



Neutral Citation Number: [2022] EWHC 1597 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
BUSINESS LIST (CH D)

Case No: BL-2019-002026

Date: 24 JUNE 2022

Before :

STEPHEN JOURDAN QC SITTING AS A JUDGE OF THE HIGH COURT

Between :

MANOLETE PARTNERS PLC

Claimant

and

- (1) EBRAHIM DALAL
- (2) SAJID DALAL
- (3) ANISHA DALAL
- (4) ELLOT COHEN (REPRESENTATIVE OF THE ESTATE OF JOHRA DALAL)

Defendants

Peter Shaw QC (instructed by JMW Solicitors LLP) for the Claimant

Emma L Fisher (instructed by Ward Hadaway LLP) for the First and Fourth Defendants

Ghazan Mahmood (instructed by Ralli Solicitors LLP) for the Second and Third Defendants

Hearing dates: 4-7 and 11 April 2022

Draft judgment circulated to counsel: 20 June 2022

Judgment handed down: 24 June 2022

JUDGMENT

Introduction

1. This is the trial of a claim brought by the Claimant as assignee of Bolton Poultry Products Ltd (“the Company”) and its liquidator, Clive Morris.
2. The claim is brought against Ebrahim Dalal, Sajid Dalal, (his son), Anisha Dalal (Sajid’s wife, and Ebrahim’s daughter-in-law) and the estate of the late Johra Dalal (Ebrahim’s wife and Sajid’s mother). Without intending any disrespect, I will refer to them by their first names.
3. The Company traded for nearly 10 years, from April 2005 to January 2015. Shortly before it went into liquidation in January 2015, the Company sold its assets to a newly formed company called Bolton Halal Chicken Ltd for £20,000. I will refer to that as “the New Company”. Its shares were owned by Sajid and Anisha.
4. In brief outline, the Claimant alleges that:
 - (a) The Company made a great deal more money from its business than was recorded in its accounts, paid in cash, and the Defendants misappropriated that cash. The additional income which the Claimant alleges the Company made is referred to in the Particulars of Claim, and in this judgment, as “the Additional Sales Receipts”.
 - (b) Certain properties purchased in the name of the Defendants, or some of them, were acquired using money belonging to the Company, and the Company can trace that money into those properties and is entitled to a proprietary interest in them.
 - (c) In 2014, Ebrahim, Sajid and Anisha Dalal authorised the payment of Company money to themselves, in breach of duties they owed to the Company, and the money should be repaid.
 - (d) The New Company acquired valuable goodwill from the Company without paying for it. Ebrahim, Sajid and Anisha are liable to pay the Company the value of that goodwill and the Court should direct an enquiry as to the amount.

The chronology

The Company and its business

5. In this section I will give a brief summary of the main events relevant to this dispute, in chronological order.
6. The Company was incorporated on 18 April 2005. 10% of the shares were registered in the name of Ebrahim, 35% in the name of Sajid, 10% in the name of Anisha, and 45% in the name of Johra.

7. The Company took over an existing business which had been run by Ebrahim since the early 1980s under the name “Bolton Poultry Products”. Some documents refer to this business as having been conducted as a partnership.
8. The business which the Company took over and thereafter carried on comprised slaughtering chickens, and selling wholesale halal chicken meat. The business was carried on from premises at 3 Moncrieffe Street, Bolton. The Company supplied halal chicken meat to restaurants and retailers. The Company’s main business was buying live birds, slaughtering them, removing the beaks, feet, feathers, blood and offal, and then preparing the birds for sale. Some birds were then sold whole. Other birds were cut up into parts - breast, thighs, drumsticks, niblets and legs. Those parts were then sold. The Company also purchased birds that had already been slaughtered, and cut those up into parts, and sold the parts, although this was a much smaller part of the business. I will refer to this as the “cut meat” part of the business. The Company also sometimes bought and sold live birds, but this was a relatively insignificant part of the business. The Company’s business was to a very significant extent conducted in cash; about half of all sales were paid for in cash.

The directors

9. Ebrahim was a registered director of the Company from the date of its incorporation, 18 April 2005, and there is no dispute that he remained its director thereafter.
10. Sajid, Anisha and Johra were registered as directors of the Company from incorporation until 20 June 2008. After that, the sole registered director was Ebrahim. The Claimant alleged that Sajid and Anisha (but not Johra) continued to act as directors after 20 June 2008 and remained liable to comply with the duties imposed on company directors.
11. Throughout the period from April 2005 to November 2014, all four Defendants lived together in one house, with Sajid and Anisha’s three children, who were born in 2002, 2004 and 2009.
12. In 2011, Ebrahim, Johra, Sajid and Anisha Dalal formed a partnership, called “A & Adam Holdings” with the purpose of rearing chickens to be sold to the Company. There were thereafter sales of chickens by A & Adam Holdings to the Company.

The purchase of the Thynne Street Property

13. On 12 July 2011, the registered leasehold titles to a property known as “land to the east side of Thynne Street and the west side of Moncrieffe Street, Bolton” were purchased in the names of the four Defendants and they were registered as proprietors. The proprietorship registers record that a price of £200,000 was paid. I will refer to this property as the “Thynne Street Property”. It was next to the Company’s processing plant at 3 Moncrieffe Street, and was purchased to provide additional space for the Company’s business. The Claimant alleges that this property was purchased with money belonging to the Company.

The HMRC investigation begins

14. In 2011, Robert Crompton of HMRC began an employer compliance enquiry into the PAYE affairs of the Company and referred the Company to HMRC's Civil Investigation of Fraud Team, which opened a corporation tax enquiry, initially dealt with by Peter Horrocks.
15. After considering information provided to him, Mr Horrocks formed the view that the Company's turnover reported in its accounts for the year ending 30 September 2009 did not appear nearly high enough, considering the number of birds it had slaughtered in that year. On 2 June 2011 he wrote to the Company saying that HMRC wanted to check the tax return for the period to 30 September 2009. On 25 November 2011, he referred the case to John Metcalfe, an officer in HMRC's Fraud Investigation Service.

The purchase of Borsdane Farm

16. On 9 February 2012, a property known as Borsdane Farm, Westhoughton (comprising two parcels registered under different title numbers) was purchased by the four Defendants for a purchase price of £1.2 million. This was purchased to be used for rearing chickens to be supplied to the Company, and thereafter used for that purpose. The Claimant alleges that this property, too, was purchased with money belonging to the Company.

The HMRC investigation continues

17. From about 2012 on, Mr Horrocks and Mr Metcalfe exchanged correspondence with the Company's then accountant, Mr Razzaq of Shacter Cohen and Bor ("SCB"). On 24 May 2012, Mr Horrocks sent Mr Razzaq copies of 5 sales invoices from 2009, and a spreadsheet summarising the entries in those invoices, with a list of questions about what various abbreviations in those 5 invoices meant. The questions were answered in the form of handwritten annotations on the spreadsheet and this was provided to Mr Horrocks in July 2012.
18. In October 2012, Mr Metcalfe wrote to each of the Defendants saying that HMRC had reason to suspect they had committed tax fraud, and that HMRC's Investigation of Fraud Code of Practice, known as "COP9", applied. He offered them each the opportunity to make a full disclosure of any tax fraud that had been committed, by entering into a contractual arrangement to disclose and completing a form making full, open and honest disclosure of all relevant fraudulent activities. SCB then provided the Company's financial records to HMRC.
19. In January 2013, SCB sent to Mr Metcalfe completed Outline Disclosure forms on behalf of each of the Defendants.
20. Johra's form said she had not committed any fraud. Contractual disclosure forms signed by Ebrahim, Sajid and Anisha were provided. In each case the form stated "I have deliberately brought about a loss of tax, through conduct which HMRC may suspect to be fraudulent." There were then headings: "Description of fraud", "Individuals and entities involved", "The period of time over which the fraud took place" and "Other information you think is relevant".

21. Ebrahim's Outline Disclosure form said: "There appears to be an understatement of sales going back to the accounts for the year ended 30 September 2006. I am working to assess levels of understatement", and "I believe there is understatement in the accounts for the year ended 30 September 2006 and in the accounts for the year ended 30 September 2007. It is less clear whether there were any understatements in subsequent years." He also said: "I have come across one or two accounting irregularities during the course of the work, I have done thus far, which, whilst they are not particularly material, appear to fall into the category of matters which I should bring to your attention. It would appear in 2007 that VAT was reclaimed on certain items of expense which was incorrect and was changed in subsequent VAT Return to correctly account for VAT. In the accounts to 30 September 2007 there was an incorrect journal entry in respect of private use of stock in that an amount was debited to the sales account rather than credited, in the sum of £1,560".
22. Sajid's Outline Disclosure form said that his Barclays Bank account had been used by the Company to facilitate receipt of monies from customers to be applied for expenses payments on behalf of the Company, in some cases online, because the Company's bank, United National Bank, did not have a facility to make online payments. He said that this account was also used to make payment of personal expenses, although all those transactions were accounted for within the Company's accounts and the private expenses were debited to Ebrahim's director's loan account by way of gift from a large credit balance on his director's loan account. He said that he had resigned as a director on 28 July 2008. He said he had an important role within the business, but "... played a minor role in the decision making and transaction process within the company, which is mainly the responsibility of my father, the company Managing Director Mr Ebrahim Dalal".
23. Anisha's Outline Disclosure form said that she had opened an HSBC account in September 2009 to enable her to deposit change from the business using a machine facility inside the bank, rather than making deposits through the Company's bank account and having to pay charges in order to deposit cash. She said the amounts were about £2,000 to £2,500 in the year to 30 September 2010, and likewise in the year to 30 September 2011. She said there had been some bankings in the year to 30 September 2012 which she had discussed with the Company's accountants so that they could be accounted for to ensure that there was no tax loss in connection with those bankings. She said she was not one of the decision makers, performing a mainly clerical role.
24. On 19 March 2013, Mr Metcalfe and Mr Horrocks met Ebrahim and Mr Razzaq at SCB's offices. A note of what Ebrahim told Mr Metcalfe at that meeting was produced, and sent by Mr Metcalfe to SCB on 8 April 2013, under cover of a letter which asked a number of questions about the conduct of the Company's business and its records.
25. Mr Metcalfe said at that meeting that Ebrahim's disclosure form was not acceptable, as it did not identify any fraud undertaken. Mr Razzaq said he and Ebrahim were baffled that the case had gone to the extent of a COP9 enquiry, and did not feel it should have gone this far. Ebrahim said he did not think there was anything additional to disclose. Mr Metcalfe warned Ebrahim that he must stop any fraudulent activity or any other tax irregularities with immediate effect. Checks would continue as appropriate. If HMRC discovered that irregularities had continued during the course of the investigation, this might result in a higher penalty or a criminal investigation. Mr Metcalfe then asked a number of questions about the operation of the business, which Ebrahim answered.

26. On 30 May 2013, SCB wrote to Mr Metcalfe saying: “The business records are not perfect but we believe we complete effective audit and accurately identify any tax loss”. They provided some of the information that Mr Metcalfe had asked for.
27. On 26 February 2014, there was a meeting between Mr Metcalfe and Mr Razzaq, where Mr Razzaq provided some further information. Mr Metcalfe made a note of that meeting, which he sent to Mr Razzaq on 4 March 2014.

The Business Economics Exercise

28. With that letter, Mr Metcalfe enclosed a document headed “Business Economics Exercise”, which was central to the Claimant’s case.
29. The Business Economics Exercise compared the reported sales in the Company’s accounts for the year ended 30 September 2009, to estimated sales figures based on the number of birds slaughtered in that year, as recorded by the Food Standards Agency, said to be 1,123,491.
30. Two calculations were made. Both assumed the average weight of a bird was 2 kg, and therefore the total weight of slaughtered birds in the year in question was 2,246,982 kg.
31. The first calculation used a price per kilo of chicken meat of £2.75, and produced the conclusion that the Company’s sales reported in its accounts should have been at least £6,179,200, produced by multiplying 2,246,982 kg by £2.75 per kilo.
32. The second used a price per kilo of chicken meat of £2.62, derived from an analysis of 43 items in the 5 invoices referred to above. This produced the conclusion that the Company’s turnover reported in its accounts for 2009 should have been at least £5,887,092, produced by multiplying 2,246,982 kg by £2.62.
33. Mr Metcalfe said in his letter of 4 March 2014 that either figure was massively higher than the declared turnover of £2,695,644, and “... whilst I may accept that some of this shortfall has been paid out in cash wages, I need Mr Dalal to understand the seriousness of these differences, and what will happen next without any significant shift in his position that there was no wrongdoing.”
34. On 16 April 2014, SCB asked for the analysis of the invoices used in the second calculation in the Business Economics Exercise, and also asked that all sales invoices, purchase invoices and other records supplied should be returned.
35. On 29 April 2014, Mr Metcalfe sent the analysis of the invoices which had produced the figure of £2.62 per kilo. I will refer to this as “the HMRC Invoices Analysis”. He also sent copies of the 5 invoices analysed. He did not send any other documents, saying that he wanted Mr Dalal to respond first from what he had provided. Subsequently, HMRC destroyed all the records that the Company had provided to them.

The events of 2014-15

36. In early 2014, Ebrahim told Sajid and Anisha that he was willing to make a gift of money to them to help them buy a house for them and their three children and pets to live in.

37. In August 2014, SCB were replaced by a new firm of accountants, AMS. They wrote to Mr Metcalfe on 29 August 2014 explaining that they had taken over, and outlined some of the paperwork that they required. They said that they regarded the Business Economic Exercise as simplistic, and did not understand how HMRC could believe that such a turnover could have been generated. They said: “We appreciate that our clients record keeping practices during the period under enquiry were not perfect and this impacted on their ability to ensure the provision of robust records to their Accountants”.
38. On 9 September 2014, Mr Metcalfe replied, denying that the Business Economic Exercise was simplistic. He said it might be valuable to meet to progress the enquiry to an equitable solution.
39. On 10 September 2014, minutes of a meeting were signed by Ebrahim, recording a meeting between him and Sajid. The minutes stated: “It has been agreed for a total of £250,000.00 (two hundred fifty thousand pounds only), to be paid from the Directors Loan account to Sajid Dalal from Bolton Poultry Products Ltd bank accounts UBL 609173 05589501 and Barclays 20107180041823. The funds are to be used towards the purchase of residential property for Sajid and Anisha Dalai being 1 Brinksway, Bolton.”
40. The £250,000 was then paid to Sajid from the Company’s bank accounts in four instalments. Two by cheque payments of £45,000 and £55,000 made on 17 September 2014, one bank transfer on 15 September 2014 of £100,000, and finally one bank transfer of £50,000 made on 19 September 2014. This money was intended by Ebrahim to be a gift from him to Sajid and Anisha, being treated as a repayment of the amount which he considered to be due to him from the Company recorded in a director’s loan account, and understood by Sajid and Anisha as such. The Claimant says that there was no money owing from the Company to Ebrahim, but even if there was, it should not have been paid to Sajid and Anisha.
41. On 16 October 2014, an email was sent by AMS to Clive Morris and others, saying that Anisha had “... basically given the green light for the liquidation and the family would like a meeting to discuss the next steps and get the process started”. It is clear from that email that, by that time, a decision had been made to start the process of putting the Company into liquidation with the assistance of AMS and Mr Morris’s firm, Marshall Peters.
42. On 27 November 2014, the purchase of the property at 1 Brinksway, Lostock, Bolton BL1 5XG (“the Brinksway Property”) was completed. The buyers were Sajid and Anisha. The purchase price was £397,500. The total cost of the purchase including SDLT, as recorded the completion statement, was £411,210. On 1 December 2014, Sajid and Anisha were registered as proprietors of the registered title. This was purchased as a home for Sajid, Anisha and their three children. Of the total cost of purchasing the property, £250,000 came from the Company as explained above.
43. On 29 November 2014, AMS wrote to Mr Metcalfe. They criticised the HMRC’s Business Economics Exercise in a number of respects. They did not mention the fact that the Company was considering a liquidation. They said:

“We accept that our client’s record keeping was far from perfect and there is some evidence to suggest that the declared sales figure was incorrect. Some of the processes employed are almost archaic and one of the first things we had to do was sit down

with the key individuals in the business to try and understand how the business operates.

We have also started to implement changes in how the selling process works and the explained the record keeping we expect to see. These changes will take time to implement as the workforce is unskilled and the capacity to train and enforce changes is limited. However, as we have explained above, there are many factors to consider when reviewing the records for this business and we believe that you need to revise your proposals considerably before we can reach an agreement.

Having discussed your figures with our client, we believe that the level of additional sales should be closer to 20% of the additions proposed in your letter.”

44. On 17 December 2014, Mr Metcalfe replied to AMS. He said if a negotiated agreement could not be achieved, assessments would be made. He suggested a meeting to see if there was some middle ground acceptable to all parties.
45. On 18 December 2014, Ebrahim, as the Company’s director, signed a resolution that a Meeting of Members should be convened as a matter of urgency to place the company into creditors’ voluntary liquidation. In December 2014, Marshall Peters arranged for a valuation of the Company’s assets to be made by Cerebrus Group. The assets were then sold to the New Company on 10 January 2015 for the sum of £20,000 plus VAT.
46. On 7 January 2015, Marshall Peters completed a Case Strategy Report. This recorded that there were minimal trade creditors, but a significant contingent debt to HMRC, with a high risk of an HMRC winding up petition. Debtors were deemed uncollectible for 75% of the ledger. A voluntary liquidation was recommended “due to significant Crown contingent debt”.
47. In the autumn of 2014 and January 2015, various cheque payments were made out of the Company’s bank account to the Defendants. The Claimant says that there was no proper basis for some of these payments.
48. On 30 January 2015, a formal resolution for the winding up of the Company was passed, and Mr Morris was appointed as liquidator.
49. On 19 June 2015, HMRC served Corporation Tax assessments on Mr Morris for allegedly unpaid corporation tax; these were revised on 4 March 2006. HMRC’s figures were arrived at as follows:
 - (a) By using the second method of calculation in the Business Economic Exercise for 2009 explained above, HMRC determined that in the year ending 30 September 2009, there had been total sales of £5,887,092.
 - (b) HMRC then assumed that, over the period from the start of the Company’s trading to the date it went into liquidation the Company had made sales of £5,887,092 in every year, applying the presumption of continuity.
 - (c) HMRC then deducted the sales reported in the Company’s accounts for each year from £5,887,092 to arrive at an estimated figure for unreported sales. This produced a total figure over the 10 years in question of about £36.6 million.

- (d) HMRC then took 20% of that figure as representing the amount of unreported sales and therefore unreported taxable profits. This produced a figure of £7,123,645. The 20% was taken from the AMS letter of 29 November 2014.
 - (e) HMRC then applied the appropriate corporation tax percentage to their figure for unreported taxable profits for each year, producing a figure for corporation tax owing of £1,780,911.
50. Marshall Peters asked for comments on those tax assessments from the Defendants. In response, in September 2015 a report was supplied which had been produced by David Clegg of AMS (“the AMS Report”). This reached the conclusion that sales had been underreported, but only by a total of £849,278, and that the cost of sales had also been underreported, meaning that the total profits that had not been reported over the period of the Company’s trading were only £61,249.
51. On 7 October 2015, the freehold title to the Thynne Street Property was purchased in the names of Sajid and Anisha, and they were registered as proprietors on 5 November 2015. The proprietorship register records that a price of £50,000 was paid. The Claimant alleges that this title, too, was purchased with money belonging to the Company.

Subsequent events

52. In March 2016, the Company, Ebrahim, Sajid and Anisha were the subject of a police investigation. No charges were pursued. In the course of the investigation, both Sajid and Anisha were interviewed by the police, and reference was made to the interview notes in the course of their cross-examinations and in submissions.
53. On 8 March 2016, a sum of around £176,000 was seized in cash by Greater Manchester Police. This cash was then released to Mr Morris on his application on the basis that it belonged to the Company by order of Greater Manchester Magistrates Court on 10 October 2017. None of the Defendants opposed that application, although it was made clear to Mr Morris that the New Company claimed that this money belonged to the New Company and not the Company.
54. Also in March 2016, HMRC served penalty determinations on the Company for deliberately understating sales in its corporation tax returns and served Personal Liability Notices on Ebrahim, Sajid and Anisha as being persons alleged to be responsible in respect of the underdeclared sales. Ebrahim, Sajid and Anisha appealed to the First-tier Tribunal (Tax Chamber), against the Personal Liability Notices. However, they failed to comply with the Tribunal’s directions, and as a result the appeals were dismissed.
55. In May 2018, Johra died, after a long illness.
56. In July 2019, Mr Morris assigned all rights to pursue claims against the Defendants to the Claimant. This claim was started by a claim form issued on 1 November 2019.

The trial and the witnesses

57. The trial took place over video, using MS Teams. The Claimant was represented by Peter Shaw QC, Ebrahim and Johra’s estate by Emma Fisher, and Sajid and Anisha by

Ghazan Mahmood. I am grateful to all three counsel for their clear and helpful submissions.

58. The Claimant called Richard Collier, Head of Finance - Charging at the Food Standards Agency (“FSA”), Mr Metcalfe and Mr Morris. They were all careful witnesses who listened to the questions they were asked and attempted to answer them as clearly as they could.
59. Ebrahim gave evidence from his home in India, via an interpreter. He is 84 years old and suffers from a number of ailments. He said in his witness statement, and again at the beginning of his evidence, that his memory was defective. He struggled to understand many of the questions, and his answers to many of them were that he could not remember the relevant events.
60. Sajid was a very nervous witness, who struggled to understand some of the questions he was asked.
61. Anisha was an intelligent and articulate witness, who listened carefully to the questions she was asked and gave clear answers to them.
62. Insofar as the evidence of the witnesses was challenged, I will evaluate it by reference to the uncontested facts, the documentary material I was taken to in the course of the trial and the inherent probabilities. I do not think any of the witnesses were giving evidence they believed to be false, but human memories are fallible, and the evidence of a witness may be incorrect even if they believe it to be accurate.
63. I circulated a draft of this judgment on 20 June 2022 with the usual directions for the provision of a list of typographical and factual errors and the production of a draft order. On 23 June 2022, the Claimant applied for me to revise my draft judgment, in written submissions by Mr Shaw asserting that I had made three “fundamental errors of reasoning”. I considered those submissions, and the parties were informed that I was not persuaded that I had made any fundamental errors or reasoning, or that I should revise my decision, but I considered that I should provide some further explanation of my reasons in my final judgment, which I have done, as appears below.

Were Sajid and Anisha directors after 20 June 2008?

64. The first issue I propose to address is whether Sajid and Anisha remained directors of the Company after they ceased to be registered as directors on 20 June 2008.

The issue

65. Sajid, Anisha and Johra were registered as directors of the Company from the time it was incorporated until 20 June 2008. It was common ground that they owed the Company the duties imposed on directors up to that date.
66. In respect of the position after that date, the Claimant did not suggest that Johra remained a director, but alleged that both Sajid and Anisha did remain directors and, as such, owed the duties set out in sections 171-177 of the Companies Act 2006. A person can be a director of a company, and as such will be subject to those duties, even if not recorded in the register of directors maintained by the registrar of companies as being a director

of the company. S.250 of the Companies Act 2006 says: “In the Companies Acts "director" includes any person occupying the position of director, by whatever name called.” A person occupying the position of director but not recorded as such in that register is generally referred to as a “de facto director”.

The principles to be derived from the authorities

67. I was referred to *HMRC v Holland* [2010] UKSC 51, [2010] 1 WLR 2793, *In re Mumtaz Properties Ltd* [2011] EWCA Civ 610, *Madoff Securities Limited v Raven* [2013] EWHC 3147 (Comm), *Secretary of State for Business Innovation and Skills v Chohan* [2013] EWHC 680 (Ch), *Smithton Ltd v Naggar* [2014] EWCA Civ 939, [2015] 1 WLR 189, *Burnell v Trans-Tag Ltd* [2021] EWHC 1457 (Ch), and *Bishopsgate Contracting Solutions Limited v O’Sullivan* [2021] EWHC 2103 (QB).
68. From those authorities, I derive the following principles:
- (a) A director of a company is someone who directs the affairs of a company, or some specific part of those affairs, alone or together with others. The function of a director is to make or join with the other directors in making the key decisions about what the company should do. A de facto director is one who acts as if they were a director, although not validly appointed as such. They must be part of the corporate governing structure – the system by which the company is directed and controlled. They must be a person who either alone or with others has ultimate control of the management of all or a part of the company's business.
 - (b) The question whether or not an individual acted as a director is to be determined objectively and irrespective of the individual’s motivation or belief.
 - (c) To establish that a person was a de facto director it is necessary to plead and prove that they undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that they were concerned in the management of the company's affairs or undertook tasks in relation to its business which could properly be performed by a manager, agent or employee, below the level of a director.
 - (d) It is not enough that an individual was consulted about decisions made by others about the affairs of the company, because in that case the individual is not making or participating in making the decision; rather, they are providing information and advice to the decision maker or makers.
 - (e) There is no single test that applies to determine if someone is a de facto director. All relevant factors must be taken into account. The Court should look at all the circumstances in the round. Factors that may be relevant include whether the individual is accountable to others for what they do, whether they are treated as being on equal footing with the registered directors, and whether the individual is called a director, or held out to third parties as a director, or treated by third parties as a director. A single act outside the period when the person is alleged to have acted as director may throw light on whether they acted as director in the relevant period.

- (f) If it is unclear whether the acts of the person in question are referable to an assumed directorship, or to some other capacity such as shareholder or consultant, the person in question is entitled to the benefit of the doubt.
69. Mr Shaw submitted that where one individual has the dominant voice within a company's governance system and others defer to them then this is an instance of their abdicating their directorial responsibilities rather than a test of whether they were acting as a director.
70. In support of that submission, he cited from the judgment of Popplewell J in *Madoff Securities Limited v Raven* [2013] EWHC 3147 (Comm) at [191]: "It is legitimate, and often necessary, for there to be division and delegation of responsibility for particular aspects of the management of a company. Nevertheless each individual director owes inescapable personal responsibilities. He owes duties to the company to inform himself of the company's affairs and join with his fellow directors in supervising them. It is therefore a breach of duty for a director to allow himself to be dominated, bamboozled or manipulated by a dominant fellow director where such involves a total abrogation of this responsibility".
71. Popplewell J was there discussing the duties of registered directors, not the test to be applied if someone who is not a registered director is nonetheless acting as a director. In my view, if the registered director makes all the decisions about the company's affairs, and other persons who work in the business defer to the registered director and follow their instructions, there is no basis for finding that those persons acted as directors.

The facts relied on by the Claimant

72. Mr Shaw relied on nine facts to justify the inference that Sajid and Anisha acted as directors.
73. First, that Anisha and Sajid were registered directors until 20 June 2008 and their roles did not change after that date. I accept that as factually accurate. He then said this leads to the inference that they remained directors after that date. That I do not accept. When someone is registered as a director, then they owe the duties of a director regardless of what they do. If they cease to be registered as a director then they will only be a director if they act as a director.
74. Second, during her police interview, Anisha said that Ebrahim and Sajid worked on the site, and that their role was "the complete operation of the business". She then explained that the New Company had taken over the business from the Company, and that she and Sajid were the directors of the New Company. The interviewing officer, DC Harris, then asked: "So your father in law was the director up until January 2015 when the title of the business changed?" Anisha replied: "We just changed but the roles have remained the same". Anisha was then asked who owned the business and she said "to me it's a family business".
75. DC Harris then asked whether there were any other people involved, to which Anisha answered: "The Chief is the senior, as ... you know our culture works as well. Obviously Mr Ebrahim Dalal he's...". Then DC Harris said: "He's the head of the company but you guys, yourself and your husband are the directors at the moment under the different name of the company now. So has Ebrahim any name on that company now, Bolton

- Halal?" Anisha answered: "He's an employee as we all are". DC Harris asked about the change of name and Anisha said: "I think it was just restructure ... I mean Mr Ebrahim Dalal he's approaching 75 and I think it was just you know, his decision to do things that way, and also we split the haulage side of the business into another company as well", into a company called Sanas Transport Ltd. DC Harris then asked if the overall person was Ebrahim because he was the head of the family, to which Anisha replied: "The transport side is more sort of Sajid's ... The haulage side, I'd say he has less to do with".
76. Anisha's explanation of this in her oral evidence was initially that the questions by DC Harris concerned payroll, and then that the questions were confusing as to whether she was being asked about the Company or the New Company. I cannot accept either of those explanations. The questions were not about the payroll nor do I think they were confusing.
77. I accept that this material does establish that there was no substantial change in the way the business was run after the transfer of the business from the Company to the New Company. In their evidence at the trial of this claim, Sajid and Anisha both said there was a substantial change, but that is inconsistent with what Anisha told DC Harris in 2016, much closer in time to the relevant events than now. I think her answers then are a more reliable guide to the position than the evidence given by her and Sajid at the trial of this claim, some 6 years later.
78. Anisha's answers to DC Harris's questions make it clear that both before and after the transfer to the New Company, Ebrahim was the senior person in the business. It does not establish that, at a time when Sajid and Anisha were not registered directors, they took the key decisions on the conduct of the business together with Ebrahim. The fact that Anisha said that Sajid and Ebrahim's role was the complete operation of the business does not tell one who was responsible for deciding how the business should be run.
79. Third, Mr Shaw relied on the minute of the meeting on 10 September 2014 referred to in paragraph 39 above, signed by Ebrahim, recording a meeting between him and Sajid at which it was agreed that £250,000 would be paid from his director's loan account to Sajid to be used for the purchase of the Brinksway Property. I cannot see that this gives any support to the Claimant's case. The minutes do not say that Sajid attended the meeting as director, or had any part to play in the decision other than agreeing that the money to be given to him would be used in a particular way.
80. Fourth, Mr Shaw relied on a statement made in the AMS letter of 27 November 2014 that Ebrahim was not involved in the 'coal face of the Company's business and was not involved in the practicalities of selling halal meat to a demanding customer base'. Mr Shaw draws the inference that Sajid was responsible for conducting the Company's sales.
81. The passage in question says:
- “... we believe that although Mr Dalal may have stated that there is no wastage, he did not mean that there is actually no wastage. Mr Dalal is not involved in the 'coal face' of the business and does not understand the practicalities involved in selling halal meat to such a demanding customer base. We have spoken to people involved in the slaughtering and selling process and they assure us that wastage is substantial as they

try their utmost to reduce the amount of returned items of poultry and improve quality. However, with a changing workforce, such quality controls are not always viable.”

This passage was not concerned with the question of who had responsibility for making decisions about the conduct of the Company’s sales, and gives no support to the Claimant’s case.

82. Fifth, Mr Shaw pointed to the fact that Sajid was a signatory to the Company’s bank account at UBL and that substantial amounts of the Company’s receipts were collected into his own Barclays bank account. This is correct, but I consider it is something that a trusted senior manager might well do. It does not tell one anything about who was responsible for making the key decisions about the conduct of the business.
83. Sixth, Mr Shaw asserted that Sajid had responsibilities for hiring of staff, supervision of slaughtering and rendering of returns to FSA and Meat Hygiene Service. In the passages in his police interview referred to by Mr Shaw, Sajid said that he was responsible for paying the staff, and that he supervised the slaughter. I cannot see that he said he was also responsible for hiring the staff. However, whether or not he was, I do not think that any of those matters give any support to the Claimant’s case; they are all matters that could be the responsibility of a senior manager who was not a director.
84. Seventh, Mr Shaw said that Anisha had responsibilities for the Company’s payroll, preparing accounts, counting and securing the substantial cash collected. It is clear that Anisha did some administrative work for the Company in relation to financial issues, although others were involved with that as well. However, there is no evidence that any of the things that she did were more than administrative functions. There is no evidence that she was involved in making decisions about the conduct of the Company’s business.
85. Eighth, Mr Shaw suggested that all of the instructions in respect of the Company’s liquidation came via Anisha. It is true that it was Anisha who sent and received emails concerning the liquidation and the sale of the Company’s assets to the New Company. However, I accept her evidence that that Ebrahim did not have an email account, struggled with his English, and therefore asked Anisha to communicate via email with Mr Morris’s office. There are emails that make it clear that it was Ebrahim who was the decision maker in relation to the liquidation. On 26 January 2015, there was an exchange of emails about the liquidator’s fees, which make it clear that it was Ebrahim who was going to decide if they were acceptable or not; one email says: “I spoke to Anisha on Friday and she said it was fine but needed to confirm with Mr Dalal”. Another says: “He’s moaning he agreed £20k+VAT with Clive when they met previously... It’s the old man that signed the cheques, agreeing a fee with Anisha isn’t enough. Can you confirm £20k+VAT?”
86. Finally, Mr Shaw argued that in a small family company in which there was very significant volumes of cash being collected, and not banked it is fanciful to consider that those members of the family had no role in the corporate governance of the Company. I disagree. Sajid and Anisha explained in their witness statement that, in their culture, Ebrahim was the head of the family and very much in charge. Sajid said: “My upbringing does not allow me to question my parents' decisions to the point I even married the girl my dad chose for me. I could not question my dad's requests or decisions and I had to be silent in his presence and when my dad came to in a room, I had to leave the room.” Anisha said: “Dad is head of the family and this is typical in his culture. As the eldest

they are entitled to make all the decisions and execute them as they wish ... In this culture, as the daughter in law I was at bottom of all the females of the family. In the Culture it is normal for the daughter in law. Daughter in law's live the shadow of the husband's family. I often felt the cultural pressure.”

87. I accept that evidence, which was not challenged, and which is quite inconsistent with Mr Shaw’s contention.

Conclusion

88. Taking all the above matters into consideration, I do not consider that the Claimant has proved that Sajid or Anisha acted as directors of the Company in the period after 20 June 2008.

Were there Additional Sales Receipts?

89. The Particulars of Claim plead the corporation tax assessments made by HMRC, and summarise how HMRC arrived at those assessments. They then allege:

“Accordingly, on the basis of the Assessments, the Company made no less than £7,123,644.80 of sales additional to the sales shown in the Company's accounts over the course of its trading history ("the Additional Sales Receipts").”

The Defendants all deny this allegation.

90. The claim is, therefore, based firmly on the HMRC tax assessments, which in turn were based on the second method used in the HMRC Business Economics Exercise. The issue is whether that method is sound and, if so, whether it produces the conclusion that there were Additional Sales Receipts in the year ending 30 September 2009. If there were, then it will then be necessary to consider the position in respect of the other trading years. As to that, HMRC applied the presumption of continuity, but Mr Morris produced a calculation which applied the logic of the Business Economics Exercise to the other trading years, which seems to me preferable. However, first it is necessary for me to determine if the evidence establishes that there were Additional Sales Receipts in the year ending 30 September 2009.
91. I will begin by discussing some general considerations which apply to this issue. I will then discuss the matters that I consider need to be taken into account and the evidence in relation to those matters. I will then state my conclusion.

General considerations

92. The fact that Mr Horrocks and Mr Metcalfe formed the opinion there were Additional Sales and that they were at least £7,123,644.80 is, of itself, no relevance. Nor is it relevant that appeals to the First-tier Tribunal were not ultimately pursued by Ebrahim, Sajid and Anisha. I must determine the issue by reference to the evidence called and submissions made at the trial. Mr Shaw did not suggest otherwise.
93. The AMS Report said that there were unreported costs as well as unreported sales. HMRC also suggested that there were unreported costs of staff. However, when I asked Mr Shaw about this, he submitted that it is unlikely that the Company would have failed

to record costs, as it would not be in the interests of the business to do so. Failing to record sales paid for in cash, however, would be advantageous as it would mean that the cash could be appropriated without having to pay tax on it. Neither Ms Fisher nor Mr Mahmood suggested that there were any unreported costs. Accordingly, the issue is simply whether the evidence justifies the conclusion that there were Additional Sales Receipts.

94. It is common ground that the burden of proof in this claim that there were Additional Sales Receipts is on the Claimant. The position is, therefore, different to that which applied in the case of the assessments made by HMRC. These assessments were what is called “discovery assessments”, which can be made if HMRC discovers that income which ought to have been assessed to tax has not been assessed. If that happens, HMRC may make an assessment in the amount, or the further amount, which ought in their opinion to be charged in order to make good to the Crown the loss of tax. The taxpayer can challenge that assessment by an appeal, and on any such appeal the burden of proving that the assessment is incorrect is on the appellant, not HMRC. In this claim, it is for the Claimant to prove that there were Additional Sales Receipts, not for the Defendants to prove that there were not.
95. Mr Shaw submitted that the Defendants are bound by their pleaded Defences to limit the points they can rely on in relation to the Additional Sales Receipts issue to those made in the AMS Report. I disagree. The Defences did refer to the AMS Report, but only by alleging that the Claimant had failed to refer to the contents of that report. For example, Sajid and Anisha’s Defence pleaded: “It is of note that the Claimant has failed to refer to the contents of AMS Accountants Corporate Ltd's ("AMS") Forensic Report, dated September 2015”. I do not think that the Defendants are thereby limited to challenging the accuracy of the assessments on the basis of the figures stated in that report.
96. In *Awards Drinks Ltd v HMRC* [2021] EWCA Civ 1235 at [38-39], the Court of Appeal had to consider a challenge to a VAT assessment raised by HMRC, where the burden of proof was on the taxpayer to prove that the assessment was wrong. The Court said that HMRC was entitled to contend that the taxpayer had committed fraud without having to plead that. The position would be different if HMRC had the burden of proving fraud – then it would have to be pleaded with particularity. At [38] Henderson LJ said (quoting from an earlier judgment of his): “The IFP2 Information Memorandum is one of the pieces of documentary evidence relied upon by the Appellants as supporting their case on this issue. HMRC were under no obligation to accept it at face value, when it was disclosed to them, and they were fully entitled to cross-examine the witnesses for the Appellants who had been involved in its preparation in order to test its reliability and examine the assumptions on which it was based. HMRC were not obliged to give advance notice of the lines of questioning which they intended to pursue with the witnesses...”.
97. In my view, the position is the same here with the Business Economics Exercise. The Defendants were not obliged to give advance notice of the challenges they proposed to make to the components of that exercise, and I consider that they are not confined to the views expressed in the AMS Report.
98. Mr Shaw accepted that it followed from the decision in *Award Drinks* that the Defendants were not required to give advance notice of the challenges that they were

seeking to make. However, he said that they were not permitted to advance a case inconsistent with their pleading. That I accept, but I do not consider that they sought to do so.

99. Mr Mahmood submitted in his closing submissions that, where a serious allegation of this kind is made, it must be established by cogent evidence commensurate with the serious nature of the allegation: see *R(N) v Secretary of State for the Home Department* [2005] EWCA Civ 1605 at [62] per Richards LJ, giving the judgment of the Court of Appeal: "... the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on a balance of probabilities".
100. In my draft judgment, I said I agreed with that proposition, and that I had borne it in mind in evaluating the evidence. In his post-draft judgment submissions, for the first time, Mr Shaw submitted that this was wrong in law. He referred to what Lady Hale said in *Re S-B (Children) (Care Proceedings: Standard of Proof)* [2010] 1 AC 678 at [13]:

"In *re B* [2009] AC 11 reaffirmed the principles adopted in *In re H* [1996] AC 563 while rejecting the nostrum, "the more serious the allegation, the more cogent the evidence needed to prove it", which had become a commonplace but was a misinterpretation of what Lord Nicholls had in fact said [in *Re H*]".
101. I do not read Lady Hale's judgment in that case as inconsistent with what the Court of Appeal said in *R(N)*. However, I have reviewed my reasoning in the light of Mr Shaw's submission. At no point in the process of reasoning which I have applied to reach my conclusion have I in fact been influenced by the fact that the allegations made are serious ones. Accordingly, it is unnecessary for me to discuss this point further.
102. Mr Shaw drew attention to admissions made by Ebrahim during the HMRC investigation. In his Outline Disclosure form dated 3 January 2013, he said: "There appears to be an understatement of sales going back to the accounts for the year ended 30 September 2006. I am working to assess levels of understatement" and "I believe there is understatement in the accounts for the year ended 30 September 2006 and in the accounts for the year ended 30 September 2007. It is less clear whether there were any understatements in subsequent years". This was before HMRC had sent the Business Economics Exercise to SCB and was information volunteered by Ebrahim.
103. When asked about this, Ebrahim said that he had studied at school in Gujarati. He could speak English when he was in the UK, but he could not read or write English. He was, therefore, dependent on his accountant to complete forms on his behalf. He could not remember the details of what had happened at the time, but: "What I used to understand is that we keep the accountant and he will do his job and he takes on the responsibility , so I was more concerned or concentrating on my business and doing all the running around." I accept that evidence which strikes me as being inherently plausible.
104. What I take from the Outline Disclosure, completed by Mr Razzaq, is that he had formed the view that there probably had been an understatement of sales in the first and second set of accounts which he had prepared for the Company, for the period ending 30 September 2006, and the year ending 30 September 2007, but was not sure about whether the same was true for the years ending 30 September 2008, 2009, 2010, 2011 and 2012. Mr Razzaq was not called by either party to give evidence, and there is no

document which explains what caused him to form that view. However, the way in which the statements in the form are made worded does not seem to me to be consistent with the Claimants' case, which is that each year of the Company's trading there were hundreds of thousands of pounds of sales which were not recorded.

105. Mr Shaw also drew attention to the AMS letter of 29 November 2014, which I have referred to in paragraph 43 above. That said: "... there is some evidence to suggest that the declared sales figure was incorrect" and "Having discussed your figures with our client, we believe that the level of additional sales should be closer to 20% of the additions proposed in your letter".
106. Mr Shaw pointed out that this was a new firm of accountants brought in by the Company to deal with the HMRC investigation and respond to the HMRC Business Economics Exercise. The response, after discussing matters with Ebrahim, was not to say that there had been no under-reporting of sales, or only a minor amount of under-reporting, but rather to say that additional sales should be "closer to 20%" of the additions proposed by HMRC. This, he submitted, was powerful evidence in support of the Claimant's case.
107. I see the force of that point. However, the statement in the letter that there were unreported additional sales of something close to 20% of the amount suggested by HMRC was an opinion formed by AMS. Like any opinion, its reliability depends on the facts on which it was based, and the reasoning applied to those facts. AMS may have been impressed by the HMRC Business Economics Exercise, and have thought that it was reliable - but they may have been wrong. AMS subsequently revisited the issue in the AMS Report, and came up with a quite different conclusion.
108. Mr Shaw, when opening the case, drew attention to a number of deficiencies in various parts of the AMS Report, and neither the Claimant nor the Defendants placed any reliance on its reasoning or conclusions. If AMS were unable to form a reliable opinion when preparing a detailed forensic accountant's report, there is no reason to suppose that they could form a reliable opinion when writing a letter at an earlier date. Accordingly, I cannot place much weight on the figure of 20% in the AMS letter.
109. What I do think the Outline Disclosure and the AMS letter establish is that two different accountants thought that there were deficiencies in the Company's systems for recording sales. If the systems for recording sales had been robust and reliable, one would not find Mr Razzaq filling in the Outline Disclosure form saying that there probably had been some understatement of sales, and AMS saying that "our client's record keeping was far from perfect". Accordingly, it is plausible that there may have been unreported sales. I do not think the inadequacies of the record keeping justifies the conclusion that there were unreported sales, but it means that there could well have been.
110. This answers a submission made by Ms Fisher. She argued that when the Company sold chickens or parts of chickens to its customers, the customers would have insisted on a receipt, for their own accounting purposes. Anisha said that the Company used duplicate receipt booklets, and when a receipt was written out, the top copy would be given to the customer and the bottom copy remained in the booklet. That submission would have force if it were not for the fact that both Mr Razzaq and AMS clearly thought that there were deficiencies in the Company's records of sales.

111. Ms Fisher and Mr Mahmood submitted that there was no evidence that any of the Defendants had enjoyed a luxurious lifestyle of the kind that might be expected if large sums of cash had been received by them. It was also pointed out that there is evidence that the A & Adam Holdings partnership borrowed money from Sohail Gissa Investments and failed to make payments due, which it was submitted is inconsistent with the Defendants having taken millions of pounds of cash from the Company. There is also the point that, in his interview with Mr Metcalfe, Ebrahim is recorded as saying: “in November or December of 2012 they had bought a farm for approximately £1.2 million with borrowings from institutions, akin to a mortgage ... they also needed a further £800,000 to complete the project of creating a chicken farm but were finding it difficult to obtain loans.” Again, it could be said that this is not consistent with the Defendants having appropriated large sums of cash. However, this argument could only be given any weight if there was sufficient evidence about the Defendants’ income, assets and expenditure to make a realistic assessment of whether they were in receipt of additional money from undeclared sales. There is no evidence of that kind, and therefore I give this point no weight.
112. Ms Fisher and Mr Mahmood also submitted that the Claimants’ case, if correct, means that the Company carried on collecting large sums of cash without declaring them after the HMRC investigation had commenced, and Mr Metcalfe had warned Ebrahim there might be checks. They said this was most unlikely. They also argued that it was not credible to suggest that Ebrahim, a man of good character, in the twilight years of his life, faced with a serious fraud investigation would have simply continued as alleged. However, the AMS letter of 29 November 2014, written only two months before the Company went into liquidation, said that the Company’s record keeping was “far from perfect” and changes needed to be made. So it seems that nothing had changed about the recording of sales after the investigation began. If there were under declarations before the investigation began, there is nothing to suggest that there was a change in the way that the Company carried on business after the investigations started.
113. Mr Shaw sought to use some of the information in the AMS Report to support the Claimant’s case. The Defendants objected, saying that as the Claimants challenged the report, no use could be made of any part of it - the Claimants could not “cherry pick” parts of the information in the Report. I disagree. The fact that parts of the Report may be unreliable does not mean that all of the information in it is unreliable.
114. The trial bundle includes only relatively few documents recording sales and purchases by the Company. Mr Shaw said that this was the fault of the directors, who should have delivered the Company’s books and records to the liquidator. He argued that the Defendants are not able to rely on the inability of the books and records which have not been provided to make good what they say otherwise is their position.
115. Given my determination that Ebrahim was the sole director of the Company after 2008, this submission could only be relevant to evaluating his case. However, I do not think it is a valid point even in his case. The Claimant’s pleaded case relied on the HMRC Business Economics Exercise, which involved analysing the sales in the year ending 30 September 2009, and then extrapolating the conclusions from that analysis to the remainder of the Company’s trading period. The documents on which HMRC relied were destroyed by them. The Claimant made no complaint during the course of the litigation that there had been inadequate disclosure by Ebrahim of books and records from other years. Nor was it suggested to Ebrahim, Sajid or Anisha in cross-examination

that they had documents which would or might cast light on the issue which they had failed to disclose.

116. Overall, my conclusion from the general points discussed above is that the Claimant's case must stand or fall on an analysis of the evidence which supports or contradicts the Business Economics Exercise calculation.
117. It will be apparent from the discussion below that the evidence on a number of aspects of the calculation was extremely thin, both on the Claimant's side and on the Defendants' side. There is substantial uncertainty about a number of aspects of the calculation. I have considered whether the evidence is so thin that I should simply determine that it is insufficient for me to make any rational decision, in which case I would have to conclude that the Claimant has failed to prove its case: see *Verlander v Devon Waste Management Ltd* [2007] EWCA Civ 825 at [24]. In the end, I have decided that there is, just, enough information for me to make a very rough estimate of the likely level of sales in the year ending 30 September 2009 which can be compared to the figure for sales in the Company's accounts for that year of £2,695,644.

The number of birds delivered to the Company's slaughterhouse in the year and the average weight per bird

118. HMRC and the Claimant relied on information provided by the FSA summarising the number of birds delivered to the Company's slaughterhouse. This information had been compiled by the FSA from its records. The underlying material which enabled the summary to be produced was not in evidence.
119. The summary provided by the FSA mostly recorded the number of birds slaughtered in a given month next to the description "Broiler/Hens/Poultry <2kg" or "All broilers, all cast hens, other poultry (excluding turkeys) weighing less than 2 kg". However, there were also entries for much smaller numbers with the description: "Yg Ptry>2kg Ad Ptry2<5kg" or "Poultry (excluding broilers, cast hens and turkeys), 2kg and over (except those which are adult)".
120. It appears clear from those descriptions that the estimated weight of the birds was of significance to the FSA. Mr Collier's evidence was that these were categories laid down in European legislation at the time, and the FSA's agents were, therefore, accounting for the number of birds in the different categories set out in the summary: "... the regulations set out distinctions on throughput, which we recorded in alignment with those." I was not told by Mr Collier or by counsel what the relevant regulations were or what they said.
121. Mr Collier said that he did not know how the figures in the FSA summary were arrived at. The process would vary from premises to premises. The way the process would normally operate is that there would be receipts from suppliers of the poultry and the information would be taken from those. As to the estimated weights, he thought they too would usually reflect information provided by the producer in the suppliers' receipts.
122. The Defendants' pleaded case was that these figures were the number of birds the Company hoped to slaughter, not the actual number slaughtered, and that the numbers provided to the FSA were inflated so that the Company was approved to slaughter up to

(but not above) those numbers provided. Sajid said in evidence that this was his understanding of the figures.

123. I accept that Sajid believed that to be the case, but it is clear from Mr Collier's evidence that this is not how the figures supplied by the FSA had been compiled. The FSA did ask for information about anticipated throughput levels when providing approvals, but also required a record of the number of birds actually delivered to a slaughterhouse because it formed the basis on which they charged. It is the latter information that is contained in the FSA's summary relied on by the Claimant.
124. The total number of birds recorded by the FSA as having been slaughtered in the period from April 2005 to January 2015 was 13,834,436, nearly all of which were described as being in one of the less than 2 kg per bird categories.
125. Before considering the reliability of the FSA records as to the number of birds delivered to the Company's slaughterhouse, it is necessary to consider the issue of the average weight of the live birds delivered to the Company and recorded by the FSA.

The average weight of the live birds delivered to the Company

126. The HMRC calculation which is relied on in the Particulars of Claim worked on the basis of an average weight of 2 kg per live bird. However, at the trial, Mr Shaw submitted that the correct weight to use was 2.6 kg.
127. There is the following evidence about the weight of the live birds delivered to the Company:
 - (a) The FSA records referred to above, according to which nearly all the birds weighed less than 2 kg.
 - (b) The AMS Report included at Appendix VI national statistics issued by DEFRA, and which can be downloaded from <https://www.gov.uk/government/statistics/poultry-and-poultry-meat-statistics>. These were average liveweights per bird at the point of slaughter. The average for broilers over the period from 2005 to 2015 ranged from 2.1 kg to 2.3 kg but was mostly 2.2 kg per bird.
 - (c) The AMS Report also included in Appendix III an analysis of a number of purchase invoices between December 2005 and June 2012. The average weight was 2.61 kg per bird.
 - (d) The trial bundle included 11 invoices from one of the Company's poultry suppliers, Sullivan's between June and September 2014. They recorded the weights, and number of birds dead on arrival and rejected. The average weight of the birds delivered was 3.25 kg.
 - (e) Two crop sheets disclosed by the Defendants on 4 April 2022 recording sales by A & Adams to the Company in August 2014 included the weights of the birds sold, which averaged 2.65 kg and 2.86 kg.

128. Apart from the FSA's records, the evidence suggests that the average live weight was higher than 2 kg, and probably around 2.6 kg.
129. However, that is quite impossible to reconcile to the FSA summary of birds delivered, where nearly all of the birds were recorded as being less than 2 kg, but some as being more than 2 kg. Mr Shaw was unable to suggest any reconciliation. His submission was that I should simply ignore the descriptions of the birds delivered as being less than 2 kg as being inconsistent with other, more reliable evidence as to their weight.
130. The difficulty with this submission is that I have no evidence as to how the numbers recorded by the FSA were arrived at. Mr Collier did not know; the most he could do is to say how the process usually worked i.e. with the information taken from the suppliers' invoices. But if that had been the case, then the vast majority of the birds would have been recorded as being more than 2 kg, not less.
131. In those circumstances, I am unable to accept that the Claimant has proved that it is more likely than not that the number of birds recorded in the FSA summaries is accurate but that the weights recorded are inaccurate.
132. Mr Mahmood identified one or two discrepancies between the FSA's original summary of the number of birds arriving for slaughter and a revised version provided to correct the dates used. Taken by itself, this does not cast any serious doubt on the reliability of the numbers. However, if the FSA's recording of the weight of the birds was consistently inaccurate, then I do think it would be safe to proceed on the basis that their recording of the numbers was consistently accurate.
133. In my view, on the evidence, the only reliable basis for carrying out the calculation is that adopted by HMRC and to assume that the FSA's numbers were accurate and that the average weight of a live bird, other than hens and "baby birds" (as to which see below) was 2 kg.
134. This was the first of the supposed fundamental errors of reasoning that Mr Shaw identified in his post-draft judgment submissions. He said that there was specific evidence of sales of 3,184,479 of purchases in which the weights were not less than 2.6 kg.
135. But, as I have already said, it is quite impossible to reconcile that evidence with the FSA records. If the FSA had been taking the number of birds and their weights from the sales invoices, they would not have recorded the vast number of birds as being less than 2 kg. So they must have used some other method to arrive at their figures, and the most likely alternative is one involving the weight recorded by the weighbridge. In closing submissions, there was this exchange:

“JUDGE JOURDAN: Is it possible that what the FSA did was look at the total weight being delivered and divide that by 2 and then put that in the 2 or less category?”

MR SHAW: It's possible. Yes, it is possible, but I'm afraid there's insufficient evidence to make a conclusion one way or the other as to the precise way they went about that calculation. I can't say anything beyond that. There simply isn't the evidence that goes further than that.”

136. I do not think it is reliable to take the number of birds delivered from the FSA records and derive the average weight from other material. Nor do I think it reliable to take the numbers of some of the birds from the material referred to in paragraph 127(c)-(e) above, and then assume that one can deduct that number from the FSA total and arrive at a reliable assessment of the total number of birds.
137. Despite the additional submissions made by Mr Shaw after circulation of the draft judgment, it remains my view that the only reliable basis for carrying out the calculation is that adopted by HMRC, and which is relied on by the Claimant in the Particulars of Claim, namely that the number of birds delivered should be taken from the FSA records on the basis of an average weight of 2 kg per bird.

The proportion of birds that were dead on arrival, or which were condemned before or after slaughter as being unfit for consumption, and therefore not saleable

138. HMRC made no adjustment to the number of birds slaughtered to reflect the fact that some birds were dead on arrival, or were condemned before or after slaughter as being unfit for consumption, and therefore not saleable.
139. Mr Collier said that the FSA's figures were the number of birds delivered to the premises, including those which were found to be unsuitable for sale due to disease or death. Accordingly, it is necessary to make a deduction from the FSA's numbers to reflect the loss of birds due to death or illness.
140. Mr Shaw analysed the Sullivan invoices in the trial bundle and showed that they recorded the proportion of dead or rejected birds as being about 2.3%.
141. In his oral evidence, Ebrahim said that the proportion that would be rejected varied but sometimes could be 10% or even 20%, saying "This has happened many times and legally, they come and check, but when there is some illness in the chickens, then 50% of that is gone. They will sometimes close the farms." In his oral evidence, Sajid agreed with his father's evidence on this point and said it could increase up to 50-60% depending on the weather.
142. It seems to me clear that there cannot have been average losses due to illness or death of anything like that amount. I think Ebrahim and Sajid must have been referring to rare occasions when there was an illness affecting the birds coming from a particular farm. I think it is likely that this happened occasionally, and therefore the figure of 2.3% taken from the Sullivans invoices will be a little on the low side. In the absence of any other evidence on the average level of mortality and illness in chickens delivered to slaughterhouses, I consider that a deduction of 5% to allow for average losses of birds due to illness or death is appropriate.

The amount of hens and baby birds sold

143. Ms Fisher submitted that some of the slaughtered birds would have weighed only 1 kg – the very young birds referred to as "baby birds". The HMRC Business Economics Exercise said that that 32,312 kg of hens and baby birds were sold. This figure cannot be derived from any of the documents in evidence, no doubt because HMRC destroyed the documents they used for the analysis. Ms Fisher argued that hens (birds that had

been kept to lay eggs and were then sent for slaughter) and baby birds (very young birds) would inevitably weigh less than 2 kg, which I agree is probable.

144. Ms Fisher then proposed an arithmetical adjustment to reflect this point – she proposed that I assume that 32,312 birds were sold for £1 each.
145. I do not think there is sufficient evidence to make an arithmetical adjustment of that kind. The average weight of 2 kg per bird is itself no more than a very rough and ready figure and the fact that some birds will have weighed much less is likely to be offset by the fact that some will have weighed much more. Accordingly, I have made no adjustment to reflect this point.

Whether the By-products could be sold and, if so, for how much

146. The HMRC Business Economics Exercise assumed that the average saleable weight of a bird was 2 kg, and that the whole of the slaughtered bird could be sold at the estimated price per kilo used.
147. Method 2, which was the only one ultimately relied on by the Claimant, assumed that the whole of the 2 kg of the weight of the bird could be sold at a price derived from an analysis of 43 items taken from 5 invoices, set out in the HMRC Invoices Analysis. Many of those items were parts of chickens. For example, the first item in the analysis was 20 kg of single full legs, sold for £1.98 per kilo. The second item was 20 kg of thigh meat, sold for £2.90 per kilo. The third item was 20 kg of breast meat, sold for £3.40 per kilo. Some of the items, however, were whole birds, sold without the skin, for £1.80 per kilo. The calculation involved adding the total sale price of all of the 43 items, said to be £6,653.70, and dividing it by the total weight sold, 2,536.35 kg, to arrive at an average selling price of £2.62 per kilo.
148. The justification given in the document for applying that figure to the whole of the weight of a live chicken was that: “The company also sold offal and feathers; essentially nothing is wasted in the chicken operations”.
149. In my judgment, there are two serious problems with this approach. The first is that the idea that the parts of a slaughtered bird such as offal, blood, beak, feet, head and neck, which I will refer to as “By-products” could be sold for the same price per kilo as the breast, thighs, legs etc. seems to me to be far-fetched. If the By-products could be sold at all, it would obviously be for a very much lower price than the chicken meat sold for human consumption.
150. The note of the 19 March 2013 interview records Ebrahim saying that “he was not involved in the selling of offal and feathers, and that in the past he would have to pay a business to remove the waste products - only more recently was he able to make any money from the sale of offal and feathers”. He also said that that the back, neck and sides were sold to animal food manufacturers.
151. In his closing submissions, Mr Shaw realistically and correctly accepted that the processes of slaughtering and cutting of meat will involve wastage of non-consumable elements which needed to be discounted in the calculation. He did not suggest that I attribute some specific value to the By-products. That seems to me to have been inevitable. There is no evidence at all about the sort of prices that By-products could

have been sold for. It is a point on which evidence could have been adduced by the Claimant, from someone with knowledge of the relevant market. As explained below, I have taken into account the fact that at least some By-products could be sold in my overall assessment of wastage.

The adjustment needed for wastage to get from the weight of a slaughtered bird to the weight of a bird sold whole

152. Ebrahim's evidence in his witness statement on wastage was as follows:

"Wastage was constantly a big issue. There would be substantial wastage following the slaughter and processing of live birds. Large parts of the bird are lost during the process such as the, offal, bones, blood, beaks, feet, head, neck and skin which cannot be sold to customers. The meat following the processing of the live bird would be approximately 60% of the weight of the live bird. Therefore if the live bird weighed 2 kilograms the meat that would be obtained after slaughter and processing would weigh 1.2 kilograms."

I will return to that figure of 60% below.

153. The AMS Report used a figure of 25% for what it called "wastage". When asked about this in cross-examination, Ebrahim said: "At that time when I was working, all that was there in my mind, that 25% is the wastage and this much liver was thrown out or -- and all that calculation was there on my mind, but not now". When asked to confirm this, he said: "When you were talking about the wastage, it can even go up to 50% because before it was wastage from hen, then the chicken, and sometimes when you take it to go and for sale it could be 35% to 40%, and sometimes if you take it there, they keep it for 2 days and then they return it back. So that's all loss for us." I do not regard any of that, by itself, as reliable evidence on the average weight of By-products as a percentage of the weight of a live chicken.
154. The AMS Report said that the figure of 25% was taken from the information in Appendix VII. That was a brochure produced by a company called Ross describing the performance objectives of a breed of chicken called the Ross 308 Broiler, indicating: "... the performance achievable under good management and environmental conditions and when feeding nutrient levels described in the Ross 308 Broiler Nutrition Specifications".
155. The figure of 25% must have been derived from the section headed "Carcass Yield". This has two tables, one for male birds and one for female birds. Looking at the female birds table, a series of live weights are given, ranging from 1.6 kg to 2.8 kg. Then for each live weight a percentage is given for breast, thigh, drumstick, and "eviscerated", which is used to mean an "eviscerated carcass (without neck, abdominal fat and internal organs) as a percentage of live weight". Taking a bird with a live weight of 2 kg, the breast is said to be 22% of the live bird's weight, the thigh 13%, the drumsticks 9.5% and the eviscerated carcass 72%. The figures for a 2 kg male bird are similar.
156. The birds which were purchased by the Company may not have been Ross 308 Broilers, and the relationship between the weight of the eviscerated carcass without By-products the live bird may well have been different. There is, therefore, substantial uncertainty

about the right percentage to use. This is a point where I would have been greatly assisted by more evidence.

157. In the absence of any other more reliable evidence, I propose to take that figure of 72% as a reasonable estimate of the weight of a whole chicken after slaughter and removal of the By-products. Given that Ebrahim told Mr Metcalfe that some at least of the By-products could be sold, I think it is appropriate to use a deduction of 25% which produces an average weight per whole bird after slaughter and removal of the By-products of 1.5 kg.
158. HMRC's analysis made no attempt to distinguish between sales of whole birds and sales of parts. However, I consider that such a distinction is essential in considering wastage. In the case of birds which were cut up into parts, I do not think it is possible to use the same weight as in the case of a whole bird. The process of removing the saleable parts from the carcass will result in pieces that can be sold for a higher price, per kilo, than the whole chicken, but the weight of the carcass would have to be deducted before applying that higher price per kilo.
159. Sajid said in his oral evidence that the weight of the parts, after removing them from the carcass would be about 50% of the weight of the whole bird. However, as Mr Shaw pointed out, this had not been mentioned in Sajid's witness statement and my impression is that it was not a figure that Sajid had given much thought to.
160. Apart from Sajid's estimate in his oral evidence, to which I cannot give any weight, the only other material in evidence which provides any guidance at all on this point is the information in the carcass yield section of the Ross document appended to the AMS Report. This includes figures giving the weight of the breast, thigh and drumstick as a percentage of the live bird. The text explains: "The following diagrams indicate how yields of the major portions change with increasing live weight in each sex. Two types of processing are described: eviscerated yield is broken down into breast meat, thigh and drumstick to represent a portioning operation and into breast meat and leg meat to represent a deboning operation".
161. The figures used to represent the results of a portioning operation indicate that, taking a live female bird weighing 2 kg, the breast, thigh and drumsticks together add up to 44.5% of the weight of the live bird.
162. The birds which were purchased by the Company may not have been Ross 308 Broilers, and the relationship between the weight of the parts and the whole may have been different to that in the Ross brochure. The Ross brochure does not include wings or niblets. There is, therefore, very substantial uncertainty about the right percentage to use. This is another point where I would have been greatly assisted by more evidence. In the absence of any more reliable evidence, I consider it appropriate to undertake the calculation on the assumption that when chickens were cut into parts and the parts were sold, the weight of saleable parts of a chicken was 65% of the weight of the whole saleable bird.
163. Therefore the wastage percentage deduction for chickens cut up into parts is $75\% \times 65\% = 48.75\%$, say 50%.

164. Mr Shaw accepted that there was good reason to conclude that the saleable parts of a chicken which has been cut up for sale in parts should be treated as weighing about 50% of the weight of a live bird, and that is the figure I propose to use.

The proportion of birds sold whole and birds sold in parts

165. SCB's letter of 30 May 2013 said that the proportion of birds sold whole and in parts would be 50:50.
166. With her closing submissions, Ms Fisher provided an analysis of 182 invoices in the trial bundle in 2011-12, which established that 42% by weight of the chickens sold were whole birds, the remaining 58% being chicken parts.
167. However, as she correctly pointed out in subsequent written submissions, because of the greater wastage involved in producing chicken parts, the percentage of live birds used to produce chicken parts will have been greater than 58%. One live bird weighing 2 kg if sold as a whole bird will, after allowing for 25% wastage, produce a sale of 1.5 kg. One live bird weighing 2 kg if cut into parts will, after allowing for 50% wastage, produce a sale of 1 kg. Given that the 40% of the weight of the chicken sold was attributable to live bird sales and 60% to sales of chicken parts, that means that 33% of the slaughtered birds were sold as whole birds and 67% were cut into parts for sale.

Wastage calculation

168. The wastage calculation is therefore as follows:
- (a) 33% of the birds were sold whole, at 75% of the weight of a live bird.
 - (b) 67% of the birds were sold cut up into parts, at 50% of the weight of a live bird.
 - (c) Therefore the total weight of the chickens sold as a percentage of total weight of the live birds was $(0.33 \times 0.75) + (0.67 \times 0.5) = 0.58$, an overall wastage deduction of 42%.
 - (d) That compares reasonably to Ebrahim's estimate in his witness statement that total wastage was around 40%.

On the evidence, that is the best estimate I can make of wastage.

The average selling price per kilo

169. HMRC's method 1 used a figure of £2.75 per kilo. There was no reliable evidence as to how that figure was arrived at, and in closing submissions Mr Shaw correctly disclaimed any reliance on it.
170. I have explained HMRC's method 2. Ms Fisher pointed out that there were arithmetical errors in the calculation, which meant that the correctly calculated average was £2.48 per kilo. However, more importantly, she submitted that the sample used was too small to give any reliable indication of average selling prices. I agree. If HMRC's method 2 was the only evidence as to average selling price, I would have regarded it as too unreliable to base any conclusions on. The analysis considered items said to have been

sold for a total of £6,653.70. The Company's reported sales for the year in question were £2,695,644. I do not think that a sample of only 0.25% of the sales in a year can be regarded as a reliable method for establishing the average selling price.

171. The AMS Report said: "Turnover has been achieved by sampling invoices every quarter from the date of incorporation to 30 September 2014 to determine the average number and sales price per kilogram". The details were set out in Appendix II. But, as Mr Shaw pointed out in opening, some of the prices per kilo given in that Appendix are very different to those recorded in the invoices analysed by HMRC. The invoices themselves were not attached to the Report and are not in evidence. There is no explanation of how the invoices were selected. He submitted, and I agree, that this makes Appendix II too unreliable to be given any weight.
172. Ms Fisher's analysis of 182 invoices is, therefore, the most reliable source of information about average selling prices. The total of the sale prices in those invoices was £135,556. That is still only 3.7% of the Company's reported turnover in 2011-12, and is not a very reliable guide, but it is the best evidence available.
173. The invoices in the trial bundle which she analysed consistently record a selling price of whole chickens of £1.75 per kilo, and I propose to use that figure for whole chickens.
174. As to the average price per kilo of parts, Ms Fisher's analysis of the invoices established an average price of £2.37 per kilo for chicken parts, which I propose to adopt.
175. Applying the above assumptions produces total estimated sales from slaughtered birds of around £2.6 million: see the calculation in Appendix 1

The extent to which customers rejected birds delivered to them or failed to pay debts that were due from them.

176. There was very little evidence on this issue. However, AMS used a bad debt allowance of 2% which Ms Fisher adopted in her closing submissions. Mr Mahmood said he agreed with Ms Fisher's submissions on the figures. Mr Shaw did not disagree with it. Accordingly, I will adopt that figure.

The amount of cut meat sold

177. This aspect of the Company's business was not analysed by HMRC, and was not reflected in the Business Economic Exercise calculations. However, in closing submissions Mr Shaw said that the sales proceeds of cut meat needs to be added to the sales proceeds from slaughtered chickens. No objection to this was made by Ms Fisher or Mr Mahmood, so I propose to consider it.
178. The FSA provided records of meat purchased by the Company for cutting, provided to it by the Company. Mr Collier explained that the Company was required to record the weight of any meat brought into its cutting establishment (in whole tonnes, rounded up) each week and to submit this within 3 days of the end of the accounting period. In the year ending September 2009, the amount recorded as delivered was 47,000 kg.
179. There was no evidence as to whether the birds purchased by the Company for cutting were delivered with or without the By-products. In the absence of any such evidence,

and given the burden of proof, I will assume that the birds were delivered with By-products and that therefore the appropriate wastage adjustment is 50%. That produces additional revenue of $47,0000 \times 0.5 \times \pounds 2.37 = \pounds 55,695$, say $\pounds 60,000$.

Resales of live birds and cut meat

180. Mr Shaw said in closing that there is not sufficient evidence to identify the quantity of bought in meat and live birds that were sold, so that can be disregarded.

Conclusions

181. Taking the figures above produces around $\pounds 2.6$ million for sales of slaughtered birds, plus around $\pounds 60,000$ from sales of cut meat, making a total of around $\pounds 2.66$ million. After a deduction of 2% for bad debts, that produces an estimated figure for income from sales of around $\pounds 2.6$ million, which approximately accords with the figure reported in the Company's accounts of just under $\pounds 2.7$ million.
182. I have very little confidence in the accuracy of that figure of around $\pounds 2.6$ million for reasons that will be evident from the discussion above. However, it is the best that I can do based on the evidence called at the trial.
183. In closing, Mr Shaw also presented calculations based on the number of birds slaughtered over the whole of the trading life of the Company. Applying the assessments I have made above, this produces a figure which is about 12% higher than the total reported sales of the Company over its trading life: see Appendix 2. Give the very substantial uncertainty in the accuracy of the figures, I do not think that this is a sufficient discrepancy to prove that there were Additional Sales Receipts. It is possible that there were, but in my judgment the Claimant has not proved that it is more likely than not that there were Additional Sales Receipts.
184. In his post-draft judgment submissions, Mr Shaw submitted that this decision is internally inconsistent with what I said in paragraph 117 above, and also inconsistent with the principles applying to determining cases on the balance of probabilities. Those were the second and third of the fundamental errors of reasoning which he submitted I had made.
185. The assessment of the likely level of sales which appears in Appendix 2 is the product of a calculation involving a substantial number of variables. In each case, the evidence which I have relied on to make my estimate is poor and my confidence in the accuracy of those estimates is low. This means that there is, inevitably, a substantial margin of error. For example, the estimate of average selling prices per kilo I have used is based on a very small sample from a period of about 2 years out of the total trading life of the Company. A different sample might well produce a different average selling price which would lead to a different output from the calculation. In his closing submissions, Mr Shaw referred to some invoices from 2011 which showed an average selling price of chicken parts of $\pounds 2.69$ per kg. Ms Fisher's analysis referred to above covering some invoices from 2011-2013 produced an average of $\pounds 2.37$ per kg, about 12% lower than Mr Shaw's figure.

186. The conclusion of the Business Economics Exercise was that the Company's sales in the year ending 30 September 2009 were more than 200% of the amount recorded in the accounts. If I had arrived at a similar assessment, then despite the uncertainties in the estimates and the need to allow a margin of error I would have been persuaded that there probably were Additional Sales Receipts, and would have endeavoured to make the best estimate that I could of what they were. As it is, my estimates produce a figure which is only 112% of the reported sales. That is not enough of a discrepancy to justify the conclusion that there probably were Additional Sales Receipts, rather than the discrepancy being due to errors in the accuracy of estimates made on the basis of poor quality evidence. It is not necessary to define what that margin of error is which ought to be applied to the calculation in Appendix 2, but it is certainly higher than 12%.
187. Mr Shaw referred to *In Re A (Children) (Care Proceedings: Burden of Proof)* [2018] EWCA Civ 1718, in which King LJ gave guidance on the correct approach to fact finding and the application of the burden of proof, in a case where the issue was the cause of death of a 10 year old girl, and the trial judge had held that the local authority had not proved it was a homicide rather than an accident or suicide. She summarised the guidance at paragraph 58 as follows:
- i) Judges will decide a case on the burden of proof alone only when driven to it and where no other course is open to him given the unsatisfactory state of the evidence.
 - ii) Consideration of such a case necessarily involves looking at the whole picture, including what gaps there are in the evidence, whether the individual factors relied upon are in themselves properly established, what factors may point away from the suggested explanation and what other explanation might fit the circumstances.
 - iii) The court arrives at its conclusion by considering whether on an overall assessment of the evidence (i.e. on a preponderance of the evidence) the case for believing that the suggested event happened is more compelling than the case for not reaching that belief (which is not necessarily the same as believing positively that it did not happen) and not by reference to percentage possibilities or probabilities.”
188. As to the first point, I have been driven to my conclusion by the unsatisfactory state of the evidence. If there had been better evidence, I would be much more confident in the accuracy of the estimates of the variables which I have made, and the margin of error would be smaller.
189. As to the second point, I have endeavoured to look the whole picture, and all relevant factors, as I hope is apparent from my judgment above.
190. As to the third point, I have not attempted a probability calculation. Rather, I have undertaken a calculation using estimates of a number of variables. In respect of each of the variables I have done my best on the limited evidence available, but there is substantial uncertainty. I have little confidence in the accuracy of the estimates and therefore little confidence in the accuracy of the output of the calculation. The discrepancy between the output in the calculation and the reported sales figures in the Company's accounts could be due to there having been Additional Sales Receipts, or could be due to errors in the estimates. If the discrepancy was very large then I would be satisfied that it was more likely than not to be due to there having been Additional

Sales Receipts. However, it is not very large; it is about 12%. On Mr Shaw's submission, even if the discrepancy was only 1% I would be bound to determine that there had been Additional Sales Receipts. It seems to me obvious that this is wrong.

Can the Claimant pursue a claim to an interest in the Brinksway Property in circumstances where there were no Additional Sales Receipts?

191. On that basis, I consider that there is no foundation for the Claimant's claim to an interest in the properties other than the Brinksway Property. There is no evidence that any Company money was used to purchase the leasehold or freehold estates in Thynne Street Property or the titles to Borsdane Farm.
192. The position in respect of the Brinksway Property does, however, require further consideration. It is common ground that in September 2014, £250,000 of the Company's money was paid to Sajid and Anisha to assist them in buying that property, and that it was used for that purpose in November 2014. This was intended by Ebrahim to be a gift from him, with the £250,000 being treated as repayment of money owed to Ebrahim by the Company, the amount of money so owed being recorded in his director's loan account with the Company.
193. The next question I must consider is whether the Claimant is entitled to pursue a claim in respect of the Brinksway Property, given that I have ruled against the Claimant on the Additional Sales Receipts issue. Mr Mahmood submitted that the Claimant had not pleaded any claim to an interest in the Brinksway Property independent of the Additional Sales Receipt claim.
194. Mr Shaw put the claim in respect of the £250,000 on the following basis:
 - (a) Ebrahim had failed to prove that there was a director's loan account pursuant to which he was owed at least £250,000.
 - (b) Even if he did have a director's loan account, it was a breach of duty for Ebrahim to cause the Company to repay money owed to Ebrahim in November 2014, at a time when the Company was balance sheet insolvent, and was therefore a breach of his duty. He submitted in closing that the accounts to 30 September 2014 showed a deficit of £25,140.
 - (c) It was alternatively a breach of duty for Ebrahim to cause the Company to pay him money it owed him at a time when he was on notice of HMRC's substantial claim.
 - (d) It was alternatively a breach of duty for Ebrahim to cause the Company to pay him money it owed him at a time when the decision had been made by the Defendants to take steps to place the Company into insolvent liquidation.
195. As to those submissions:
 - (a) The Reply undoubtedly puts in issue the question of whether there was a director's loan account and if so how much was owed.
 - (b) The Particulars of Claim do allege that the Company was insolvent at all material times, so the Claimant can rely on the fact that the Company's balance

sheet showed its assets as being worth £25,140 less than its debts on 30 September 2014.

- (c) The Particulars of Claim do sufficiently plead that Ebrahim was on notice of HMRC's substantial claim. Paragraph 11 pleads that the assessments ultimately made by HMRC "were raised following an investigation by HMRC into the Company's affairs, is set out in documents produced by HMRC, copies of which have been provided to the Defendants."
- (d) I do not think the Claimant can rely on the fact that the payment was made at a time when the decision had been made by the Defendants to take steps to place the Company into insolvent liquidation. The Particulars of Claim do not plead those facts and the Defendants were not on notice that the date of the decision was of importance to the Claimants' case.

196. Accordingly, I need to consider the following issues:

- (a) Did the Company owe Ebrahim at least £250,000 in November 2014, so that the payment should be treated as one made by the Company to Ebrahim and then by Ebrahim to Sajid and Anisha?
- (b) Did the deficiency shown on the balance sheet mean that the Company was insolvent at the date of the payment?
- (c) Did the fact that Ebrahim was on notice of HMRC's claim at the date of the payment mean that it was a breach of duty for him to cause the Company to repay him money it owed him?

Did the Company owe Ebrahim at least £250,000 in November 2014?

197. Until the last set of accounts, for the year ending 30 September 2014, the Company's accounts did not refer explicitly to a loan by Ebrahim to the Company. That last set of accounts included as note 13 the following: "At the year end, a balance of £367,647 (2013: £309,485) was due to the directors. The above loan is interest free with no fixed date of repayment". The figure of £367,647 does not appear as a discrete figure in the details of creditors at notes 8 and 9 although the figure of £309,485 is shown as an amount falling due after more than one year. There is a figure under the heading "Creditors: amounts falling due within one year" for creditors
198. However, there is a substantial amount of evidence that the accounts of the Company each year were prepared by SCB on the footing that the Company did owe money to Ebrahim, recorded in a director's loan account. Mr Horrocks and Mr Metcalfe were both told that there was a director's loan account. Mr Horrocks' statement made in the FTT proceedings says that three director's personal bills had been debited to a loan account which was in credit by £500,000. Mr Crompton's statement in the FTT proceedings records Mr Razzaq saying there was a large credit balance due to Ebrahim, due to him selling some shares and placing the amount in the loan account. SCB's letter of 30 May 2013 to Mr Metcalfe said that there was a large credit balance held in a director's loan account, which comprised of sums credited in respect of the transfer of the assets of the partnership and amounts credited in respect of personal properties and the disposal of

his shares. The AMS report contains a detailed year by year breakdown of the amount owed by the Company to Ebrahim recorded in the director's loan account.

199. When asked about this by Mr Shaw, Ebrahim struggled to follow the questions, and it was clear he could not remember anything much about the loan account or how it came about that the Company owed him money. I can place no weight on his evidence on this point. However, I consider that the documentary material is sufficient to establish that the Company probably did owe Ebrahim at least £250,000 at the time the payment was made.

Did the deficiency shown on the balance sheet mean that the Company was insolvent at the date of the payment?

200. The mere fact that a company's balance sheet records that its assets, valued using the applicable accounting conventions, are worth less than its debts, does not mean that it is insolvent. I do not think the Claimant has discharged the burden of proving that the value of the Company's assets was less than the amount of its liabilities, applying the principles explained in *BNY Corporate Trustee Services Ltd v Eurosail* [2013] UKSC 28. Accordingly, I do not think that the fact that the Company's balance sheet showed its assets as being worth £25,140 less than its debts on 30 September 2014 means that it was a breach of duty for Ebrahim to cause the payment to be made.

Did the fact that Ebrahim was on notice of HMRC's claim at the date of the payment mean that it was a breach of duty for him to cause the Company to repay him money it owed him?

201. S.172 of the Companies Act 2006 sets out the general duties of a directors owed to a company. S.172(1) provides that 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. S.172(3) then provides: "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".
202. The question of whether there is any rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company, was discussed in the judgment of David Richards LJ in *BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112, [2019] BCC 631. Henderson and Longmore LJ both agreed with his judgment. The case was appealed to the Supreme Court and judgment is awaited, but until that judgment is handed down, the law must be taken from the judgment of David Richards LJ.
203. David Richards LJ conducted a thorough review of the authorities. His conclusion was that directors are under a duty to consider the interests of creditors where a company is insolvent or is more likely than not to become insolvent: see paragraph 220.
204. At paragraph 217, he said that the rationale for the imposition of this duty to creditors was that given by Street CJ in *Kinsela v Russell Kinsela Pty Ltd (in liq.)* (1986) 4 NSWLR 722 at 730:

"In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors

arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration."

205. The reasons for imposing the duty prior to actual established insolvency were explained by David Richards LJ in paragraph 218 as follows:

"The precise moment at which a company becomes insolvent is often difficult to pinpoint. Insolvency may occur suddenly but equally the descent into insolvency may be more gradual. The qualified way in which judges have expressed the trigger ... reflects that the directors may often not know, nor be expected to know, that the company is actually insolvent until some time after it has occurred. For this reason, among others, a test falling short of established insolvency is justified."

206. I have held, on the evidence called at this trial, that the Claimant has failed to prove that there were Additional Sales Receipts. However, as I have explained, HMRC were in a different position to the Claimant. HMRC were claiming that there had been Additional Sales Receipts. They were in a position to raise discovery assessments requiring substantial amounts of additional corporation tax to be paid, and then require the Company to prove that there were no Additional Sales Receipts. That was the situation at the time the payment of the £250,000 was made. On the evidence, I consider that it must have been apparent to Ebrahim in September 2014 that it was going to be difficult to prove that there had been no Additional Sales Receipts; and if that could not be proved, it was probable that discovery assessments would be made and a substantial amount of money would be owed to HMRC, far in excess of what the Company could pay.
207. In my judgment, that means that the Company should be treated as probably insolvent in September 2014. Despite my ruling on the Additional Sales Receipt issue, I consider that HMRC should be treated as creditors for the purpose of applying the rationale of the *Kinslea* case. Just as directors may not know that a company is actually insolvent, so they may not know whether a substantial money claim against the company is valid or not. If there is a substantial money claim against a company, which the company bears the burden of disproving, and which it is apparent it will be difficult to defend, I consider that the rationale given in the *Kinslea* case is applicable.
208. Ebrahim may have thought that HMRC's claim was unfounded, but it is apparent from the letter referred to in paragraph 43 above that the advice he was receiving at that time from AMS was that there were substantial Additional Sales Receipts and therefore a substantial of corporation tax due from the Company. In those circumstances, I consider he was required to consider the interests of the creditors when deciding whether to cause the Company to repay money it owed him.
209. In my view, where a person is claiming that a company owes them more money than the company can afford to pay, and the company is unlikely to be able to defend the claim,

the company should be treated as being more likely than not to be insolvent for the purposes of imposing on the directors duties to consider the interests of the creditors.

210. It is apparent that Ebrahim did not give any thought to the interests of the creditors. In those circumstances, an objective test applies to determine whether there was a breach of his duty, rather than the subjective test which usually applies under s.172 of the 2006 Act: see *Re HLC Environmental Projects Ltd (in liquidation)* [2013] EWHC 2876 (Ch); [2014] BCC 337 at [92(b)]. 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 person 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.
211. In my judgment, an intelligent and honest person in Ebrahim's position could not have reasonably believed that causing the Company to pay £250,000 to him in repayment of money it owed him was for the benefit of the creditors as a whole. The creditors were essentially him and HMRC. The payment was for his own benefit, because it enabled him to make a generous gift to his son and daughter-in-law which would enable them to buy a house. But his duty was to consider the creditors as a class, not just himself: see *GHLM Trading Ltd v Maroo* [2012] EWHC 61 (Ch), [2012] BCLC 369 at [168]. The payment was not for the benefit of the creditors as a class. Accordingly, I consider that Ebrahim did act in breach of his duty to the creditors when he caused the payment to be made.
212. The consequence was that the payment cannot be treated as having been made as a repayment of money due from the Company to Ebrahim. In *GHLM Trading*, a director of company A caused it to sell stock to company B (which was owned by the director) with the sale proceeds being taken by the director on the basis he was owed money by company A. Newey J held at [170-171] that a company can disavow a contract which a director has caused it to enter into if the director was acting in his own interests rather than those of the company, its members or (where appropriate) its creditors as a class, and the other party to the contract had notice of the director's breach of duty. Any such contract, he held, is void.
213. Newey J was concerned with a contract. Here, I am concerned with a gift. Questions of notice are of no relevance where one is concerned with a gift, rather than a contract. Here, a director of a company caused its money to be paid to his son and daughter-in-law, with the intention of making a gift to them. The director acted in breach of his duty under s.172 of the 2006 Act in causing the payment to be made. In those circumstances, I consider that the Company was entitled to a proprietary claim to the money at the point it was paid to Sajid and Anisha. If the Company had gone into liquidation before Sajid and Anisha had used the money towards the purchase of the Brinksway Property, I consider that the Company could have claimed the money back from Sajid and Anisha by way of a proprietary claim. Once they used the money to help purchase the property, I consider that the Company is entitled to trace its money into the title to the property, and to a proprietary claim in respect of that property.
214. In *Foskett v McKeown* [2001] AC 102 at p.127, Lord Millett explained that:

“Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old ...

The transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment. There is no "unjust factor" to justify restitution (unless "want of title" be one, which makes the point). The claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment. Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is "fair, just and reasonable". Such concepts, which in reality mask decisions of legal policy, have no place in the law of property.

A beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also, and his interest binds every one who takes the property or its traceable proceeds except a bona fide purchaser for value without notice. In the present case the plaintiffs' beneficial interest plainly bound Mr Murphy, a trustee who wrongfully mixed the trust money with his own and whose every dealing with the money (including the payment of the premiums) was in breach of trust. It similarly binds his successors, the trustees of the children's settlement, who claim no beneficial interest of their own, and Mr Murphy's children, who are volunteers. They gave no value for what they received and derive their interest from Mr Murphy by way of gift.”

215. In my judgment, the same is true of a company where its director, in breach of his fiduciary duty to the company, causes its money to be paid away by way of a purported gift by the director to members of his family. The company retains its beneficial interest in the money or its traceable proceeds and can assert that, by way of a proprietary claim, against anyone other than a bona fide purchaser for value without notice. In the case of a volunteer, who gives no value, notice is irrelevant. A volunteer is bound by an equitable proprietary interest regardless of notice.
216. If, contrary to my view, notice is relevant, then the I consider that the burden is on Sajid and Anisha to prove that they did not know about the circumstances which made it a breach of duty for Ebrahim to cause the payment to be made, and I do not think they have proved that.
217. I therefore conclude that the Claimant is entitled to trace the £250,000 into the title to the Brinksway Property. It follows that the Claimant is entitled at its election to a proportionate interest in it or an equitable lien for the £250,000: see *Foskett v McKeown* at p.130.

The cheque payments

218. The Particulars of Claim plead:

“41. Between September 2013 and January 2015, a number of cheque payments were made by the Company to the Defendants as follows:

- a. £107,000 in direct payments to Sajid between March 2014 and January 2015;
- b. £7,000 in direct payments to Anisha between March 2014 and January 2015;
- c. £119,254.27 in direct payments to "Mr & Mrs Dalai" between March 2014 and January 2015;
- d. £310,055.85 in direct payments to "Mr Dala" [sic] between September 2013 and January 2015;

- e. £214,574.68 in direct payments to A & Adam Holdings between December 2013 and January 2015. A & Adam Holdings is a partnership in which the Defendants are the partners; and
- f. £80,799.84 in direct payments to "E. Dalai" between February 2014 and January 2015.

42. Further particulars of the above payments are set out in the Schedule attached hereto at Appendix A.

43. There was no consideration nor other proper reason for the payments. In the premises:

43.1 The recipients of the respective payments hold or held the monies on trust for the Company and are liable to account to it as constructive trustees for the said monies, alternatively in damages/equitable compensation for breach of trust.

43.2 Ebrahim and/or Sajid and/or Anisha were in breach of duty to the Company in causing or allowing the payments to be made and are liable to account to the Claimant and/or in damages/equitable compensation for breach of duty.”

219. The Claimant accepted that some of the cheque payments pleaded in Appendix A were for the supply of chickens by the A & Adams Holdings partnership and abandoned its claim to those. The cheque payments which the Claimant pursued in closing submissions, and my decision on the claim in each case, were as follows.

The payments to Ebrahim with no justification offered

220. The following payments were made by the Company by cheque to Ebrahim for which no justification was put forward.

Date	Amount
13/11/2014	£3,181.43
26/11/2014	£3,231.91
03/12/2014	£3,484.31
10/12/2014	£3,601.13
16/01/2015	£10,875.00
Total	£24,373.78

221. Where a director of a company receives money from the company, the burden is on the director to justify the payment: see *GHLM Trading Ltd v Maroo* [2012] EWHC 61 (Ch), [2012] 2 BCLC 369 at [143-149]. At paragraph 149, Newey J said: “... once it is shown that a company director has received company money, it is for him to show that the payment was proper. In a similar way, it seems to me that, where debit entries have correctly been made to a director’s loan account, it must be incumbent on the director to justify credit entries on the account”.

222. No justification was offered for the payments, and therefore Ebrahim must repay them.

The payments to A & Adam Holdings

223. A payment of £74,895.29 was made to A & Adam Holdings on 22 August 2014 and a payment of £67,223.35 on 9 September 2014. At the beginning of the trial, two documents were produced which I consider made it clear that those were payments for birds supplied to the Company by A & Adam Holdings. Mr Shaw said that there were no purchase orders for those birds, and no invoices. However, I consider that the documents are sufficient without other paperwork to make it clear that the payments were for chickens supplied to the Company. I therefore reject the claim to those payments.

The payments to Sajid and Anisha

224. There were three payments to Sajid. Two of them were for £45,000 and £55,000 respectively and formed part of the £250,000 used to buy the Brinksway Property. The Claimant cannot make a claim in respect of those cheques and also claim an interest in the Brinksway Property.

225. The third payment to Sajid was for £7,000 paid on 16 December 2014. On the same day, a payment of £7,000 was also made to Anisha. In both cases, the payments were intended to be a bonus. No consideration was given for the payments. Given the time at which they were made, and the circumstances in which it was made, I consider it was a breach of duty for Ebrahim to cause them to be made, and that the Company is entitled to be repaid the money, for the same reasons I have discussed in relation to the £250,000 used to buy the Brinksway Property.

Transfer of Company assets

226. The Particulars of Claim made various allegations about the transfer of the business and assets of the Company to the New Company. In the end, the only claim pursued was that if there were Additional Sales Receipts, the Company must have had valuable goodwill which the New Company took over but did not pay for. Mr Shaw asked me to direct an enquiry as to the value of that goodwill. Since I have rejected the claim that there were Additional Sales Receipts, it follows that there is nothing in that argument.

Conclusion

227. In conclusion then, my determination of the claims made by the Claimant is as follows:

- (a) The Claimant is entitled to trace the payment of £250,000 into the title to the Brinksway Property, and must now elect between a lien for that amount, or a proportionate interest in the property. I will give effect to the Claimant's election in the order I make when this judgment is handed down.
- (b) The Claimant is entitled to recover £24,373.78 from Ebrahim in respect of cheque payments made to him.
- (c) The Claimant is entitled to recover £7,000 from Sajid in respect of a cheque payment made to him.

- (d) The Claimant is entitled to recover £7,000 from Anisha in respect of a cheque payment made to her.
- (e) The Claimant is not entitled to any relief against Johra or any other relief against the other Defendants.

Appendix 1 – year ending 30 September 2009 figures

Weight of birds before wastage adjustments			
Number of birds delivered to the Company in year ending 30.9.2009	1,121,336		
Allowance for dead and ill birds	5%		
Deduction for dead and ill birds therefore	-56,067		
Number of birds after that allowance	1,065,269		
Average weight of whole live bird	2	kg	
Total weight of whole birds	2,130,538	kg	
Sales revenue from whole birds			
Proportion of birds sold as whole birds	33%		
Weight of birds sold as whole birds before wastage adjustment	703,078	kg	
Wastage adjustment for whole bird	25%		
Weight of birds sold as whole birds after wastage adjustment	527,308		
Average price per kg for whole birds	£1.75		
Estimated sale proceeds from whole birds			£922,789
Sales revenue from chicken parts			
Proportion of birds sold in parts	67%		
Weight of birds sold in parts before adjustment for wastage	1,427,461	kg	
Wastage adjustment for birds sold in parts	50%		
Weight of the birds sold in parts therefore	713,730	kg	
Average price per kg	£2.37		
Estimated sale proceeds from birds sold in parts			£1,691,541
Total sales from slaughtered birds			£2,614,330
Weight of meat bought for cutting	47,000	kg	
Saleable meat proportion	50%		
Saleable meat weight	23,500	kg	
Average price per kg of cut parts	£2.37		
Sale proceeds			£55,695
Total estimated sales before bad debts allowance			£2,670,025
Bad debts allowance		2%	-£53,401
Estimated sales after bad debts allowance			£2,616,625
Reported sales in the accounts			£2,695,644

Appendix 2 – trading life of the Company figures

Weight of birds before wastage adjustments			
Over whole trading life of the Company			
Number of birds delivered to the Company	13,834,426		
Allowance for dead and ill birds	5%		
Deduction for dead and ill birds therefore	-691,721		
Number of birds after that allowance	13,142,705		
Average weight of whole live bird	2	kg	
Total weight of whole birds	26,285,409	kg	
Sales revenue from whole birds			
Proportion of birds sold as whole birds	33%		
Weight of birds sold as whole birds before wastage adjustment	8,674,185	kg	
Wastage adjustment for whole bird	25%		
Weight of birds sold as whole birds after wastage adjustment	6,505,639		
Average price per kg for whole birds	£1.75		
Estimated sale proceeds from whole birds			£11,384,868
Sales revenue from chicken parts			
Proportion of birds sold in parts	67%		
Weight of birds sold in parts before adjustment for wastage	17,611,224	kg	
Wastage adjustment for birds sold in parts	50%		
Weight of the birds sold in parts therefore	8,805,612	kg	
Average price per kg	£2.37		
Estimated sale proceeds from birds sold in parts			£20,869,301
Total sales from slaughtered birds			£32,254,169
Weight of meat bought for cutting	2,451,000	kg	
Saleable meat proportion	50%		
Saleable meat weight	1,225,500	kg	
Average price per kg of cut parts	£2.37		
Sale proceeds from cut meat			£2,904,435
Total estimated sales before bad debts allowance			£35,158,604
Bad debts allowance		2%	-£703,172
Estimated sales after bad debts allowance			£34,455,432
Reported sales in the accounts			£30,716,557
Difference			£3,738,875
Difference as a percentage of reported sales			12.2%