

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
RE: SHAHI TANDOORI RESTAURANT LTD (co.no.03658338)
AND RE: THE INSOLVENCY ACT 1986

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

Date: 26 February 2021

Before :

ICC JUDGE PRENTIS

Between :

KEVIN THOMAS BROWN
(Liquidator of Shahi Tandoori Restaurant Ltd)

Applicant

- and -

(1) ABDUL MONNAN BASHIR
(2) ABDUL BAHAR BASHIR

Respondents

Faith Julian (instructed by **Charles Russell Speechlys LLP**) for the **Applicant**
Lynette Calder (instructed by **Rainer Hughes**) for the **First Respondent**
Dale Timson (instructed by **Rainer Hughes**) for the **Second Respondent**

Hearing dates: 24-26 November 2020
Further written submissions: 4 December, 11 December 2020

JUDGMENT

ICC JUDGE PRENTIS:

Introduction

1. 40 Beaconsfield Road, Brighton is to the north of the railway station and just to the south of the viaduct carrying the Hastings line. It is an area popular with students rather than day-visitors. In November 1990 the Bashir family opened their Shahi Tandoori Restaurant there, initially run by the father of Abdul Monnan Bashir and Abdul Bahar Bashir, the Respondents. It was successful enough that by 1996 it could expand into number 42 next door from which to operate its dining restaurant, number 40 remaining the takeaway. From 2005 number 42 has been owned by the First Respondent and leased to the restaurant.
2. On 29 October 1998 Shahi Tandoori Restaurant Ltd (the “Company”) was incorporated to take over the business. Two days later the First Respondent was appointed director and Reena Bashir secretary. They are recorded at Companies House as having resigned on 1 January 2014, leaving an apparent gap in directorships as on the same date the Second Respondent, who had been appointed as a director on 2 February 2008, also resigned. Whether those resignation dates are accurate, and what role the Respondents carried out from 1 January 2014, is in issue.
3. The First Respondent was sole shareholder in the Company until 2008. From then he has held 9 of the 12 issued shares and the Second Respondent 3.
4. Although there remains an identically-named restaurant on the site, still run by the family, the Company ceased trading on 31 March 2015.

5. On 14 March 2017 HMRC presented a winding-up petition against the Company in the sum of £362,317. Aside from penalties, interest and surcharges, that was made up of corporation tax based on the Company's returns from the year ends 1999 through to 2009, in a sum in excess of £111,000, and VAT assessments from 31 July 2010 through to August 2014 of more than £135,000.
6. That led one or both Respondents, whether as de facto director or shareholder, to approach an insolvency practitioner, Neil Gibson. Under his aegis a new director of the Company was appointed, Amy Blackham. She had no connection with it or prior knowledge of it, but on 4 April 2017 took the appointment to facilitate the creditors' voluntary liquidation which commenced on 12 May 2017. On 5 December 2018 Kevin Brown was appointed liquidator in place of Mr Gibson.
7. Counsel for the Respondents are right to observe that the corporation tax element of the petition bears very little resemblance either to the Company's filed accounts, or to its trading figures. Mr Brown has not elaborated on the position. However, Ms Blackham in signing off the statement of affairs allowed the petition debt in full, the other identified creditor being Sameer Frozen Food Limited, owed £37,392. There were no assets.

The claim

8. This claim was brought by application notice of 14 June 2019. No pleadings were ordered. The relief as originally described in the notice was for:

“A declaration that the transactions in the sum of £771,918 comprising of monies belonging to the Company retained for the benefit of the Respondents constituted misfeasance within the meaning of section 212 of the Insolvency Act 1986 [“IA86”] and/ or that the total sum of £771,918 remains property that the Company is entitled to under section 234(2) of the [IA86]...”;

together with an order that:

“the Respondents do repay, restore or account and/or contribute by way of compensation to the assets of the Company in the sum of £771,918 on a joint and several basis”.

9. By consent order of 9 January 2020 there was added:

“or in such other sum as the Court thinks fit”.

10. Those sums represent cash which the liquidator says was removed from the Company’s takings over the course of its trading by the Respondents or either of them, without being accounted for in the books.

11. The consent order also added another ground:

“Further, or in the alternative, a declaration that in failing to file, progress, or pursue diligently an appeal and/ or review and/ or challenge against a Notice of Assessment issued by HMRC on 19 August 2014, or cause the same to be done, either in time or at all, the Respondents are guilty of misfeasance pursuant to section 212... and/ or have breached their statutory, fiduciary and/ or other duties to the Company”.

12. The resulting order sought is that:

“...the Respondents do repay, restore or account and/ or contribute by way of compensation to the assets of the Company in the sum of £139,846.92 plus the costs of the Company’s liquidation and such statutory interest as may be due on the debts comprising the Company’s liquidation estate, or such other sum as the Court thinks fit”.

13. The £139,846 is the amount of the 19 August 2014 assessment. Following an HMRC investigation, which I will describe below, that was its calculation of undeclared VAT on its determination of undeclared takings, including £2,409 interest.

14. The grounds are further elucidated in Mr Brown’s evidence.

15. In his first statement he relies on breaches of duties under the Companies Act 2006 (“CA06”) and otherwise in, in the period 1 November 1998 to 31 July 2013:

15.1 “Failing to properly declare the Company’s income to HMRC”, and

15.2 “Transferring property belonging to the Company (namely cash) to themselves for their personal benefit”.

16. The first of these is said to be a breach of section 174 CA06, reasonable care, skill and diligence. Mr Brown goes on to say that this failure to account for VAT “by intentionally concealing a large proportion of its income from HMRC... ultimately led to the Company becoming insolvent”.

17. Except as to its factual aspect of intentional concealment through the filing of inaccurate returns, Ms Julian for Mr Brown has not pursued this point separately at trial. Put in these bald terms, no loss to the Company is identified; on the contrary, what is stated is a preservation of assets through non-payment of a creditor.
18. The second ground has been the kernel of the case at trial. Ms Julian relies principally on its being a breach of section 171, acting within powers, and section 172, promoting the success of the Company.
19. Shortly before trial the Respondents chose to be represented by separate counsel, Lynette Calder for the First Respondent and Dale Timson for the Second Respondent. Although the Respondents' initial witness statement in answer, dated 6 August 2019, was in joint names and signed by both, it is the First Respondent who has made two later, overlapping, witness statements, of 26 November 2019 and 26 October 2020, his third and fourth. The First Respondent was cross-examined, but not the Second: Mr Timson did not call him, and presented no evidence. The First Respondent denies all allegations; his brother has put the liquidator to proof.
20. Although the application notice sought the same relief against each, in his fourth statement of 29 September 2020 Mr Brown accepted that his claim against the Second Respondent inured only for the time he was a director, being from 1 February 2008. The total sought against him under this second ground is therefore £321,252.
21. What the separation of representation emphasises is that the position of each Respondent must be assessed.

22. The third ground is the Company's claim of entitlement to the cash under section 234 IA86. This added nothing, and was not pursued in light of the intervening decision in *Re Charlotte Street Properties Limited* [2020] EWCA Civ 687.
23. The fourth ground is if the Respondents or either of them did not take cash, then they were in breach of their duty of stewardship of the Company's assets for allowing it to be taken by the other or some other. This, then, is an alternative to the second ground. It was explicitly put only in Mr Brown's third statement of 3 January 2020, as "a failure to properly manage and account for the Company's affairs and assets". Aside from engaging that fiduciary duty, sections 171, 173 and 174 CA06 may apply.
24. The fifth ground is the failure to progress the appeal. Ms Julian confirms that this is presented as an alternative to the second ground. In his third statement of 3 January 2020 Mr Brown said that this should be added to the claim because of the Respondents' defence that nothing had been taken, so none of the assessed tax was due. The claim is for the £139,846, being the VAT assessments with interest. Non-pursuit of the appeal is said to constitute a breach of sections 172 and 174 CA06.
25. The Respondents have each raised limitation defences. Those were the subject of further written submissions, and I will deal with them at the end.

The law

26. The law is largely agreed between the parties, and can be dealt with shortly.

27. Section 212 IA86 is a procedural gateway, not a free-standing cause of action.
28. By section 171 a director must “(a) act in accordance with the company’s constitution, and (b) only exercise powers for the purposes for which they are conferred”.
29. By section 172 a director “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” (or, where a director knows or should know that the company is probably insolvent, then for the benefit of its creditors). While the duty is subjective, if no reasonable director could have reached a particular decision then it may be set aside; and where there has been no consideration of an issue, then the test becomes the objective one of “whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company”: *Re HLC Environmental Projects Ltd* [2013] EWHC 2876, [2014] BCC 337 at [92b], drawing from *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62.
30. By section 173 a director must exercise independent judgment, denoting positive independent action in the company’s interests and not, for example, a thoughtless following of the wishes of others.
31. By section 174 a director “must exercise reasonable care, skill and diligence”, being the objective minimum together with his subjective attributes. This is not a fiduciary duty, but one the breach of which would lie in damages.

32. Although an aspect of each of the above duties, a director is anyway under the separate fiduciary obligations to cause the company to keep proper records of its transactions, and to provide an account of his own dealings with company property, of which he is treated as being a trustee. The failure to keep or produce documentary records is not a matter which a director can pray in aid when facing liability for dealings with the company's property: *Re Mumtaz Properties Ltd* [2012] 2 BCLC 109. Once a transaction between the company and its director is demonstrated, the burden is on the director to explain it, albeit that that may be by reference to other evidence: *Re Idessa (UK) Ltd* [2011] EWHC 804 (Ch), [2012] BCC 315; *Toone v Robbins* [2018] EWHC 569 (Ch), [2018] BCC 728.
33. As section 178 preserves the equivalent common law and equitable remedies, the parties agree that where a fiduciary duty has been breached the usual order will be one for equitable compensation, which may require the taking of an account to be accurately, or fairly, quantified.
34. By section 73(1) of the Value Added Tax Act 1994 ("VATA"):

"Where a person has failed to make any returns required under this Act... or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment...".
35. Woolf J described the process of assessment, with reference to the provision's materially identical predecessor, in *Van Boeckel v Customs and Excise Commissioners* [1981] 2 All ER 505 at 507-508:

“...the very use of the word ‘judgment’ makes it clear that the commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them. Clearly they must perform that function honestly and bona fide...

Secondly, clearly there must be some material before the commissioners on which they can base their judgment...

Thirdly, it should be recognised, particularly bearing in mind the primary obligation... of the taxpayer to make a return himself, that the commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgement, is due... What the words ‘best of their judgment’ envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them”.

The witnesses

36. Mr Brown expresses his conclusions from analysing the paperwork, and the reports of his staff. He cannot speak to contemporaneous matters, and his evidence is therefore of little assistance. He can, and does, say that his

investigations have been hindered by the failure of the Respondents to provide relevant documentation and any assistance.

37. His oral evidence had the caution of the experienced officeholder- “I must be careful about how I go about answering”- ever-alert to the possibility of being tripped by Ms Calder’s raking questions. That was not inappropriate in the circumstances. His primary case, that the First Respondent be found liable in the specific figure of £771,918, jointly and severally with his brother as to £321,252, is an upscaling to turnover of HMRC’s assessment of missing VAT. Asked therefore whether he adopted HMRC’s investigation and conclusions in their entirety he said “I recount them. I am not sure I adopt them. I don’t know what you are leading to...”. That nuancing was correct: his conclusion as to liability, as opposed to quantum, is his own, albeit the conclusion is based in large part on HMRC’s findings.
38. So, while a reliable witness, Mr Brown’s evidence is also largely irrelevant.
39. Philip Mortell, who does have contemporaneous knowledge as the investigating officer at HMRC who dealt with the Company, was called by Mr Brown. He has been at HMRC, where he is an investigator, inspector and VAT Consultant, for 30 years. His evidence was calm, dispassionate, and impressive: he listened to the questions and gave straightforward answers, explaining HMRC methodology and approach, and recounting in particular what happened at the important meeting of 26 November 2013. When it was put to him that his notes of the meeting did not comply with HMRC Code of Practice 8, he acknowledged that he was not really aware of that Code, and to subsequent questions described what training was given as to the conduct of

investigatory meetings. He did not pretend knowledge he did not have, nor hide anything (and Ms Calder was careful to stress that she was not saying that COP8 applied directly to the November meeting). I will explore the meeting further below, but say now that where there is a conflict between his evidence and the First Respondent's I have no hesitation in preferring Mr Mortell's.

40. The First Respondent's evidence was characterful, engaging, and unreliable. He was rarely reliant on the translator who had been provided: his comprehension appeared good, and his answers were usually to the point. However, there were times when he responded with repeated negatives to series of questions, closing his ears to them. He also seemed to have a pre-determined story as to the roles in the November meeting: Mr Mortell aggressive, angry and frustrated, desperate to get a settlement offer; John Wood, the accountant, ignorant as to the Company's dealings; the First Respondent bravely standing up for the true position of no cash being removed.

41. That is not a story which begins to hold up. Mr Mortell came across as a relaxed and phlegmatic man. Mr Wood was not "merely a bookkeeper" but the Company's accountant since its incorporation, and before that the business's accountant; a man with (at the time) 23 years of working with the Respondents' family.

42. It is also striking that in a case concerning accounting, the Company's original records have not been handed up by the Respondents. The First Respondent twisted on the availability of these. In his third statement he professed that "We have at our disposal all of the receipts from the relevant period. It would

have been very easy for HMRC to request access to these receipts and tally them against our declared income”, and he proceeds to criticise HMRC for not doing so. Such a clear statement was missing from his fourth statement. Orally it was his position that he is in possession of all sales invoices, except those for 25 January and 28 February, being the dates of HMRC’s undercover visits. “If they want them, I have them”, he said; “If someone asked me to disclose them, I could”. As may be expected, the liquidator has requested the documents, and a disclosure order was made on 24 July 2019. Nothing has been provided.

43. Overall, the First Respondent’s evidence smacked of expediency: stories which best fitted his own current view of matters. Where not controverted by Mr Mortell, it requires analysis against the documents with a quizzical eye.
44. No other evidence was led by either Respondent.

Findings

45. The Company filed VAT returns throughout its trading life. Towards the end of 2012 HMRC’s analysis revealed that its declared turnover was low given its business, anticipated customer level and location. On an annualised basis its years 31 October 2007 to 31 October 2012 (which was also the Company’s year end) each showed declared turnover falling below expenditure. That was of particular concern, as wages were not within VAT inputs, yet must be being met. The Company was selected for investigation.

46. On Friday 25 January 2013 an HMRC Officer, Nick Hilton, collected his takeaway from the restaurant. He was charged £18.10 rather than the £18.30 menu price; and paid in cash.
47. Less than an hour later, Mr Mortell also collected a takeaway and paid £11.15 cash.
48. On 28 February 2013 Mr Hilton and Mr Mortell revisited. This time Mr Hilton and another dined in the restaurant, again paying cash: £42.40, including a £3 tip. Mr Mortell paid £12.80 in cash for his takeaway.
49. These dealings were each recorded by the relevant officer shortly afterwards, Mr Hilton on a standard form, Mr Mortell in his notebook.
50. On 21 June 2013, another Friday, and through into the early hours of the next day Mr Mortell and Mr Hilton made an unannounced visit to the restaurant, commencing at 9.50pm, to observe the cashing up and to discuss the business with an owner. The First Respondent was there. He told the officers that Mr Wood operated the Company's PAYE scheme, but wages were paid in cash, drawn from the takings; if that were insufficient then it would be drawn from the bank by cheque. Weekly wages were in excess of £2,000. In evidence which I do accept, the First Respondent described to the Court one of the difficulties of the business, being the retaining of salaried staff, in particular for the restaurant side, even though trade was lighter in summer, because the students were not there, and on most week nights.

51. The First Respondent told the officers that most meals were paid by card; that prices had changed little over the past few years; and that stock purchases were not by cash but cheque, with overheads by direct debit.
52. The takings that night, “considered average by Mr Bashir” for a Friday says the officers’ note, were £1378 for the takeaway and £610 for the restaurant. The First Respondent stated that either he or a Moynul Islam, a manager, would cash up.
53. The Second Respondent was not apparently on site that night, nor was he mentioned.
54. The 26 November 2013 meeting was pre-booked as a VAT inspection. It was held at the restaurant. In attendance were Mr Mortell, the First Respondent, and Mr Wood to provide accounting assistance.
55. The note we have of that meeting is Mr Mortell’s own, typed up shortly afterwards. It was not counter-signed by the First Respondent or Mr Wood as being an accurate report. Nevertheless, and in the absence of Mr Wood, it is the best evidence we have as to what took place. Mr Mortell was an entirely credible witness, and I can see no reason why this report for internal purposes should be anything other than accurate. It is also consistent with HMRC’s later correspondence.
56. Mr Mortell records being told that business was “flourishing at the moment... this has coincided with an advertising campaign on Juice FM”.
57. Next, he asked

“whether Mr Wood conducted any cash reconciliation exercises as part of his accounting procedures, he advised he did, and for the years 30/10/2011 & 30/10/12 he did have cash discrepancies where cash purchases exceeded cash taken, without cash injection by the director, of £3,600 and £9385.82 respectively. He believed that these were unrecorded sales, but had not yet accounted for the VAT undeclared”.

58. Nowhere do the Respondents address specifically that evidence of unrecorded turnover.

59. Mr Wood gave Mr Mortell the accounts for those years. Seeing the carrying over of losses, he then asked about “the director’s means”. Mr Mortell was told that the mortgage on number 42 was about £100,000, and the monthly repayments on it of “in excess of £800”, and costs, were “just covered” by the monthly rent of £1,000 charged by the First Respondent. Mr Mortell noted the low amounts in the accounts for director’s income: £14,040 in 2010 and 2011, £10,710 in 2012.

“We established that was the only income received by the director, apart from the rental income... We established that the director’s home mortgage had repayments of approx. £1000 per month, which were just covered by the director’s income. On discussing how his family lives (he lives with his wife and 4 children), he advised that their living costs... were just about covered by the child benefits, working family tax credits and child tax credits, approx. £800 per month”.

60. Again, there is no direct challenge to this evidence. I note Mr Mortell's assumption that all recorded directorial drawings were for the First Respondent.

61. Next, Mr Mortell inspected the Company's books and records. There were three parts to these. There were the original order records, written on white paper which carboned onto pink, at least one part of which would be retained. Those would be totalled at the end of the night, bundled up with the total written on the front and inserted in what have been called the Happy Shopper records, which were therefore an immediate record of daily takings. There was then a Cathedral book detailing all takings and expenses. This system is uncontroversial.

62. Mr Mortell reported thus.

“On examining the Cathedral analysis cash book I noted alongside the takings figures there was a capital introduced figure of approximately £8,000 for each quarter. When I raised this I was informed that this was payments by the director for restaurant supplies made on his personal credit card, which was paid off each month. I queried how the director paid these sums, due to the income and expenditure already established. I advised that I was concerned by the discrepancy.

I asked the director and accountant to discuss matters, and left the premises for 10 minutes to give them some privacy”.

63. On his return:

“...I asked whether they had established what had happened and Mr Wood advised that there had been a miscommunication between him and his client and that these figures were in fact undeclared takings, and these takings were not included in the businesses’ declared takings. I asked the director what had happened, and he advised he took cash from the till to cover these expenses. I pressed him as this would lead to an anomaly between the customer bills and the cash/ card takings. He admitted that he destroyed some of the customer bills in order to match the takings to the bills.

Mr Wood advised that this may have been going on for 2½ years. I asked why this length of time, and he could not answer specifically other than it was around this time that the director started paying some suppliers by his personal credit card and reimbursing himself from the till. We all agreed that this was deliberately done and the director was aware that his actions were wrong.

Having established that the business takings figures were understated we agreed that Mr Wood would discuss matters with his client, examine his client’s personal bank and credit card records and try to establish the level of arrears. I advised that it would be helpful if the director also sent in a statement to advise us what procedures he put in place to underdeclare the business’ takings...”.

64. So at the end of the meeting Mr Mortell writes that

“We agreed that Mr Wood would prepare a schedule on underdeclared takings, and a written statement would be drawn up by the director to explain how these underdeclarations had been effected”.

65. There had been one other piece of business. Mr Mortell had sought the bills and takings figures for 25 January and 28 February 2013, to be compared against what he and Mr Hilton had ordered.

“On examination of the meal bills I established that none of these... transactions were in the records. I advised that seemed to lend weight to the fact that there was substantial systematic suppression being undertaken, and that I expected this to be reflected in the revised figures to be produced”.

66. The First Respondent’s account of the meeting has varied. In his first statement he said that Mr Mortell had never shown him the actual bills, was unable to distinguish the dishes, and anyway the price of the dishes did not match that on the menu. He says that at the end of the meeting Mr Mortell was

“insisting that we should offer him a good settlement offer which will make him happy. When I refused to give him an offer without any proof or evidence, he threatened to us to dig this matter further”.

The First Respondent says that Mr Mortell took away with him the business sales records for 25 January and 28 February 2013, and has never returned them.

67. In his third statement the First Respondent says that Mr Mortell “failed to disclose the name of the dishes that were ordered”, and the prices he gave failed to match those on the menu. He says that

“Mr Mortell pressed us to make an ‘offer’, in exchange of which he would ‘stop the matter’”.

This was why, he says, Mr Mortell left him and Mr Wood alone. Mr Wood “also attempted to persuade me to make a concession”, but the First Respondent refused.

“Mr Mortell’s reaction was immediately hostile. Before he left the premises, he made the express threat that he would ‘dig you from the beginning’”.

68. Aside from the change in the naming of the dishes, the chronology of the threat and its terms, the First Respondent says:

“I cannot recall whether Mr Wood did say to Mr Mortell that the Company had underdeclared sales... Mr Wood is not a qualified accountant, but merely a bookkeeper”.

69. That account is matched in the First Respondent’s fourth statement, save that what Mr Wood might or not have said to Mr Mortell is removed.

70. Neither version grapples with what books were shown to Mr Mortell, nor with the point that it was not Mr Mortell’s role to provide evidence to the First Respondent, but the other way round. As Mr Mortell said, until he had evidence he could not know what a proper offer would be; and therefore he

would not be seeking to impose one at this stage, but would instead attend the meeting with an open mind.

71. The First Respondent's oral evidence adopted the last chronology of the threats, and added to them, Mr Mortell swearing at him. He said that Mr Mortell had asked the accountant, and not him, for records, which he conceded Mr Mortell had then looked at. He could not recall whether Mr Wood had said the £8,000 per quarter was undeclared takings, but Mr Wood had not told him that. He said that he had not paid anything personally. He said Mr Mortell took away the records for the two days.
72. Untouched in the First Respondent's evidence are the year-end 2011 and 2012 cash discrepancies identified by Mr Wood; what was represented by the £8,000 per quarter; and what action was to follow the meeting.
73. The last informs the earlier.
74. On 11 July 2014 Mr Morrell wrote to the First Respondent for the first time since the meeting.

"I write following my VAT inspection with you and Mr Wood.

We agreed during my visit that you would prepare a statement detailing the takings omissions from your VAT and Corporation Tax declarations following your admission that the returns filed were understated, and you had omitted to record all or your cash takings in your daily takings records which formed the basis of your VAT return and Corporation Tax turnover declarations. You also agreed that you would provide a detailed schedule of the understated sales.

I have spoken to Mr Wood on numerous occasions chasing up this information. During our last conversation he advised me that you had collected your records from him, and he no longer acted for you.

As I have not heard from you I am making an assessment for the underdeclared output tax on your VAT returns as detailed on the enclosed spreadsheets...”.

75. This assessment was a preliminary warning, giving the Company 30 days for challenge, before being formally raised on 19 August 2014.
76. Mr Mortell was therefore awaiting the statement and schedule, and had been chasing Mr Wood for them.
77. They have never been produced. Neither have the receipts, the Happy Shopper records, or the Cathedral book which the First Respondent retains, and which according to him would prove his position and that of his brother.
78. Mr Mortell sought these documents because Mr Wood disclosed the issues which he had found as the Company’s accountant.
79. At £3,600 and £9,385 the cash discrepancies for the year ends 2011 and 2012 were relatively small, but they were instances of cash expenditure exceeding cash receipts, which could not be.
80. Then there is the approximate £8,000 per quarter in the Cathedral book. Mr Brown described this as a “chimaera”. I disagree. What we know from its description is that this was a balancing figure. It was required to meet what was otherwise an unexplained shortfall between known expenditure and

apparent income. It represented monies which must have come from somewhere. The First Respondent denies they came from him. The only other suggested option is that they came from the Company. That would be consistent in principle with there being cash discrepancies for 2011 and 2012, and with the Company's declared turnover on its VAT returns being insufficient to meet what it required to trade.

81. I therefore have not the slightest doubt that cash was being diverted from the Company.

82. So, consistent as well with my view of Mr Mortell's evidence, I am also sure that Mr Wood did tell him that the £8,000 and the earlier figures were underdeclared takings by way of cash from the till, taken by the First Respondent; and that bills would be destroyed to try to cover the removals. The Respondents have continued to try to cover their tracks by not disclosing the records which they still retain either within these proceedings, or to their advisers: on 29 June 2017 Martyn F. Arthur Ltd, engaged to appeal the assessments, wrote in anger to the First Respondent- "quite frankly I am appalled by your attitude"- noting that they had caused the assessments to be appealed and subject to a statutory review but

"In the absence of any further information from you, the original decision was upheld".

83. The Martyn F. Arthur correspondence is instructive. Early in the retainer, on 30 April 2015 it wrote to Mr Mortell seeking a response to its 1 April letter which had included this:

“The taxpayer believes that the liability has been excessively calculated and that his ‘admission’ was incorrectly interpreted and misunderstood”.

Thus, an excessive liability rather than no liability; and an acknowledgment that something had been said which had wrongly been construed as an admission.

84. That there was a discrepancy appears from the next letter, of 18 May 2015.

“...we have asked the taxpayer to begin quantifying the sums of money that he introduced to the company that were not sales...”.

85. On 27 May 2015 Martyn F. Arthur was seeking documents which are said to evidence those introduced monies.

“The taxpayer has informed us that all his papers were held by JB Wood accountants and subsequently taken by HMRC. Unless HMRC return them to the taxpayer, he will not be able to quantify the amounts he introduced to the company”.

86. Mr Mortell’s reply of 5 June confirmed that the Happy Shopper records

“were returned to the business the week after the visit of 21 June 2013, as the business would need them to submit the VAT return for period 7/13. I have spoken to Mr Wood, he advises that he did not send any records to HMRC, he sent the client’s records to his new agent Iqbal Sadeque & Co”.

He then gave essentially the same account of the November meeting as is above.

87. Following another enquiry, on 19 June 2015 Mr Mortell confirmed they had been “returned by hand to the restaurant on 24 June 2013”.
88. Mr Mortell’s assessment was that the Company owed £139,846 in VAT, being £137,437 plus interest, from the commencement of its trade to 31 July 2013. As explained in his 11 July 2014 letter, Mr Mortell was taking the First Respondent at his word when assured that “you would cease to admit cash sales from your takings records”. Hence Mr Mortell assumed that the Company’s next VAT return, to 31 October 2013, was correct, and also that to 31 January 2014. Mr Mortell then calculated by reference to the Company’s earlier returns that these returns showed an increase in turnover of 25.47%. Having satisfied himself that there was no obvious point at which non-declaration of turnover had commenced, Mr Mortell then applied this figure to all returns up to 31 July 2013.
89. In cross-examination Mr Mortell confirmed that all his calculations had been carried out in accordance with HMRC guidance, and that his conclusions had been checked by a manager. He acknowledged that the Company’s turnover had risen and fallen, on occasion dramatically, but insisted that in his professional and experienced view, what was shown was a reasonably consistent pattern. I see no reason to doubt Mr Mortell’s evidence, and this trial is not a backdoor appeal against his decision,
90. The conclusion that cash was taken is supported by the VAT returns of 31 October 2013 and 31 January 2014. They showed outputs at a level never before declared. To look back a year, the previous four returns had shown (going backwards) outputs of £70,915 and inputs of £51,492; £66,529

(£77,637); £70,915 (£51,492); and £66,529 (£77,637). October 2013 had outputs of £83,302 and inputs of £73,390; and January 2014 outputs of £84,434 and inputs of £55,231. In very rough terms, inputs were at similar levels, but outputs much higher.

91. The only potential explanation for this rise was one offered at the 21 June 2013 meeting: there had been recent advertising on Juice FM. In their first statement the Respondents also led this:

“The reason we have more sales in last two quarters was because we had promotional marketing offer in Radio and local newspaper in that period which help us having more sales...”.

92. In his third statement the First Respondent said the campaign had started in about 2012 and had stretched over telephone directories, the Friday-Ad, the Evening Argus, Juice FM, hand-delivered leaflets and offers for diners.

“The campaign showed promising results from an early stage. In particular, the restaurant-side of the business saw remarkable improvement”.

Set against that “the price of raw material tripled or quadrupled”.

93. This does not explain fully the abrupt rise in turnover to the quarters 31 October 2013 and 31 January 2014. The campaign had commenced in 2012- there is a receipt for a Friday-Ad advertisement on 26 October 2012- and on the First Respondent’s own case had early results.

94. Neither does the contention that only a “very small portion of our sales... less than 10%” would be in cash take us very far, absent disclosure of the records.
95. Thus I am satisfied that there has been an illicit removal of cash from the Company in the period to 31 July 2013.
96. Understandably given the defences, no period at which this may have started has been identified by the Respondents. On the slight evidence we have, there is no clear point at which it did so; even Mr Wood was unable to give specific details of why he thought the practice had started about 2½ years before the November 2013 meeting, and despite requests no elaboration was ever forthcoming to HMRC. I therefore conclude that it is likely to have occurred from the commencement of trade until 31 July 2013.
97. As to who was responsible, the First Respondent was a director throughout; he was sole shareholder until 2008 when then Second Respondent joined him; and he remained a 75% shareholder, the Second Respondent holding the balance. He has given oral evidence. Neither he nor the Second Respondent has identified anybody else who may have taken the money. The Company’s only other director within the period was Moynul Haque; he only held office between 1 February 2002 and 6 January 2003, and has been unmentioned.
98. On his own case the Second Respondent was director for over five years. He was not present at the June 2013 visit, nor the November 2013 visit. He has had no obvious involvement in the Company’s business, save for approving its annual accounts.

99. Nevertheless, he must have been appointed and remained a director, and given shares, for some reason; it is not disputed that he was involved in the business, at the least from his appointment until its cessation on 31 March 2015; and it is for him, as fiduciary, to explain himself and the Company's business, which he has chosen not to do.
100. He is also someone who on the face of the documents has acted in lock-step with his brother. They and Reena Bashir are said to have resigned on 1 January 2014, although the resignations were only filed on 27 December 2016. There is no reason to think that either brother resigned on that date: the business continued to run for another 15 months, and nobody else is said to have managed it. By decision of the board, specified as directors in the plural, the Company's 2013 accounts were approved on 31 July 2014; its 2014 accounts on 27 February 2015; and its accounts for the period to 31 March 2015 on 27 December 2015. At some point in 2015 the Company appointed a new accountant, Iqbal Sadeque, in place of Mr Wood. In August 2014 it had appointed VAT Consultants Ltd to challenge the assessment, and subsequently Martyn F. Arthur. In January 2015 Jeremy Knight & Co LLP had been approached to provide insolvency advice. Mr Knight is a very experienced insolvency practitioner, and his engagement letter of 7 January 2015 was addressed "To the Directors".
101. The filing of these backdated resignations in December 2016 therefore seems to me another example of expediency; and one to which the Second Respondent is a party.

102. It is inconceivable that the First Respondent was not involved in the removal of cash. Given that it extended over the entirety of the Second Respondent's directorship and that he was involved in the running of the business with his brother, I also find it highly improbable that he was not in receipt of it as well. Such diversions were outside the proper uses of the Company's money and could never have been considered in its best interests, solvent or not.
103. Alternatively on this evidence, even were the First Respondent the sole recipient, the Second Respondent would be liable for a failure of stewardship, in knowingly permitting the Company's monies to be so paid away without due accounting, and/ or for a failure to exercise independent judgment.
104. The Respondents accept that if I find direct receipt there is no limitation defence: section 21(1)(b) of the Limitation Act 1980 ("LA80"); *Burnden Holdings (UK) Ltd v Fielding* [2018] UKSC 14, [2018] AC 857.
105. Neither would any limitation defence be open to the Second Respondent on the alternative analysis. Apart from his being a party to the first witness statement, he has provided no positive assistance to the liquidator: there has been a deliberate concealment within section 32(1)(b) LA80, or under section 32(2), in circumstances where no independent board was appointed which could discover the truth until 4 April 2017: see *Haysport Properties Ltd v Joseph Ackerman* [2016] EWHC 393 (Ch), [2016] BCC 676.
106. No findings are therefore necessary on the liquidator's alternative case of failure to prosecute an appeal. As has already been mentioned, the evidence is that Martyn F. Arthur did cause an appeal and statutory review to be lodged, which failed because the Respondents did not provide the necessary

information. However, Deputy Judge Barnett's order of 18 October 2019 also gave the Respondents until 6 December 2019 to appeal to the FTT. That they did on 5 December 2019, accompanied by an application for permission to appeal out of time. In the event the appeal was dismissed as the Respondents had no locus, and the liquidator did not wish to take it over.

107. I think that points up what would have been one of the difficulties with this alternative case: from the moment the Company entered liquidation, the ability to appeal no longer rested with the Respondents. Further, it was always open to the liquidator to adjudicate on HMRC's proof of debt and, if he thought fit, to exclude the assessed amount and its consequential. That he would be unable sensibly to do either of these things, because he had no documents, does not support this claim, but rather a claim, which has not been made, based upon the failure to provide documents.
108. I add that I am not convinced that this head of claim demonstrates any loss to the Company anyway. It had no assets on liquidation. A successful appeal would not have given it any more assets, but would serve only to reduce its liabilities.
109. To what remedy is the liquidator entitled?
110. Ms Julian has argued vigorously that liability against the First Respondent should be for £771,918, jointly and severally with the Second Respondent as to £321,252; in other words that it should be aligned with HMRC's findings.
111. With respect, that seems to me wrong in principle. The liquidator is seeking equitable compensation. Mr Mortell was not engaged in assessing that, but in

carrying out his functions under the VATA. That is neither the same, nor even, at this stage, an equivalent. For example, as Ms Calder and Mr Timson underline in their spirited submissions, Mr Mortell agreed that his concern was outputs but not inputs.

112. On the evidence this is not a mere dry point. The figures for missing cash from the 2011 and 2012 accounts of £3,600 and £9385 were discovered because purchases for the Company had been made in those sums. Likewise, the £8,000 per quarter was to balance spending of that amount by the Company. So it appears that at least some of the cash taken was ultimately used for the Company's benefit. I add that it would not, of course, follow that all such sums had been so used.
113. The imposition of a flat rate of removal over the relevant period also seems to me inappropriately clumsy where the Company's business was some years more successful than others, and where its advertising campaign had led to an upturn in sales.
114. Thus the natural relief is for the taking of an account. I will so order, and will hear counsel on appropriate directions.
115. I make that order fully aware that this trial was intended, if it could be, to be conclusive; that the taking of an account will be additional expense, albeit one which an appropriate costs order can mollify; and that the Respondents have already had full opportunity to comply with their fiduciary obligations by producing the books and records, and have not yet done so.

116. I add this. Should it be the case that the Respondents continue to refuse to produce the Company's books and records and all other relevant information, then the Court may be constrained to arrive at the best figure it can in the circumstances; and at that stage I anticipate that, at least as to outputs, the best, swiftest and cheapest evidence it will have is likely to be Mr Mortell's, founded as it is in HMRC's expertise.