitimate investment of the UCL Funds on behalf of the Company, the obvious question which arises is why the Company did not simply make its own direct investments, using its own money (the UCL Funds) for that purpose. Independent of this point, if one assumes, albeit without evidence to support this assumption, that there was some reason for investments to be made through third parties, one would expect to see some evidence of this, in the form of investment agreements or loan agreements where investments were made through third parties. In the case of investment into properties acquired in the names of third parties, one would expect to see evidence of the Company's interest in the relevant property, in the form of a charge or other interest registered against the relevant property. There is however no such evidence. All that there is, in this context, are two loan agreements, which are mentioned in paragraphs 316-319 of Ms. Brittain's first affidavit. These loan agreements are however loan agreements which purport to have been made between Dynamic and Universal Total, both of which appear to have been signed by Mr. Raja on behalf of Universal Total. If these loan agreements are assumed to be genuine, and I do not think that it is possible for me, on a summary basis, to say that they are not genuine, they do nothing to fill the gap in the evidence concerning the investment of the UCL Funds. There remains no evidence of any agreement securing to the Company any benefit from the millions of pounds of UCL Funds removed from the Company and invested by third parties.

128. While it is not necessary to go this far, in reaching the conclusion that the suggestion that the admitted movement of the UCL Funds was all part of a legitimate investment scheme is not credible, there is also this point. If, as Mr. Raja has also claimed, the movement of the UCL Funds was all part of an investment scheme orchestrated by Mr. Cervenak, Mr. Ali, and Ms. Bogdanova, with Mr. Raja as the unwitting dupe of the scheme, there is the remarkable fact that while Mr. Raja benefited greatly from the removal of the UCL Funds from the Company, there appears to have been no benefit realised to Mr. Cervenak at all from such a scheme, while it is unclear how either Mr. Ali or Ms. Bogdanova

benefited from such a scheme. When I circulated this judgment in draft form, for corrections, Mr. Raja sent in some suggested corrections to the draft judgment which included a claim that these three individuals were paid substantial fees, in the order of £600,000, and that they received nearly £7 million in payments. None of this was explored, or was the subject of specific submissions in the hearing. Nor was my attention drawn to any specific evidence, in this context, in the hearing. As I have already noted in this judgment, Imperial LLS was involved in at least one of the property transactions which were carried out using UCL Funds. I also believe, from reading Ms. Brittain's witness statement, that UCL Funds did pass to Imperial LLS in connection with transactions concerning other Defendants in the action but, as I have said, none of this was explored at the hearing, beyond the unchallenged evidence of Ms. Brittain, which I have already recorded, of the movement of the UCL Funds. That evidence confirms that large sums were paid by Dynamic to Imperial LLS, in connection with various transactions, including at least one property transaction and the Pakistan Payments. It seems to me that the point remains in place, although it is not necessary to go this far, that the benefit to Mr. Raja from the removal of the UCL Funds from the Company is clear, while it is, on any view of the matter, a good deal less clear how Mr. Cervenak, Mr. Ali, or Ms. Bogdanova benefited.

129. There is also the question of whether evidence which demonstrates that the removal of the UCL Funds from the Company was part of a legitimate investment scheme for the benefit of the Company can reasonably be expected to be available at a trial of this action, even if it is not available now. In my judgment there is no basis for thinking that such evidence will, or may become available at trial. If there was such evidence, and even making every allowance for Mr. Raja's complaints about being shut out from the Company records, one would expect to see some sign of it in the evidence at this stage, at least in an incomplete form. There is however no sign of such evidence.

130. A point I would add in this context is that it would be surprising to find such evidence. The Company's current position is that it owes millions of pounds to the Revenue in unpaid PAYE, NIC, and VAT, with the debt having built up as

a result of systematic non-payment or under-payment of the Company's liabilities to the Revenue, during the relatively short life of the Company since its incorporation on 9th March 2017. Given this position, no one could ever sensibly or reasonably have thought that a viable commercial strategy for the Company to adopt was to put funds, which were required to meet its liabilities to the Revenue, into the hands of third parties for investment on the Company's behalf.

131. In the case of payments to Mrs Nisa, and although this point was not specifically advanced at the hearing, Mr. Raja did claim, in a document prepared in response to an earlier order of the court requiring disclosure of the Company's dealings, that some payments made to Mrs Nisa represented directors' dividends or loans. The sums involved are relatively small, amounting to some £44,370.05. Given that Mrs Nisa held a number of directorships, I am left in the dark as to which company the alleged dividends and directors' loans related to. It seems to me that, on this summary judgment application, it is not possible for me to get to the bottom of whether these payments were in fact dividend payments or directors loans. It does not seem to me that the point particularly matters for the purposes of the Application, because the point could, at most, provide a justification for only a very small part of the total of the UCL Funds removed from the Company. I do however remind myself that the burden is upon a director who receives the property of the company of which he is a director, to demonstrate that his receipt of the relevant property was proper; see *Gillman & Soame* above. It seems to me, in the absence of further explanation, that this burden has not been discharged in relation to the payments claimed as dividends or director's loans paid to Mrs Nisa.

132. In all the circumstances of this case, and keeping firmly in mind that this is a summary judgment application, I do not consider that I can accept any of the matters raised by Mr. Raja as constituting a good answer to the Application, on behalf of any of the Application Defendants, or as raising matters which need to go trial. In particular, I regard myself as able to find, on a summary basis, and do find that:

(1) the removal of the UCL Funds from the Company was not part of a legitimate investment strategy either on behalf of the Company or for the benefit of the Company, and

(2) there was no good or legitimate reason for the removal of the UCL Funds from the Company.

133. Mr. Raja was also aggrieved at the steps which the provisional liquidators had taken, on behalf of the Company, to secure freezing injunctions against the Defendants. In particular, Mr. Raja complained of the way in which he had been characterised in the evidence and arguments in support of the applications for freezing injunctions. Mr. Raja made the particular point that he had been characterised as someone who had fled to Pakistan for the purposes of removing assets from the jurisdiction, in circumstances where he was in fact receiving medical treatment in Pakistan, following which he returned to this country. The obvious point here however is that I am not concerned, in the Application, to consider whether Mr. Raja was unfairly characterised in the applications for freezing injunctions against the Defendants. Nor am I concerned with the steps taken to obtain those freezing injunctions. I am only concerned with whether the Company can satisfy the test for obtaining summary judgment in this action, so far as the Company seeks summary judgment on its claims in this action. I do not consider that the complaints made by Mr. Raja in relation to the obtaining of the freezing injunctions are relevant to what I have to decide on the Application.

134. Finally, I should briefly mention Mr. Raja' criticisms of Ms. Brittain, which Mr. Raja sought to bolster by reference to other cases where, so it was alleged in the relevant materials assembled by Mr. Raja, the Revenue had ruined legitimate businesses by a heavy handed and unjustified approach. All of this material seemed to me to be completely irrelevant to what I have to decide on the Application.

(5) The relief sought against Mrs Nisa

135. The relevant case against both Mrs Nisa and Mr. Raja is that they were in breach of the duties which they owed to the Company, as its directors, in the manner

alleged in paragraphs 66 and 68 of the Amended Particulars of Claim, which are in the following terms:

> *"66. In the premises, Mrs Nisa and Mr Raja were each in breach of the fiduciary, statutory and common law duties set out at paragraph 58 above and/or in breach of trust in causing or permitting:*
>
> *(a) The Known Transfers referred to above, which amounted to the misappropriation and misapplication of at least £16,270,427.43 of the UCL Funds;*
>
> *(b) The Unknown Transfers made by UCL, which amounted to the misappropriation and misapplication of at least ~~£10,788,058.09~~10,662,409.76 of the UCL Funds."*
>
> *"68. Further or alternatively, Mrs Nisa and Mr Raja at all material times, and Mr Cervenak when he was a de jure director, were each in breach of the fiduciary, statutory and common law duties pleaded at paragraph 58 above, in that they:*
>
> *(a) failed to account to HMRC for the tax that UCL owes HMRC; and/or*
>
> *(b) caused or permitted UCL to trade without making provision for such tax liabilities to HMRC, as set out above."*

136. The starting point is that large sums, comprising UCL Funds, left the Company during the Relevant Period. Looking at the movement of the relevant UCL Funds, and as I have already found, there was no good or legitimate reason for the removal of the funds from the Company, and certainly no commercial advantage to the Company. To the contrary, the funds removed from the Company were, on the Company's evidence and as I find, funds which should have been used to discharge the Company's liabilities to the Revenue for PAYE, NIC, and VAT.

137. Where does this leave Mrs Nisa? She was a director of the Company at least from the date of its incorporation until 10th September 2019. She was then re-appointed as a director on 15th February 2020, although this re-appointment, if

one accepts the information in the subsequent notice of termination as correct, lasted only one day.

138. Mrs Nisa received the total sum of £41,204.04 from the Company, and the total sum of £546,607.09 from Dynamic; with this latter sum being derived from UCL Funds paid by the Company to Dynamic. I have found that there was no good or legitimate reason for these payments, and no commercial benefit to the Company. Mrs Nisa also received a payment of £3,593.66 from Universal Real, for which no explanation has been provided. Again, I find that there was no good or legitimate reason for this payment. In addition to this, three of the Properties were purchased in the name of Mrs Nisa, using UCL Funds.

139. I have already set out Mrs Nisa's evidence, in her affidavit, to the effect that she was *"a stay-at-home mother"* to her four children, had no involvement with any of the companies for which she was named as a shareholder or director, and simply signed documents put in front of her by Mr. Raja, her husband. It seems to me that I am not in a position, on a summary basis, to reject this evidence. I have not heard any oral evidence from Mrs Nisa, and she has not been cross examined. It seems to me that I have to proceed on the basis that, if this action goes to trial on liability, this evidence of Mrs Nisa may be accepted by the trial judge.

140. Proceeding on this basis however, one is left with a position where Mrs Nisa effectively did nothing to comply with her duties as a director of the Company, as those duties are pleaded in paragraph 58 of the Amended Particulars of Claim. It seems to me that such inactivity inevitably placed Mrs Nisa in breach of her duties to the Company.

141. Paragraphs 66 and 68 of the Amended Particulars of Claim are not specific in identifying which of the duties pleaded in paragraph 58 of the same document were breached by the actions and omissions set out in paragraphs 66 and 68. It seems to me that Mrs Nisa was, by her inactivity, in breach of the following duties which she owed to the Company, as a director of the Company:

(1) the duty pursuant to Section 172 to act in the way which the director considers would be most likely to promote the success of the company for the benefit of its members as a whole, having regard (amongst other matters) to the matters listed in paragraphs (a) to (f) of Section 172(1);
(2) the duty pursuant to Section 173 to exercise independent judgment;
(3) the duty pursuant to Section 174 to exercise reasonable care, skill and diligence;
(4) the duty pursuant to Section 175 to avoid conflicts of interest.

142. In relation to the duties which Mrs Nisa owed to the Company as a fiduciary, it seems to me that Mrs Nisa was in breach of her fiduciary duties to the Company by virtue of her breaches of the duties imposed upon her by Sections 172 and 175. In this context I cannot see that it is a defence for Mrs Nisa to rely either upon her claimed inactivity or upon her claimed ignorance of what was going on. Applying the law as explained in *Regentcrest* and in *Re HLC Environmental Projects Limited* the situation of Mrs Nisa seems to me to fall into the second exception (to the subjective test) explained by the Deputy Judge in *Re HLC*, at [92]. On Mrs Nisa's own evidence, she gave no consideration whatsoever to the best interests of the Company. As such, it seems to me that it is legitimate to consider the question of whether Mrs Nisa was in breach of her fiduciary duties on an objective basis, by asking whether an intelligent and honest person in the position of a director of the Company could, in the circumstances, have reasonably believed that the removal of the UCL Funds from the Company was for the benefit of the Company. In my view, in the circumstances of this case and while keeping firmly in mind that this is a summary judgment application, that question can only be answered in the negative.

143. I keep in mind that this is a summary judgment application, so that the relevant question is whether Mrs Nisa has no real prospect of success, at the trial of this action, of arguing that she was not in breach of her duties to the Company. I cannot however see that Mrs Nisa has any real prospect of success in this context. Nor can I see any other reason, compelling or otherwise, for this question to go trial. The reality was that Mr. Raja, in his arguments and evidence on behalf of the Application Defendants, was not able to identify any

defence to the claims of breach of directors' duties made by the Company, either on his own behalf or on behalf of Mrs Nisa. Mr. Becker's submissions reflected that position. I therefore consider that I am able to decide, notwithstanding that this is a summary judgment application, that Mrs Nisa was in breach of the duties set out in paragraph 58 of the Amended Particulars of Claim, to the extent that I have identified above, in the manner alleged in paragraphs 66 and 68 of the Amended Particulars of Claim.

144. I therefore decide that Mrs Nisa is liable to the Company for damages and/or equitable compensation for breach of her duties as a director of the Company, with such damages and/or equitable compensation to be subject to a separate assessment. I can see no issue which needs to go to trial in this respect.

145. I should, in particular, make two matters clear in relation to this decision. First, and to spell out the obvious, this is not a decision as to the quantum of Mrs Nisa's liability to the Company. All questions relating to the quantum of such liability are for a trial of the quantum of the liability. The only possible exception to this, to which I shall come shortly, is the question of interim payment. Second, I have made my decision on liability on the basis that Mrs Nisa was a de jure director of the Company from 9th March 2017 to 10th September 2019. I have left open the question of whether Mrs Nisa's re-appointment as a director of the Company lasted beyond 15th February 2020, and I have also left open the question of whether Mrs Nisa was a de facto director of the Company, at those times when she was not a de jure director. Both of these questions will need to be determined in the quantum trial, if they are relevant to the quantum trial.

146. This leaves the question of whether an interim payment should be ordered against Mrs Nisa. The jurisdiction to order such an interim payment is available, pursuant to CPR Rule 25.7(1)(b), because the Company has now obtained a judgment against Mrs Nisa, for damages and/or equitable compensation to be assessed.

147. The sums claimed against Mrs Nisa by way of interim payment are restricted to those of the Pakistan Payments which were paid while Mrs Nisa is said to have been a director of the Company, in the sum of £826,665, and to those sums received directly by Mrs Nisa, which were or can be traced back to UCL Funds, in the sum of £591,404.79. The Company's global case against Mrs Nisa is that the total amount misappropriated from the Company for which she is alleged to be liable in respect of her time as a de jure director of the Company, is £18,455,101.90.

148. I do not think that it is appropriate to order an interim payment against Mrs Nisa either in the amount of £591,404.79 or in the amount of any component part of this sum. This sum is made up of sums, received by Mrs Nisa, which either came directly from the Company, or came from UCL Funds received by Dynamic and Universal Real. As I have already found, there was no legitimate explanation for the payment of these sums to Mrs Nisa. They were payments which should not have been made and, in the case of Dynamic and Universal Real, the relevant sums should not have been in their hands in the first place. In terms of an interim payment however, it seems to me that questions of causation arise. It is necessary to consider what would have happened if Mrs Nisa had acted in compliance with her duties as a director of the Company. In the case of Mrs. Nisa, whose breaches of duty came about (according to her own evidence) by reason of her inactivity, I do not think that I am equipped to deal with these questions of causation on the hearing of an application for an interim payment. At this stage I do not think that I can be satisfied that, at the quantum trial, the Company will recover at least this sum from Mrs Nisa by way of damages and/or equitable compensation for breach of Mrs Nisa's duties as a director of the Company.

149. I also decline to order an interim payment in the amount of any sum representing the Pakistan Payments. Bearing in mind the timing of the Pakistan Payments, and bearing in mind that my determination of Mrs Nisa's liability to the Company is limited, as matters stand, to the period from 17th March 2017 to 10th September 2019, and thereafter to 15th February 2020, I do not think that I can

be satisfied, at this stage, that Mrs Nisa's liability to the Company will extend to an amount equal to the Pakistan Payments or any part thereof.

150. In summary therefore, I decide that the Company is entitled to judgment against Mrs Nisa for damages and/or equitable compensation for breach of her duties as a director of the Company, with such damages and/or equitable compensation to be subject to a separate assessment. I decline to order an interim payment against Mrs Nisa.

(6) The relief sought against Mr. Raja

151. As I have already identified, the relevant case against Mr. Raja is that he was in breach of the duties which he owed to the Company, as its director, in the manner alleged in paragraphs 66 and 68 of the Amended Particulars of Claim, which I have set out above.

152. I cannot see any answer which Mr. Raja can have to these claims of breach of duty. As with Mrs Nisa, one starts with the fact that large sums, comprising UCL Funds, left the Company during the Relevant Period, for no good or legitimate reason and to no commercial advantage to the Company. As I have already found, the funds removed from the Company were funds which should have been used to discharge the Company's liabilities to the Revenue for PAYE, NIC, and VAT. In the case of Mr. Raja, he was either a de jure director of the Company or a de facto director of the Company until the Company went into provisional liquidation, and the controlling mind of the Company. Also in the case of Mr. Raja, he received a substantial sum from Dynamic, which was paid by Dynamic using UCL Funds paid to Dynamic by the Company. In addition to this, three of the Properties were purchased in the name of Mr. Raja, using UCL Funds.

153. I have already found that the removal of the UCL Funds from the Company was not part of any legitimate investment strategy. Unlike Mrs Nisa, it is clear that Mr. Raja was actively involved in the removal of the UCL Funds from the Company. I agree with Mr. Brockman that the evidence, in which I include Mr.

Raja's own evidence, demonstrates that Mr. Raja was the architect of the removal of the UCL Funds from the Company.

154. Dealing specifically with Mr. Raja's duties under Section 172, Mr. Raja could argue that he thought that he was acting in the best interests of the Company, in orchestrating the removal of the UCL Funds from the Company. It does not necessarily follow, from the fact of the removal of the UCL Funds from the Company, that Mr. Raja was not genuine in his belief that the removal of the UCL Funds was part of a legitimate investment strategy. Nor does it necessarily follow from this that Mr. Raja was not duped into believing that this was the case. As such, so Mr. Raja might argue, the subjective test in *Regentcrest* applies, and Mr. Raja has, at the least, a case which should go to trial on the factual question of whether he did or did not think that he was acting in the best interests of the Company.

155. In my judgment there is no case which should go to trial in this respect. I say this for two reasons.

156. First, it seems to me that the objective test identified in *Re HLC* should apply. It seems to me impossible to say that Mr. Raja gave any actual consideration of the best interests of the Company. I cannot see how the view that the removal of the UCL Funds from the Company was part of a legitimate investment strategy could have survived any actual consideration of the best interests of the Company. If the objective test does apply, the answer is the same as that which applies in the case of Mrs Nisa. I do not think that an intelligent and honest person in the position of a director of the Company could, in the circumstances, reasonably have believed that the removal of the UCL Funds from the Company was for the benefit of the Company. In my view, in the circumstances of this case and keeping firmly in mind that this is a summary judgment application, there is no issue in this respect which needs to go to trial.

157. Second and more fundamentally, if the subjective test does apply, I do not accept that there is a case which needs to go to trial on this alternative basis. I refer back to the section of this judgment where I have dealt with the defences

to the Application raised by Mr. Raja. Mr. Raja is an accountant and he was, as I have found, the architect of the removal of the UCL Funds from the Company. The point bears reiterating that, during the Relevant Period, large sums of money were being removed from the Company, with no commercial benefit to the Company, while at the same time the Company was incurring liabilities, running into millions, in terms of unpaid PAYE, NIC, and VAT. It beggars belief that any director of the Company, let alone one with accountancy expertise, could have thought that it was in the best interests of the Company for the Company to conduct its affairs in this way. In my judgment the facts of this case are exceptional and justify a finding, on a summary basis and without hearing oral evidence from Mr. Raja, that Mr. Raja had no honest belief that his actions as de jure and de facto director of the Company were in the interest of the Company.

158. As I have already noted in the case of Mrs Nisa, paragraphs 66 and 68 of the Amended Particulars of Claim are not specific in identifying which of the duties pleaded in paragraph 58 of the same document were breached by the actions and omissions set out in paragraphs 66 and 68. It seems to me that Mr. Raja was, by his conduct as de jure and de facto director of the Company, in breach of the following duties which he owed to the Company, as a director of the Company:

(1) the duty pursuant to Section 172 to act in the way which the director considers would be most likely to promote the success of the company for the benefit of its members as a whole, having regard (amongst other matters) to the matters listed in paragraphs (a) to (f) of Section 172(1);

(2) the duty pursuant to Section 173 to exercise independent judgment;

(3) the duty pursuant to Section 174 to exercise reasonable care, skill and diligence;

(4) the duty pursuant to Section 175 to avoid conflicts of interest.

159. In relation to the duties which Mr. Raja owed to the Company as a fiduciary, and applying my analysis of the conduct of Mr. Raja as set out above, it seems to me that Mr. Raja was in breach of his fiduciary duties to the Company by virtue of his breaches of the duties imposed upon him by Sections 172 and 175.

160. I continue to keep in mind that this is a summary judgment application, so that the relevant question is whether Mr. Raja has no real prospect of success, at the trial of this action, of arguing that he was not in breach of his duties to the Company. As with Mrs Nisa, I cannot see that Mr. Raja has any real prospect of success in this context. Nor can I see any other reason, compelling or otherwise, for this question to go trial. I repeat, in this context, the point I have already made in relation to the claim of breach of duty made against Mrs Nisa. The reality was that Mr. Raja, in his arguments and evidence on behalf of the Application Defendants, was not able to identify any defence to the claims of breach of directors' duties made by the Company, either on his own behalf or on behalf of Mrs Nisa. Mr. Becker's submissions reflected that position. I therefore consider that I am able to decide, notwithstanding that this is a summary judgment application, that Mr. Raja was in breach of the duties set out in paragraph 58 of the Amended Particulars of Claim, to the extent that I have identified above, in the manner alleged in paragraphs 66 and 68 of the Amended Particulars of Claim. I can see no issue which needs to go to trial in this respect.

161. I therefore decide that Mr. Raja is liable to the Company for damages and/or equitable compensation for breach of his duties as a director of the Company, with such damages and/or equitable compensation to be subject to a separate assessment.

162. I again spell out the obvious point that this is not a decision as to the quantum of Mr. Raja's liability to the Company. All questions relating to the quantum of such liability are for a trial of the quantum of the liability. As with Mrs Nisa, this is subject to the possible exception, to which I shall come, of an interim payment. In the case of Mr. Raja it is also subject to the possible exception of the claims for declaratory relief, to which I turn.

163. The Company also seeks, on the Application, declaratory relief against Mr. Raja, to the effect that he holds on constructive trust, for the benefit of the Company, the three Properties which were purchased in his name. An order is also sought for the transfer of these three Properties to the Company.

164. As I have already noted, a breach by a director of a fiduciary duty owed to the company of which that person is a director is treated as a breach of trust; see Chadwick LJ in *JJ Harrison (Properties) Limited*. This has the consequence that remedies applicable to a breach of trust become available in such a case. In particular, and as I have also noted, this may mean that a proprietary claim lies against a third party to whom the property of the relevant company has been transferred and who still retains that property or its traceable proceeds. The basic principle is that the relevant company, in the same way as the beneficiary of a trust, is entitled to a continuing beneficial interest not merely in the trust property, but in its traceable proceeds.

165. In the case of the three Properties purchased in the name of Mr. Raja, the relevant Flow Charts, which have not been challenged by the Application Defendants, demonstrate that the funds used to purchase the three Properties came from Mr. Raja, and comprised the bulk of the funds paid to Mr. Raja by Dynamic. I have already decided that Mr. Raja, although never a de jure director of Dynamic, was a de facto director of Dynamic throughout the Relevant Period.

166. The Flow Charts thus establish that the funds used to purchase the three Properties were UCL Funds. It seems clear to me that the removal of those funds from the Company, and the use of those funds by Mr. Raja to acquire the three Properties in his own name constituted a breach of the fiduciary duties which Mr. Raja owed to the Company. It also seems clear to me that this breach of Mr. Raja's fiduciary duties caused the loss of those funds to the Company. On the route which the relevant funds took, from the Company into the three Properties, there was no bona fide purchaser for value without notice of the Company's rights to the funds. Dynamic gave no consideration for the UCL Funds which it received from the Company, and it was aware, by its de facto director Mr. Raja, of the Company's rights to those funds. As for Mr. Raja himself, when the relevant funds came into his hands from Dynamic, he was of course the person whose breach of his fiduciary duties had enabled the relevant

funds to be removed from the Company and had also enabled their onward investment into the three Properties.

167. In these circumstances it seems to me that the conditions are satisfied for the Company to be able to trace the relevant part of the UCL Funds into the three Properties held in the name of Mr. Raja, and thereby to be able to claim a beneficial interest in these three Properties. I can see no issue which needs to go to trial in this respect. As such, I conclude that Mr. Raja does hold the three Properties, that is to say 98 Randolph Road, Flat 1 Khalid Road, and Flat 2 Eugene House (as more particularly described in the Schedule), on constructive trust for the Company.

168. In terms of the relief which falls to be granted consequent upon this conclusion, I will defer the question of what form this relief should take to the hearing consequential upon the handing down of this judgment ("the Consequential Hearing"). In particular, I will need to be satisfied that there are no third party interests in any of the three Properties, which might affect the terms of the relief sought by the Company in this respect. The evidence of the office copy entries for the three Properties which I have seen suggests that this is not the case, but this point was not one which was addressed in the hearing.

169. This leaves the question of whether an interim payment should be ordered against Mr. Raja. The jurisdiction to order such an interim payment is again available, pursuant to CPR Rule 25.7(1)(b), because the Company has now obtained a judgment against Mr. Raja, for damages and/or equitable compensation to be assessed.

170. The sums claimed against Mr. Raja by way of interim payment are restricted to (i) the Pakistan Payments which were paid while Mr. Raja was either a de jure or a de facto director of the Company, in the sum of £975,189, and (ii) the UCL Funds received directly by Mr. Raja, less the purchase prices of the three Properties purchased in his name, leaving a net sum which is put at £103,341.23. I calculate the relevant figure to be £104,928.29, but the difference is a small

one and the calculation is made for the purposes of an interim payment, rather than an actual award of damages and/or equitable compensation.

171. There is also reference, in the summary produced by Mr. Brockman of the relief sought on the Application, to the claim for an interim payment including whatever is held in the client account of Russell-Cooke LLP in the name of Universal Care World. I am not sure however what sum this is said to relate to and, for the moment, I leave it out of account for the purposes of assessing whether an interim payment should be ordered. I leave it open to the Company to address me further, at the Consequential Hearing, on the question of whether the interim payment should be increased to take account of this sum. The same applies, for what it is worth, to the mathematical discrepancy identified in my previous paragraph.

172. The Company's global case against Mr. Raja is that Mr. Raja is liable for the total amount which is said to be due from the Company to the Revenue, in the sum of £36,418,026.45.

173. I think that it is appropriate to order an interim payment against Mr. Raja in the amount claimed; namely £1,078,530.23. This sum comprises UCL Funds which were clearly lost to the Company as a result of Mr. Raja's breaches of his duties as a de jure and de facto director of the Company. I am satisfied that, at the quantum trial, the Company will recover at least this sum from Mr. Raja by way of damages and/or equitable compensation for breach of Mr. Raja's duties as a director of the Company.

174. In summary therefore, I decide that the Company is entitled (i) to judgment against Mr. Raja for damages and/or equitable compensation for breach of his duties as a director of the Company, with such damages and/or equitable compensation to be subject to a separate assessment, and (ii) to an interim payment in the sum of £1,078,530.23. I also decide that Mr. Raja holds the three Properties registered in his name on constructive trust for the benefit of the Company. I defer the question of what form of relief should be granted consequential upon this latter decision to the Consequential Hearing. I also give

the Company permission to address me further at the Consequential Hearing, if so advised, on whether the interim payment should be adjusted to take account of either of the two areas of uncertainty which I have noted above.

(7) The relief sought against Dynamic

175. The relevant case against Dynamic is that it was in knowing receipt of the UCL Funds which it received from the Company, and holds such of the UCL Funds as remain in its possession on constructive trust for UCL, as alleged in paragraph 72 of the Amended Particulars of Claim. On the same basis it is alleged that Dynamic was in breach of constructive trust in making the payments which it made, as set out earlier in this judgment; see paragraph 74 of the Amended Particulars of Claim. It is also alleged that Dynamic dishonestly assisted Mr. Raja in his breaches of the fiduciary duties which he owed to the Company; see paragraph 75 of the Amended Particulars of Claim. Paragraphs 72, 74, and 75 of the Amended Particulars of Claim are in the following terms:

> *"72. Dynamic holds on constructive trust for UCL all money misappropriated from UCL or any assets acquired directly or indirectly with such money, or is liable to account to UCL for all such money or assets:*
>
> *(a) Dynamic has received the UCL Funds as a result of breaches of fiduciary duty or breaches of trust by Mrs Nisa, Mr Raja and Mr Cervenak (or one or some of them);*
>
> *(b) Dynamic knew or has blind eye knowledge (through its controlling mind(s)), that the UCL Funds received by it resulted from the aforesaid breaches;*
>
> *(c) In the premises, it would be unconscionable for Dynamic to retain those benefits."*
>
> *"74. In breach of the trusts referred to at paragraphs 72 and 73 above, Dynamic made the payments referred to at paragraph 33 above."*
>
> *"75. Further or alternatively, Dynamic has by receiving and dealing with the monies paid to it by UCL in breach of fiduciary duty*

and/or breach of trust (as set out at paragraphs 66 and 67 above), dishonestly assisted those breaches."

176. I start with the claim in knowing receipt, the required elements of which I have set out earlier in this judgment.

177. It is clear that there was a disposal of the assets of the Company to Dynamic, in the form of those of the UCL Funds paid to Dynamic by the Company. It is also clear that Mr. Raja was responsible for this removal, in his capacity as de jure or de facto director of the Company and in his capacity as de facto director of Dynamic. I have also decided that, in orchestrating the removal of the relevant UCL Funds from the Company to Dynamic, Mr. Raja was in breach of the fiduciary duties which he owed to the Company. I can see no issue which needs to go to trial in any of these respects.

178. It is also clear that Dynamic was in beneficial receipt of those UCL Funds. The unchallenged evidence of the Company demonstrates that the relevant UCL Funds did pass from the Company to Dynamic, and are traceable into the hands of Dynamic. Again, I can see no issue which needs to go to trial in this respect.

179. This leaves the question of whether Dynamic acted with knowledge that the relevant UCL Funds were traceable to Mr. Raja's breaches of his fiduciary duties. As explained in *Akindele*, the relevant test is whether Dynamic's state of knowledge was such as to make it unconscionable for Dynamic to retain the benefit of the UCL Funds which it received.

180. Dynamic was of course a corporate personality, so that it could only have had such knowledge through those acting on its behalf. I am not in a position to decide, on a summary basis, whether Mrs Nisa or Mr. Cervenak had the requisite knowledge in their capacities as directors of Dynamic, at the times when they were directors of Dynamic. There is however Mr. Raja who was, as I have already decided, de facto director of Dynamic throughout the Relevant Period, and also, as I have also already decided, the controlling mind of Dynamic. Mr. Raja was well aware of the removal of the UCL Funds from the

Company to Dynamic, of which he was the architect. Mr. Raja was also well aware, as I have also already decided, that there was no good or legitimate reason for the removal of the UCL Funds from the Company to Dynamic. It seems to me that this knowledge of Mr. Raja, in his capacity as de facto director and controlling mind of Dynamic, can be attributed to Dynamic. It also seems to me that this state of knowledge, on the part of Dynamic, was amply sufficient to render it unconscionable for Dynamic to retain the UCL Funds which it received from the Company. I can see no issue which needs to go to trial in any of these respects.

181. I therefore conclude that the Company's claim in knowing receipt against Dynamic, as pleaded in paragraph 72 of the Amended Particulars of Claim, is established at this stage, and does not need to go to trial. I cannot see that Dynamic has any real prospect of a successful defence to this claim at trial, and I can see no other reason, compelling or otherwise, for this claim to go trial.

182. What follows from this conclusion is that Dynamic held on constructive trust the UCL Funds paid to it by the Company, and acted in breach of this constructive trust in paying out the relevant funds to other parties, as pleaded in paragraph 74 of the Amended Particulars of Claim. The sums held on constructive trust include the sum now held in the Dynamic Account, save for any part of that sum which cannot be traced to the UCL Funds. I include this last qualification because Ms. Brittain says, in paragraph 41 of her witness statement, that the sum in the Dynamic Account was *"wholly, or almost wholly"* traceable to the Company. There may therefore be a small amount of money in the Dynamic Account which cannot be traced to the Company.

183. I therefore decide that Dynamic is liable to the Company for equitable compensation in respect of the knowing receipt by Dynamic of the UCL Funds paid by the Company to Dynamic, with the quantum of such equitable compensation to be subject to a separate assessment. I again spell out the obvious point that this is not a decision as to the quantum of Dynamic's liability to the Company.

184. This leaves the question of whether Dynamic dishonestly assisted Mr. Raja in the breaches of the fiduciary duties which Mr. Raja owed to the Company, as alleged in paragraph 75 of the Amended Particulars of Claim. This requires a finding that Dynamic acted dishonestly; see *FM Capital Partners*, which in turn requires findings (i) that a person acted dishonestly, and (ii) that the dishonesty of that person can be attributed to Dynamic. The test of whether there was dishonesty requires fairly extensive investigation of the state of mind and knowledge of the relevant person who is alleged to have been dishonest; see Cockerill J. in *FM Capital Partners* at [82v-vi]. In the present case, and so far as this hearing is concerned, the relevant person could only be Mr. Raja, as de facto director and controlling mind of Dynamic during the Relevant Period. I consider that I am not in a position, at this hearing, to make a relevant finding of dishonesty against Mrs Nisa or Mr. Cervenak, in their respective capacities as de jure directors of Dynamic for parts of the Relevant Period.

185. In the present case the claim in dishonest assistance is another route by which the Company can establish an entitlement to the relief to which it is also entitled by virtue of my decision on the claim in knowing receipt. In my view it is neither necessary nor appropriate, on this summary judgment hearing, to embark on the question of whether Mr. Raja was dishonest by reference to the test in *FM Capital Partners*. I am doubtful that I am equipped with all the evidence which I would require to make a decision, by reference to the criteria in *FM Capital Partners*, that Mr. Raja was dishonest in the required respect. I think that this is a question better left to a trial, if the Company regards it as necessary to pursue the claim in dishonest assistance to a trial.

186. Accordingly, I decide that the claim in dishonest assistance, as pleaded in paragraph 75 of the Amended Particulars of Claim, is not one which I can or should decide on a summary basis.

187. In summary therefore, I decide that the Company is entitled (i) to judgment against Dynamic for equitable compensation to be assessed, by reason of the knowing receipt by Dynamic of the UCL Funds which it received from the Company, with the quantum of such equitable compensation to be subject to a

separate assessment, and (ii) to a declaration that the sum held in the Dynamic Account, together with any interest earned on that sum are held upon constructive trust for the Company, and (iii) an order that the total sum held in the Dynamic Account be paid over to the Company. The mechanics of the order for payment of the relevant total sum will need to be dealt with at the Consequential Hearing, together with an identification of the total sum which will be the subject of this order. In relation to the declaration relating to the sum held in the Dynamic Account, there may need to be a qualification to the declaration to take account of any part of the sum which cannot be traced back to the Company. I also leave this latter question to the Consequential Hearing.

(8) The relief sought against Universal Real

188. I can take this part of the Application more quickly, because the result essentially follows from decisions which I have already made.

189. The relevant case against Universal Real is that it was in knowing receipt of the UCL Funds which it received, and holds such of the UCL Funds as remain in its possession and any assets acquired using the UCL Funds on constructive trust for the Company, as alleged in paragraph 76 of the Amended Particulars of Claim. It is also alleged that Universal Real dishonestly assisted Mr. Raja in the breaches of the fiduciary duties which Mr. Raja owed to the Company, as alleged in paragraph 79 of the Amended Particulars of Claim. Paragraphs 76 and 79 are in the following terms:

> *"76. Each of Universal Real, ~~and~~ Universal Total, Luminous, New Spring, United Care, FI Holdings, Synergy and First Response (together the "**Other Defendants**") hold on constructive trust for UCL all money misappropriated from UCL or any assets acquired directly or indirectly with such money, or is liable to account to UCL for all such money or assets:*
>
> *(a) ~~Universal Real and Universal Total~~ The Other Defendants each knew or had blind-eye knowledge (through their respective controlling mind(s)) that the monies received by them from UCL were received as a*

result of the breaches referred to at paragraphs 66 and 67.

(b) ~~Universal Real and Universal Total~~ The Other Defendants each knew or had blind-eye knowledge (through their respective controlling mind(s)) that the monies received by them from Dyanamic and/or Bond Adams and/or Imperial Law Legal Services were traceable to and/or received as a result of the breaches referred to at paragraphs 66, 67 and 74 above.

(c) In the premises, it would unconscionable for ~~Universal Real or Universal Total~~ the Other Defendants to retain those benefits."

"79. Further or alternatively:

(a) Universal Real has by receiving and dealing with the monies paid to it by UCL in breach of fiduciary duty and/or breach of trust (as set out at paragraphs 66 and 67 above), dishonestly assisted those breaches; and

(b) Universal Real and Universal Total have, by receiving and dealing with the UCL Funds or their traceable proceeds paid to them by Dynamic, dishonestly assisted the breaches of trust by Dynamic referred to at paragraph 74 above."

190. I again start with the claim in knowing receipt, and the required elements for a claim in knowing receipt.

191. It is clear that there was a disposal of the assets of the Company to Universal Real. Universal Real received a substantial sum of money directly from the Company, in the sum of £1,933,430.22, and a substantial sum from Dynamic, which can be traced back to the Company, in the sum of £1,723,895.44. It is also clear that Mr. Raja was responsible for the movement of these sums, in his capacity as de jure or de facto director of the Company, and in his capacity as de facto director of Dynamic, and in his capacity as de jure or de facto director director of Universal Real. I have already decided that, in orchestrating the

removal of the relevant UCL Funds from the Company to, respectively, Dynamic and Universal Real, Mr. Raja was in breach of the fiduciary duties which he owed to the Company. I can see no issue which needs to go to trial in any of these respects.

192. It is also clear that Universal Real was in beneficial receipt of those UCL Funds which it received. As with Dynamic, the unchallenged evidence of the Company demonstrates that the relevant UCL Funds did pass from the Company to Universal Real, and are traceable into the hands of Universal Real. Again, I can see no issue which needs to go to trial in this respect.

193. Once again therefore, this leaves the question of whether Universal Real acted with knowledge that the relevant UCL Funds were traceable to Mr. Raja's breach of his fiduciary duties. As explained in *Akindele*, the relevant test is whether Universal Real's state of knowledge was such as to make it unconscionable for Universal Real to retain the benefit of the UCL Funds which it received.

194. As a corporate personality, Universal Real could only have had such knowledge through those acting on its behalf. I am not in a position to decide, on a summary basis, whether Mrs Nisa had the requisite knowledge in her capacity as a director of Universal Real, at the times when she was a director of Universal Real. Once again however there is Mr. Raja who was, as I have already decided, either a de jure director or a de facto director of Universal Real throughout the Relevant Period, and was also, as I have also already decided, the controlling mind of Universal Real. Mr. Raja was well aware of the removal of the UCL Funds from the Company to Universal Real, of which he was the architect, both directly and through Dynamic. Mr. Raja was also well aware, as I have also already decided, that there was no good or legitimate reason for the removal of the UCL Funds from the Company to Universal Real, either directly or through Dynamic. It seems to me that this knowledge of Mr. Raja, in his capacity as de jure or de facto director and controlling mind of Universal Real, can be attributed to Universal Real. It also seems to me that this state of knowledge, on the part of Universal Real, was amply sufficient to render it unconscionable

for Universal Real to retain the UCL Funds which it received from the Company, either directly or through Dynamic. I can see no issue which needs to go to trial in any of these respects.

195. I therefore conclude that the Company's claim in knowing receipt against Universal Real, as pleaded in paragraph 76 of the Amended Particulars of Claim, is established at this stage, and does not need to go to trial. I cannot see that Universal Real has any real prospect of a successful defence to this claim at trial, and I can see no other reason, compelling or otherwise, for this claim to go trial.

196. What follows from this conclusion is that Universal Real held on constructive trust the UCL Funds paid to it by the Company and Dynamic, and equally holds on constructive trust, for the benefit of the Company, those of the Properties purchased in the name of Universal Real, all of which were purchased using UCL Funds.

197. I therefore decide that Universal Real is liable to the Company for equitable compensation in respect of the knowing receipt by Universal Real of the UCL Funds paid to Universal directly by the Company and indirectly by Dynamic, with the quantum of such equitable compensation to be subject to a separate assessment. I again spell out the obvious point that this is not a decision as to the quantum of Universal Real's liability to the Company, although this is subject to my consideration of the claim for an interim payment which is made against Universal Real.

198. The Company also seeks a declaration that Universal Real holds the Properties purchased in its name on constructive trust for the benefit of the Company, and an order for the transfer of these Properties to the Company. It seems to me that Universal Real does hold the relevant Properties on constructive trust for the benefit of the Company. The Company's unchallenged evidence, and specifically the evidence of the Flow Charts show that a substantial part of the UCL Funds received by Universal Real was used to purchase these Properties and can be traced into these Properties.

199. So far as the claims for declaratory relief and an order for transfer are concerned, I will take the same course as I have taken with the equivalent claim in respect of Mr. Raja, and defer the question of what form this relief should take to the Consequential Hearing. In particular, I will need to be satisfied that there are no third party interests in any of the Properties held by Universal Real, which might affect the terms of the relief sought by the Company in this respect. In the case of Universal Real there is also the point that one of the Properties to be acquired in its name (14 Sydney Houses) appears still to be registered in the names of the vendors (David and Judith Jackson). This is a further matter which would need to be addressed in deciding what relief to grant in relation to the Properties acquired or intended to be acquired in the name of Universal Real.

200. There is then the question of whether Universal Real dishonestly assisted Mr. Raja in the breaches of the fiduciary duties which Mr. Raja owed to the Company, as alleged in paragraph 79 of the Amended Particulars of Claim. This requires a finding that Universal Real acted dishonestly which in turn, and as with the claim in dishonest assistance against Dynamic and for the reasons there explained, requires a finding of dishonesty against Mr. Raja in his capacity as de jure and de facto director of Universal Real during the Relevant Period. For the same reasons as I have explained in the case of Dynamic, I decide that the claim in dishonest assistance, as pleaded in paragraph 79 of the Amended Particulars of Claim, is not one which I can or should decide on a summary basis.

201. There is also the question of whether the Company is entitled to an interim payment against Universal Real, in respect of the judgment for equitable compensation to be assessed. An interim payment is sought in the sum of £1,164,447.92, which is the difference between the UCL Funds which Universal Real is known to have received from the Company, both directly and indirectly through Dynamic, and the sums which were used to purchase Properties in the name of Universal Real.

202. The jurisdiction to order such an interim payment is again available, pursuant to CPR Rule 25.7(1)(b), because the Company has now obtained a judgment against Universal Real, for damages and/or equitable compensation to be assessed.

203. I think that it is appropriate to order an interim payment against Universal Real in the amount claimed; namely £1,164,447.92. This sum comprises UCL Funds which were clearly the subject of knowing receipt by Universal Real. I am satisfied that, at the quantum trial, the Company will recover at least this sum from Universal Real by way of equitable compensation for knowing receipt of UCL Funds.

204. In summary therefore, I decide that the Company is entitled (i) to judgment against Universal Real for equitable compensation to be assessed, by reason of the knowing receipt by Universal Real of the UCL Funds which it received from the Company, both directly and indirectly from Dynamic, with the quantum of such equitable compensation to be subject to a separate assessment, and (ii) to an interim payment in the sum of £1,164,447.92. I also decide that Universal Real holds the Properties registered in its name on constructive trust for the benefit of the Company. I defer the question of what form of relief should be granted consequential upon this latter decision to the Consequential Hearing.

(9) The relief sought against Universal Total

205. As with Universal Real, I can take this last part of the Application more quickly. The relevant case against Universal Total is that it was in knowing receipt of the UCL Funds which it received, and holds such of the UCL Funds as remain in its possession on constructive trust for UCL, as alleged in paragraph 76 of the Amended Particulars of Claim. It is also alleged that Universal Total dishonestly assisted Mr. Raja in the breaches of the fiduciary duties which Mr. Raja owed to the Company, as alleged in paragraph 79 of the Amended Particulars of Claim. I have set out paragraphs 76 and 79 in the previous section of this judgment.

206. I again start with the claim in knowing receipt, and the required elements for a claim in knowing receipt.

207. It is clear that there was a disposal of the assets of the Company to Universal Total. Universal Total received a substantial sum of money, in the sum of £2,231,000, from Dynamic. The Company's unchallenged evidence demonstrates that this payment was made using UCL Funds received by Dynamic from the Company. It is also clear that Mr. Raja was responsible for the movement of these sums, in his capacity as de jure or de facto director of the Company, and in his capacity as de facto director of Dynamic, and in his capacity as de jure or de facto director of Universal Total. I have already decided that, in orchestrating the removal of the relevant UCL Funds from the Company to Dynamic, and then to Universal Total, Mr. Raja was in breach of the fiduciary duties which he owed to the Company. I can see no issue which needs to go to trial in this respect.

208. It is also clear that Universal Total was in beneficial receipt of those UCL Funds which it received. As with Dynamic and Universal Real, the unchallenged evidence of the Company demonstrates that the relevant UCL Funds did pass from the Company to Universal Total, and are traceable into the hands of Universal Total. Again, I can see no issue which needs to go to trial in this respect.

209. Once again therefore, this leaves the question of whether Universal Total acted with knowledge that the relevant UCL Funds were traceable to Mr. Raja's breach of his fiduciary duties. As explained in *Akindele*, the relevant test is whether Universal Total's state of knowledge was such as to make it unconscionable for Universal Total to retain the benefit of the UCL Funds which it received.

210. As a corporate personality, Universal Total could only have had such knowledge through those acting on its behalf. I am not in a position to decide, on a summary basis, whether Mrs Nisa had the requisite knowledge in her capacity as a director of Universal Total, at the times when she was a director

of Universal Total. Once again however there is Mr. Raja who was, as I have already decided, either a de jure director or a de facto director of Universal Total throughout the Relevant Period, and was also, as I have also already decided, the controlling mind of Universal Total. Mr. Raja was well aware of the removal of the UCL Funds from the Company to Universal Total. Mr. Raja was also well aware, as I have also already decided, that there was no good or legitimate reason for the removal of the UCL Funds from the Company to Universal Total, either directly or through Dynamic. It seems to me that this knowledge of Mr. Raja, in his capacity as de jure or de facto director and controlling mind of Universal Total, can be attributed to Universal Total. It also seems to me that this state of knowledge, on the part of Universal Total, was amply sufficient to render it unconscionable for Universal Total to retain the UCL Funds which it received from the Company, through Dynamic. I can see no issue which needs to go to trial in any of these respects.

211. I therefore conclude that the Company's claim in knowing receipt against Universal Total, as pleaded in paragraph 76 of the Amended Particulars of Claim, is established at this stage, and does not need to go to trial. I cannot see that Universal Total has any real prospect of a successful defence to this claim at trial, and I can see no other reason, compelling or otherwise, for this claim to go trial.

212. What follows from this conclusion is that Universal Total held on constructive trust for the benefit of the Company the UCL Funds paid to it by Dynamic, and equally holds on constructive trust, for the benefit of the Company, the two Properties purchased in the name of Universal Total, both of which were purchased using UCL Funds.

213. I therefore decide that Universal Total is liable to the Company for equitable compensation in respect of the knowing receipt by Universal Total of the UCL Funds paid to Universal Total indirectly by Dynamic, with the quantum of such equitable compensation to be subject to a separate assessment. Once again I spell out the obvious point that this is not a decision as to the quantum of Universal Total's liability to the Company.

214. The Company also seeks a declaration that Universal Total holds the two Properties purchased in its name on constructive trust for the sole benefit of the Company. There are also claims for an order for the transfer of one of these Properties (Forester House) to the Company and for an order that the Company is entitled to be registered as the sole proprietor of the other of these Properties (29 East Street). In principle it seems to me that Universal Total does hold the relevant Properties on constructive trust for the benefit of the Company. The Company's unchallenged evidence, and in particular the evidence of the Flow Charts show that a substantial part of the UCL Funds received by Universal Real was used to purchase these Properties and can be traced into these Properties.

215. So far as the claims for declaratory relief and the ancillary orders for transfer and registration are concerned, I will take the same course as I have taken with the equivalent claims in respect of Mr. Raja and Universal Real, and defer the question of what form this relief should take to the Consequential Hearing. In particular, I will need to be satisfied that there are no third party interests in the two Properties held by Universal Total, which might affect the terms of the relief sought by the Company in this respect. There is also the problem that Universal Total does not yet appear to be registered as the proprietor of 29 East Street. An order for the transfer of the registered title to Universal Total would affect the position of Chevin Asset Management Limited, which appears to remain as the registered proprietor of 29 East Street and which is not a party to the Application. This is a further matter which will need to addressed in deciding what relief to grant in relation to the two Properties acquired or intended to be acquired in the name of Universal Total.

216. This leaves the question of whether Universal Total dishonestly assisted Mr. Raja in the breaches of the fiduciary duties which Mr. Raja owed to the Company, as alleged in paragraph 79 of the Amended Particulars of Claim. This requires a finding that Universal Total acted dishonestly which in turn, and as with the claims in dishonest assistance against Dynamic and Universal Real, requires a finding of dishonesty against Mr. Raja in his capacity as de jure and

de facto director of Universal Total during the Relevant Period. For the same reasons as I have explained in the case of Dynamic and Universal Real, I decide that the claim in dishonest assistance, as pleaded in paragraph 79 of the Amended Particulars of Claim, is not one which I can or should decide on a summary basis.

217. In summary therefore, I decide that the Company is entitled to judgment against Universal Total for equitable compensation to be assessed, by reason of the knowing receipt by Universal Total of the UCL Funds which it received from the Company, indirectly through Dynamic, with the quantum of such equitable compensation to be subject to a separate assessment. I also decide that Universal Total holds the two Properties registered or intended to be registered in its name on constructive trust for the benefit of the Company. I defer the question of what form of relief should be granted consequential upon this latter decision to the Consequential Hearing.

Conclusion

218. The outcome of the Application is that the Company is entitled, on a summary basis, to the following relief against the following parties:

(1) As against Mrs Nisa, the Company is entitled to judgment for damages and/or equitable compensation for breach of her duties to the Company as a director of the Company, with the quantum of such damages and/or equitable compensation to be subject to a separate assessment. The application for an interim payment is refused.

(2) As against Mr. Raja, the Company is entitled (i) to judgment for damages and/or equitable compensation for breach of his duties to the Company as a director of the Company, with the quantum of such damages and/or equitable compensation to be subject to a separate assessment, and (ii) to an interim payment in the sum of £1,078,530.23. I have also decided that Mr. Raja holds the three Properties registered in his name on constructive trust for the benefit of the Company. I defer the question of what form of relief should be granted consequential upon this latter decision to the Consequential Hearing. I also give the Company permission to address me further at the Consequential

Hearing, if so advised, on whether the interim payment should be adjusted to take account of either of the two areas of uncertainty which I have identified in the relevant section of this judgment.

(3) As against Dynamic, the Company is entitled (i) to judgment for equitable compensation to be assessed, by reason of the knowing receipt by Dynamic of the UCL Funds which it received from the Company, with the quantum of such equitable compensation to be subject to a separate assessment, and (ii) to a declaration that the sum held in the Dynamic Account, together with any interest earned on that sum are held upon constructive trust for the Company, and (iii) to an order that the total sum held in the Dynamic Account be paid over to the Company. The mechanics of the order for payment of the relevant total sum will need to be dealt with at the Consequential Hearing, together with an identification of the total sum which will be the subject of this order. In relation to the declaration relating to the sum held in the Dynamic Account, there may need to be a qualification to the declaration to take account of any part of the sum which cannot be traced back to the Company. I also leave this latter question to the Consequential Hearing.

(4) As against Universal Real, the Company is entitled (i) to judgment for equitable compensation to be assessed, by reason of the knowing receipt by Universal Real of the UCL Funds which it received from the Company, both directly and indirectly through Dynamic, with the quantum of such equitable compensation to be subject to a separate assessment, and (ii) to an interim payment in the sum of £1,164,447.92. I have also decided that Universal Real holds the Properties registered or intended to be registered in its name on constructive trust for the benefit of the Company. I defer the question of what form of relief should be granted consequential upon this latter decision to the Consequential Hearing.

(5) The Company is entitled to judgment against Universal Total for equitable compensation to be assessed, by reason of the knowing receipt by Universal Total of the UCL Funds which it received from the Company, indirectly through Dynamic, with the quantum of such equitable compensation to be subject to a separate assessment. I have

also decided that Universal Total holds the two Properties registered or intended to be registered in its name on constructive trust for the benefit of the Company. I defer the question of what form of relief should be granted consequential upon this latter decision to the Consequential Hearing.

219. The parties are encouraged to agree as much as possible, in respect of the terms of the order to be made consequential upon this judgment, including the costs of the Application. I have however assumed that there will need to be a consequential hearing (the Consequential Hearing), at least for the purposes of ironing out the various uncertainties which I have identified in this judgment in relation to parts of the relief sought by the Company on the Application.

THE SCHEDULE

Property address	Registered title number and type of interest	Date on which acquisition completed (subject to registration)	Price paid	Registered proprietor on completion of acquisition	Solicitors acting on purchase
184 Normanton Road, Derby DE23 6YY	DY490145 Freehold	4th September 2017	£305,000	Mrs Nisa (subject to registered charge in favour of Together Commercial Finance Limited)	Smith Solicitors
460 Stenson Road, Derby DE23 1LN	DY317869 Freehold	29th November 2017	£280,000	Mrs Nisa (subject to registered charge in favour of Bank of Scotland plc)	RW Skinner
1166 to 1168 London Road, Alvaston, Derby DE24 8QG	DY24425 Freehold and DY31034 Freehold	17th April 2018	£595,000	Mrs Nisa (subject to registered charges on each title in favour of Together Commercial Finance Limited)	Smith Solicitors
98 Randolph Road, Derby DE23 8TE	DY8285 Freehold	30th July 2018	£61,000	Mr. Raja	Kash Tutter
Flat 1, Khalid Court, 7 Marsh Road, Luton LU3 2QF	BD143199 Long leasehold	18th September 2018	£155,000	Mr. Raja	Smith Solicitors
Flat 2, Eugene House, 7 Marsh Road, Luton LU3 2QF	BD141076 Long leasehold	18th September 2018	£110,000	Mr. Raja	Smith Solicitors

99 Princes Street, Derby DE23 8NS	DY192059 Freehold	21st August 2018	£70,000	Universal Real	Smith Solicitors
The School House Business Centre, Land on the North East Side of London Road, Derby	DY415023 Freehold	12th October 2018	£875,000	Universal Real	Kash Tutter
48 Sutherland Road, Derby DE23 8RW	DY202966 Freehold	19th October 2018	£85,000	Universal Real	Kash Tutter
Portland Hotel, 603 London Road, Alvaston, Derby DE24 8UQ	DY195621 Freehold	15th November 2018	£425,000	Universal Real	Smith Solicitors
The Marble Works, 10, 12 and 14 St. Helens Street DE1 3GY	DY530941 Freehold	25th January 2019	£550,000	Universal Real	Smith Solicitors
Ukrainian Orthodox Church of St. George, 175 Shaftesbury Crescent, Derby DE23 8NA	DY484766 Freehold	15th March 2019	£150,000	Universal Real	Smith Solicitors
24 Addison Road, Derby DE24 8FG	DY9609 Freehold	30th April 2019	£90,000	Universal Real	Smith Solicitors
7 Leopold Street, Derby DE1 2HE	DY54181 Freehold	30th April 2019	£285,000	Universal Real	Smith Solicitors
14 Sydney Houses, Church Street, Littleover, Derby DE23 6GE	DY79313 Long leasehold	22nd August 2019	£55,000	David Jackson and Judith Jackson	Imperial Law

8 Leopold Street, Derby DE1 2HE	DY92958 Freehold	30th August 2019	£250,000	Universal Real	Imperial Law
29 East Street, Derby DE21 2AL	DY458547 Freehold	22nd July 2019	£241,233.26 (including VAT and additional apportionments)	Chevin Asset Management Limited	Imperial LLS (understood not to be a firm of solicitors)
Forester House, Becket Street, Derby DE1 1NW	DY296610 Freehold	13th September 2019	£1,920,000 (including VAT)	Universal Total	Bond Adams
6 Leopold Street, Derby DE1 2HD	DY61438	28th May 2020	£600,000	The purchase price was paid and the property was to be registered in the name of First International Holdings Limited. The property remains registered in the name of the vendor, JNT Properties Limited	Bond Adams