

ENGLAND AND WALES / JUDGMENT

Bhullar v Bhullar & Ors

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Neutral Citation Number: [2017] EWHC 407 (Ch) IN THE HIGH COURT OF JUSTICE CHANCERY DIVISION MANCHESTER DISTRICT REGISTRY Case No: C30MA082 Manchester Civil Justice Centre, 1 Bridge Street West, Manchester M60 9DJ Date: 2 March 2017 Before: HIS HONOUR JUDGE STEPHEN DAVIES SITTING AS A JUDGE OF THE HIGH COURT Between :

- ----- INDERJIT SINGH BHULLAR
- and – Claimant
- (1) JATINDERJIT SINGH BHULLAR
- (2) BHULLAR DEVELOPMENTS LIMITED
- (3) BHULLAR BROTHERS LIMITED Defendants
- -----
- ----- LESLEY ANDERSON QC (instructed by Excello Law, London WC2)
for the Claimant PAUL CHAISTY QC & ANDREW GRANTHAM (instructed by Mills & Reeve,
Manchester M1) for the First Defendant Hearing dates: 10, 11, 12, 13, 16, 17, 18, 19 January
2017 Draft judgment circulated 3 February 2017
- ----- JUDGMENT APPROVED His Honour Judge Stephen Davies:
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Introduction

1. 2. This is a derivative claim brought by the claimant Inderjit Singh Bhullar, referred to as “Inder”, on behalf of two limited companies, the second defendant (“BDL”) and the third defendant (“BBL”) against his brother the first defendant Jatinder Singh Bhullar, referred to

as “Jat”. Inder sought permission to make two derivative claims but Morgan J. granted Inder permission to bring only one of those claims, referred to as the Torex claim and also declined to make a pre-emptive indemnity as to costs in his favour. The judgment of Morgan J. is reported at [2015] EWHC 1943 (Ch). It begins with a summary of the significant individuals and companies involved in this case and of the Torex claim, which I gratefully adopt and repeat here. “[4] This case concerns three family owned companies. The three companies are Bhullar Bros. Limited (“BBL”), Bhullar Developments Limited (“BDL”) and Bhullar Limited (“BL”).

- [5] BBL is a private company, incorporated on 22 October 1964. At all material times, BBL has carried on the business of property development. In addition, BBL owns 50% of the issued share capital of Silvercrest Trading Limited.
- [6] BDL is a private company, incorporated on 5 November 1998. At all material times, BDL has carried on the business of property investment and development.
- [7] BL is a private company, incorporated on 2 March 2005. BL owns all of the issued share capital of BBL and BDL.
- [8] The family in question is the Bhullar family and the members of that family relevant for present purposes are the father, Sohan Singh Bhullar (“Sohan”), who died on 5 September 2008, the mother, Rajinder Kaur Bhullar, (“Rajinder”) and their two sons, Inderjit Singh Bhullar (“Inder”) and Jatinderjit Singh Bhullar (“Jat”). Satwant Kaur Sandhu, the sister of Inder and Jat, has provided a witness statement in connection with the present application.
- [9] The 1,132 issued shares in BL are owned as follows: Inder has 244 shares (22%), Jat has 466 shares (41%) and their mother, Rajinder has 422 shares (37%); these percentages are stated to two significant figures. Prior to Sohan’s death on 5 September 2008, Sohan and Rajinder held some 57% of the shares in BL.
- [10] The position as to the directorships of the three companies is as follows: Sohan was a director of BBL, BDL and BL until his death on 5 September 2008; (1)
 - (2) Rajinder has been a director of BBL from 24 July 2007 until the present, a director of BDL from 3 August 2000 until the present and a director of BL at all material times until the present; Jat has been a director of BBL, BDL and BL at all material times; and Inder was a director of BBL, BDL and BL until he was removed from office on 28 April 2011. (3) (4) The allegations of wrongdoing [11] [12] [13] Inder makes a number of allegations of wrongdoing. The allegations are directed principally against Jat. These allegations fall into two categories. The first category concerns certain payments to a company, Torex Developments Limited (“Torex”) and the second category concerns the transfer to Jat of a property, referred to as Southgate B. In June 2006, Jat acquired Torex, an off the shelf company. At all material times, Jat has been the sole shareholder and director of Torex. Torex commenced trading in around June 2007, carrying on the business of property development. Inder says that Torex is therefore a direct competitor of BBL and BDL but he does not identify any

specific business activities of Torex in relation to which a remedy is claimed. The payments made to Torex which fall into the first category of allegations of wrongdoing are: on 24 September 2007, BBL made a payment of £440,000 to Torex; (1) between 24 September 2007 and 27 September 2007, BDL made 16 payments to (2) Torex, totalling £196,000; on 21 August 2008, BDL made a payment of £335,446.37 to Torex. (3) Inder contends that these payments were made by BBL or BDL, as the case may be, as gifts to Torex. Jat contends that the payments were by way of loans and that £140,000 has been repaid to BBL (on 4 January 2008) and approximately £33,000 has been repaid to BDL (during 2009). Inder contends that if the payments were by way of loans, then they were not recorded in the books of BBL or BDL, were unsecured and no terms as to payment of interest or repayment of capital were agreed. Further, BBL was borrowing from its own bank in order to make payments to Torex. The amount still outstanding, ignoring interest, is £798,256.37. It is also said that Torex now has very significant debts and is likely to be unable to repay these loans, if that is what they were. Although Inder was at the relevant times a director of BBL and BDL he was not involved in any way with these payments to Torex. He contends that these payments by BBL and BDL to Torex were without the approval of the board of directors of BBL or BDL and 2 Further investigations have revealed that she was appointed a director of BBL in March 2007. Further investigations have revealed that she was also appointed a director of BL in March 2007 – although the process appears to have been repeated in September 2007 – see [50] below. without any approval by a resolution of BL (as sole member of BBL and BDL) and involved breaches of fiduciary duty by the other directors of BBL and BDL (to the extent that they were involved), including Jat. Further, Jat did not declare his interest in these transactions to the board of the relevant company, which at the relevant times included Inder.

[14] ... [15] Inder contends that BBL and BDL have suffered loss by making gifts, or unsecured and interest free loans, to Torex. Inder seeks an account and inquiry in relation to the losses made by the relevant company and/or of the profits made by Jat.” 3. By way of further introduction I record that:

- (1) BDL and BBL are, for obvious reasons, parties to the claim, but have not been represented nor taken any active part in the claim.
- (2) As Morgan J. noted later in his judgment, this claim is part of a wider dispute between Inder on the one hand and Jat and Rajinder on the other. Unless that overall dispute is compromised following this trial it is highly likely that a shareholder action under s. 994 of the Companies Act 2006 will follow. Although, as Morgan J. also noted, it would have been possible for Inder to have litigated this dispute as part of a s. 994 action, he rejected the submission made to him by Mr Chaisty QC and Mr Grantham on behalf of Jat that permission to bring this claim should be refused on that basis. He said this: “[44] In relation to Mr Chaisty’s submission that I should refuse Inder permission to continue this derivative claim, I accept that it would be open to Inder to bring section 994 proceedings and in the course of those proceedings to ask the court to determine the issues raised in the derivative

claim. However, I do not accept that I should refuse permission to Inder to pursue the derivative claim on this ground. The issues in the derivative claim (even if one included the claim in relation to Southgate B) are relatively narrow and self-contained. The issues in section 994 proceedings would be significantly wider. Section 994 proceedings would be slow and expensive if they proceeded all the way to a trial. Both parties would be very well advised to compromise section 994 proceedings long before any such trial. I can see that there would be a real advantage to Inder if he were able to establish what he alleges in the derivative claim before negotiating a formal split between himself and Jat. [45] I am also satisfied that Inder is acting bona fide in wishing to pursue this derivative claim. If the claim succeeds, BBL and BDL will benefit. Inder will also benefit as a shareholder in BL, the holding company of BBL and BDL. The fact that a successful derivative claim will also be of benefit to Inder in negotiations with Jat as to a formal split does not mean that a derivative claim is not bona fide on the part of Inder. I think that it is likely that Inder's wish to pursue a derivative claim is significantly influenced by his hope that he will be awarded a pre-emptive indemnity as to costs in relation to the derivative claim whereas he could not expect such an indemnity in relation to section 994 proceedings. I will later consider whether it is appropriate in this case to grant a pre-emptive indemnity. However, at this stage I can say that Inder's hope that he will be granted such an indemnity does not mean that he is not acting bona fide in pursuing a derivative claim."

- (3) One particular dispute which may well figure in any s. 994 claim relates to the shareholding in BL, referred to at [9] of Morgan J's judgment. Inder disputes the transaction by which Rajinder transferred Sohan's shares from his estate to herself and Jat but not to him, but accepts that this is not an issue for this case.
- (4) The amounts advanced by BDL to Torex and repaid by Torex, referred to at [12] and [13] of that judgment, have been updated following further disclosure provided by Jat. Save for a minor dispute as to one payment of £500 they are agreed.
- (5) A further family member who has also now provided a witness statement and given evidence in this case is the fourth child and second daughter of Sohan and Rajinder, Jaswant Athwal. Both Satwant and Jaswant married and moved to the USA, where they still live, although following their respective marriages and moves they both remained in regular contact with, and regularly visited, their family in Huddersfield. (6) Sohan's death on 5 September 2008 was due to a brain tumour, which had been first discovered some 2 years earlier in summer 2006. He was advised when it was discovered that it was inoperable and that his probable life expectancy was around 18 – 24 months. Although as time went on the tumour affected him physically it appears that his mental faculties were unaffected until very shortly before his death. By 2006 I am quite satisfied that the relationship between Inder and Jat, which had always been difficult, was a poor one. The events of 2006 through to 2008 must be viewed in the context that all members of the family were aware that once Sohan died it would be very difficult, if not impossible, for Inder and Jat, as men then in their 40's with their own wives and families, to work together in the family business in co-

operation without Sohan's continued presence as family patriarch to keep their rivalry and antagonisms in check. 4. BBL was incorporated in 1964 to run the retail grocery business which had been carried on by Sohan and his brother Mohan in partnership in the Huddersfield area since the 1950s. Sohan and Mohan became the first directors. Over time BBL expanded into the acquisition of properties in the Huddersfield area, including an investment property known as Springbank Works. On 1 February 1995, Inder, Jat and their cousin, Kalvinder (known as Tim) became directors of BBL. Inder had enjoyed a university education, and appears to have concentrated on the financial side of the business, whereas Jat, who had not, was more involved in the operational side of the business. 5. By May 1998 relations between the respective sides of the family had soured. Attempts were made to reach a negotiated division of the business but failed, as a result of which Mohan and Tim brought proceedings in the Leeds Chancery District Registry for minority shareholder relief pursuant to what was then s. 459 Companies Act 1985. The evidence in this case indicates that whilst Sohan and Jat were keen to compromise Inder was determined not to do so and ultimately Sohan and Jat went along with his wishes, apparently at the instigation of Rajinder. The trial came on before HHJ Behrens in May 2002 and Sohan's side of the family were successful in defeating the s. 459 claim. However Inder and Jat's defence failed in relation to one discrete element of the claim and their appeal against the order was dismissed by the Court of Appeal in March 2003 – reported as *Bhullar v Bhullar* [2003] EWCA Civ 424. That element of the case related to BDL, initially known as Silvercrest Trading (GB) Limited (not to be confused with Silvercrest Trading Limited, the scrap steel and trading subsidiary of BBL - of which more later), which was incorporated in November 1998 by Inder and Jat to acquire and hold as an investment for their retirement a commercial property known as White Hall Mill which was on a site adjacent to the Springbank Works. HHJ Behrens held, and the Court of Appeal agreed, that they had acquired this property in breach of their fiduciary duty owed to BBL as directors of that company. That is material for two reasons. First, because it shows that Inder and Jat must as a result of their involvement in this case have become more aware than most directors in their position as to the full rigour of the fiduciary duties owed by directors to their companies. Second, because the evidence in this case shows that Sohan was particularly infuriated to discover that his two sons had undertaken a business venture without involving him, contrary to what he regarded as an inviolate family principle that all business ventures should be undertaken by all of the family or by none of them. In order to assuage his annoyance, and as part of the restructuring entered into to buy out the Mohan family interest in BBL and the claim in relation to White Hall Mill, Inder and Jat agreed to and did transfer BDL into family ownership. BL was incorporated in 2005 as a holding company to acquire the shares in BBL and BDL so as to facilitate the re-structure and buy-out of the Mohan family shares in April 2005. Its initial directors were Sohan, Jat and Inder. Sohan held 443 shares, Rajinder held 200, and Inder and Jat held 244 each. From the evidence I have heard in this case, as to which there was no real dispute, although Rajinder was by no means someone who would always do what her husband told her to do immediately and without question, and might on occasions persuade him to change his mind, ultimately she would follow her husband's

bidding in relation to business decisions. Thus Sohan, with the backing of Rajinder, held a majority controlling shareholding interest in BL. The Bhullar family were accustomed to bank with Barclays Bank, to use the professional services of Simpson Wood accountants for accountancy work, and to use the professional services of Baxter Caulfield solicitors for legal work. It is clear from the documents that when they were engaged in transactions which required formal documentation, including documentation relating to board and shareholder meetings, such as in the context of the dispute with the other side of the family and the restructure, that documentation would be produced by the bank or Simpson Wood or Baxter Caulfield, and executed as required by such of the four family members as needed to do so. Otherwise the evidence shows and I find 6. 7. that decisions were not documented other than insofar as they happened to be referred to in contemporaneous correspondence. 9. There has been some dispute as to how business decisions were taken. I am satisfied there was no fixed pattern. What I am satisfied about is that Sohan was old-fashioned in regarding matters of business as being only for the men of the family. Thus although Rajinder was a shareholder in BL she did not become a director until 2007 and only then in circumstances where – as she said and as I am satisfied – Sohan wanted her to take his place after his death to support Jat against Inder. I am also satisfied that whilst Sohan might well consult Rajinder for advice before making decisions, particularly where the decision was in part business related and in part family related, as it would be where he would have to decide how to treat his two sons in the context of the family business, ultimately he would expect her to go along with his decision and she would do so.

10. As regards his sons, Sohan was also old-fashioned in that he also expected them to accept his decisions once made. I am satisfied that he would consult with his two sons in relation to matters of business, and there would be discussion and sometimes disagreement between them, but that he would expect them to accept and abide by his final decision. I am satisfied that although Jat was always willing to do so Inder was more independent and became increasingly prepared to refuse to back down. Both Sohan and Inder were clearly extremely strong willed, so that the possibility for conflict increasingly arose, especially after 2005 by which time it appears that Inder felt that he ought to be stepping into his father's shoes as chairman of the family business whereas Sohan and Jat were not prepared to allow him to do so. 11. I am satisfied that it never happened that all four family members would hold regular meetings, whether formal or informal, to discuss and agree business matters. I am satisfied that sometimes Sohan might speak to Inder and Jat separately and sometimes together, and that occasionally that might be at the family home, where at the time of the events in question Inder and his family still lived, whereas Jat and his family lived in their own house. I am satisfied that the men might have discussed business at the family home over tea or lunch and that on such occasions Rajinder might be present and participate. However I do not accept that this would have been regarded as necessary or that it would have been common, unless it was in the context of a part business and part family matter. I am satisfied that no-one contemplated taking notes of these discussions or meetings. If anything was discussed or agreed or decided upon which needed accountancy or legal input

a meeting would be arranged with Simpson Wood or with Baxter Caulfield as appropriate. If it involved the bank it would typically be left to Inder to arrange. 12. Following the family buy out in late 2005 the retail grocery business of BBL was sold to various third parties including the Co-op, although BBL retained ownership of the shop premises from which the businesses were carried on and let them out to the grocery operators. At this stage I am satisfied that Sohan took the decision to reduce his involvement in the family business, leaving more control to his sons. At the same time decisions had to be taken about the direction(s) in which the family business was to go. There were a number of commercial properties which were tenanted, most notably the former retail premises, a shopping centre known as Salendine Nook where the company offices were located, as well as Springbank Works and White Hall Mill, and all these needed managing. It appears that Inder effectively assumed this function and, much to Jat's annoyance, started to view himself as acting chief executive. It also appears that it was recognised to be beneficial for tax reasons to invest the receipts from the sale of the grocery businesses in other business ventures, and both Inder and Jat were interested in going into residential property development. To that end, in October 2005, BDL changed its name to its current style to reflect that decision.

13. At around the same time Inder became aware of a business opportunity to become involved in trading in scrap metal and other trading activities by way of a joint venture with two other men, Mr Haleem and Mr Soni. There was considerable dispute about the precise details and circumstances of this. It was Inder's case and evidence that Mr Haleem was known to Jat as well as him and that this was very much a joint decision and always intended to be a family venture. It was Jat's case and evidence that Mr Haleem was Inder's contact and Inder's business opportunity, even though Jat was quite interested in the opportunity because he thought that it had the potential to be far more profitable than property development. There was also evidence that Sohan did not like or trust Mr Haleem or Mr Soni, and nor did Rajinder, who both thought that it was a very bad idea to go into business with non-family members. However what cannot be disputed is that in July 2005 a company known as Serveright Limited was incorporated, which changed its name on 23 January 2006 to Silvercrest Trading Limited ("Silvercrest"), which is around the same time as it opened a bank account and commenced business. Its directors were Inder, Jat, Mr Haleem and Mr Soni, all of whom were appointed, according to such company records as there are (see D2/523) in July 2005. BBL owned 2 of the 4 issued shares and Mr Haleem and Mr Soni 1 share each. Thus, whilst there is a dispute about whether this reflected the position as understood by Jat, on the face of these records and further documents to which I shall refer later this was still very much a family business, although one in which the family had an equal interest with the two outside parties.
14. Thus by late 2005 / early 2006 the position was that in addition to BBL and its business interests there was BDL which owned White Hall Mill and which was intended to be the vehicle for further family property development, and – at least on the records - Silvercrest which was 50% owned and controlled by BBL and which was intended to be the vehicle for a family trading business as a joint venture with Mr Haleem and Mr Soni. 15. I must now turn

to and determine the important factual matters in dispute. As with many if not most inter-family business disputes there are a large number of fiercely contested matters, not all of which are directly relevant to the issues in dispute, although they could all at one level be said to be relevant to the credibility of the various family members who gave evidence. However many such issues are not the subject of any contemporaneous documentation or evidence from non-family members upon whose disinterested evidence the court can safely rely. In the circumstances and given my assessment of the various witnesses, to which I now turn, there is nothing to be gained and much time and effort to be lost in seeking to resolve such matters and I therefore do not do so. The witnesses

16. The principal witnesses are Inder and Jat. They are both intelligent men who have, sadly, fallen out irretrievably over the running of the family business in the years preceding and following the death of their father. The end result is that each has become convinced that the other is a liar who has defrauded the family business and each is so determined to win this and any future litigation between them that they are unable to give evidence with any real detachment. Therefore, I am unable to accept the uncorroborated evidence of either as wholly genuine, objective or reliable.
17. As regards Inder, he said early in cross-examination that he had “practically 100% confidence in his recollection of events” because he had “lived it and dreamed it all the time”. That is a perfect description of someone who has become so identified with his case, and so convinced that he is in the right and his brother in the wrong, and that everyone else who does not agree with him is lying, that he is unable to distinguish between his genuine independent recollection of the detail of events and what he has convinced himself happened. Mr Chaisty submitted that there were many occasions where he attempted to avoid answering difficult questions by making long and impassioned speeches, and I agree with that criticism. Mr Chaisty also suggested to him in cross-examination and submitted that he does not have, and never has had, any genuine belief in this claim, which is simply: (a) a smokescreen to divert attention from his own alleged defalcations in relation to Silvercrest; (b) a crude attempt to exert pressure on Jat and Rajinder to improve his position in the underlying dispute as to his overall financial entitlement in relation to the Bhullar family business. I reject that submission. I do not consider that this claim, and Inder’s evidence, is a dishonest charade designed to divert attention from Silvercrest. I am satisfied that Inder passionately believes that Jat has, in effect, stolen monies from the family companies and ought to be forced to repay them. I do accept that there was a strong tactical element in bringing this claim as a separate claim which has, however, rather backfired on him due to the refusal by Morgan J. to make a pre-emptive costs indemnity order in his favour. As he frankly conceded in cross-examination, had he known that this was the case he would not have issued this as a separate claim and litigated it instead as part and parcel of a s. 994 claim. That does not, however, in any way invalidate the claim, nor in my view does it have any particular impact on his credibility.

18. As regards Jat, he did come across to me as a more reasonable person in the round, but again I am satisfied that he had let his personal feelings against Inder taint his recollection of events. Most significantly in my view was his failure to make reference to what are now very important elements of his case in previous correspondence and in his first witness statement. He attempted to blame his previous solicitors for the errors and omissions in his first witness statement. I accept that there is some reference in his second witness statement to his first witness statement having been prepared in a rush. However that does not in my view come anywhere close to explaining his failure to mention these matters in his first witness statement and he was unable to provide any sensible explanation as to how he had come to recall these important issues to include them in his third witness statement. He is, as I have said, an intelligent man who I am satisfied clearly knew that this was an important issue in the case. If what he now says happened had indeed happened then I have no doubt he would have told his previous solicitors, who would have put it in the correspondence and witness statements. I regret to say that I am satisfied that he has altered his evidence once he became aware that unless he was able to give evidence to this effect his prospects of successfully defending the case were adversely affected. I am satisfied that he has persuaded himself that this happened under the pressures of the litigation.
19. 20. I am also unable to place any more weight on the evidence of Rajinder. She has clearly sided wholeheartedly with Jat, on the basis that this is what Sohan had done in 2007 and 2008 and would have done had he still been alive, and I am satisfied that her evidence suffers from the same unreliability as does that of her two sons. I am quite satisfied that she has discussed this case extensively both with Jat and with Jat's wife and also with Jaswant, and that – without deliberately concocting a false story – she has come to believe that what they all now wish had happened did happen, so that I am unable to place any more weight on her evidence than I do on Jat's evidence. In my view she is an intelligent woman of strong views. At times she claimed to have an impaired recollection of events, but it was noticeable that when she was asked a question which she knew might be adverse to Jat's case she very quickly gave an answer which supported his case. As with Jat, the most significant change in her evidence was from her first two witness statements to her third witness statement, where for the first time she claimed to have been told by Sohan that he had told Inder of his decision to allow Jat to borrow money for Torex, and that Inder had agreed. In her case she did not even have the explanation available to her that her earlier statement had been taken by Jat's previous solicitors, since her second substantive witness statement had been taken by Jat's current solicitors, but still made no mention of this. Even more remarkable was her evidence for the first time, when pressed about this in cross-examination, that she had been in the house when this conversation had taken place and that Sohan had told her what had happened immediately afterwards.
21. The evidence of the sisters was also affected by the family fall out, with Satwant rather siding with Inder and Jaswant rather siding with Jat and Rajinder, and in my view with the reliability of both of their evidence being skewed in consequence. I am unable to accept that either now had any very clear or reliable recollection of events occurring in 2005 – 2008 in

relation to matters of business, in which they were not directly involved and in respect of which they had no real interest in comparison with their more immediate personal family problems in the USA. Satwant however had limited her evidence to an account of one family lunch in September 2007. Although I do not accept her detailed account of that lunch as reliable, and suspect that it emanates in large part from her subsequent discussions with Inder, I do nonetheless accept her evidence as to the essential gist of what happened as being consistent with my assessment of the evidence overall and my assessment of the inherent probabilities. I found Jaswant's evidence in relation to the key areas of dispute to be insufficiently reliable to place any significant weight upon. She had not limited her evidence to matters about which she could speak directly and I am quite satisfied she had allowed herself to be used to give detailed evidence on matters which represented her understanding of what Jat and Rajinder's case was, in the belief that in so doing she was supporting her late father, rather than because she had any real recollection of events.

22. The consequence of all this is that I have had to make findings by reference primarily to the contemporaneous documentary evidence, by reference to the witness evidence of those other witnesses from whom I heard and whose evidence I accept as broadly reliable, and by reference to my assessment of the inherent plausibility of the accounts given by the witnesses in relation to each of the important issues in dispute. 23. 24. I heard from Stephen Newman the commercial solicitor at Baxter Caulfield who had been involved in negotiations involving the parties about a division of the family business in 2007. I did gain the impression that he had little time or sympathy for Inder, perhaps not surprisingly given Inder's subsequent complaints against him and his firm for continuing to act for the Bhullar companies and for Sohan, Rajinder and Jat against him, but I did not gain the impression that this had skewed his evidence against Inder in a material way. That said, since he had not taken a note of the significant meetings in which he had been involved, which took place over 9 years ago, I do not think that I can place significant weight on the detail of his evidence where not supported by contemporaneous correspondence or other confirmatory evidence. Finally I heard from Helen Stratton, the former bookkeeper to BBL and BDL, who came across to me as a genuine and reliable witness. She did not seem to me to be motivated when giving evidence by animosity against Inder, even though she had resigned as bookkeeper for BBL – I am satisfied – because he had verbally abused her when she had refused to provide him with documentation relating to BDL. When Inder had been asked about this in cross-examination he gave what I regard as untrue and vindictive evidence. That said, her oral evidence was not quite as positive as was her evidence in her witness statement, and I do not think that I can accept her evidence in her witness statement without question where not confirmed in her oral evidence or otherwise consistent with other reliable evidence. The matters in dispute The “Original Loan Agreement” 25. Jat's pleaded case begins with what he says happened in October 2005. He says that there was an incident where Inder went to his house one evening following a heated discussion and pushed him and threatened him in front of his wife and children (referred to at trial as “the pushing incident”). He says in his evidence that this followed an incident earlier that year at

the office, where Inder threw a bunch of keys at him, striking him on the forehead, and used abusive language in front of several employees (referred to at trial as “the keys incident”). He says that having told his parents of the pushing incident there was a family meeting at the family house the following day, which amounted to an informal meeting of the directors and shareholders of BL, BBL and BDL. He says that Inder refused to follow his father’s request that he apologise to Jat for the pushing incident. He says that as a result it was agreed at that meeting by all four family members that Inder and Jat were incapable of working together and would have to conduct their business affairs separately. He says that it was agreed that Inder should undertake the Silvercrest trading business and that he should undertake the BDL property development business, with each being allowed to borrow up to £700,000 from BBL for that purpose (referred to as the “Original Loan Agreement”).

26. What Jat did not plead, but what he says in his third witness statement, is that it was also decided by all that this meant that each would be entitled to retain all of the profits earned from their respective businesses, but equally have to bear themselves any losses made by their businesses. 27. 28. 29. Inder accepts that these two incidents occurred, but not until the following year in 2006. He claims that Jat is significantly exaggerating what happened, that at the time they were viewed as unfortunate but not serious events, and that the relationship between the brothers was still reasonably cordial until later in 2007. He accepts that in 2006 it was discussed and agreed that he should concentrate on the Silvercrest business, whilst continuing to be primarily responsible for the BBL business, and Jat on the BDL business, but that this was not in any sense a formal division of the businesses, and there was no question of the businesses being run by each brother solely for his own account. I have heard copious evidence about these events. In short, I accept on the balance of probabilities that the keys and the pushing incidents did happen in 2005 rather than in 2006 and that they were substantially as described by Jat, although I do accept that there was some degree of exaggeration by him in his oral evidence. I also accept that this led to a family discussion about whether it was possible for the two sons to work closely in the same business together and a decision by Sohan that it was not. Whilst I accept that Jat was pushing for a complete separation of business responsibilities I do not accept that either Inder or Sohan was willing to agree this. Instead, what was agreed at that stage was that Inder should concentrate on BBL and Silvercrest and Jat on BDL. However I am unable to accept Jat’s case that it was also agreed that each should be allowed to borrow up to £700,000 from BBL or that they were to retain and be solely responsible for the profits and losses of Silvercrest and BDL respectively. My reasons are as follows. I prefer and accept the evidence adduced by Jat which places the pushing incident and subsequent discussion and agreement in October 2015. I accept that Jat and Rajinder’s evidence as to the date originated not from their own memory but from Jat’s wife’s recollection that this incident immediately preceded a planned visit to the USA. Whilst as Ms Anderson QC submits it is difficult to evaluate the reliability of this recollection, since Jat’s wife was not called as a witness, the placing of the date was also confirmed by Jaswant, who was called as a witness. Perhaps more significantly, it is also consistent with the meeting with and the letter subsequently written by Simpson Wood in

November 2005. Inder accepted that there had been such a meeting, and the letter to Jat refers to the “directors advising the meeting that you and Inder wish to pursue individual business projects and are investigating how finance can be provided for these”. Although Inder suggested that this was just something which was discussed from time to time, and that this simply reflected a suggestion which was not taken forwards, I do not accept that something as significant as this would have happened – or been permitted by Sohan to happen - without a serious triggering event such as the pushing incident, and no other reason has been plausibly suggested. 30. Further Inder did not seem to me to have any cogent objective basis for contending that it happened later in 2006. I also consider it significant that he did not challenge the date either in his Reply to Defence or in his witness evidence, only amending paragraph 9 of his third witness statement in examination-in-chief.

31. As I have said however I do not accept that it was clearly agreed that each brother should be solely entitled to the profits of and be solely responsible for the losses of Silvercrest and BDL respectively. That would have marked a radical departure from the previous approach, enforced by Sohan, that all business ventures should be family ventures. It would also, importantly in my view, have meant that Sohan and Rajinder would not have been able to share in the profits of those businesses, including at that stage the profits of BDL from its investment property at Whitehill Mill, which I am satisfied would never have been contemplated by Sohan in particular unless there was no alternative. It was also not what was asserted on Jat’s behalf in the detailed pre-action protocol letter of reply sent in November 2013. 32. 33. It is also significant that the letter from Simpson Wood is not consistent with a firm decision having been made. It was addressed to Jat, rather than to all three directors, and discussed a number of options. Significantly, the first option referred to each setting up their own limited companies, rather than using the companies which were already in existence and on Jat’s case intended to be used, and also referred to any loan being on commercial interest terms, but also pointing out the risk to BDL in the event of repayment default. This is significant because it is Jat’s case that no question of interest being charged was ever discussed or agreed, nor of any terms for repayment, nor for example of any security being provided. The tenor of this letter is difficult to square with Simpson Wood being instructed to put into effect – or at least advise on the implications of – a family decision having already been taken to use Silvercrest and BDL as the vehicle for entirely separate business ventures. At the very least one might have expected some reference to what was to happen to White Hall Mill as a BDL owned investment property if that company was, effectively, to be gifted to Jat. Jat’s case is also inconsistent in my view with what actually happened subsequently. It appears that by October 2005, whilst Silvercrest had already been set up as a joint venture between the Bhullars and Messrs Haleem and Soni, it had not yet undertaken any business. Although Jat claims that he did not realise he had been made a director of Silvercrest, I am unable to accept this evidence since I do not regard him as being the sort of man who would have signed documents such as he did in relation to Silvercrest without reading them first at least to understand what they

were and without having agreed in advance with Sohan and Inder that he should do so. It also begs the question why nothing was done from October 2005 to January 2006 to effect the change. It would have been extremely simple for Jat to resign as director and for BBL to transfer its shareholding in Silvercrest to Inder. It also begs the question why Sohan and Jat should have been so aggrieved about Silvercrest's subsequent losses if they were for Inder's account alone. Even allowing for the risk to BBL arising out of its having guaranteed Silvercrest's bank borrowing it would still have been Inder, on Jat's version of events, who would have to make good any liability as between the family members. In my judgment the true position is that, as Jat said in his third witness statement at paragraphs 27 and 293, at the time Silvercrest was regarded as a potentially very lucrative Before adopting his witness statement as his evidence Jat removed these sections from his witness statement, but was unable to explain why he had included them in the statement as signed, and it seemed to me to be a business, and I am satisfied that neither Inder or Jat would have wanted to cede it completely to the other. 34. Furthermore, no steps were taken to transfer BDL into Jat's ownership and control. Nor were loans worth up to £700,000 made available either to Inder to use in Silvercrest or for Jat to use in BDL. Thus:

- (a) As regards Silvercrest, whilst in January 2006 Baxter Caulfield was instructed to draw up a loan agreement and debenture to formalise secured lending by BBL to Silvercrest, there is no evidence that this proceeded or, if it did, that it related to a £700,000 loan. Instead what happened was that in May 2006 Silvercrest obtained a £1 million facility directly from Barclays which was guaranteed by BBL. It is unrealistic to suppose that Sohan and Jat would have agreed to this, and that Jat would have signed the necessary paperwork, as I am satisfied happened, if that was £300,000 more than had been agreed, and at a time when BDL had not borrowed anything. When asked about this in cross-examination Jat suggested that he assumed at the time that the £1 million was to be available equally for Silvercrest and BDL, but in my view that is completely inconsistent with the Original Loan Agreement as he contends for and also the rationale for the split.
 - (b) As regards BDL, Jat took no immediate or active steps to make use of the £700,000 loan facility he alleges he had been allowed for BDL. It was not until October 2006 that a £600,000 overdraft facility was arranged for BDL to acquire a property known as Southgate and that only happened to regularise a situation where funds in Silvercrest's account was initially used to pay for this acquisition a month earlier.
35. Whilst it would be unrealistic to have expected that everything could or would have happened immediately following the meeting in October 2005, the fact that the family seem to have effectively given up on any attempt to move matters on after the letter of advice from Simpson Wood in November 2015 is difficult to square with Jat's case that a clear agreement for a complete division had been agreed on the basis that anything less than that was intolerable and unworkable. 36. In my judgment what happened was that none of the options suggested by Simpson Wood were viewed by Sohan in particular as being attractive or agreeable. Instead, he fell back on the less difficult and divisive approach of a division of

responsibilities as between Silvercrest and BDL, whilst keeping both businesses, as well as BBL, within the family – albeit as I say that Silvercrest was a family joint venture with Messrs Haleem and Soni. Indeed the fact that what was Silvercrest Trading (GB) Limited changed its name to BDL in October 2005 is itself inconsistent with Jat’s case; fundamentally it makes no sense to use a family owned company with an existing valuable investment property, re-naming it to make it clear that it is part of the family group of companies, as a vehicle for one family member to conduct his own separate business venture. purely opportunistic removal of evidence which he had come to appreciate did not support his case. The “Varied Loan Agreement” 37. 38. 39. 40. Jat’s pleaded case is that “in around summer 2006 Sohan, Rajinder and Jat discovered that Inder (sic) was trading at a significant loss and that he had lost a significant part of the funds advanced to Silvercrest by BBL: up to £100,000”, and that “Inder told Sohan that BBL would have to pay Silvercrest sufficient monies to meet these losses”. He says that after this there was a meeting between Sohan, Rajinder and Jat at which they agreed that “Jat would purchase a new company outside of the Bhullar group in order to trade separately in residential property development and that the loan facility that was to have been made available to BDL pursuant to the Original Loan Agreement was instead to be made to that new company and would be provided by BBL and BDL as funds permitted”. He alleges that “Sohan then informed Inder of that agreement and Inder agreed to and/or acquiesced in the same”. He refers to this as the “Varied Loan Agreement”. Inder does not accept any of this. He says that he was not aware of the financial problems with Silvercrest until November 2006, and that it was not until later in 2007 that the full scale of the losses became apparent. He says that this issue in relation to Silvercrest had nothing to do with BDL, and was not the precursor to any agreement to allow Jat to set up and borrow family monies for his own separate company, which simply did not happen so far as he was concerned, and was something with which he would never have agreed and did not agree. In my judgment the evidence simply does not support Jat’s case as regards the alleged Varied Loan Agreement. Firstly, it is clear that Torex was incorporated in May 2006 and acquired by Jat as the sole shareholder, using the services of Baxter Caulfield for this purpose, in June 2006. He was appointed as its sole director on 19 June 2006, when his wife was appointed its secretary, and its name was changed to Torex on 22 June 2016. On Jat’s case, he acquired Torex in anticipation of setting up his property development business on his own account, independent not only of Inder but also of his parents.

41. However given the timescale as regards Silvercrest it is difficult to see how this could have been undertaken with his parents’ consent, let alone that of Inder, as a reaction to Silvercrest’s financial difficulties. As explained above, Silvercrest did not obtain its overdraft facility until early May 2006. Silvercrest’s accounts for the year ended 31 July 2006 identify current creditors of only £53,921 and net current liabilities of only £36,885. As at the same date its current bank account was still in the black, although it is true that: (a) it had by that stage already received some £200,000 from BBL; (b) by the end of the following month it was over £170,000 overdrawn. It is also true, as Mr Chaisty submits, that the accounts for the year ended 31 July 2007 do show much more substantial current creditors of £1,227,389 and net

current liabilities of £576,298. It is also possible, as he submits, that these losses might have been known of in the previous year but for accounting purposes posted to the following year. Nonetheless there is no contemporaneous evidence, either in the bank statements or in email traffic or the like, that Silvercrest was making, or was known to be making, substantial losses prior to mid June 2006. When Mr Chaisty asked Jaswant to identify when Sohan became aware of Silvercrest's losses by reference to the time when he was diagnosed with his tumour she said he was diagnosed in summer 2006 and became aware of Silvercrest's losses later, perhaps in the autumn of that year. Jat's pleaded chronology is imprecise, however in his third witness statement he made it quite clear (paragraphs 37-42) that he was saying that all this happened before he set up Torex. I have no doubt that this is because he perceives the need to justify his having set up Torex at the time that he did. However in my judgment his case, which involves Torex being acquired by him with his parents' blessing, to conduct business on his own account instead of through BDL as a family business, and as a response to Silvercrest's financial problems, is fatally undermined by the chronology from the available contemporaneous documents. 42. It is of note that in his first witness statement Jat had given a somewhat different chronology, explaining the decision to set up Torex as being simply a response to the difficult working relationship with Inder, and dating the discovery of the financial problems with Silvercrest to later on, in December 2006. That first witness statement is consistent with the detailed pre- action protocol letter of reply sent in November 2013, which makes no reference to it being agreed that Jat could use monies from BBL or BDL to fund Torex.

43. The other difficulty with Jat's case is that at the same time as he was acquiring Torex as his own company and on his case to undertake property development independently of the family, rather than through BDL as the family company, in actual fact instead of using Torex for that purpose he was causing BDL to do so. Thus:
 - (i) On 5 June 2006 BDL secured an overdraft facility, albeit a modest one, with Barclays. Importantly, however, this was secured by an existing cross-guarantee and debenture given by BBL to the bank and by an existing legal charge over White Hall Mill. (ii) In July 2006 a property at Cumberworth was acquired by BDL for development for around £90,000. (iii) In September 2006 a property at Southgate was acquired by BDL also for development but this time for around £448,000. As explained above, the purchase price was initially taken from Silvercrest's bank account, and repaid by BDL in October 2006 once its £600,000 overdraft facility from Barclays was in place.
44. When asked about this in cross-examination, Jat's explanation was that the properties at Cumberworth and Southgate were only transferred to and developed by BDL because Torex was not ready to do so at the time. However on the evidence Jat would have been in a position to cause Torex to acquire these developments from June 2006. If the agreement had been as Jat contends, there would have been no reason why, instead of obtaining a modest overdraft facility for BDL in June 2006 followed by a more substantial one in October 2006, he should not with the consent of his parents have obtained a substantial facility for Torex in

summer 2006, secured by BBL in the same way as Silvercrest's facility was, in accordance with the Varied Loan Agreement. Even if Jat could possibly argue that there was insufficient time to do so before the acquisition of Cumberworth in July 2006, there is no conceivable explanation for his failure to do so in relation to Southgate. It is not, and never has been, Jat's case that whilst his parents were agreeable to his doing this, it was stymied or blocked by Inder's refusal to agree, which therefore stymied Torex's ability to obtain funding secured through BBL. There is no evidence to support such a case, which would, of course, anyway fatally have undermined Jat's case that Inder agreed to or acquiesced in the Varied Loan Agreement.

45. There is evidence, both documentary (in Baxter Caulfield's second letter dated 6 December 2007) and in Mr Newman's evidence that by the time of meetings which took place in late November 2007 there was a dispute as to what had previously been agreed, with Sohan and Jat saying that there had been an agreement reached for a division of the business, albeit that the precise means for doing so had not been agreed, whereas Inder was disputing that there had been any such agreement. Whilst Jat relies on this as showing that this was his case in December 2007, I am unable to accept either that Mr Newman has accurately recalled precisely what Sohan and Jat were apparently saying at the time or that their recollection of what had been agreed in October 2005 was any more accurate than was Inder's. Mr Newman's recollection is not derived either from any contemporaneous note or from what he wrote in contemporaneous correspondence, and I am unable to accept that he has a clear recollection in 2017 as to the detail of what was said around without prejudice meetings held 9 years previously. Moreover, what Sohan and Jat may have said might well in any event have been heavily influenced by their perception that Inder had agreed to a division in principle in discussions from early 2007 onwards, which may well have been correct but did not equate to Inder having agreed that the division could take place in advance of a final agreement being concluded. If the Varied Loan Agreement had been made in summer 2006, and Torex set up quite openly and disclosed to Inder, it is difficult to explain why there is no reference at all in any correspondence to Torex from summer 2006 until March 2008, when Ford & Warren first raise the Torex payments. The letter from Simpson Wood to Jat dated 15 January 2007, to which I refer below, is itself inconsistent with the Varied Loan Agreement, since it makes no reference to Torex nor does it suggest that there should be a separate company to be solely owned by Jat and financed by BBL to enable him to pursue a separate property development business. 46. In my judgment the true position is that in 2006 there was no such Varied Loan Agreement. Instead, the agreement reached the previous year in relation to the division of responsibilities was proceeding as envisaged, in that Silvercrest was set up and financed with the backing of BBL, and was starting to trade as a (part) family owned business, and BDL was also financed with the backing of BBL to acquire properties for redevelopment as a family owned business. I am satisfied that Jat acquired Torex in June 2006 because it was still his ultimate intention that there should be a formal division with his having Torex as his own property investment and development business. It is probable, I accept, that he

would have obtained Sohan's agreement to forming this company in anticipation of a formal division, but I do not accept either that: (i) there was a further agreement between Sohan and Jat under which it was agreed that Jat could borrow up to £700,000 from BBL and/or BDL for the purposes of the Torex business; (ii) Rajinder was even informed of the formation of Torex let alone informed about or asked to agree to any borrowing by Torex from BBL or BDL, nor did she. I am completely satisfied that, even if I am wrong in relation to Sohan and Rajinder, Inder was never informed of any of this, let alone asked for his agreement to it.

47. The letter of 15 January 2007 from Simpson Wood refers to a meeting held on 11 January 2007. It would appear that only Jat had been in attendance at the meeting, because the letter notes that the proposals being put forward by Simpson Wood would "require authority from your family", which indicates that neither Sohan, Rajinder nor Inder were present. Inder denied that he was present or involved in this, and I accept his evidence on this point. What was being proposed by Simpson Wood was indeed a full scale division of the family business, to be achieved by means of Jat becoming the sole owner of BDL and Inder becoming the sole owner of Silvercrest, with White Hall Mill being hived up from BDL into BBL (obviously, so as to remain a family owned asset), and with BBL being owned equally by two separate companies, one being owned by Jat and his parents and the other being owned by Inder and his parents.
48. The letter refers to the matter as being urgent. I am satisfied that at this stage the division was being pushed by Jat, in circumstances where by this time it had become apparent that: (1) Silvercrest was doing far less well than had initially been anticipated; (2) Jat was frustrated that what he would have perceived as profitable developments at Cumberworth and Southgate would have to be shared with Inder as well as with his parents, as would the further developments he was contemplating, unless he could achieve this formal division.
49. The documentary evidence shows that by May 2007 the family was sufficiently concerned about the potential losses at Silvercrest for Baxter Caulfield to be instructed to prepare documentation to regularise the terms of the joint venture and thus to facilitate the prospects of securing a contribution from Mr Haleem and Mr Soni to any loss. However these documents were not signed until August 2007. By around this time Inder was, he accepts, coming under increasing pressure from the rest of the family to close down Silvercrest and cut his losses, but he asked for time until the end of the year to seek to sell the business and mitigate the losses. As part of this strategy Inder was, I accept, spending more time on Silvercrest's business, including travelling to Africa, where a major part of its business had been, at this time. 50. I am satisfied that by this stage Sohan had lost patience with Inder, particularly because of his frustration with the losses at Silvercrest and Inder's insistence both that the family business had to cover them and also that he should receive more than Jat if the business was going to be formally divided. By this stage Sohan had also become convinced that the family business would have to be split if it was to survive after his death. This of course was exactly what Jat had previously argued for and I also have no

doubt that Rajinder went along with Sohan's wishes. This growing division between Sohan, Rajinder and Jat on the one hand and Inder on the other may be seen in a number of events over summer 2007, such as: (1) (2) (3) In March 2007, when Rajinder was made a director of BL4 and BBL. I have no doubt that this was to ensure that Sohan's wishes could be enforced by Rajinder siding with Jat in the event of any dispute should he suddenly die or become incapable of acting as director. In June 2007, when BBL's bank mandate was changed so as to require two signatories from any one of Sohan, Rajinder and Jat, but not Inder. In July 2007, when Jat made contact with the bank without reference to Inder in an attempt to force a reduction in Silvercrest's overdraft facility. 51. It appears to be common ground that through 2007 there were a number of discussions to seek to reach agreement in relation to a formal division. However it is also common ground that Inder was extremely resistant to a formal division other than on terms which reflected his view that the family business would have to cover Silvercrest's losses and also that he should receive some payment to reflect the loss of opportunity to receive a share in the profits of development of BDL's existing property portfolio. At some stage in 2007 (the date is not recorded in contemporaneous documentation) Sohan and Jat involved Mr Newman to see if some mutually agreeable solution could be found, but discussions foundered because Inder was insisting – as he conceded was probably what he said - that he should receive a £500,000 bonus as part of any agreed division, whereas neither Sohan nor Jat were prepared to agree to this.

52. Thus Inder was, effectively, stymying both Jat's desire to divide the business so that he could move forwards with his property developments and Sohan's desire to formalise a family division whilst he was still alive and in a position – as he believed – to force it through. It is abundantly clear that by this time Inder was no longer prepared to accede to Sohan's wishes, no matter how strongly Sohan might express them. Although the remainder of the family still appear to have respected Sohan's ultimate decision making authority as the head of the family, Inder was not prepared to give way. The Torex payments 53. It is clear from the documents that at some stage after 15 May 2007 (the date of the annual return submitted in relation to Torex which described it as a non-trading company) Torex began undertaking business. Jat admits that BDL made a payment of £261.85 on behalf of Torex for planning advice given in relation to a property known as 20 Carlton Road (also known as Carlton House). Although Jat admits that this payment was made on 25 July 2007, in fact it would appear from the document at [C1/109] that this may be a reference to the date of the invoice rather than the date of the cheque payment hand written on the invoice as being 10 September 2007. That would be consistent with the fact that, as Jat also admits, on 10 September 2007 BDL made a payment of £540 for a survey in relation to that property. More The documentation appears to show that Rajinder was appointed director at a meeting held on 7 March 2007 for which the necessary formalities were observed, and that she also signed an appointment form on that date, but – rather confusingly – she also signed a further appointment form on 12 September 2007 showing her as having been appointed on 20 September 2007. It is the second form which is stamped received by Companies House, and it may be that the formalities of filing the first form were overlooked. significantly, on 24

September 2007 there were two substantial transfers into Torex's business bank account with Barclays, which was only opened 4 days earlier. The first and largest was a transfer of £440,000 from BBL to Torex. The second were two transfers totalling £130,000 from BDL to Torex. It is common ground, and is apparent from the bank statements, that these funds were immediately transferred out the same day (the precise figure being £568,811.57) to enable Torex to acquire the property at 20 Carlton Road, which by October 2007 had been made the subject of a legal charge in Barclay's favour to secure Torex's borrowing with Barclays. From that date onwards there were a series of payments made from BDL either directly into Torex's account or to third parties. Most of these were made in 2007, although some were also made in 2008 as well and two in 2009. The third party payments were made to discharge liabilities of Torex incurred in relation to its property development business. Whilst I am willing to assume that the majority of the funds paid into Torex's account were used for its business purposes, in cross-examination Jat admitted that £44,000 of £50,000 transferred by BDL in November 2007 was used to enable him to acquire a motor car, although he also said that he repaid this money to Torex.

54. The table produced in Jat's written opening, taken from the evidence, shows that a total of [£558,779.46 per AG]5 was paid by BDL to Torex or for its benefit over the period to 31 December 2009.
- (1) This includes £335,466.37 paid in August 2008 into a business premium account held by Torex, which represented the proceeds of the sale by BDL of the Cumberworth property. In cross-examination Jat suggested that the reason it was paid into this account was because Torex had an interest earning premium account, whereas BDL did not. Whilst that may well be true, the Torex bank statements indicate that within a week or so the equivalent amount was transferred from Torex's premium account to its current account, and the subsequent accounts for BDL treat this as a loan from BDL to Torex, as to which no separate terms were ever agreed. Although Ms Anderson suggested in cross-examination that this transaction was not recorded in BDL's nominal activity ledger report for Torex, in fact it does appear in what is said by Jat in his witness evidence to be such a report at [E2/251]. Whilst it does not appear that there is a report from 2008 in the same format as the reports for other years, I do not consider this to be suspicious. Apart from anything else, it would appear from the correspondence between Simpson Wood and Baxter Caulfield in March 2010, to which Jat was referred in cross-examination, that at that time the former were treating the payment as a loan to Jat personally.
- (2) Apart from one final transfer of £13,000 from BDL to Torex in December 2009, all of the other payments made by BDL in 2008 and 2009 were to third parties for Torex's benefit.
55. These payments include some payments only disclosed for the first time more recently following supplemental disclosure made by Jat in relation to Torex. There is one modest dispute as to one payment of £500, as to which I accept Jat's case. Please can the total in the table be added up and the figure agreed and inserted.

56. Taking into account 4 payments made by Torex to BDL in 2009, the net balance of payments made by BDL to Torex was £525,428.44 [£526,028.44 per LA QC]
57. As regards the £440,000 paid by BBL to Torex, in early January 2008, £140,000 of that was repaid to BBL, leaving a net balance of £300,000. It is not entirely clear why this repayment was made. Jat contends that it demonstrates that the original payment was regarded as a loan, because he did cause Torex to make this repayment when it could afford to do so. Inder suggests that it was necessary because without it BBL would have exceeded its overdraft facility. That does not appear to be correct, because it can be seen from the bank statements that the repayment caused the overdraft to reduce from around £485,000 to around £348,000, which is less than the £600,000 facility which it appears to have enjoyed since October 2006. In my judgment, this does support Jat's case that the advance was regarded as a loan so that when in January 2008 Torex was in a position to repay part of the loan it did so. I do however accept that Jat would have been keen not to cause the advance from BBL to Torex to lead to a situation where BBL exceeded its overdraft limit. It is also clearly the case that it was known that the Bhullar companies would have to discharge a substantial tax liability at around this time, and it is probable that this repayment was made with this purpose in mind.
58. Thus, leaving aside any question of interest or other items, the total amount for which Torex is indebted to BBL and BDL is £825,428.44 [£826,028.44 per LA QC]. Jat was asked in cross-examination about his intentions as regards these monies, given that on his case they were loans, albeit that on his case, supported by Rajinder, these loans were made without any specific agreement as to repayment, on the understanding that they could and would be repaid when Jat was in a position to do so, rather than on demand, and that there was no term as to payment of interest. In his first witness statement made in March 2015 he had suggested that Torex might be able to repay some £400,000 within the course of that year if it was able to dispose of some unidentified property. However that prospect has never materialised. There is little if any hard documentary evidence to enable any assessment to be made as to the prospects of Torex ever being able to repay its liability to BBL or BDL. Its most recent accounts show it to be a dormant company, and the previous year's accounts show no activity, modest tangible assets of around £200,000 and negative net assets and net current assets. In the circumstances, and based on the evidence which Jat has chosen to adduce in this case, I am satisfied that there is no current or realistic future prospect of any repayment of this balance being made by Torex.
59. Before considering the respective accounts as to the circumstances in which these payments were made and the extent – if at all – to which Inder knew of and/or consented to or acquiesced in them I should also refer to the evidence as to how these payments were effected and recorded. The recording of the Torex payments 60. It is common ground that the relevant payments were made either by CHAPS transfer by attending at the bank in person or by telephone banking (subject to a £5,000 limit). Such payments could be authorised by Jat alone, who would not have needed to involve Inder (nor Sohan nor

Rajinder for that matter) and nor would the bank have needed to contact Inder to confirm that the payments were in order.

61. Both Inder and Jat had their own offices at Salendine Nook. In autumn 2006 Helen Stratton took over from the previous bookkeeper, known as Margaret, working for 2 days a week at Salendine Nook on a self-employed basis as company bookkeeper for BBL and BDL. She was not employed to undertake the bookkeeping for Silvercrest; it appears that there was also a secretary, known as Fran, who according to Inder sometimes dealt with the Silvercrest correspondence. Ms Stratton was given a brief induction by the departing bookkeeper. She was told that there was a cash book into which she had to enter all cheque payment details. Although Inder said that the cash book ought also to have entered into it details of bank transfers or other bank payments, and although there was evidence that the cash book did contain such entries before Ms Stratton took over, I accept her evidence that she understood that only cheque payment details should be entered, and that was plainly what she in fact did whilst working for the companies. Her practice was to process all invoices, entering the details in the cash book and preparing cheques for payment, and leaving the cash book and prepared cheque on Inder's desk for him to authorise, signing the book to authorise payment and signing the cheque accordingly, to enable her to complete the payment process on her next attendance. Although Inder said that this was a 2 stage process, where one director – whether he or Jat – would authorise the payment and the other would sign the cheque, I found his explanation confused and confusing and intrinsically unlikely, and prefer her explanation.
62. There was a dispute as to what happened to the bank statements, which were provided weekly due – I am satisfied – to the historically high incidence of bank transactions when BBL operated the grocery business. Inder said that all correspondence, including bank statements, were opened and processed by Ms Stratton, so that he did not see them on a weekly basis, whereas in her witness statement she said that all correspondence, including bank statements, was opened by Inder and then placed by him on her desk for processing. She was a little more equivocal in her oral evidence and I am satisfied that this is because the position was rather less formalised than either suggested. By mid 2007 it appears that Jat spent most of his time working from home, only attending the office where necessary, with the intention – I am satisfied – of avoiding Inder as much as possible. However, since Inder was as I have said devoting a considerable proportion of his time on Silvercrest business, including making foreign trips, I am satisfied that by this stage he was not a permanent presence at the office. In the circumstances I am satisfied that there was no set pattern, and that correspondence might be left on any one of the three respective desks, opened or unopened, and that it might be opened and read by Inder or by Jat before being processed or it might not. I would accept that Inder would not have felt it necessary to receive and read the bank statements for BBL, let alone for BDL, each week.

63. The processing function involved Ms Stratton checking the bank debit entries, so as to reconcile them against invoices and payments. Once reconciled, she would enter the details onto the Sage office software system which was installed onto the desktop computer which was provided on her desk for her use. She would allocate the payments to the relevant nominal ledger for the supplier or creditor in question. There was no security system in place so that anyone – including Inder and Jat – could access the computer and interrogate the Sage system. However Inder’s evidence, which Ms Stratton did not dispute, was that his computer skills in this respect at least were rudimentary, so that if he wanted to obtain information held on Sage he would tend to ask her and she would provide a printout for him to read.
64. Ms Stratton’s evidence was that she would refer any queries over a debit entry which she did not recognise to one or other of the directors. In this case her evidence, which I accept, was that she had written against the relevant entry on BBL’s bank statement recording “transfer to Torex Developments” on 24 September 2007 the words: “Jat’s new company”. She was unable to recall when asked whether this would have been information obtained from Inder or from Jat. Her evidence, which Inder agreed, was that the bank statements, once the reconciliation process was completed, would be put into files which were then stored on shelves above her desk, which was located in an office in between the two brothers’ offices, and again to which both brothers had unrestricted access.
65. The evidence shows that the BBL bank statements were always addressed to the Salendine Nook address. The BDL bank statements were also addressed to Salendine Nook until November 2007, when the bank was instructed – by Jat or Ms Stratton at his instruction I have no doubt – to send them to his home address instead. It follows that the payments made from BDL to Torex before that date would have been shown on bank statements which were sent to Salendine Nook, whereas those made after that date were shown on bank statements which were sent to Jat’s home address. It was Jat and Ms Stratton’s evidence that there was nothing sinister in this, simply reflecting the fact that at that point Jat had effectively stopped working at the office at all. Indeed Ms Stratton explained, and I accept, that in order for her to undertake the BDL bookkeeping the bank statements were dropped off at the offices for her to work on. Insofar as Inder suggested that the change of bank statement address was undertaken with the deliberate motive of concealing them from him, I reject that. If the intention had been to disguise the transactions in issue it would have been done before the substantial transactions of 24 September 2007, and would have had to involve BBL’s bank statements being transferred or concealed as well. 66. I reach the same conclusion as regards the fact that subsequently it was agreed between Jat and Ms Stratton that she should undertake the bookkeeping for BDL from his house, using a laptop with Sage installed provided by Jat for that purpose. In her witness statement she said this happened in early 2008, in re-examination she said it was March 2008. I accept that it was around that time. Ms Anderson cross-examined both Jat and Ms Stratton by reference to a memorandum written by Jat in November 2011, where he had stated that the BDL records had been moved to his house in “2006 or 2007”. I have no doubt that this was written in error and may be

disregarded. Insofar as there was some suggestion that this was also a deliberate attempt to disguise these transactions, I reject that. Indeed Ms Stratton said, and I accept, that the BDL entries already entered onto Sage by her using the desktop computer at the Salendine Nook offices remained on that computer, and could have been accessed by anyone with access to the computer and with sufficient skills to do so. Whilst the contemporaneous nominal ledger entries from September 2007 onwards have not been disclosed, I have no doubt that they were posted by Ms Stratton to the BBL and BDL Torex nominal ledger at the time, and that they were not in any way concealed. The circumstances in which the Torex payments were made 67. 68. 69. 70. 71. 72. Jat's pleaded case is that the Torex payments were made pursuant to the Original Loan Agreement and the Varied Loan Agreement. He admits [paragraph 19.1] that he did not inform Inder of each individual payment prior to making it. In his detailed pre-action protocol letter of reply sent in November 2013 he had said that it was Sohan's suggestion and not his that he should borrow money from BBL and BDL. He made no reference to Inder having been consulted or having agreed to this. In his first witness statement he repeated (paragraph 28) that it was Sohan's suggestion and not his that he should borrow money from BBL and BDL. However at paragraph 30 he also said that: "I believe that the claimant knew of these loans at the time, although I do not claim that he agreed with them as my mother and father did." In his evidence in chief he said that he wished to alter this so that it read: "I believe that the claimant knew of these loans at the time and agreed." In his third witness statement he said (paragraph 47) that he had asked his father whether he could use BBL and BDL's monies for Torex, that both Sohan and Rajinder had agreed to this, and that Sohan had said he would tell Inder. In paragraph 56 he said that Sohan subsequently confirmed to him that he had told Inder. It will be apparent from this that Jat's evidence has altered significantly as regards these important matters. I have already referred to Satwant's evidence. As I have said I do not accept the detail of what she said in her witness statement, not least because the sequence of events as described in her witness statement was contrary to the sequence as she described it under cross-examination, and also because I do not accept it as likely that she would now have such a detailed recollection of the lunch as she now says, but I do accept the following account as essentially accurate. It was not challenged by Jat, who simply said when asked in cross-examination that he could not recall this. In September 2007 she was staying with her parents at their house on a visit from the USA when Jat came to lunch, but Inder was not present. She was already aware of the problems with Silvercrest by this time. Sohan told her that the sons weren't getting on, that he'd decided that they should do their own projects with money from the family business, and that he was going to give Jat money for his new business. She gained the impression that her father wanted her to agree with the decision. She was surprised because she had always understood the family practice to be that no-one in the family should have their own private business, and she expressed her surprise that Inder was not being involved in the decision. She was told by Sohan that it was his decision. She did not challenge her father once he had said that it was his decision. Rajinder did not say anything to contradict Sohan. Although Satwant was not told explicitly not to inform Inder, she did not do so, fearing that to do so would only lead to an escalation of family

tensions at a time which would upset her father when he was ill. She only told Inder about this in 2015 when Inder asked her whether she was able to give any evidence which might support his case and she felt that she ought to assist him in his dispute with the rest of the family. Inder's discovery of the Torex payments

73. The first documentary evidence of Inder questioning the payments to Torex is on 27 March 2008, when Inder's then solicitors, Ford & Warren, instructed since December 2007, wrote to Baxter Caulfield, who were still acting – despite Inder's protests – for the companies and Sohan, Rajinder and Jat. What they said, as relevant, was that whilst Inder had been sorting out BBL's service charge and rental accounts at Sohan's request he had discovered the transfer to BBL of the £140,000 - recorded on the bank statement (by Ms Stratton, I find) as being from "Torex Dev". They said: "3. We are slightly concerned about this receipt because it seems that Jat borrowed £440,000 from BBL on behalf of his private company being Torex (we believe). Our client is unaware as to the shareholding but knows that neither he nor his parents have shares in the organisation. Is it true that Jat did borrow this money? If so, could you please provide a copy of the board minute authorising it.
4. ... 5. The concern is clearly one which needs to be explained with the supporting board minutes. The tax position is unclear. We understand that Jat is attempting to arrange bank facilities to discharge the current tax liability, but it seems that he owes or his company owes BBL around £300,000. If this is the case why does his company [not] simply pay BBL back so that [the tax liability can be paid without the need for further facilities]?" 74. 75. Inder's evidence is that he did not become aware of the Torex payments until around February
2008. His evidence was that he did not open or see the bank statements relating to BBL (or to BDL, for that matter) at the time of the September transfers, and that he was completely unaware from any other source, whether Jat, his parents, anyone else in his family, Ms Stratton, the bank, or any other documentary source, that they had been made. He says that his attention was fully focussed on trying to rescue the situation with Silvercrest at the time, including making a number of trips to Africa. In his first witness statement he said that "in or around February 2008 I became aware that BBL's bank borrowing under its bank facility had increased to around £550,000. Initially I assumed that this was because the facility had been used to pay off a substantial tax bill, which I knew to be owing at the time. When I discovered that the tax bill had not in fact been paid I took steps to investigate the finances of BBL and BDL". In cross-examination he said that he had seen the bank statement showing borrowing at around £500,000 in January 2008. It was pointed out to him that the BBL account was never more than £485,000 overdrawn throughout January or February 2008, and it was suggested to him that he must have seen a bank statement earlier than January 2008. The BBL bank statements show that the balance rose – briefly – as high as around £619,000 on 25 September 2007 and then hovered around the £600,000 mark – broadly keeping within the £600,000 overdraft limit – until mid November 2007 when it started to reduce steadily so that the overdrawn balance stood at around £485,000 on January 2008. It is not apparent that it ever stood at or around £550,000 over that period.

However it seems to me to be plausible on the basis of the movements on the account together with the evidence referred to below that at some stage in December 2007 Inder did see a bank statement showing the balance at around £500,000 overdrawn, and did assume that this was because the tax had been paid, especially in circumstances where he was distracted by Silvercrest's affairs. 76. It is known from the documentary evidence that on 16 November 2007 Baxter Caulfield wrote to Inder giving notice of an intended board meeting of all 3 Bhullar companies at which a formal division of the companies would be discussed. Inder wrote asking for an adjournment to enable him to obtain legal advice. Meetings took place on 27 November and 2 December 2007. Although those meetings were held on a without prejudice basis, some evidence has been given as to what was said before and after those meetings, and it has not been alleged that anything was said about Torex or the Torex payments by anyone at that stage. Nor did Inder make any reference to these matters in his letter to Baxter Caulfield of 5 December 2007 in which he objected to its continuing to act. Nor did Baxter Caulfield do so in its further letter of 6 December 2007, advising of a formal meeting to take place on 14 December 2007, in which it referred amongst other things to the means by which a formal division could be achieved as well as the significant and overdue tax liabilities of the Bhullar companies which needed to be addressed. Mr Newman accepted that he was unaware of Torex at this time, and the tenor of this letter is wholly inconsistent in my view with all concerned being fully aware that Jat had already set up his own company which had been advanced substantial funds by BBL and BDL and which already held its own investment properties.

77. Reference was also made to the tax liabilities in Simpson Wood's letter of 11 December 2007. Inder's letter of the same day records that he was due to be in Africa the following week to deal with Silvercrest matters, in the context of asking that the meeting be postponed. It appears that the meeting proceeded in his absence in relation to certain matters, one of which was a resolution to discharge the tax liability as soon as possible, and this decision was notified to Ford & Warren, who were then involved, the following week. There is no evidence of anything else material occurring until 28 January 2008, when Ford & Warren wrote to explain that Inder had still been heavily involved ever since in relation to seeking to resolve Silvercrest's affairs, and nothing of significance occurring from then until the letter of 27 March 2008. 78. Inder's evidence in cross-examination was that upon discovering these transactions he had telephoned home and asked Jaswant – who was then visiting – to ask his parents if they knew anything of these transactions and was told by her that they did not. He said that he had a little later spoken to his parents about them, who had asked him not to call the police, as he had threatened to do because in his view Jat had stolen the money. Later in cross-examination he said that he had also raised this with Jat a few days later. I do not accept this evidence. It is not consistent with what he said in his fourth witness statement at [26] – [31], nor is it consistent with the delay in raising this until the letter from Ford & Warren at the end of March 2008 and the more measured way in which it is expressed in that letter. 79. In short, in my view there is nothing in this contemporaneous correspondence which is inconsistent with Inder's account that he was unaware of Torex or

the Torex payments until sometime in early 2008, or which tends to support Jat's case that the letter of 27 March 2008 was a charade.

80. Mr Chaisty described this as a letter written in moderate terms. I agree, although in the context of a dispute such as this I would regard that as a compliment rather than as a criticism. Because it is relevant to the question of acquiescence, which I address later, I should record that although Mr Chaisty submitted that there was no suggestion in this letter of any personal responsibility on Jat's part that is not quite right, because it did make reference to Jat having borrowed the funds on behalf of Torex, and to Jat or Torex owing BBL £300,000. Mr Chaisty points out that it was not until August 2009, when it was revealed in a meeting that there was a concern that Torex might be unable to repay the monies advanced to it by BBL and BDL, that Ford & Warren wrote making for the first time a positive allegation that Jat had breached his fiduciary duties to the companies as regards the Torex payments. However, since the question of board authorisation was expressly raised in this March 2008 letter, there is little doubt in my view that there was at least an implicit suggestion at this stage that Jat might have procured a substantial loan to himself or to his company without prior proper authorisation, which in my view carried with it an implicit suggestion of personal responsibility if not repaid by Torex. It is not surprising that no claim against Jat personally for breach of fiduciary duty was made until it became apparent that Torex might not be able to repay the monies. 81. It is also right to record that Baxter Caulfield never provided a substantive response to that letter, even after Ford & Warren had written a chasing letter and a further letter raising what was perhaps a less focussed question. Jat contends and Mr Chaisty submits that this letter was simply a device to put forward a negotiating position for Inder in the context of the argument about the financial division of the family business. However, as Ms Anderson submits, it seems inconceivable that if Sohan had informed Inder of the proposed loan to Jat's new company and that Inder had agreed and was aware of it, that Baxter Caulfield would not have been instructed to write a speedy response making that point in firm terms. Indeed, if the explanation given by Ford & Warren why Inder had only recently become aware of the advance was itself manifestly untrue and a cynical contrivance, one might also – and perhaps even more – have expected Sohan and Jat to take issue with that. Jat's evidence was that he refused to respond to this request in relation to BDL because so far as he was concerned Inder was also refusing to deal with his requests for information in relation to Silvercrest. That seems to me to be consistent with what was happening; in short a "tit for tat" approach rather than a deliberate attempt to conceal matters from Inder. Breach of fiduciary duty – the law and the respective arguments 82. It is not in dispute that Jat, as a director of BBL and BDL, owed fiduciary and other duties to those companies in his capacity as director. There is no director's service agreement or shareholders' agreement which seeks to modify in any way such duties as are imposed by law or statute and nor do the articles of association of the companies seek to do so. 83. Identifying with precision the particular duties owed in this case is a little more complicated than it might otherwise have been because: (i) the incorporation of Torex and the first substantial Torex payments pre-date the coming into force of the first tranche of the

relevant sections of the Companies Act 2006 on 1 October 2007; (ii) the later Torex payments post- date the coming into force of the second tranche of those relevant sections on 1 October 2008. However fortunately this is not a case which turns on any material distinction between the law pre and post 1 October 2007 or pre and post 1 October 2008. In her written opening Ms Anderson provided an extremely helpful summary of the position as regards the applicable law and the pleaded cases in that regard, which is not the subject of dispute and which I gratefully adopt and repeat here in slightly modified form. 84. Jat admits that, as a director of BBL and BDL, he owed the following duties prior to 1 October 2007 – see the Particulars of Claim at [10] and the Amended Defence at [8]:

- (1) A fiduciary duty to act in good faith in what he believed to be the best interests of the company;
- (2) A fiduciary duty to exercise his powers lawfully and for proper purposes;
- (3) A duty, at common law, to act with reasonable skill, care and diligence. 84. Jat also admits that, as a director of BBL and BDL, he owed the following duties prior to 1 October 2008 – see the Particulars of Claim at [11] and the Amended Defence at [8]:
 - (1) A duty under s.317 Companies Act 1985 to declare any interest, direct or indirect, in any contract or proposed contract, at a meeting of the directors of the company;
 - (2) A duty in equity not to put himself in a position where his personal interests conflicted or might conflict with his duties to the company. 85. Jat also admits that, as a director of BBL and BDL, he owed the general duties in ss. 171 to 174 Companies Act 2006 after 1 October 2007 – see the Particulars of Claim at [12] and the Amended Defence at [8]. This included:
 - (1) Under s. 171(b), a duty to exercise powers only for the purposes for which they were conferred;
 - (2) Under s.172, a duty to act in good faith in the way he considered in good faith most likely to promote the success of the company. 86. Jat also admits that, as a director of BBL and BDL, he owed the general duties in ss. 175 to 177 CA 2006 after 1 October 2008 – see the Particulars of Claim at [13] and the Amended Defence at [8]. This included:
 - (1) Under s. 175, a duty to avoid conflicts of interest;
 - (2) Under s. 177, a duty to declare to the other directors the nature and extent of any interest in a proposed transaction or arrangement with the company. 87. So far as concerns the obligations to declare in BBL, Jat admits – see the Particulars of Claim at [14] and the Amended Defence at [18] - that pursuant to Regulation 84(1) of Table A 1948 and Article 12 of the Articles of Association he was obliged to declare the nature of his interest in the manner required by s.199 of the 1948 Act. So far as concerns the obligations to declare in BDL, Jat admits – see the Particulars of Claim at [15] and the Amended Defence at

- [18] - that pursuant to Regulation 85 of Table A 1985 he was obliged to declare the nature and extent of his interest to the directors.
88. The main differences between the pre- and post-Companies Act 2006 position is that: (1) In the case of the general duties relating to conflict of interest, the Companies Act 2006 provides for their disapplication in certain circumstances upon either (a) disclosure of the material facts to the directors in the context of s.177 or (b) approval by the disinterested directors in the context of s.175, notwithstanding the pre-Companies Act 2006 rules requiring the consent of members – see s.180(1).
- (2) The general duties are subject to (a) any rule of law enabling the company to authorise the matter in question, and (b) any provision in the company's articles of association dealing with conflicts of interest – s.180(4). This thus preserves the power of the company to ratify conduct by a director amounting to “negligence, default, breach of duty or breach of trust”. Post 1 October 2007 ratification is governed by s. 239, which provides that any such ratification must be made by resolution of members of the company disregarding the director in question or any member connected with him (which for these purposes would include Sohan and Rajinder).
- (3) Otherwise the UK statutory code does not permit the duties or liabilities of directors to be diluted or limited by the articles of association – s.232. 89. In their written opening Mr Chaisty and Mr Grantham made the following submission: “5.5. It is recognised that:- 5.5.1. Jat failed formally to declare his interest in the loans to Torex; 5.5.2. There was no formal resolution of the directors of BDL/BBL resolution of the member of BBL/BDL authorising such loans. 5.6. However, there was unanimous and informed consent to each of:- 5.6.1. The Original Loan Agreement; 5.6.2. The incorporation and trading of Torex and Jat's involvement and interest therein; 5.6.3. The Varied Loan Agreement; 5.6.4. The making of payments to Torex by the directors of each of BL, BBL and BDL (that is Jat, Inder and their parents) and of the members of BL and accordingly the member of BBL/BDL (that is BL). 5.7. Each of BL, BBL and BDL were at all material times solvent. It was not therefore necessary to give consideration to the wishes of any creditors and Inder has not sought to allege the contrary. 5.8. In those circumstances, the principle in *Re Duomatic* applies.” 90. In my view the concession in paragraph 5.5 is a realistic acceptance of the position. Insofar as relevant I would go further and hold that: (i) It would be a breach of his fiduciary duties as a director of BBL and BDL to cause those companies to agree to make and to make substantial payments to his company, Torex, to enable it to undertake speculative property developments, without any terms as to repayment, as to payment of interest, or as to the provision of security, unless he had made full disclosure of his interest in Torex and the proposed agreements and/or payments and unless BBL and BDL had given informed consent to the making of such agreements and such payments in the manner required by the general law, by the Companies Acts as in force at the relevant times and by the articles of association of those companies. (ii) Neither BBL nor BDL followed the requirements of the general law or the Companies Acts as in force at the relevant times or the articles of association of those

companies as regards the making of such agreement and such payments. In particular, there was no formal meeting of the directors of BBL or BDL at which Jat declared his interest in Torex and the proposed transactions and at which the making of any agreement as regards Torex or the making of the Torex payments was sanctioned in the requisite manner, nor any ratification of his conduct in accordance with s. 239 Companies Act 2006. 91. It therefore follows that Jat is obliged to, and does, rely on what is commonly referred to by lawyers as the Duomatic principle to legitimise what would otherwise amount to an undoubted breach by him of his fiduciary duties to BBL and BDL. The principle was explained by Buckley J in *Re Duomatic* [1969] 2 Ch 365, 373 as being that: "...where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be."

93. Mr Chaisty and Mr Grantham drew my attention to certain material aspects of the Duomatic principle in their written opening.
94. They referred me, as did Ms Anderson, to the decision of the Court of Appeal in *Sharma v Sharma* [2013] EWCA Civ 1287, [2014] BCC 73 as confirming a number of significant principles of relevance to this case. That was an appeal from a decision of Simon J. [2012] EWHC 2529 (Fam), in the context of financial remedy proceedings in the Family Division, that the director of a dental company was not in breach of her fiduciary or statutory duty by acquiring certain dental practices for her own benefit, rather than for the benefit of the company, where the central issue in the appeal was whether the shareholders with knowledge of the material facts had acquiesced in the director's proposed course of conduct. It was held by Jackson LJ, in a judgment with which McCombe and Floyd LJJs agreed, dismissing the appeal, that (and I quote from the helpful headnote in the BCC report): "The relevant principles could be summarised as follows: (i) a company director was in breach of his fiduciary or statutory duty under s.175 of the 2006 Act if he exploited for his personal gain: (a) opportunities which came to his attention through his role as director; or (b) any other opportunities which he could and should exploit for the benefit of the company; (ii) if the shareholders with full knowledge of the relevant facts consented to the director exploiting those opportunities for his own personal gain, then that conduct was not a breach of the fiduciary or statutory duty; (iii) if the shareholders with full knowledge of the relevant facts acquiesced in the director's proposed conduct, then that may constitute consent. However, consent could not be inferred from silence unless: (a) the shareholders knew that their consent was required; or (b) the circumstances were such that it would be unconscionable for the shareholders to remain silent at the time and object after the event; (iv) for the purposes of (ii) and (iii) full knowledge of the relevant facts did not entail an understanding of their legal incidents, i.e. the shareholders needed not appreciate that the proposed action would be characterised as a breach of fiduciary or statutory duty. (*Boardman v Phipps* [1967] 2 A. C. 46 followed; *Re Duomatic Ltd* [1969] 2 Ch. 365, *Re Home Treat Ltd*

[1991] B. C. C. 165 and Knight v Frost [1999] B. C. C. 819 applied.)”

95. Mr Chaisty and Mr Grantham also noted that the principle in *Re Duomatic* applies to both members and directors, referring me to the observations of Lewison LJ at [36] in *Speechley v Allott* [2014] EWCA Civ 230, where he cited *Barron v Potter* [1914] 1 Ch 895 and *Runciman v Walter Runciman plc* [1992] BCLC 1084. They also noted that provided the shareholders/directors agree to the course of conduct in question, there is no need to enquire as to the capacity in which they purport to act, and that the shareholders/directors need not be present at the same time, so that assent given on separate occasions will suffice, referring me to the observations of HHJ Purle QC in *Re BW Estates Ltd (No 2)* [EWHC] 2156 (Ch) at [40] – [41].
96. Mr Chaisty and Mr Grantham also refer me to s. 239(6)(a) Companies Act 2006, which makes clear that nothing in s. 239 affects the validity of a decision taken by unanimous consent of the members of the company. 97. In this case the decisions in question to agree to and make payments to Torex were of course decisions which were taken on behalf of the companies BBL and BDL. From March 2007 onwards Sohan, Rajinder, Inder and Jat were all directors of those companies, as well as directors of BL. The sole shareholder of BBL and BDL was BL. All four were the sole shareholders in BL. It follows that the correct analysis is that in order for the Duomatic principle to apply it must be shown that all four agreed to or acquiesced in any decision to agree to and make payments to Torex.
98. Ms Anderson emphasised that the Duomatic principle required: (a) full knowledge of the relevant facts; (b) approval, not just knowledge; and (c) unanimous approval of all the relevant shareholders. I agree with that submission. I note that in *Re D’Jan of London Ltd* [1993] BCC 646, a claim against a director for negligence in completing and signing an insurance proposal form, Hoffman LJ (sitting as an additional judge of the Chancery Division) said in a similar context that it was no defence to argue that the director and his wife as sole shareholders would probably have ratified his action if they had known or thought about it before the subsequent liquidation of the company removed their power to do so. 99. It followed, she submitted and I agree, that the burden of proof is upon Jat to establish actual assent or acquiescence, so that it would not be sufficient for Jat to say that even if Rajinder did not assent or acquiesce nonetheless since she habitually did what Sohan said she would have agreed if asked. Nor is it sufficient for Jat to say that Inder knew unless it could also be said that he assented or acquiesced. Nor, for that matter, would it be sufficient for Jat to say that Inder would have agreed eventually if that is what Sohan told him he had to do. Did the other directors know of and agree to or acquiesce in the Torex payments?
100. I have already made findings to the effect that there was no agreement by Sohan nor Rajinder, let alone by Inder, in the terms of the Original Loan Agreement or the Varied Loan Agreement. Thus there is simply no question of there having been any assent or acquiescence to Jat being entitled to procure BBL or BDL to make payments to Torex.

101. However I must also consider the position in relation to the Torex payments.
102. It is sensible to begin with the payments made in 2007 onwards (excluding the Cumberworth payment and the final £13,000 payment in December 2009, in respect of which different considerations may apply).
103. The first question is whether or not I am satisfied on the balance of probabilities that Sohan and Rajinder knew of and consented to the payments. Inder's primary case has always been that neither Sohan nor Rajinder knew of or agreed to these payments, because of his belief that neither would have agreed without obtaining his agreement as well. However, in my view this failed to reflect what I am satisfied was the reality of the relationship as between him and his parents by September 2007, and is also inconsistent with the evidence he adduced from Satwant, which as I have said I accept. Accordingly I am satisfied that Sohan did both know of and consent to Jat using BBL and BDL's funds to enable Torex to acquire and develop the Carlton Road property. In short, I am satisfied that by this stage he was so aggrieved by the scale of Silvercrest's losses, for which he blamed Inder, and by Inder's refusal to agree to a formal division of the family business on what he regarded as fair terms, that he decided that Inder should no longer be permitted to frustrate and to delay Jat's plans to acquire and develop further property in his own right, in circumstances where he believed that this was the only sensible way forward and one which was going to happen, either by negotiation and agreement or if not by exercising the majority voting rights, before long in any event.
104. As regards Rajinder, Ms Anderson has submitted that there is insufficient evidence to make such a finding. She submits that it is inconsistent with the evidence that Sohan would not have involved her in business decisions, so that the likelihood is that it was something which was agreed solely as between Sohan and Jat. However, on balance I am satisfied that Rajinder did both know and consent. In particular I am satisfied that this was not a purely business decision, but one which had family ramifications insofar as it did involve treating the two sons differently because of Sohan's view as to their behaviour in the wider sense. I am also satisfied that Sohan would have wanted to ensure that Rajinder knew and approved, because he knew that she would have to exercise her rights as director of BBL and BDL and as majority shareholder in BL after his death, in the face of possible opposition from Inder, to ensure that his decision was respected and adhered to.
105. This is also consistent with Satwant's evidence, which is that Rajinder was present at the family lunch in September 2007 where Sohan explained to her what he was going to do. It could be argued that her silence in such circumstances is insufficient to amount to consent or acquiescence. It could also be argued, given Rajinder's evidence as to her knowledge of her responsibilities as a director, that this could not have amounted to informed consent. However, in my view it would be unrealistic to treat this as the first or only occasion on which Sohan and Rajinder would have discussed this; I am satisfied that it must have been discussed on a number of occasions. Moreover, even if that was wrong, I am satisfied that in the fact-specific context of this case, given the inter-connected family and business

relationship and responsibilities, in circumstances where as I have said Sohan had taken steps to ensure that she was positioned to operate as his representative after his death, on an objective analysis her silence can only be taken as amounting to agreement. Finally, whilst I accept that Rajinder would not have had any knowledge of the legal issues involved and nor, probably, of her role as shareholder and director of BL or as a director of BBL and BDL, I am satisfied that she knew of the essential facts in relation to the proposed payments.

106. I should also resolve the question as to whether these payments were intended, on an objective analysis, to be unconditional and permanent transfers, in effect to be gifts – as is Inder’s primary case - or to be loans, as Jat contends. I am satisfied that there was never any discussion let alone agreement to the effect that these monies were to be given outright to Jat. When Jat was asked about this in cross-examination he said that “if I’d done well it would have been repaid ... when I’d made money I’d pay it back”. I am satisfied that it was agreed or understood at the time that they were to be regarded as a form of loan as opposed to an outright gift, but on a non-commercial family basis, so that there was no provision for interest to be payable and no time for repayment was specified, with the agreement or understanding being that Jat would repay the loan at a timescale to be agreed as between himself and Sohan (or Rajinder after his death), the expectation being that it would be repaid as and when the Carlton House development was completed and sold, subject to any further agreement to roll over the loan for use in a further development project.
107. I accept that this is a very loose form of agreement which does not address what would happen if – as Jat appears to say has happened - the Carlton House development was loss-making and there was no money available to repay the loan once the bank and other third party creditors were paid off. Nonetheless I am satisfied that this does reflect the way in which matters were agreed at the time as between Sohan and Jat. I also consider that Sohan and Jat proceeded on the basis that if the development had made a handsome profit some agreement would have been reached whereby as well as repaying the loan some part of the profit would have found its way to Jat’s parents one way or another, possibly by way of payment of what would have been described as interest, as Jat appeared to suggest in cross-examination. As is natural in a situation like this, transactions between family members proceed on the basis that it is assumed the project will be successful and, unlike commercial lenders, little if any thought is given to what will happen if things do not go well. Nonetheless, I do not consider that Sohan would ever have contemplated giving family funds to Jat unconditionally, with no obligation to repay however successful the project, any more than he would have considered giving family funds to Inder outright. I do not consider that Jat would have expected these funds to be provided as an unconditional gift.
108. It is not without relevance in this context that in the contemporaneous correspondence, for example Ford & Warren’s letter of March 2008, Inder clearly believed that it was a loan, and indeed he continued to write referring to them as unauthorised loans – see his memorandum to Jat of 23 September 2010 and his letter to Simpson Wood of 20 December 2010, and I reject his oral evidence to the contrary. Of course, as a matter of law the default

position is that if monies are transferred by one to another they are to be assumed to have been transferred by way of loan unless the evidence shows that there was a clear agreement or intention to make them over as a gift.

109. I now turn to the crux of the case, which is whether or not Inder knew of and agreed or acquiesced in the payments.
110. Perhaps the strongest point made by Mr Chaisty was that it would not have made sense to seek to conceal matters from Inder, in circumstances where everyone else in the family knew what was going on, and where there was no realistic prospect of concealing from Inder the fact that a substantial payment had been made by BBL to Torex. I am completely satisfied that they knew that it would have been impossible to conceal the transactions involving BBL and BDL from Inder for very long and, as I have already found, no attempt was made by Jat to seek to conceal the bank statements from Inder in September 2007. I suspect that it was a surprise to them that Inder did not discover what had happened before he did.
111. However, there is a significant difference in my view between knowing that Inder would almost certainly discover in due course what had happened and taking a positive decision to notify him in advance of the transactions, let alone proceeding on the basis that his consent would have to be obtained before the transactions could lawfully proceed. I have no doubt that Sohan and Jat would not have wanted to notify him in advance, strongly suspecting – as I am satisfied they must have – that he would almost certainly have objected and might have taken steps to block the payments. Although no disclosure has been made of Baxter Caulfield's conveyancing file for the purchase of Carlton House, so that the gap – if any – between exchange and completion is not known - there is no reason to consider that the vendors would have been prepared to wait indefinitely for completion whilst Jat attempted to obtain Inder's approval. Under cross-examination Jat initially said that he told Sohan the same day as the £440,000 was transferred and that he believed Sohan had told Inder the following day. Later he said that he told Sohan what he was going to do and Sohan said that he would tell Inder, but he did not know when this was. I am satisfied that Jat would have wanted Sohan's agreement that he could use family company funds for the purchase before he committed to it, but there is no satisfactory evidence in my judgment that Inder was told in advance of the transaction, let alone that he was told some time in advance to enable him to decide whether or not to consent and any necessary formalities to be completed.
112. I also do not accept that he was told after the transfers had happened. On the balance of probabilities, I am satisfied that Sohan and Jat decided that the best course was simply to transfer the funds from BBL and BDL without seeking or obtaining Inder's advance approval. I am satisfied that whilst they expected that Inder would discover what had happened in due course and would be extremely upset, they believed that he would be in a weak position to complain, given the losses suffered in relation to Silvercrest, and given that they believed – as it transpires erroneously – that they could always use their majority interest (including Rajinder) in the family companies to legitimise it anyway, so that in the end he would just

have to live with it and accept a partition of the family business.

113. In short, I am satisfied that Sohan did not tell him within a short time of it being agreed, as Jat, supported by Rajinder and Jaswant, says. Even if it did in some way come to his attention at the time, I am also and even more firmly satisfied that he did not agree to it. This whole version of events is, in my view, completely inconsistent with the version of events in the contemporaneous and subsequent correspondence (in particular the pre-action protocol letter of response) or in the witness statements. I have no doubt that it has been introduced, quite opportunistically by Jat supported by Rajinder and Jaswant, once it became apparent to him that it would not be a sufficient defence for him to rely upon the majority control of the companies by Sohan, Rajinder and himself at the time of the transactions.
114. In my view, the letter of 27 March 2008 from Ford & Warren is entirely consistent with Inder having first discovered what had happened sometime in the previous month. Had he known about it in late September 2007, or prior to the meetings of November and December 2007, I have no doubt that it would have been raised at that time by him as a matter of complaint – whether justified on his case or as a cynical tactic on Jat’s case, yet the documentary evidence shows and everyone including Mr Newman confirms that he did not.
115. Nor in my view does the evidence show that Inder must have known before he says he did. In particular: (i) It is clear that the transfers from BBL and BDL to Torex were indeed shown on the bank statements. It is also clear, and I accept, that Ms Stratton wrote on the BBL bank statement recording “transfer to Torex Developments” the words “Jat’s new company”, and thereafter caused the Sage accounts for both companies to show in the nominal ledgers the transactions as transfers to Torex. However, notwithstanding what she said in her witness statement, in cross-examination she accepted that she could not say - especially since she was only in the office 2 days a week - that it was Inder, as opposed to Jat, who would invariably have opened or scrutinised all of the bank statements as they came in. Nor could she say that it was Inder and not Jat who must have provided her with the explanation which caused her to write what she did on the BBL bank statement. (ii) In my view it is equally possible and on balance more probable, that by this stage Inder was sufficiently distracted by his concerns in relation to Silvercrest that he was not in the office at the relevant time and that Ms Stratton asked and was provided with the explanation by Jat. In a way that is not surprising, because she knew that BDL was – as she perceived it – Jat’s company, and would have seen the payments out from BBL and BDL to Torex at around the same time. Again therefore, she was more likely, if Inder was not immediately available, to have asked Jat for an explanation. (iii) It is also worth noting that 2 days after the £440,000 was transferred out of the BDL account sufficient was paid in to cause the balance to reduce back to below the £600,000 limit. It follows that it is entirely plausible that the bank would not have felt it necessary to seek to contact Inder to enquire why the overdraft limit had been exceeded. (iv) Although initially I was unimpressed by Inder’s explanation that once he saw that BBL’s overdrawn balance had increased to £550,000 he assumed, without checking, that this was because Jat had paid the outstanding tax liability whilst he was away in Africa on Silvercrest

business in fact, on an analysis of the documentary evidence and the correspondence in relation to this in the context of the meetings and correspondence in December 2007, this explanation seems to me to be both plausible and reasonable. It is clear that by this stage steps were being taken by Sohan and Jat, with the assistance of Simpson Wood and Baxter Caulfield, effectively to remove his de facto control of BBL and its financial affairs and reinstate the control of Sohan, supported by Jat.

116. I accept, however, that there is no evidence to support any contention that Jat deliberately intercepted the bank statements or concealed them from Inder or sought to involve Ms Stratton in a strategy to conceal the transaction from Inder. I am satisfied that she would not have been party to such conduct, nor was it seriously if at all suggested to her that she had been. The evidence, including that of Inder, shows clearly that the bank statements for both companies were there for him to see at the office, had he wanted to, from September 2007 onwards, and that it was not until later in November 2007 that BDL's bank statements were redirected to Jat's home address (and even then were still returned to the office for Ms Stratton to work on until she started to work on BDL's books at Jat's house in 2008) whereas BBL's statements were always kept there. The evidence also shows that there would have been no reason why Ms Stratton would not have told him about these payments had he asked, or have provided him with a Sage printout, had he requested one.
117. So far as the Cumberworth payment is concerned, this was transferred to Torex on 22 August 2008, which was only just over 2 weeks before Sohan's death. When Jat was asked about this in cross-examination he said that he had told Sohan that the property was being sold and that he was intending to transfer the proceeds to Torex. He also said that Sohan had told Inder about this, but he did not suggest that Sohan had told him that Inder was agreeable to this.
118. Again I am prepared to accept on the balance of probabilities that Jat would have informed Sohan, who did not object. I am also prepared to accept that Sohan would have told Rajinder at that time, and she would not have disagreed. However there is no satisfactory evidence that Sohan even told Inder, let alone that Inder agreed. The context is of course important, which is that in my judgment it is virtually inconceivable that Sohan, who was on any view in a very poor state of health at least physically at this stage, would have provoked a serious falling out with his eldest son by informing him that he had agreed to allow Jat to receive £335,000 as the proceeds of sale of a development property acquired by BDL only 2 years previously.
119. There was no evidence adduced in relation to what appears to have been very much an isolated one-off payment of £13,000 from BDL to Torex in December 2009. By then, of course, only Rajinder and Inder would have been involved, and I have no doubt whatsoever that even if Rajinder was informed, which I have to say I doubt, Inder would not have been.

120. What then about acquiescence? Given the conclusions that I have reached that Inder was never even informed, let alone asked to agree, to the payments to Torex, there is no basis for finding any acquiescence as regards his conduct prior to the time he found out, as I have found, about the payment from BBL in around February 2008.
121. In closing submissions, Mr Chaisty contended that acquiescence could be found by reference to Inder's conduct in relation to the letter from Ford & Warren dated 27 March 2008 and subsequent events. Whilst I applaud the ingenuity of the argument, in my judgment it has no merit. I have already referred to the terms of the letter at [73] above and have already noted at
- [80] that whilst it was moderately expressed it nonetheless: (a) asked Jat's solicitors to explain on what basis this substantial payment had apparently been made to Jat's company without authorisation; (b) cannot be read as Inder electing to look solely to Torex for repayment of the loan, as opposed to looking to Jat to repay the money on the basis that it was an unauthorised payment to his company and for which he was responsible. It is simply not possible in my judgment to read this as amounting to anything like acquiescence. Moreover, whilst Mr Chaisty also pointed to the delay until August 2009 in Inder making a positive allegation against Jat of breach of fiduciary duty, that does not really assist Jat in circumstances where over that whole period neither Jat nor his solicitors had ever provided any substantive response to the simple questions posed in the 27 March 2008 letter. By reference to the test as explained in *Sharma* it is difficult to see how this exchange of correspondence could possibly be construed as Inder being asked to give his consent to this unauthorised payment and, by his silence, being treated as having failed to voice an objection which in the circumstances he would be expected to voice. Was Jat in breach of fiduciary duty?
122. Given the findings I have already made I can summarise my conclusions relatively shortly. In short, I am satisfied that no thought was given by Sohan or Jat (or Rajinder for that matter) as to whether what was done was in the best interests of BBL or BDL. They completely ignored the cautionary advice given by Simpson Wood in November 2005 as to the appropriateness of lending substantial funds without express provision for repayment to a non-family company and without provision for interest, so as to make it a justifiable commercial proposition, and appear to have given no thought to the financial risk to BBL or BDL if the property development was not successful. No thought was given to the possibility of taking security over Carlton House or other property, nor of taking a guarantee from Jat. It is apparent that neither Sohan nor Jat thought it sensible to approach Simpson Wood or Baxter Caulfield for advice or assistance in structuring the transaction on some proper accounting or legal basis, contrary to the position adopted previously for example in relation to Silvercrest. I am satisfied that this was because they simply regarded this as family money, as opposed to company money, which they believed that Jat was entitled to borrow and to risk for his own benefit, on the basis that this was justified because of their adverse view about Inder and the monies lost by Silvercrest, and also because they believed that Jat

would be entitled to use his interest in the assets of the family business for his own property investments once the business was formally divided, as they expected would happen before long either by Inder finally agreeing or, if not, by taking action as majority directors and shareholders to force through their wishes.

123. In conclusion, I am satisfied that Jat did act in breach of his fiduciary duty to the companies and that the Duomatic principle is not engaged so as to excuse it. Limitation
124. It is common ground that unless the case can be brought within one or more of the exceptions in ss. 21 or 32 of the Limitation Act 1980 the vast majority of the claim is statute-barred. That is because the claim was issued on 22 December 2014, and it is established law that the claim in this case is subject to a 6 year limitation period. Here, the payments span the period September 2007 to December 2009, so that all payments made before 22 December 2008 would be statute-barred. Only 4 payments were made by BDL on or after 22 December 2008, totalling £22,530.
125. Prior to trial it appeared that the claimant accepted that in order to overcome the limitation defence it would need to establish either that Jat was party to a fraud or fraudulent breach of trust, so as to bring the claim within the exception in s. 21(1)(a), or had been guilty of deliberate concealment, so as to bring the claim within the exception in s. 32(1)(b). Although the claimant had not pleaded a positive case in relation to limitation in his Reply to Defence, as Mr Chaisty said it is clear both from the terms of the Particulars of Claim and from the judgment of Morgan J. that this was the case being advanced by the claimant.
126. However, in her opening written submissions Ms Anderson advanced the alternative argument that the claim also fell within the exceptions in s. 21(1)(b) (claims for the recovery from a trustee of trust property or the proceeds of property in the trustee's possession or previously received by the trustee and converted to his use) and/or s. 32(1)(a) (action based on fraud by the defendant). Mr Chaisty objected that this was not pleaded, and needed to be pleaded before this argument could be run and so that a decision could be taken on behalf of the defendant whether or not to object to any amendment of the existing statement of case. I agreed and Ms Anderson duly provided a draft amended Reply, in which reliance on s. 21(1)
- (b) and s. 32(1)(a) was explicitly pleaded. Having considered the draft pleaded case Mr Chaisty sensibly and realistically conceded that he could not oppose the amendment although he reserved his position in relation to costs.
127. Mr Chaisty also considered the case law in relation to s. 21(1)(b) and, in particular, the recent decision of the Court of Appeal in *Burnden Holdings v Fielding* [2016] EWCA Civ 557, in which David Richards LJ, in a judgment with which Tomlinson LJ and Arden LJ agreed, approved an earlier decision of Richard Field QC (later Field J) in *Re Pantone 485 Ltd* [2002] 1 BCLC 266, and held that where a director used company money to confer a benefit on another company controlled by him that amounts to a conversion of trust property and hence a claim against the director for equitable compensation for breach of fiduciary duty in

that regard falls within the scope of s. 21(1)(b) and is not subject to the 6 year limitation period. Although Mr Chaisty reserved his client's position to argue the point in the appropriate court should the matter go further, he accepted that the effect of this decision is that the claim made here for equitable compensation for breach of fiduciary duty is not limitation barred.

128. Although, that leaves outstanding the issue as to whether or not the alternative pleaded claim for an account of profits was nonetheless statute-barred, in circumstances where in *Burnden David Richards LJ* inclined to the view that such a claim was not within s.21(1)(b), for reasons I give later I am satisfied that it is neither appropriate nor necessary to award the claimant such relief in this case. However, since the limitation issue in relation to the other subsections of the Limitation Act were argued, and may be relevant as to costs, I should address them, if only briefly.
129. The most hotly contested issue was whether or not Inder could satisfy me that Jat's breach of fiduciary duty was dishonest, so as to allow him to rely on the s. 21(1)(a) gateway.
130. There was no dispute between the parties as to the applicable law in this regard. The test for dishonesty in this context was stated by the Court of Appeal in the case of *Gwembe Valley Development Co Ltd v Koshy* [2003] EWCA Civ 1048. It is necessary to refer only to the relevant parts of three paragraphs: "122. In view of Mr Page's detailed challenge to the judge's finding of dishonesty, it is necessary to set out the relevant parts of his judgment in some detail. They begin in the earlier part of the judgment (para 20ff), where the judge made certain "Preliminary Observations". First, he directed himself correctly as to the need for strong evidence to establish the serious allegation of dishonesty, by reference to *In re H. and Others (Minors)* [1996] AC 563, 586, per Lord Nicholls of Birkenhead. ..."
131. In *Armitage v. Nurse* [1998] Ch 241 at 251D, 260G Millett LJ held that, in this context, a breach of trust is fraudulent, if it is dishonest. He accepted counsel's formulation that dishonesty - "... connotes at the minimum an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the company or being recklessly indifferent whether it is contrary to their interests or not." and added: "It is the duty of a trustee to manage the trust property and deal with it in the interests of the beneficiaries. If he acts in a way which he does not honestly believe is in the interests of the beneficiaries then he is acting dishonestly." (p 251D-F)
132. The correctness of this guidance was not in issue before us. We were also referred to the recent decision of the House of Lords in *Twinsectra v Yardley* [2002] AC 164, [2002] UKHL 12. Lord Hutton, giving the leading speech, emphasised the objective and subjective aspects of the "combined test": "which requires that before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest." (paras 27, 38) ..."

131. In this case I consider that the arguments are finely balanced.
132. On the one hand Ms Anderson can and does submit with some force that: (i) Jat must have known from his involvement in the previous litigation with his uncle and cousin about the fiduciary obligations owed by directors; (ii) Jat must have known that for the companies to advance substantial monies to Torex on the terms agreed was contrary to their interests, or at least was recklessly indifferent as to that; (iii) Jat must have known that his own interests did not necessarily coincide with the interests of the companies, and that the interests of the companies necessarily involved the wider interests of the Bhullar family business, including therefore the interests of all four shareholders of BL; (iv) the very fact that Jat did not seek to obtain Inder's approval, whether formally or informally, indicates very strongly that he knew that what he was doing was wrong, as does the fact that no attempt was made to obtain advice from the accountants or the solicitors as to the appropriateness of what was being done. She also seeks to rely upon her case as regards deliberate concealment, although based on my findings as expressed above it seems to me that this has lost what force it originally might have seemed to have.
133. On the other hand Mr Chaisty can and does submit with some force that the case was initially advanced on the basis that the payments were – as Inder did not shy from contending – thefts from the companies, concealed from Sohan and Rajinder as well as from Inder, whereas as I have now found that was not the case, and they were made with Sohan's and Rajinder's knowledge and consent on the basis that it was at least hoped they would be repaid on the successful conclusion of the development. Not seeking or obtaining Inder's assent as well as that of Sohan and Rajinder is as consistent with an honest belief that it was not necessary, given that the majority of the family in terms both of directors and shareholding were in favour, as it is with knowledge that the payments would be illegitimate without Inder's assent being obtained. It can also be said that if Jat honestly believed that all that he was doing was taking money to which he was entitled since Inder had effectively had family company money given to him for Silvercrest, and which was going to come to him anyway on a division of the company which he believed was going to happen sooner or later and which Inder could not properly resist, that is not dishonest. It can also be said with some force that the case for inferring dishonesty relying on concealment of the payments cannot now stand given the conclusions I have already reached on that issue.
134. In my judgment Inder has failed to satisfy, with strong evidence, the burden of proof upon him to prove dishonesty on Jat's part. For essentially the reasons submitted by Mr Chaisty I am satisfied that the evidence is as, if not more, consistent with an honest albeit misguided belief that Jat was entitled to do what he did than with actual dishonesty. Whilst the facts of this case come close to reckless indifference, on balance I am not satisfied that they cross the line.

135. It follows that Inder does not succeed in relation either to s. 21(1)(a) or s.31(1)(a). As to the latter, there is the further difficulty that on the authorities an action is not “based upon the fraud of the defendant” unless fraud is an essential element of the cause of action, which is plainly not the position here.
136. Finally, I must consider s. 32(1)(b). It is acknowledged by Ms Anderson, rightly so, that this argument cannot succeed in relation to the BBL payment, since Inder was aware of it in February 2008 and thus the 6 year limitation period running from the date of discovery would have expired before December 2014 when this claim was issued.
137. Although it was pleaded on Inder’s behalf that he did not discover the concealment until after he was provided with the BBL company books and accounts in January 2010, following an order for pre-action disclosure made in December 2009, in cross-examination he confirmed what he had said in his fourth witness statement at [31], which was that he had discovered the removal of funds from BDL in January or February 2009, when Jat had provided him with access to some of the BDL books. However that would still of course mean that the claim was not statute-barred if that was when the 6 year period started to run.
138. In cross-examination, Inder was also asked whether he was aware in February 2008, at around the time he discovered the BBL payment, of the possibility that monies had been paid from BDL as well as from BDL. He said that he was. He said that he had taken it up with his parents and asked them to deal with it, but had taken no other action. This however is inconsistent with the fact that in their letter of March 2008 Ford & Warren had asked for the BDL books to be returned to the office, repeating that request with the threat of an application to the court in June 2008.
139. It would also appear on the evidence of Ms Stratton that it would still have been possible for him to have accessed the BDL bank statements in February 2008, since they were still kept at the Salendine Nook office. He could also have asked Ms Stratton to provide a Sage printout of the nominal ledger relating to Torex, and thus ascertained the details of the Torex payments made by BDL. However by March 2008 and certainly later I am satisfied that he would have been unable to access the bank statements which had by then been moved to Jat’s home office.
140. The two key issues therefore are:
 - (a) Whether or not there has been deliberate concealment, in circumstances where by s. 32(2) it is provided that “deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty”;
 - (b) Whether or not Inder could, with reasonable diligence, have discovered the concealment earlier.

141. The first difficulty for Inder in my view is that given my findings as to concealment there is no basis for a finding that the payments made by BDL to Torex in September 2007 were unlikely to be discovered for some time. They were not positively disclosed, but equally they were not concealed, and Jat would as I have found have known that there was no impediment to Inder seeing the weekly BDL bank statements at any time after the initial payment was made and discovering what had transpired, in precisely the same way he did in February 2008 when he did see the relevant BDL bank statements. It follows, in my judgment, that this first pre-condition is not satisfied at least as regards the 2007 statements.
142. The second difficulty for Inder in my view is that as at February 2008 he knew that it was at least possible that payments had also been made to Torex from the BDL bank account. As he said in his first witness statement – see [75] above – once he discovered the BDL payment he began to investigate the finances of both BDL and BBL, and it is clear from his evidence and I find that this was because he at least suspected that payments might also have been made by Jat from BDL to Torex. This, I am satisfied, was one of the reasons why he subsequently began to press Jat and the accountants and solicitors for production of the BDL books, and why he eventually made a successful claim for pre-action disclosure against BDL. Whilst I am prepared to accept that he did not realise in February 2008 that the BDL bank statements were still in the office, nor did he realise that the Sage accounts on the desktop in the office would have showed – as I find from Ms Stratton’s evidence - at least the 2007 payments from BDL to Torex, I accept Mr Chaisty’s submission that he cannot excuse his failure to take any real steps from February to December 2008 to search for or obtain this information, especially since he was still a director of BDL and had retained solicitors. I am satisfied that with the exercise of reasonable diligence he would have discovered prior to 22 December 2008 any concealment of the BDL payments made up to and including the year end 2007.
143. I do accept however that the position is different in relation to the 2008 and 2009 payments, and specifically the Cumberworth payment. These were payments made at a time when Inder had no access to the BDL bank statements or accounts, and amounted in my view to deliberate commission of breach of duty in circumstances where they were unlikely to be discovered for some time. Whilst there may be some room for criticism of Inder in not making an application for pre-action disclosure earlier than he did, it is difficult in my view to be satisfied that with reasonable diligence he could have discovered them before early 2009. In the circumstances I would have been satisfied that these claims were not statute-barred regardless of the s. 21(1)(b) point. Relief under s.1157 Companies Act 2006
144. This section provides as follows: “1157 Power of court to grant relief in certain cases (1) (a) If in proceedings for negligence, default, breach of duty or breach of trust against– an officer of a company, ... it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit.”

145. Whilst I have found that I am not satisfied that Jat acted dishonestly, I am wholly unpersuaded that he acted reasonably. He cannot rely on the fact that Sohan and Rajinder agreed or acquiesced in his breaches of fiduciary duty, nor on his ignorance of the true ambit of his fiduciary obligations. Nor do I consider that having regard to all of the circumstances of the case he ought fairly to be excused from his liability to repay the net indebtedness of Torex to BBL and to BDL. It is irrelevant that Inder may have lost family monies through the investment in Silvercrest, since this is a claim being pursued for the benefit of BBL and BDL. The appropriate remedy
146. Whilst the claim for equitable compensation for breach of fiduciary duty is made out and is not statute-barred, any claim for an account of profits could only proceed as not statute-barred by reference to the 2008 and 2009 BDL payments.
147. It would appear to me that the straightforward remedy is for repayment of the outstanding monies together with payment of interest which, although I have not heard submissions on the point, would prima facie appear to be appropriate at the interest rate applicable to the BBL and BDL accounts over the periods in question.
148. In my view, there is no reasonable basis for believing that there are any other payments made by BBL or BDL which were procured by Jat in breach of fiduciary duty, whether payments to Torex or to Jat or otherwise. I bear in mind that following disclosure Inder's then solicitors raised queries in relation to certain further transfers, and that Jat's solicitors responded by accepting that these were also payments made to or for the benefit of Torex, which were then admitted in Jat's evidence and in the Amended Defence. Whilst Ms Anderson says that this raises a reasonable suspicion that these were previously concealed and there may also be others, when one looks at these items in context I accept Jat's explanation in evidence that they were simply errors, which were corrected when drawn to his attention. In the circumstances, I am satisfied that there is no reasonable basis for making an order for some further investigation in that regard and that it is not in the best interests of BBL or BDL for permission to be given for that to be done.
149. Furthermore, although Inder made some reference in his evidence to bank charges and costs or losses arising out of taking out an interest swap product, I am satisfied that there is no sufficient evidence before me to justify awarding equitable compensation on that basis, and that there is no sufficient basis for allowing this derivative claim to continue so as, in effect, to require a further trial process to ascertain whether there is a loss in that regard and, if so, what loss.
150. Finally, I am also not satisfied that a sufficient basis has been made out for awarding an account of profits. This is not a case where, on the evidence before me, there is any reason to believe that Torex has made any or any significant profits by reference to the use of this money which ought to be returned to BBL or BDL, whether in relation to the 2008 or 2009 payments or otherwise. Again, I do not think that it is in the interests of BBL or BDL to allow this derivative claim to take on a further life of its own and extend to such an investigation.

Conclusions

151. That concludes this substantive judgment. All remaining matters will have to be left over for further argument at a further hearing unless agreement can be reached.
152. I conclude by expressing my gratitude to counsel and to the solicitors for their efficient conduct of this litigation, which has made my task very much easier than otherwise would have been the case.

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