Neutral Citation Number: [2021] EWCA Civ 675

Case No: A3/2020/0853
A3/2020/0929

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST
MR RECORDER DOUGLAS CAMPBELL QC (Sitting as a judge of the High Court)
[2020] EWHC 688 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7th May 2021

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE NUGEE
and
LORD JUSTICE BIRSS

- -

Between :

(1) LIFESTYLE EQUITIES C.V. **(2) LIFESTYLE LICENSING B.V.** (each company is incorporated under the laws of the Netherlands)	**Respondents/ Appellants**
- and -	
(5) MR KASHIF AHMED **(12) MS BUSHRA AHMED**	**Appellants/ Respondents**

Thomas St Quintin (instructed by **Brandsmiths**) for the **Respondents/Appellants**
Peter Knox QC and **Timothy Sampson** (instructed by Ronald Fletcher Baker LLP) for the **Appellants/Respondents**

Hearing dates: 09/10th March 2021

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Approved Judgment

Covid-19 Protocol: This judgment been handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website.
The date and time for hand-down has been deemed to be 11:00am on 7th May 2021.

Lord Justice Birss:

1. These appeals arise from a trade mark dispute. The claimants below brought proceedings for infringement of registered trade marks and passing off. The relevant trade marks include word marks for BEVERLY HILLS POLO CLUB and devices based on horse riding polo players. The claimants can be called "Lifestyle". There is no relevant distinction between the two claimant companies. The proceedings were brought against a group of sixteen defendants who were associated with the use of a sign SANTA MONICA POLO CLUB along with devices based on horse riding polo players. Most of the defendants were companies, but Mr Kashif Ahmed and his sister Ms Bushra Ahmed were also named as defendants (D5 and D12 respectively). They were alleged to be jointly and severally liable for the torts committed by at least two of the companies of which they were directors (D3 and D11). Each of those two companies at one time or another had traded as "Juice Corporation". I will refer to persons found to be jointly and severally liable with another as accessories and the person with whom they are jointly liable as the principal.

2. The matter came to a first trial in October 2017 before Mr Recorder Douglas Campbell QC sitting as a judge of the High Court. The first trial was concerned with the liability of eight of the corporate defendants including D3 and D11. The question of the accessory liability of D5 and D12 had been separated out to be addressed at a second hearing (if necessary). At the first trial the judge held that all eight defendants were liable on both grounds. There was no appeal from that first trial. Following the first trial Lifestyle elected to pursue an account of profits against D3 and D11 but those companies went into insolvent administration. There was then a second trial. The second trial addressed the accessory liability of the Ahmeds, and Lifestyle's claim for an account of profits against them. The trial took place in February 2020 before the same judge. This appeal is from the judge's order dated 29th May 2020 made following the second trial. In his judgment ([2020] EWHC 688 (Ch)) the judge decided that the Ahmeds were each jointly and severally liable. Lifestyle had contended that a finding of joint and several liability would mean that the accessories should be liable for the whole profits for which D11 was liable to account to Lifestyle. The judge rejected that submission as a matter of law and held that the accessories should only be liable for profits they themselves made from the wrongful acts. He decided that the sum by way of profits which Mr Ahmed had to pay to Lifestyle was £779,981.20, consisting of a loan of £635,789 and 10% of his overall salary amounting to £144,192.20. The sum Ms Ahmed had to pay was £57,007.60, which represented 10% of her salary in the period. The judge also assessed the sums which would be due if the Ahmeds were liable for the profits of D11 on the footing he was wrong on the law. Those sums would have been £3,129,921 for Mr Ahmed and £312,992 for Ms Ahmed.

3. With the permission of the judge Lifestyle appeals the ruling on the law about whether the Ahmeds should be liable for the whole profits made by D11 or only liable for profits they themselves made.

4. The Ahmeds resist Lifestyle's appeal and themselves appeal against the judge's order on six grounds, with permission given by Floyd LJ. The issues on the Ahmeds' appeal can summarised as follows. First (Ground 1) the judge erred in law in finding that the Ahmeds were jointly and severally liable with the relevant company. Second (Ground 2) even if they were liable, the judge erred in ordering an account of profits to be taken against them. Third (Grounds 3 and 4) the judge erred in concluding that the loan was

a profit earned by Mr Ahmed. Fourth (grounds 5 and 6) the judge erred in treating the salaries or a portion of them as profits earned by Mr Ahmed or Ms Ahmed respectively.

5. Before us Lifestyle was represented by Mr Thomas St Quintin, as it had been at the trial. The Ahmeds were represented in this court by Mr Peter Knox QC leading Mr Timothy Sampson. In the court below Mr Knox did not appear. For the trial itself the Ahmeds represented themselves although Mr Sampson did appear for them at a failed application to adjourn before the trial and at the hearing to determine the form of order (which also included a failed application on Mr Ahmed's behalf to reconsider aspects of the judgment).

Lifestyle's appeal

6. The origins of the remedy of an account of profits were discussed in detail by Lord Nicholls in ***Attorney-General v Blake*** [2001] 1 AC 268. The remedy is available in various situations. It is a well established remedy for infringement of intellectual property rights, such as trade marks. The remedy, and its relationship with damages, was explained by Kitchin LJ in ***Hollister v Medik Ostomy*** [2012] EWCA Civ 1419 as follows:

> "54 A claimant who has succeeded in an action for infringement is entitled to damages as of right. If it seems the claimant may have suffered more than nominal damage then he will generally be entitled to an inquiry, the central purpose of which is to ascertain the extent of his losses and so restore him to the position he would have been in if the infringement had not been committed.
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> 55 Alternatively, a successful claimant may seek an account of the profits made by the infringer. This is an equitable remedy and the court has a discretion whether to order it. It may be refused if, for example, the infringer was entirely innocent or the trade mark owner has delayed in bringing proceedings. The purpose of an account is very different from an inquiry as to damages. It is to deprive the infringer of the profits he has made by the infringement. He is treated as if he has conducted the infringing business on behalf of the claimant. The losses the claimant has suffered by reason of the infringement are therefore not relevant."

7. As a species of equitable relief, accounts of profits are also available in other circumstances such as cases of breach of fiduciary duty and dishonest assistance. Some of the cases addressed below are from that sphere. One of Lifestyle's submissions before us was that the principles applied to accounts of profits in fiduciary or dishonest assistance cases did not necessarily apply to accounts of profits in intellectual property cases. I disagree. The circumstances will differ, but I can see no reason why the principles applicable to this remedy should differ in that way.

8. The question we have to decide is whether, when an account of profits is to be given in a case when an accessory is jointly and severally liable with a principal as joint

tortfeasor, is the accessory liable for profits they have made for themselves or are they liable for the profits made by the principal?

9. As the judge did, I start with ***Hotel Cipriani v Cipriani Grosvenor Street*** [2010] EWHC 628 (Ch). In that case Briggs J (as he then was) was dealing with the liability of an accessory in an account of profits in a trade mark case. At paragraph 7 he held as follows:

> "I must first deal with the relevant legal principles. By contrast with joint liability as tortfeasors for damages, including damages calculated on a royalty basis, an account of profits operates against each defendant separately, requiring him or it to disgorge such profits as are shown to have been derived by that defendant from the relevant infringements. In that respect, there is no difference between trademark infringement and passing off, even though the basis of liability for one is statutory and, for the other, based on the common law… The measure of liability is the profit derived by the defendant from the infringement."

10. That is a clear conclusion in favour of the finding that the accessory is liable to account for their own profits and not for those of the principal. Nevertheless, as the judge below recognised in paragraph 30 of the judgment, in ***Hotel Cipriani*** the receiving party was arguing in favour of that conclusion, no doubt because it would have increased their recovery, and Briggs J did not hear adversarial argument on the point because the defendants did not appear.

11. Next I refer to the conclusion reached by Lewison J (as he then was) in ***Ultraframe (UK) Ltd v Fielding*** [2005] EWHC 1638 (Ch). That was a case about dishonest assistance and breach of fiduciary duty. After hearing full argument and addressing a Canadian case which went the other way (***Canada Safeway Ltd v. Thompson*** [1951] 3 DLR 295 and [1952] 2 DLR 591) and an unreported decision of HHJ Seymour QC in ***Comax Secure Business Services Ltd v. Wilson*** (21 June 2001), Lewison J held:

> "1600. I can see that it makes sense for a dishonest assistant to be jointly and severally liable for any loss which the beneficiary suffers as a result of a breach of trust. I can see also that it makes sense for a dishonest assistant to be liable to disgorge any profit which he himself has made as a result of assisting in the breach. However, I cannot take the next step to the conclusion that a dishonest assistant is also liable to pay to the beneficiary an amount equal to a profit which he did not make and which has produced no corresponding loss to the beneficiary. As James LJ pointed out in *Vyse v. Foster* (1872) LR 8 Ch App 309:
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> "This Court is not a Court of penal jurisdiction. It compels restitution of property unconscientiously withheld; it gives full compensation for any loss or damage through failure of some equitable duty; but it has no power of punishing any one. In fact, it is not by way of punishment that the Court ever charges a trustee with more than he actually received, or ought to have received, and the appropriate interest thereon. It is simply on the

> ground that the Court finds that he actually made more, constituting moneys in his hands "had and received to the use" of the cestui que trust."
>
> 1601. I was not referred to any authority binding me so to hold; and I decline to do so."

12. Lewison J's conclusion was followed by Christopher Clarke J (as he then was) in ***Novoship (UK) Ltd v Mikhaylyuk*** [2012] EWHC 3586 at paragraph 99. ***Novoship*** was another fiduciary case. It went on appeal [2014] EWCA Civ 908. There is some support for the same view at paragraph 77 of the judgment of the court, but this point was not addressed specifically in the appellate court.

13. Those are the authorities against Lifestyle. The strongest authority in Lifestyle's favour on this point is the judgment of Costello J in the High Court of Ireland in ***House of Spring Garden v Point Blank (No 2)*** [1983] FSR 489 at p494. The judge said this:

> "It has also been submitted on the defendants' behalf that before the court can make an order for the payment of profits it would have to ascertain the person or firm who actually received them and make the order only against the actual recipient. But this submission ignores the nature of the relief now being considered. An order for an account of profits and their payment is an equitable remedy, given in lieu of an order for the payment of damages. Just as an order for the payment of damages can be a joint and several liability imposed on all wrongdoers who have contributed to a wrong so also can an order for the payment of profits be made against all persons who have been involved in the same tortious act of copyright infringement."

14. Costello J's decision was upheld in the Irish Supreme Court at [1985] FSR 327 but there was no discussion of this principle.

15. A number of other cases were mentioned below and before us but they do not advance the issue. The position is therefore that there is no authority on the point binding on this court. The judge below held (at paragraph 39) that the balance of authority in this jurisdiction was against Lifestyle's case and in any event he agreed with the reasoning of Briggs J, Lewison J and Clarke J in the cases referred to.

16. I agree with the judge's conclusion. The conclusion follows from the nature of the remedy of an account of profits itself. The liability to account for profits is a liability to account for the profits that the person liable has actually derived from the wrongful conduct which has made them liable in the first place. That accords with the equity of the situation.

17. Another reason why this ought to be the right result is that making the accessory liable for the profits made by the principal raises conceptual problems which do not arise when one makes an accessory liable for the damages due for a loss caused to someone else. In the case of damages the extent of the loss limits the extent of all the liability of all the defendants. There may be questions of contribution as between them but that is another matter. However there will be circumstances in which each of the accessory

and the principal have made distinct profits. That seems to have been what happened in ***Hotel Cipriani***. If those are the facts it is hard to see why the claimant should be barred from claiming from the accessory, the accessory's actual profits. If the legal principle is as Lifestyle contend for, does it mean that the claimant is never entitled to the profits actually made by the accessory and is always and only entitled to claim from the accessory a sum equal to the principal's profits? That does not make sense. Moreover I cannot see any justification for a conclusion that the claimant could obtain from the accessory both the profits made by the principal and the profits made by the accessory. Nor can I see any good reason why the claimant would be entitled to choose which of the two profits to recover from the accessory. These difficulties do not arise if an account of profits is confined simply to being an account of the relevant profits actually made by the person giving the account.

18. I would therefore dismiss Lifestyle's appeal.

Joint and several liability (ground 1 of the Ahmeds' appeal)

19. Before the judge Lifestyle's case on the joint and several liability of Mr Ahmed and Ms Ahmed was put on the basis that each was alleged to have authorised or procured the acts of infringement of the company D11 (judgment paragraph 24(1)) and/or that each had acted pursuant to and in furtherance of a common design to secure that such acts took place (judgment paragraph 24(2)). For authorisation the judge cited ***CBS v Amstrad*** [1988] AC 2013 and also referred to ***Twentieth Century Fox v Newzbin*** [2010] FSR 21, for common design the judge referred to ***Fish & Fish v Sea Shepherd*** [2015] AC 1229.

20. In paragraphs 41 to 44 the judge considered the facts and evidence relating to Mr Ahmed. The evidence showed that the company D11 was a family owned SME with a number of employees and a substantial turnover. Mr Ahmed was the managing director and took a close, active and personal part in bringing about the activities found to infringe. He was responsible for choosing what brands to put on the goods, he chose the factories to make the goods found to infringe and agreed prices with them, complaints about confusion were brought to him and, when talking about D11's sales, and what happened in offices and showrooms Mr Ahmed repeatedly referred to himself personally as doing those things.

21. Mr Ahmed contended that he had no improper motive, that he acted on advice, that he delegated design of the logos to a professional design team, that the company was not a "one man" company and that all the other shareholders took an active interest in running the company. The judge held at paragraph 43 that none of these purported defences amounts to a defence in law and went on to hold at paragraph 44 that Mr Ahmed was jointly and severally liable with D11 in relation to the infringing acts. The judge also said it was not necessary to distinguish between authorising and common design because the same facts establish liability on both bases.

22. In relation to Ms Ahmed, the judge held that she was not liable for wider infringing activity of D11 but was liable for infringement by a division called House of Brands. That division of D11 was in a separate building and Ms Ahmed was very hands on, managing the day to day running of that business. The House of Brands had a showroom which stocked goods found to infringe. It was her decision to stock those goods and she sold them to customers.

23. Like Mr Ahmed, Ms Ahmed contended that her dealings with the infringing goods had been without an improper motive or intention to infringe. At paragraph 48, as with Mr Ahmed, the judge held these did not amount to a defence in law. The judge held (paragraph 49) that Ms Ahmed was jointly and severally liable with D11 in relation to the infringing acts committed by the House of Brands but not more widely. Again he did not find it necessary to distinguish between authorising and common design because the same facts establish liability on both bases.

24. Ground 1 of the Ahmeds' appeal is that the judge erred in law in rejecting the defences advanced by both Mr and Ms Ahmed. As put on the appeal, they amount to the following. First is the submission that they had no improper motive, and that (for Mr Ahmed) he acted on advice. The appeal is also put on the basis that the acts done by the Ahmeds were all done *bona fide* in their capacities as directors of the company, for the company's benefit and they were acting within their authority as such (or there was no finding to the contrary). It is submitted that there was no allegation that either individual caused the infringing acts to be done when they knew or should reasonably be taken to have known that they were infringements or were likely to be infringements. The submission is that in those circumstances acts of company directors cannot be such as to make them liable as joint tortfeasors for torts committed by the company concerned.

25. The overall submission can be sub-divided into two points. The first is about the state of mind of the individual concerned. There is no question that the Ahmeds' conduct was deliberate and intentional in the sense that they obviously knew and intended that the company should do the things which in fact have turned out to be infringements. However Counsel's submission is that that is not enough and that even if the torts in question are torts of strict liability, as a matter of law in order to find company directors liable as accessories, it is necessary for the individuals to have known, actually or constructively, that the acts were infringements or at least that that was likely. The second point is about director's duties. The submission is that for a company director to be found liable as an accessory for the acts of the company, it is necessary to find that the director exceeded their authority or acted in breach of their fiduciary duties as a director to act in the best interests of the company. These two points interact since the state of mind is effectively being advanced as the reason why the director in question may have exceeded their authority.

26. Counsel for the Ahmeds reviewed a number of authorities including ***Joseph Constantine Steamship Line v. Imperial Smelting Corp.*** [1942] AC 154, ***Yuille v. B & B Fisheries (Leigh) Limited*** [1958] 2 Lloyd's Rep 596, ***Wah Tat Bank Ltd v. Chan Cheng Kum*** [1975] AC 507, and ***Evans v Spritebrand*** [1985] 1 W.L.R. 317. Counsel also cited the judgment of the Federal Court of Australia (Victoria District Registry) (Emmett, Besanko and Jessup JJ) in ***Keller v LED*** [2010] FCAFC 55. Reference was also made to passages from other cases cited in those authorities, including the Canadian case of ***Mentmore Manufacturing Co. Ltd. v. National Merchandising Manufacturing Co. Inc.*** (1978) 89 D.L.R. (3d) 195, to ***White Horse v Gregson*** [1984] RPC 61, ***Unilever Plc v. Gillette (U.K.) Ltd*** [1989] R.P.C. 583, and to ***Standard Chartered Bank v. Pakistan National Shipping Corporation (No. 2)*** [2000] 1 Lloyd's Rep 218. In the end the focus of the submissions was on ***MCA Records Inc. v. Charly*** [2002] FSR 26 and the judgment of Chadwick LJ in that authority. Two later cases

were also referred to: ***Adelle Challinor v Juliet Bellis*** [2013] EWHC 347 (Hildyard J) and ***Ottercroft v Scandia Care*** [2016] EWCA Civ 867.

27. Counsel submitted that no authority had been put before the court whose ratio was that a company director could be held liable as a joint tortfeasor without one of the two points mentioned above being established. To deal with this submission and the arguments made on the Ahmeds' behalf more generally, I propose to start with the position absent any question of company directorship and then turn to ***MCA v Charly***, in which the Court of Appeal authoritatively reviewed the decisions on the question of a director's liability as a joint tortfeasor for infringement of intellectual property rights by the company.

28. Absent any issue arising from their status as directors (or shareholders) it is clear from ***Fish & Fish v Sea Shepherd*** that there is no requirement, for a tort of strict liability like the trade mark infringements in this case, that the accessory should have an improper motive or should know or have reason to believe that the activity is or may be an infringement. For this point it is enough to set out a passage from the judgment of Lord Neuberger at paragraph 60 where he explained that

> " … it is unnecessary for a claimant to show that the defendant appreciated that the act which he assisted pursuant to a common design constituted, or gave rise to, a tort or that he intended that the claimant be harmed."

29. Lord Sumption made the same point in paragraph 37(iii) of his judgment when he referred to the defendant being liable if they assisted in the commission of a tort pursuant to a common design to do an act which is "or turns out to be" tortious.

30. In the present case the fact that the Ahmeds' conduct was clearly deliberate and intentional in the sense I have described already means that they satisfied the test in ***Fish & Fish v Sea Shepherd***. Thus the only basis on which this ground of appeal can succeed is on the footing that they were directors of the company. In fairness that is how counsel put the case on their behalf but it bears emphasising at this stage. This means that the two points identified above (state of mind and director's duties) in effect come down to the same issue.

31. Turning to ***MCA v Charly*** Chadwick LJ noted (in paragraph 47) that in ***Mentmore*** the question of whether and in what circumstances a director should be liable with the company was described as a difficult question of policy and that in the end a balance has to be struck between two considerations. The first consideration is the distinction between a company as a distinct legal person and its shareholders, directors and officers. The second is that everyone should be answerable for their tortious acts. The judge then made the point that because there was a balance to be struck in each case it was dangerous for an appellate court to attempt a formulation of the principles since it may come to be regarded as prescriptive (paragraph 48). Nevertheless Chadwick LJ did feel able to formulate four principles which he then set out.

32. Given their centrality to the issues on this appeal I will set them out in full:

> "49. First, a director will not be treated as liable with the company as a joint tortfeasor if he does no more than carry out

his constitutional role in the governance of the company—that is to say, by voting at board meetings. That, I think, is what policy requires if a proper recognition is to be given to the identity of the company as a separate legal person. Nor, as it seems to me, will it be right to hold a controlling shareholder liable as a joint tortfeasor if he does no more than exercise his power of control through the constitutional organs of the company—for example by voting at general meetings and by exercising the powers to appoint directors. Aldous L.J. suggested, in *Standard Chartered Bank v. Pakistan National Shipping Corporation (No. 2)* [2000] 1 Lloyd's Rep 218, 235—in a passage to which I have referred—that there are good reasons to conclude that the carrying out of the duties of a director would never be sufficient to make a director liable. For my part, I would hesitate to use the word "never" in this field; but I would accept that, if all that a director is doing is carrying out the duties entrusted to him as such by the company under its constitution, the circumstances in which it would be right to hold him liable as a joint tortfeasor with the company would be rare indeed. That is not to say, of course, that he might not be liable for his own separate tort, as Aldous L.J. recognised at paragraphs 16 and 17 of his judgment in the *Pakistan National Shipping* case.

50. Second, there is no reason why a person who happens to be a director or controlling shareholder of a company should not be liable with the company as a joint tortfeasor if he is not exercising control though the constitutional organs of the company and the circumstances are such that he would be so liable if he were not a director or controlling shareholder. In other words, if, in relation to the wrongful acts which are the subject of complaint, the liability of the individual as a joint tortfeasor with the company arises from his participation or involvement in ways which go beyond the exercise of constitutional control, then there is no reason why the individual should escape liability because he could have procured those same acts through the exercise of constitutional control. As I have said, it seems to me that this is the point made by Aldous J (as he then was) in *PGL Research Ltd v. Ardon International Ltd* [1993] F.S.R. 197.

51. Third, the question whether the individual is liable with the company as a joint tortfeasor—at least in the field of intellectual property—is to be determined under principles identified in *C.B.S. Songs Ltd v. Amstrad Consumer Electronics Plc* [1988] A.C. 1013 and *Unilever Plc v. Gillette (U.K.) Limited* [1989] R.P.C. 583. In particular, liability as a joint tortfeasor may arise where, in the words of Lord Templeman in *C.B.S. Songs v. Amstrad* at page 1058E to which I have already referred, the individual "intends and procures and shares a common design that the infringement takes place".

> 52 Fourth, whether or not there is a separate tort of procuring an infringement of a statutory right, actionable at common law, an individual who does "intend, procure and share a common design" that the infringement should take place may be liable as a joint tortfeasor. As Mustill L.J. pointed out in *Unilever v. Gillette*, procurement may lead to a common design and so give rise to liability under both heads.

33. The important principles are the first two, but before turning to them I note the careful statement by Chadwick LJ in paragraph 51 that he was stating the principle there at least in the field of intellectual property. As I said above on Lifestyle's appeal, I can see no reason why the principles applicable should differ as between those cases and others. Nevertheless every judicial statement of the law has to be understood in the context and circumstances in which it is made. Like Chadwick LJ, I am seeking to identify the applicable principles in the context of this case, which is about infringements of intellectual property rights.

34. Chadwick LJ's paragraphs 49 and 50 fit together and in my judgment they substantially answer the issue on this appeal. They explain that the grounds on which a company director may be found to be an accessory are not wider than those applicable to other people. So to be found liable one way of approaching the matter will be to ask whether the individual's conduct would make them liable as an accessory in any event, irrespective of their status as a director. Assuming that is so, then the next question is whether the fact that person is a director of the company means they have a defence open to them. They may do so but only if the conduct which has made them potentially liable amounts to their doing no more than carry out their constitutional role in the governance of the company.

35. The last three sentences of paragraph 49 contemplate that even in that circumstance then a director may be still liable, but only in rare cases. Reading Chadwick LJ's judgment as a whole (and see paragraph 54 which I deal with below), he regarded those rare cases – when a director may be liable even though they have done no more than carry out their constitutional role in the governance of the company – as the ones when the very difficult ***Mentmore*** question of policy would arise.

36. Furthermore the converse is also true. If the individual's conduct does not make them liable as an accessory, then the fact they are a director in and of itself cannot make them liable when they would not be otherwise. That was also made clear by Chadwick LJ in paragraph 37 of the same judgment in which he held that it was a correct statement of the law that a director or other officer of a company may in certain circumstances be personally liable for the company's torts, although they will not be liable merely because they are an officer: they must be personally involved in the commission of the tort to an extent sufficient to render them liable as a joint tortfeasor. Whether they are sufficiently involved is a question of fact, requiring an examination of the particular role played by them in the commission of the tort.

37. I do not read Chadwick LJ's paragraph 49, or any other part of his judgment, as being so prescriptive as to mean that the only thing which amounts to carrying out the director's constitutional role is voting at board meetings, but it is clear that Chadwick LJ had in mind a narrow exception. That is not surprising given his recognition that a balance is involved and that everyone should be liable for their tortious acts.

38. There is nothing in ***MCA v Charly*** to support the argument being advanced before us, that individuals like Mr and Ms Ahmed, who no doubt never acted outside their authority as a senior executive employees of D11, in personally procuring the actions which turned out to be infringements and by assisting in those actions pursuant to a common design to bring them about, should escape liability simply because they are directors of the company when another senior executive employee, who did the very same things but was not a director, would not. That is the opposite of Chadwick LJ's reasoning. By the same token nor is there any support for the notion that it would make any difference merely because nothing the directors did was a breach of their fiduciary duties.

39. Counsel also sought to gain support for the submission by reference to what happened in ***MCA v Charly*** itself on the facts. The issue in the case was whether the judge had been right to hold that the fourth defendant (Mr Young) was personally liable for the actions of Charly Records Ltd (CRL) having procured or participated in them. When turning to the challenge to the judge's findings of fact Chadwick LJ said this at paragraph 54:

> "54. It is, I think, important to keep in mind that, at the relevant times, Mr Young did not hold office as a director of CRL. The judge described him, at paragraph 185 of this judgment, as "Holdings" nominee director, albeit only a de facto or shadow director". But that is, I think, only another way of saying that Mr Young was the individual through whom Holdings exercised control. Whatever the true relationship between Mr Young, Holdings and CRL, it is plain, on the judge's findings, that control was not exercised through the constitutional organs of CRL. This, then, is not a case in which the "very difficult question of policy" identified by the Federal Court of Appeal in *Mentmore Manufacturing Co. Ltd v. National Merchandising Manufacturing Co. Inc.* (1978) 89 D.L.R. (3d) 195 at 202 needs to be resolved. If the judge's findings of fact are accepted, Holdings and Mr Young chose to exercise control over CRL otherwise than through its constitutional organs."

40. Counsel submitted that this showed that Mr Young had not been able to escape liability because the control he had exercised over CRL could not have been through the constitutional organs of CRL because he was only a shadow director of that company and not a *de jure* director. Thus if he had been a *de jure* director exercising control in that way he might have been able to escape liability.

41. That is not what Chadwick LJ is saying in paragraph 54. It is the wrong way round. The point was that Mr Young was in effect the holding company's nominee director of CRL and was part of the corporate governance of CRL. Nevertheless the trial judge had found in a series of detailed findings, quoted by Chadwick LJ in paragraph 21, that Mr Young had had a close personal involvement and participation in the relevant events. He had personally directed and procured the commission of the acts which had been held to infringe. That is why the judgment that he was liable as a joint tortfeasor was upheld on appeal. The fact that Mr Young was no doubt acting within the authority given to him as nominee director of CRL did not absolve him of responsibility, nor

would it have made any difference that he was not acting in breach of his fiduciary duties.

42. In my judgment when properly understood ***MCA v Charly*** stands as a clear authority bearing on the issue arising on this appeal and there is no need to go back through the earlier cases cited by counsel in argument. However the three later authorities ought to be addressed.

43. The 2010 Australian case of ***Keller v LED*** was concerned with directors' liability for acts of infringement of registered design right by the relevant company. Jessup J refers to ***MCA v Charly*** at paragraph 393-395 and expresses the view that Chadwick LJ's four principles did not come to grips with the practical questions which arise in the cases. Jessup J then comes to the conclusion (paragraphs 403 to 407) that the right approach is to hold that Chadwick LJ's first principle, which absolves directors of liability in certain cases, should be expanded such that any act done by a director in what they perceive to be the interests of the company will not make the director personally liable. Of course Jessup J is not bound by ***MCA v Charly***. Nevertheless I cannot reconcile that conclusion with ***MCA v Charly***, nor would I be attracted to it if the matter was free from authority, for the following reason. Jessup J at paragraph 407 recognised that the logical conclusion of the approach could not be limited to directors but would apply to every servant or agent of the company whose acts brought about the commission of a tort. I agree that that is the logical conclusion of that approach but as I see it, the point demonstrates why Jessup J's approach does not represent the law in England and Wales. In England and Wales an individual A who commits a tort, such as a trespass, has still committed the tort whether or not they acted within their authority as an employee of a company. The company might be vicariously liable but that does not mean A did not commit a tort. When one starts from that proposition, the analysis of accessory liability can follow. Another individual B who procures employee A to commit that tort will be liable as an accessory. The fact that individual B was a senior executive employee, and also did what they did in the course of their employment, is no defence either. Nor is there any obvious reason why it should be, given that A is liable. ***MCA v Charly*** makes clear that there is a potential defence open to B if they are a director of the company but only if it can be shown that they have done no more than carry out their constitutional role in the governance of the company. Jessup J in paragraph 404 sought to draw a distinction between a case of the kind just described and a case in which there would be no tort at all without the company but I do not find that a convincing distinction. Finally I note that counsel for Lifestyle disputed whether Jessup J's approach represented the law of Australia. It is not necessary to examine that.

44. In 2013 Hildyard J decided ***Challinor v Juliet Bellis***. It was a complex and hard fought case (paragraph 22) about an investment scheme. The judge found that the defendant firm (Juliet Bellis Ltd) held investment money advanced to them by the claimants (Mrs Challinor and others) on trust and had acted in breach of trust by paying the money out to another company called AFL, now insolvent. Mr Egan and his employer ECS had promoted the relevant investment scheme and part of the claim involved allegations of misrepresentation by Mr Egan at ECS. By the trial both the defendant firm and the claimant had claims against Mr Egan. The claimants claimed Mr Egan personally owed them a duty of care which he breached by making misrepresentations. The defendant firm claimed a contribution from Mr Egan on the basis of breach of fiduciary duty and

dishonest assistance. The defendant firm also claimed that Mr Egan was personally liable for procuring ECS to commit whatever acts were found to be wrongful.

45. The judge rejected the claimed misrepresentations (para 702-718) but went on to consider the other aspects of Mr Egan's position in case that conclusion was wrong. He also rejected the claims against Mr Egan personally by both the claimants and the defendant firm. The issue of Mr Egan's liability as an accessory took up five paragraphs in an 800 paragraph judgment (paragraphs 788-792). The judge noted that the defendant firm had not elaborated its argument beyond simply citing ***MCA v Charly*** and ***Standard Chartered v Pakistan National Shipping***. The judge quoted passages from ***MCA v Charly*** and then stated a conclusion, without elaboration, that Mr Egan was not liable "because he cannot be said to have stepped outside his remit as a director/employee or acted otherwise than in the discharge of his obligations as he perceived them as such". I do not agree with the judge that that would have been a sufficient basis to find that Mr Egan was not liable as a joint tortfeasor, however the point was obiter (since ECS had not committed a tort) and had clearly not been argued in any depth. Furthermore on appeal the Court of Appeal ([2015] EWCA Civ 59) overturned the judge's main finding that the defendant held the money on trust at all. The claim against the defendant firm was therefore dismissed. There was no distinct appeal in relation to Mr Egan but the outcome means that he cannot have been liable in relation to any act of the defendant firm, on any view.

46. Finally I turn to ***Ottercroft v Scandia Care*** in 2016. (When I refer to paragraphs in that judgment it is convenient to refer to both paragraph numbers which appear in the report.) The question there was whether it had been right to hold that a Dr Rahimian was personally liable with a "one man band" company of which he was a director for its interference with a right of light held by the owner of a neighbouring property. Lewison LJ rejected the submission that the finding of joint tortfeasance amounted to piercing the corporate veil (at paragraph 15/17) and rejected the submission that it is impossible for a director to have a common design with a one man band company (at paragraph 17/19) since the company is a distinct legal personality. At paragraph 18/20 Lewison LJ cited the first two propositions from ***MCA v Charly*** and then said this:

> "19. 22. The acid test, then, is whether the putative tortfeasor is exercising control through the constitutional organs of the company. If he does no more than vote at board meetings, then he will be exercising control through the constitutional organs of the company. The constitution of the company may of course have delegated authority to officers of the company without the need for formal board meetings; and in that event I would not rule out the possibility that an individual doing no more than exercising that properly granted authority would escape personal liability."

47. Lewison LJ turned to some of the findings of fact (in paragraph 20/23), noting Dr Rahimian's close personal involvement in the relevant activity, and then at paragraph 21/24 said:

> 21. 24. In the present case, moreover, there was no evidence of what the company's constitution was, no evidence of the decision making process within the company, no indication that Dr

> Rahimian's co-director played any part in that process, and no evidence that the company did anything other than what Dr Rahimian wanted it to do. The judge's finding at paragraph 12 was that Dr Rahimian controlled Scandia Care. He continued:
>
> > "It is abundantly clear that he did so and that he was personally instrumental in pushing the plans for redevelopment through. Any act that I am considering was an act of Dr Rahimian as much as it was an act of the company. To join Dr Rahimian to proceedings is not to pierce the corporate veil, it is to bring a claim against a tortfeasor."
>
> 22. 25. I do not consider that it can be said that the judge's finding of fact was wrong.

48. The most that arises from this judgment which is relevant to the Ahmeds' appeal is the holding that cases of delegated authority are possible and cannot be ruled out, which I respectively agree with. However if such a case is to be advanced then it must be proved, with evidence. The evidence lacking in ***Ottercroft*** was that directed to the company's constitution, the decision making processes and the role of co-directors. Lewison LJ upheld the judge's finding that Dr Rahimian was jointly liable because he was personally instrumental in procuring the company to commit the tort. There was no suggestion that in doing what he did Dr Rahimian had exceeded whatever authority he had or acted in breach of his fiduciary duties and if either of those had been a necessary finding, then the appeal would not have been dismissed. Therefore ***Ottercroft*** does not assist ground 1 of this appeal.

49. Pulling things together, in my judgment ***MCA v Charly*** represents the law on this topic in England and Wales. The protection for a director identified in Chadwick LJ's first principle is not strictly confined merely to voting at a board meeting but it is a narrow protection limited to exercising control through the constitutional organs of the company, albeit that may be something which can be delegated. A director seeking to avail themselves of that principle of delegation in order to escape liability, will need to prove that that has taken place. In any event showing simply that the director has acted properly, in the sense of not acting in breach of their fiduciary duty, is no defence.

50. In the present case the close personal involvement by the Ahmeds in the acts of trade mark infringement mean that they do not come near to bringing themselves within the protection afforded by the first principle in ***MCA v Charly*** or the possibility of delegated authority identified in ***Ottercroft***. The fact that neither Mr Ahmed nor Ms Ahmed can be said to have had an improper motive or to have known or been on notice that the actions were likely to amount to trade mark infringement makes no difference to their liability. Nor does the fact that Mr Ahmed acted on advice, the fact the logo designs were delegated or that the company was not a "one man band".

51. The judge was right to hold that none of these points amounted to a defence in law to the claim that they were joint tortfeasors and he was entitled to reach the conclusion that they were liable on the facts. I would dismiss this ground of appeal.

Ordering an account of profits (ground 2 of the Ahmeds' appeal)

52. The Ahmeds contend that even if they are jointly and severally liable, no account of profits should have been ordered against them. The matter is put in ground 2 of their grounds of appeal as follows:

> "Even if the Appellants were jointly liable for D11's torts, the learned Judge erred in law in that (a) he failed to take into account that it was a matter of discretion as to whether or not to order an account, and that the Respondents had no right to the same; (b) he failed, in the exercise of that discretion, to take into account the matters referred to in ground 1 above (i.e. the Appellants acted as directors and employees and in good faith); and (c) he concluded that it would be appropriate to order an account of profits, when in fact, by reason of those matters, it was wholly inappropriate to order such an account against them. Therefore, for this reason too the claim as put against them (for an account of profits) should be dismissed."

53. These grounds are drafted on the footing that the judge turned his mind to the question of whether to order an account of profits, did so but erred in the doing of it. In fact, as I read the judgment as a whole, the judge never actually considered that issue as a free standing point, and it seems tolerably clear from the history of the matter that the reason that did not happen is because it was not put to him that he had to do so. To see how this happened involves consideration of the course of the proceedings below.

54. As explained already, before the first trial took place the issue of the personal liability of the Ahmeds had been hived off to be decided at a separate later trial, which no doubt would only be needed if the companies lost the first trial. That was a sensible case management approach which is not uncommon in intellectual property cases. Having succeeded at the first trial Lifestyle sought the right to elect between damages and an account of profits against the eight defendant companies and asked for disclosure from them in advance of the election (an approach first undertaken in ***Island Records v Tring*** [1995] FSR 560). The judge made the appropriate orders. It seems to me that making that order (dated 21st December 2017) involved the exercise of the court's discretion to award the equitable remedy of an account of profits as against those eight defendant companies. It may well have been made without any careful consideration but that would only have been because I cannot imagine on the facts as they were that there was any good reason why the court would not order such an account. For example it would obviously not have been disproportionate to order such an account against those companies.

55. Shortly afterwards, on 16th January 2018, administrators were appointed over D3 and D11 and by March 2018 a compromise had been reached between Lifestyle and the administrators of D11. The next step was an order dated 14th June 2018 by Marcus Smith J. This order gave directions for the second trial. It was a consent order, consented to by the Ahmeds to the extent it affected them. The order recites that Lifestyle has elected to pursue an account of profits against the Ahmeds. It gives directions for disclosure on both the account and on the issue of joint and several liability.

56. It seems to have been assumed after this that if the Ahmeds were held liable as accessories then Lifestyle were necessarily entitled to the sums due on taking the

account. This confusion should not generally arise because the point at which the court normally exercises the discretion to direct an account of profits, following a trial on liability, is immediately after that trial. Directions for disclosure and the like are usually only made after the discretion has been exercised, for obvious reasons. However Lifestyle rightly did not suggest that the order of Marcus Smith J amounted to the exercise of the equitable discretion to order an account against the Ahmeds. It cannot have been, not least because that would have depended on finding the Ahmeds liable as accessories, which was a matter for the second trial. Therefore the effect of the consent order was that the matter proceeded to the second trial with the discretionary power still to be exercised.

57. The trial took place and the judge gave his judgment. The judgment is well structured and does not contain a section in which the judge asks or answers the question whether, having found that the Ahmeds are liable as joint tortfeasors, an account of profits should be awarded.

58. Counsel for the Ahmeds before us submitted that Mr Ahmed had contended before the judge that the discretion should not be exercised. I do not accept that. The transcript makes clear that what Mr Ahmed was submitting was that the salaries should not be within the equitable remedy of an account of profits. He was not arguing that no account of profits at all should be undertaken. The Claimants never addressed the point either, nor was the point taken when judgment was handed down.

59. Therefore it is clear that the appeal on this ground is well founded in the sense that the point should have been addressed below and never was. The question is what should be done now. This court has all the powers of the lower court (CPR r52.20(1)). The discretion arises to be exercised because the Ahmeds have been found to be jointly and severally liable as accessories with D11 and the appeal on that ground has failed.

60. The discretion is one to be exercised in all the circumstances. The claimant's choice is an important factor. As Henry Carr J said in ***GSK v Wyeth*** [2017] EWHC 91 (Pat) at paragraph 31, it is standard to allow the successful patentee to elect for either an inquiry as to damages or an account of profits for past infringements. The same is true for the holder of any other intellectual property right. Moreover ***Island Records v Tring*** shows that the rights holder whose rights have been vindicated is entitled to choose, as between damages and an account of profits, the remedy with the higher value. Assuming the rights holder is seeking an account (or seeking the right to elect between an account and an enquiry as to damages) then *prima facie* the court will exercise the power in the rights holder's favour. Some good reason would be required to refuse. Proportionality is relevant and so, if an account would be disproportionate, then that would be a good reason to refuse it. Also relevant, in a case in which they arise, would be the factors mentioned by Kitchin LJ in ***Hollister*** at paragraph 55 (quoted above).

61. Counsel for the Ahmeds submitted, relying on another passage from the judgment of Henry Carr J in ***GSK v Wyeth*** (paragraph 23-28) that there should be some unconscionable or improper conduct by the defendant for an account of profits to be ordered in an infringement case. That is not what the judge there said, and the submission is wrong. I agree with Henry Carr J, as he said in paragraph 23 of that judgment, that a basic principle of accounts of profits is that there should be some unconscionable or improper conduct by the defendant. In saying this I emphasise that this does not limit the remedy to cases of unconscionability. However nor does it

impose an extra hurdle for a rights holder whose rights have been found to be infringed by a defendant. The acts which render the defendant liable are themselves improper conduct.

62. Counsel for the Ahmeds also submitted that it was relevant that there was no allegation or finding of bad faith, knowledge or the like and so to exercise the discretion against them in such a case would be a serious error of law. I do not accept that either. It is true that there was no finding of bad faith by the Ahmeds nor a finding of infringement with knowledge that the acts did in fact infringe. However neither of those are necessary matters which must be found before an account of profits can be ordered. To order an account in the absence of either (or both) would be no error at all. Note also that there was no suggestion that the Ahmeds were unaware of Lifestyle's trade marks at any material time.

63. There was also a suggestion that the fact that Lifestyle had reached a settlement with the administrators had the result that any claim for an account against the Ahmeds fell away, but the agreement which had been reached did not have that effect and is irrelevant.

64. Finally counsel referred to alleged delay, arguing that Lifestyle knew of the defendants' logo by March 2014. Since the claim form was issued in August 2016, there is no relevant delay which might have a bearing on the discretion.

65. I would order an account of profits in this case. There is no good reason not to.

The loan to Mr Ahmed (grounds 3 and 4 of the Ahmeds' appeal)

66. Lifestyle contended that Mr Ahmed was liable to account for the sum of £635,789 which represented a loan to him from the company D11. Lifestyle argued that the loan had been caused, enabled or facilitated by the profits derived by D11 from the infringement. The focus of the debate before the judge was whether the loan had been repaid. Mr Ahmed contended vigorously that it had been repaid and that if it was still outstanding then the administrators of D11 would have been pursuing him. The judge rejected Mr Ahmed's account, holding:

> "100. I regret to say I do not believe Mr Ahmed has repaid that money. If he had done so, it would have been an easy thing for [him to] prove using his own personal records, but he has not done so. Nor has he even explained what the loan was for, if not for something to do with the infringement. The burden of proof was upon him since all the Claimants knew was that he had received the loan in the first place, which was not disputed.
>
> 101. In those circumstances I find for the Claimants. Mr Ahmed is therefore liable to account for the £635 789."

67. On appeal counsel for the Ahmeds attacked this reasoning on a number of grounds. They can be summarised as (i) even if the loan had not been repaid, it remained a loan and Mr Ahmed's obligation to repay it meant it could not be a profit, (ii) there was no allegation Mr Ahmed had acted dishonestly or improperly in taking out the loan, (iii) the judge made no finding that the loan was referable to D11's infringement or, if he

did, it was plainly wrong and inconsistent with the finding that only 10% of the salaries were referable to the infringements. Points (i) and (ii) are aspects of ground 3 and point (iii) is ground 4.

68. I reject point (iii). The company clearly made substantial profits from the infringements. From the judgment as a whole, it is clear that the judge understood that part of his task was to decide if the sum represented by the loan was derived from the infringements. The judge was entitled to place an evidential burden on Mr Ahmed to explain what the loan was for and put forward at least some evidence that it was not referable to the infringements carried out by the company and he was right that Mr Ahmed had never explained what the loan was for. The judge was entitled to draw the (implicit) conclusion that the sum was referable to the infringement.

69. I reject point (ii) as well. The absence of any allegation about Mr Ahmed acting dishonestly is irrelevant. The fact that Mr Ahmed had been found to be liable as an accessory for the trade mark infringements committed by the company was sufficient, in terms of improper conduct, to justify him having to account for a profit referable to the company's infringement. If the loan was indeed such a profit then he was liable to account for it.

70. However I would allow the appeal on point (i). At trial, and at the date of the order following judgment, the loan remained outstanding and so Mr Ahmed still owed an obligation to repay it to D11. If Mr Ahmed still owed an obligation to pay that sum then it was not, in his hands, a profit at all. For that money to represent a profit in Mr Ahmed's hands at the time, one way that could be established would be to show that it was not a loan at all, but something like a gift or disguised dividend (Mr Ahmed was a shareholder of D11). However that was not established and there is no basis for making such a finding in this court. Therefore I would allow the appeal on ground 3.

71. Before leaving this issue however, I should note that since the judge's order was made, the company has been dissolved and so it could now be said that by today's date Mr Ahmed no longer does owe an obligation to anyone to repay it. However that did not represent the state of affairs when the order under appeal was made below and so it does not amount to a justification for upholding the judge's order now.

72. I would therefore allow the appeal on ground 3 (in part).

The salaries (grounds 5 and 6 of the Ahmeds' appeal)

73. By ground 5 Mr and Ms Ahmed challenge the judge's conclusion that they must account to Lifestyle for a portion of their salary as a profit. Ground 6 relates to the salaries too and contends that the judge's conclusion that 10% of the salaries was attributable to profits from the infringement was inconsistent with a finding about overheads of D11 which the judge had made.

74. The judge held that in the relevant period Mr Ahmed's remuneration was about £1.4 million. The judge decided that 10% of that sum was to be apportioned to profits made from infringement and so Mr Ahmed was liable for the sum set out in paragraph 2 above. In relation to Ms Ahmed, her total remuneration for the period was about £570,000 and the judge also held that 10% of that sum was to be apportioned to profits made from infringement. The judge recognised that the finances of House of Brands

could have been different from those of D11 as a whole, but he had no evidence that they were in fact different and that is why he used the same 10% figure for both D5 and D12.

75. The point taken on appeal as ground 5 is that salary cannot be treated as profits at all, even if it was in part derived from infringing activities, because there was no allegation, evidence or finding that the salaries were artificially inflated over the market rate for the labour concerned. They were just the normal remuneration for the services rendered by the Ahmeds and so (citing ***My Kinda Town v Soll*** [1983] RPC 15 at p58) they should not be required to account for them. Reference was also made to ***Phipps v Boardman*** [1967] 2 AC 46 on the footing that if the salaries could be regarded as profits then a fair, liberal, allowance for the labour involved should be made and on the facts that would entirely or very largely cancel out any award of profits. Related to these points was a submission that the salary could not be profit at all because consideration was given for the sums. It was also said that the judge's conclusion was contrary to ***Murad v Al-Saraj*** [2005] EWCA 959 (judgment of Arden LJ) and ***HPOR Servicos de Consultoria v Dryships*** [2019] 1 Lloyds Rep 260 (Cockerill J).

76. The reference to ***My Kinda Town*** relates to an observation by Slade J at p58 that when accounting for the profits earned by a restaurant business held to have amounted to passing off, an allowance for working directors had to be made. That makes sense. I would characterise it as an observation about causation. The task is to assess the profits actually made from the activity which has been found to have been infringing. Allowances for direct costs and overheads are permitted but they must be attributable to the relevant activity *(**Hollister v Medik**)*. Often the way forward is to make a fair apportionment.

77. ***Murad v Al-Saraj*** was about fraud and breach of fiduciary duty. Mr Al-Saraj was found to have made fraudulent misrepresentations and the remedy was that he should disgorge all the profits that he made from inducing the Murads by his fraudulent representations to enter into the relevant venture, subject to any allowances permitted by the court (paragraph 84). Counsel for the Ahmeds relied on the next paragraph (paragraph 85) in which Arden LJ drew the distinction, in the taking of an account of profits, between "the restitution of profits which ought to have been made for the beneficiary" (also described as "the profit obtained from the breach of trust") on the one hand as opposed to the account being "a procedure for the forfeiture of profits to which the defaulting trustee was always entitled for his own account" on the other hand. I agree that that distinction is a real one. However applied to an account of profits in a case like the present one it is the same as the point I have already made about causation and possible apportionment. What is to be accounted for are the profits attributable to the wrongful activity. That will not necessarily be the same as all the profits the person liable made in the circumstances.

78. In ***Dryships***, a case of breach of fiduciary duty by an agent, Cockerill J applied paragraph 85 of ***Murad***, summarising it (at paragraph 82) as showing that the profits due were those for the misuse of the property rather than the sum the agent in that case was due to be paid under the contract. That is another example of the same point about causation and apportionment which I identified above.

79. In the light of these principles I do not believe anything further or relevant to the account of profits in this case can be derived from ***Phipps v Boardman***.

80. A further point of principle taken by counsel was a submission that the fact good consideration was given for the sums earned means they were not profits. That is wrong. The fact that a profit might be earned in a transaction in which consideration is given is irrelevant. The paradigm example in the present context will be the sale of garments by D11 bearing the infringing sign. Good consideration (a garment) was given by D11 for the sale price received from the customer, but that does not mean that the profit earned on that transaction ceased to be a profit earned from that wrongful act. The fact that the Ahmeds gave their labour as good consideration for their salary is no different.

81. This comparison also demonstrates, so it seems to me, that there is no question of there being a need to show that the profit has been inflated by the infringement or is otherwise higher than it would have been if the goods had not been infringing the trade mark. The profit which is to be accounted for is simply the profit attributable to the act of infringement – which in this case will have been the sale of goods under the infringing sign.

82. If an individual sole trader in a market stall was selling infringing t-shirts then their profit made on those sales would be potentially available in an account. The question in that case would be what profits were properly attributable to the infringing trade and what costs were properly deductible. The profits would include all the relevant receipts, net of appropriate costs which were relevant to the sale of the infringing goods. The fact the individual earned income as a result of their labour does not mean that income is not a profit. Nor, as it seems to be, does anything change in principle if the individual is an employee so that the income they earn is earned from their employment.

83. Nevertheless, in my judgment it is manifest that neither Mr Ahmed nor Ms Ahmed could be liable to account for the whole of their salaries as profits attributable to the infringements. In respect of neither individual could it have been said that all they ever did as employees was procure the infringements. On the other hand it also seems to me that there is no reason in principle why some portion of their salaries might not be attributable as profits they themselves earned as a result of their activity for which they are liable to the claimants. The discussion above about causation and attribution shows that what the judge had to do was decide what, if any, portion of their salary fell into that category.

84. The judge held that 10% of each of the Ahmeds' salaries represented profit attributable to the infringements. That finding of fact, in relation to both Mr and Ms Ahmed, was something which was open to the judge on the evidence. It is a finding that this portion of their salary is something they earned as a result of the acts complained of in this case and for which they have been found liable. Apart from ground 6, there is no other basis on which the Ahmeds could successfully challenge that finding on appeal. Putting that finding in terms of ***Murad*** and ***Dryships*** the judge held that 10% of their salary represented profit due from them for the misuse of Lifestyle's property, that is its registered trade marks. The remaining 90% of their salaries represented profits in their hands but not attributable to the wrongful activity. It was money they earned on their own account and to which they are entitled come what may.

85. Before leaving ground 5 I will mention income tax. Neither party raised this on the appeal, but it seems to me at least doubtful that the claimants are entitled to the whole of the sums due from Mr Ahmed or Ms Ahmed without taking account of income tax.

Since these sums are a share of their salary, it seems likely to me that the Ahmeds would be entitled to make a deduction for the income tax they paid on that share of their remuneration. If the tax position cannot be agreed, I would invite the parties to make brief written submissions on the point and resolve it on paper. Subject to that I would dismiss ground 5.

86. I turn to ground 6. The submission is that there is an inconsistency between attributing 10% of the Ahmeds' salaries as profits made by them from the infringement, and the decision the judge also made that, as against the company itself (D11), the whole of its general overheads were not deductable in computing what were the company's profits from the infringements. That latter assessment was made by the judge so that if he was wrong in law that the claimant was not entitled to recover from the Ahmeds the profits made by the company itself, those profits would have been calculated. In refusing to deduct the general overheads the judge was applying ***Hollister v Medik***, which is authority for the proposition that in an account, allowance for direct costs and overheads is permitted but to be deductable the costs must be attributable to the relevant activity and so unless general overheads can be attributed that way, they cannot be deducted. There may be an apportionment in a proper case.

87. The alleged inconsistency arises because in the hands of the company D11, the Ahmeds' salaries were said to be part of the general overheads. Therefore the argument goes, if 10% of those salaries were attributable to the infringements then surely that 10%, paid by the company to the Ahmeds, ought also to have been attributable as a cost in the company's hands against the profit it earned from infringement.

88. I must say I do not believe the logic necessarily follows given the paucity of evidence about overheads before the judge (see judgment paragraph 85 and 86), but I acknowledge there is a point to be made. However in my judgment it is no basis for overturning the judge's conclusion on the facts that 10% of the salaries were attributable. That finding was part of the ratio of the judge's judgment since he had decided the point of law in the Ahmeds' favour. It was open to him. His decision on the company's profits was obiter. The right way of looking at this is that having reached the conclusion about the salaries, at most perhaps a further deduction of that sum from the portion of the company's profit attributable to the infringement ought to have been made, but that is all. It does not undermine the judge's fundamental reasoning.

Conclusion

89. I would dismiss Lifestyle's appeal, allow ground 3 of the Ahmeds' appeal and, subject to the income tax point, dismiss the remainder Ahmeds' appeal on all other grounds.

Post script I

90. After the draft judgment was circulated counsel for Lifestyle submitted that paragraphs 70-72 above (about the loan) were incorrect. The submission was that while it was correct that the dissolution had not taken place by the time of the judge's order, after the judgment was handed down and prior to the hearing to determine the final order, the Ahmeds had put the administrators' final report into evidence before the judge, and that final report recorded that the administrators would not be pursuing any connected parties for monies owed to D11. However as counsel for the Ahmeds points out, Lifestyle objected below to that new evidence being admitted and the judge accepted

Lifestyle's objection, ruling that it should not be admitted. Thus the state of the evidence before the judge did not include the final report and, having successfully objected to it, Lifestyle cannot now rely on it. Treating this as an application to reconsider paragraphs 70-72, the application is refused.

Post script II – income tax

91. Following the direction in paragraph 85 above, the parties made brief written submissions about income tax. The figures are not in dispute. Taking account of the income tax paid would reduce the sum due from Mr Ahmed by £65,252.54, leaving a net payment of £78,939.66 and would reduce the sum due from Ms Ahmed by £18,176.66 leaving a net payment of £38,830.94.

92. Lifestyle submitted it was too late to raise the point now. I disagree. The court has power to deal with it, and the issue arose from consideration of the wide ranging submissions made on this appeal.

93. Counsels' researches found only one case in which the issue has come up before, ***Blizzard Entertainment v Bossland*** [2019] EWHC 1665 (Ch), an account of profits for copyright infringement. At paragraph 75 Deputy Master Bowles recorded that it was common ground between the parties that the amount for which the defendants there were accountable was an amount net of the tax paid, or payable, upon the profits in question. He went on to determine a figure net of tax as best he could on the available evidence.

94. Lifestyle referred to paragraph 29-13 of the income tax section of the textbook Copinger & Skone James (18^{th} Ed), however that paragraph relates to the treatment of damages due for intellectual property infringement in the computation of profits. It is irrelevant.

95. I believe the common ground in ***Blizzard*** was correct. When considering individuals liable to account for a portion of their salary, it is right to deduct a sum equal to the income tax paid or payable on that portion. Therefore to this extent I would allow ground 5 of the appeal in part, substituting the net amounts set out above for the figures ordered by the court below.

Lord Justice Nugee:

96. I agree.

Lord Justice Moylan:

97. I also agree.