Case No.: T20107201; U20220350

IN THE CROWN COURT AT SOUTHWARK

1 English Grounds, London, SE1 2HU

17 March 2023

BEFORE HIS HONOUR JUDGE BAUMGARTNER

IN THE MATTER OF THE PROCEEDS OF CRIME ACT 2002

AND IN THE MATTER OF ACHILLEAS MICHALIS KALLAKIS

BETWEEN:

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE

Applicant

- and -

ACHILLEAS MICHALIS KALLAKIS

Defendant

- and -

MICHALIS KALLAKIS

Interested Party

JUDGMENT

Christopher Convey (instructed by the **Serious Fraud Office**) for the **Applicant**
Martin Evans KC (instructed by **Birds Solicitors**) for the **Defendant**
Giles Bedloe (instructed by **CJJ Law**) for the **Interested Party**

Hearing dates: 13-15 February 2023

I direct that pursuant to Crim. PR r.5.5(1)(a) no official shorthand note shall be taken of this judgment and that copies of this version as handed down (subject to editorial corrections) may be treated as authentic.

HIS HONOUR JUDGE BAUMGARTNER:

Introduction

1. This is an application (the **"Application"**) by the Director of the Serious Fraud Office (the **"Applicant"**) pursuant to s.22 of the Proceeds of Crime Act 2002 (the **"Act"**). The Applicant seeks a reconsideration of the available amount of £3.25M found by this Court in accordance with the formula prescribed by s.9 of the Act and as set out in the confiscation order dated 23 September 2014 (the **"Confiscation Order"**) made against Achilleas Kallakis (the **"Defendant"**) in the sum of £3.25M. The Defendant's son Michalis Kallakis (the **"Interested Party"**) intervenes in the Application as an interested party.

2. By this Application, the Applicant seeks the Court to undertake a new calculation in accordance with s.22 of the Act by applying s.9 as if references to the time the Confiscation Order was made were to the time of the new calculation, and as if references to the date of the Confiscation Order were to the date of the new calculation. The Applicant applies for the available amount to be increased by £92,500, for reasons to which I shall shortly mention, and for consequential orders.

Background

3. The background to the Application is as follows.

4. On 16 January 2013, after a lengthy trial the Defendant was convicted of two counts of conspiracy to defraud: on Count 1, that between 1 August 2003 and 30 November 2008 he and Alexander Williams conspired with Michael Becker and others to defraud Allied Irish Banks PLC (**"AIB"**); and, on Count 21, that between 1 January 2007 and 2 May 2008 he and Williams conspired with Becker and others to defraud The Bank of Scotland PLC (**"BoS"**). On 17 January 2013, he was sentenced to seven years' imprisonment. The sentence of imprisonment was subsequently increased by the Court of Appeal (Criminal Division) to 11 years' imprisonment.[1] The facts relied upon by the Court of Appeal on appeal are rehearsed at some length in the judgment delivered by Pitchford LJ at [2] to [19], reported at [2014] 1 Cr. App. R. (S.) 26. For the purposes of this Application, the salient facts which formed the factual basis for sentence can be found at [4] to [16] of the Court's judgment. To appreciate the nature and scale of the Defendant's offending insofar as it relates to this Application, it is convenient to set out those facts here:

> "4. The objective of the count 1 fraud was to persuade AIB to advance funds sufficient to provide the purchase price of valuable properties in London together with an additional sum purportedly to be used to cover, at least in part, what was called a 'reverse premium' but was in fact to be a payment made for the benefit of the fraudsters in order that the fraud could be perpetuated. The offenders worked from offices in Mayfair. Kallakis represented himself as chief executive officer of the Pacific Group of Companies. There was no such entity, at least of substance. The properties

[1] A subsequent appeal against this sentence on the ground that it was manifestly excessive was dismissed by a differently constituted Court of Appeal (Criminal Division) in *Kallakis* [2017] EWCA Crim 2461.

acquired were to be managed by Atlas Management Corporation Limited, incorporated in 2002, with the offender, Williams, as its managing director. While Kallakis was not named in any of the Atlas documentation, he was in ultimate control. In 2002 AIB established a property team within its corporate banking department. Its purpose was to seek and obtain business for the provision of secured loans. During the summer of 2003 Kallakis was introduced, falsely, to members of AIB's team as the scion of a wealthy Greek family which had made its fortune in shipping. He represented that the family wished to diversify into property. Kallakis said that Sun Hung Kai Properties Limited (**"SHKP"**), a very substantial Hong Kong based company with whom he already did business, wished to invest in UK property but, for political reasons, wished to do so discreetly. High value property would be purchased by a Kallakis company which would become the landlord. A subsidiary of SHKP would take from the landlord a long head lease at a rent which exceeded the aggregate of rents currently being paid by existing tenants. The effect would be immediately to increase the capital value of the property while creating a shortfall between the rent paid under the head lease and the rent paid by sub-lessees. In time the rent due to the sub landlord (the SHKP subsidiary) would increase to exceed the rent due under the head lease. To cover the temporary shortfall the Kallakis purchaser company would pay to the SHKP subsidiary a reverse premium. On any re-sale, there would be a profit share between SHKP and the landlord. This was the underlying scheme which purportedly justified the several loans and purchases which followed.

5. For present purposes it is enough to summarise the fraud which culminated in the first of the purchases, and to identify only the scale and general nature of further frauds. Kallakis formed Andromeda Alliance Inc to be purchaser and head landlord. Michael Becker, in Switzerland, was the director. The head lessee, purportedly an SHKP subsidiary, was Causeway Capital Corporation. The proposal was for the purchase of Fitzroy House, 355 Euston Road, then occupied by Network Rail. The purchase price of the freehold was £16.5 million with costs of purchase of about £1 million. Kallakis sought a loan of £18.8 million. Comfort in the loan to value proportion was provided to AIB by a valuation obtained from commercial estate agents. If the SHKP subsidiary, Causeway Capital, entered into a head lease committing itself to an annual rent which exceeded the current rent paid by the tenant, and SHKP guaranteed the rent due under the head lease, the freehold value of Fitzroy House would increase to £23.6 million. In return Causeway would receive from Andromeda a reverse premium of £4 million. On 27 October 2003 Michael Becker wrote to AIB describing himself as the Kallakis family lawyer. The £4 million reverse premium would be provided by companies controlled by the Kallakis family. The loan application was approved by AIB on 30 October 2003. On the following day £18.8 million was paid into the client account of Mayer Brown, solicitors acting for AIB. From that sum £16.45 million was utilised by Andromeda to complete the purchase of Fitzroy House. The balance of £2.16 million [sic] was transferred to solicitors acting for Kallakis. That sum was dispersed to meet a liability of £69,000 in respect

of another Kallakis matter and £2,653.37 [sic] was remitted to a Swiss bank account held by Michael Becker.

6. The whole edifice on which this ingenious financial proposal was based was a sham. Significant features of the deception, but by no means all, comprised:

(i) A representation by Kallakis that the Pacific Group was formed in 1992 following a merger with his father's business interests. There was no such merger and Kallakis's father had no knowledge of his son's activities.

(ii) There was no genuine participation by SHKP of Hong Kong. Kallakis, the Pacific Group and Atlas Management were unknown to SHKB [sic]. No subsidiary was incorporated by SHKP to act as head lessee; Causeway was the creation of Kallakis for his own benefit. No guarantee of rent was given by SHKP. No subsidiary of SHKB [sic] received any reverse premium. All documents purportedly emanating from SHKP and required to complete the transaction were forged, including the signatures of its chairman and chief executive, and an executive director, on the deed of surety for payment of rent and an indemnity granted to Andromeda for any default by Causeway. Also forged were minutes of a purported but non-existent meeting of the SHKP board of directors during which it was purportedly resolved that the guarantee was approved, and the two officers of the company we have identified authorised to sign it. A certificate of authorisation dated 28 October 2003 purporting to certify SHKP's approval of the deed of guarantee was also forged. The die stamp used to seal the deeds was forged as was SHKP's headed notepaper. Kallakis's solicitor at no time had personal contact with SHKP. Executed documents were produced by Kallakis as and when they were required.

(iii) AIB's solicitors were provided with a false receipt purporting to be signed by James Ng on behalf of Causeway, supposedly SHKP's subsidiary, as evidence of receipt of the sum of £4 million representing the reverse premium. No such person worked for Causeway which was, in any event, a Kallakis and not a SHKP company, and no reverse premium was received to the use of SHKP or its subsidiary.

7. Further and similar transactions took place. India Buildings in Liverpool was purchased for £43 million in January 2004. The loan from AIB was for £47.5 million. The sum sent to Michael Becker in Switzerland on the direction of Williams was £4,260,439.

8. In late 2006, 32 St James' Square was purchased with a loan of £12 million from AIB. This time the head lessee was to be Oregon Finance Corporation, declared to be a Kallakis company, rather than a subsidiary of SHKP. Oregon was to provide a £3 million capital guarantee. Oregon was in fact a company with no net assets. A loan of £11.9 million was used to

fund the purchase by Meadow Ridge Acquisition SA of which Michael Becker was the sole director. The deeds which provided guarantees for the rent payable under the head lease and, therefore, repayments of the loan, were worthless. In March 2007 the penny dropped with AIB that they should have some personal contact with SHKP. Kallakis told them that a director of SHKP's treasury department would be passing through London on his return to Hong Kong and a meeting was arranged for 28 March. A person calling himself Jonathan Lee arrived for the meeting with the offender Williams. Kallakis, who was supposed to attend, cried off at the last minute. Lee had nothing to do with SHKP. He was an unknown individual who had been recruited to act the part of SHKP's representative, which he did with some skill, but his efforts on behalf of the offenders were entirely fraudulent. He had been coached both as to the questions likely to be asked and the information to be provided.

9. In May 2007 a similar arrangement was made by which AIB advanced loans of £9 million and £1.2 million to purchase 8 Carlos Place, the offenders' Mayfair office, and a property at Ennismore Gardens. The guarantor was again Oregon Finance.

10. In late 2007 AIB advanced £224 million for the purchase of 111 Buckingham Palace Road. This time guarantees from both SHKP and Oregon Finance were to be provided. False information was provided of Oregon's asset position.

11. In October 2007 AIB was approached for a loan to purchase properties at 7 and 8 St James' Square, Duke of York Street, and 7 Apple Tree Yard. The total sum lent was £152 million. After the purchase there was a surplus of £29.5 million. It was understood that this sum would be used to pay stamp duty and a reverse premium. In fact it was dispersed on the directions of the offender Williams for the benefit of the fraudsters.

12. In total AIB was persuaded to lend £743,345,000 to companies registered in the British Virgin Islands and controlled by the offender Kallakis. The sum remaining after payment of the necessary costs and expenses of purchase was approximately £77 million. From that sum money was dispersed to various destinations. £14 million went to Atlas Management. It was used as a fund from which to meet the shortfall between genuine rent received and the mortgage payments due to AIB. £22 million went to the Kallakis client account of Michael Becker in Lugano, Switzerland. £6.4 million went to the purchase of further property in Hungary and Mykonos, for the purchase of a ferry the subject of count 21, for the costs of purchase of a helicopter and private jet and for the purchase of a motor-car. A further £40 million went to companies associated with Kallakis. £5.6 million was dispersed to a number of different beneficiaries.

13. Count 21 represented a proposal of a somewhat different nature. The offenders were seeking a loan to finance the re-fitting of a ferry called MV Mercator II so as to transform it into a luxury super yacht worth €87 million. Their target was the Bank of Scotland PLC. The borrower proposed was the Mercator Shipping Corporation, a British Virgin Islands

company owned by Oregon Finance. The success of the proposal depended upon satisfactory evidence of Oregon's balance sheet position. It was represented that Oregon had a net worth of over $2 billion. The deed of loan contained a covenant that Oregon's minimum net worth was £500 million. Evidence was produced in the form of profit and loss accounts for Oregon, a letter of confirmation from Michael Becker, and letters purportedly emanating from the Pacific Group and Atlas Management detailing companies and mortgaged assets owned ultimately by Oregon Finance and the Kallakis family trust which controlled them. These documents were utterly misleading and two of them were forged. The Bank of Scotland wanted to speak to the purported author of one of these letters. An elaborate arrangement was made by Williams to set up a virtual office in Athens and to instruct a person answering a telephone number at that office to say that the individual wanted was in a meeting and would ring back.

14. When in June 2007 the Bank sought further information as to the financial status of Oregon, Kallakis successfully bluffed his way to securing the loan and the agreement was executed on 17 April 2008. Oregon Finance was the guarantor. Mercator defaulted on its interest payments in September and October 2008. Work on the vessel had stopped. The guarantee was worthless. The total loss to the Bank of Scotland was €5.8 euros. At a meeting with Kallakis and Williams on 5 March 2009 Kallakis said the debt was not his responsibility; both Mercator and Oregon were 'under water'. In fact Oregon was placed in liquidation on the petition of AIB in March 2009. Oregon subsidiaries had been used by Kallakis in 2006 to purchase a private jet for $44 million and a helicopter in 2008 for $8.4 million. These purchases had been made with loans from GE Capital guaranteed by Oregon. The jet and helicopter had been re-possessed and Oregon's debts exceeded £61 million.

15. AIB discovered that Kallakis was a man of straw after receiving a tip-off from another bank to which he had made an approach. It was learned that he had a conviction for fraud under the name Stefanos Kollakis. AIB made enquiries of SHKB [sic] and realised in September 2008 that it had been conned.

16. In October 2008 AIB reported to the Financial Services Authority and the Serious Organised Crime Agency. Notice of default was served on the 14 Kallakis companies which had borrowed the money. On 21 November 2008 AIB formally called in the cross guarantees taken in respect properties which were worthless. All were sold on the same day to a property group at a paper loss of £56m."

5. From all this it is evident that the scale and extent of the frauds in which the Defendant, Williams and Becker were found by the jury to have conspired was extraordinary and, at the time of the Defendant and Williams' conviction, unprecedented.

6. Unlike the Defendant and Williams, however, Becker did not stand trial for his part in the conspiracies as he was outside of the jurisdiction of this Court and, so far as I am aware, he remains at liberty in Switzerland. At trial, the jury, nonetheless, by their

verdicts were sure that Becker had criminally conspired with the Defendant and with Williams as the Prosecution alleged in Counts 1 and 21. From the AIB scam alone, £22M of the £77M balance remaining after deducting the overinflated purchase prices of the properties went to Becker's client account in Lugano. There is nothing in the papers before me to suggest that Becker personally benefited from his part in the conspiracies, but clearly he had access to and/or controlled many millions of pounds derived from the frauds and sent to him in Lugano.

Confiscation proceedings

7. Confiscation proceedings against the Defendant followed, and, on 23 September 2014, he was found to have had a criminal lifestyle and, as I have mentioned, the Court made the Confiscation Order against him in the sum of £3.25M. In doing so, the Court was bound to apply the provisions of the Act which govern the making of such orders. It is useful to set out those provisions before I turn to consider the nature of the Confiscation Order and the Application now before me.

Legal framework

8. The provisions relevant to confiscation are found in Part 2 of the Act, and are helpfully summarised by the Court of Appeal (Criminal Division) in *Wood* [2022] EWCA Crim 1243, at [16] to [20]. I adopt that summary here.

9. By s.6(1) of the Act, the Court must proceed with confiscation if the conditions set out in s.6(2) and 6(3) are satisfied. In the instant case, the Defendant was convicted of offences in proceedings before the Crown Court (thus triggering the first condition in s.6(2)(a)), and the Prosecution asked the Court to proceed under s.6 (thus triggering the second condition in s.6(3)(a)).

10. Where the first and second conditions in s.6 are satisfied, by s.6(4) the Court must proceed as follows:

    (a) the Court must decide whether the defendant has a criminal lifestyle;

    (b) if the Court decides that the defendant has a criminal lifestyle, it must decide whether he has benefited from his general criminal conduct;

    (c) if the Court decides that the defendant does not have a criminal lifestyle, it must decide whether he has benefited from his particular criminal conduct.

11. If the Court decides the defendant has benefited from his criminal conduct, s.6(5) of the Act requires the Court to decide the "recoverable amount" and to make an order requiring the defendant to pay that amount. Sections 7(1) and 7(2) go on to provide as follows:

    "(1) The recoverable amount for the purposes of section 6 is an amount equal to the defendant's benefit from the conduct concerned.

    (2) But if the defendant shows that the available amount is less than that benefit the recoverable amount is—

        (a) the available amount, or

(b) a nominal amount, if the available amount is nil."

12. Section 8 of the Act provides for the calculation of the "defendant's benefit" mentioned in s.7(1). Section 9(1) defines the "available amount" mentioned in s.7(2) as follows:

> "For the purposes of deciding the recoverable amount, the available amount is the aggregate of—
>
> (a) the total of the values (at the time the confiscation order is made) of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority, and
>
> (b) the total of the values (at that time) of all tainted gifts."

It is evident from the definition of "available amount" in s.9(1) of the Act that the defendant's "available amount" includes:

> "all the free property then held by the defendant".

13. Section 10 of the Act specifies certain assumptions which are to be made in the case of finding that the defendant has a criminal lifestyle, but those assumptions are not directly relevant to the issues now before the Court.

14. Section 11 of the Act provides that, unless the Court orders otherwise, the full amount ordered to be paid under a confiscation order must be paid on the day on which the order is made. If any amount is not paid on the due date, s.12(1) provides for the payment of interest on outstanding amounts. The amount of that interest must be treated as part of the amount to be paid under the confiscation order: s.12(4).

Confiscation Order

15. The Confiscation Order made by the Court on 23 September 2014 was in the following, agreed, terms:

(1) the Defendant's benefit, in accordance with s.8 of the Act, as £95,026,935.62 (the **"Defendant's Benefit"**) and

(2) the available amount, in accordance with s.9 of the Act, as £3.25M (the **"Available Amount"**),

and the Defendant was given six months to pay the sum ordered. In default of payment, the Court imposed a term of imprisonment of seven years. No order for compensation was made.

16. The Confiscation Order included a detailed schedule of the assets which comprised the Available Amount (the **"Schedule"**), consisting of items that were either the Defendant's admitted available assets, or were admitted tainted gifts to his wife, Pamela Kallakis, such as jewellery and fur coats. These items did not comprise only the Defendant's Form 5050A available or realisable assets, but an additional, detailed schedule of realisable assets agreed by him to be his property in accordance with s.9(1) of the Act.

17. Thus, in agreeing the Confiscation Order and the Schedule, the Defendant agreed in fact and law that property he had previously claimed to be held by companies within an entity called the Hermitage Syndicated Trust (the **"HST"**) was his property. To give one example, initially items 1 (the property in Mykonos, Greece) and 2 (2A Brompton Square, London) on the Schedule were claimed by the Defendant to be part of the HST structure, but, at the confiscation hearing, he accepted those properties (and other items in the Schedule) were his assets and were not part of the assets which he previously asserted were held by the HST. That, of course, had to be the case, given the definition of the "available amount" in s.9(1) of the Act includes "all the free property then held by the defendant" (my emphasis).

18. In the Defendant agreeing the factual and legal basis of the Confiscation Order and the Schedule, the Applicant submits that material benefit accrued to the Defendant, not least because, in contrast to the position in a contested confiscation hearing, it limited his potential liability. The Applicant submits that the Defendant's compromise of the confiscation proceedings also had a direct financial benefit for the Defendant's wife, Pamela Kallakis: for example, the Defendant's concession that the HST's ownership of the family home at 2A Brompton Square was a fiction permitted his wife to retain one half of the net value of the family home (*i.e.* £2.1M).

19. I am told that, throughout the course of the confiscation proceedings, the Applicant relied upon evidence of forged trust documents used by both the Defendant and his co-conspirators Williams and Becker to show that the HST was a sham. In making the Confiscation Order the Court did not have to make any findings in this connection, but the Defendant's concession regarding his ownership of the items in the Schedule which I have mentioned was contrary to the position he had advanced previously regarding their ownership by the HST, and I bear that in mind. The Applicant's position in relation to the HST remains that it is a sham, created by the Defendant for the purpose of distancing him from assets that, in reality, he owned and controlled (and, says the Applicant, still does to this day).

Outcome

20. In the event, the Defendant satisfied the Confiscation Order in full on 24 March 2015, leaving a deficit of £91,776,935,62 between the Defendant's Benefit and the Available Amount.

This Application

Legal framework

21. The legal framework for applications for a reconsideration (or "uplift" applications, as they are sometimes referred to) of the available amount is set out in s.22 of the Act.

Conditions

22. Section 22 of the Act applies in the following circumstances (my emphasis):

> "(1) …
>
> (a) a court has made a confiscation order,

(b) the amount required to be paid was the amount found under section 7(2), and

(c) an applicant falling within subsection (2) applies to the Crown Court to make a new calculation of the available amount.

…

(3) In a case where this section applies the court must make the new calculation, and in doing so it must apply section 9 as if references to the time the confiscation order is made were to the time of the new calculation and as if references to the date of the confiscation order were to the date of the new calculation."

23. I pause here to consider s.9 of the Act, given s.22(3) requires the Court to apply the provisions of that section at the time of the new calculation. Section 9 relevantly provides:

"(1) For the purposes of deciding the recoverable amount, the available amount is the aggregate of—

(a) the total of the values [at the time the new calculation is made] of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority, and

(b) the total of the values (at that time) of all tainted gifts."

24. Section 22 of the Act continues:

"(4) If the amount found under the new calculation exceeds the relevant amount the court may vary the order by substituting for the amount required to be paid such amount as—

(a) it believes is just, but

(b) does not exceed the amount found as the defendant's benefit from the conduct concerned.

…

(8) The relevant amount is—

(a) the amount found as the available amount for the purposes of the confiscation order, if this section has not applied previously;

(b) the amount last found as the available amount in pursuance of this section, if this section has applied previously.

(9) The amount found as the defendant's benefit from the conduct concerned is—

(a) the amount so found when the confiscation order was made, or

(b) if one or more new calculations of the defendant's benefit have been made under section 21 the amount found on the occasion of the last such calculation."

25. Thus, pursuant to s.22 of the Act, the following conditions must be satisfied in order for the Court to increase the Available Amount:

(a) the Court has previously made a confiscation order (which it has);

(b) on the previous occasion, the Court found that the Available Amount was less than the recoverable amount (which it did); and

(c) an application is made by the prosecutor to re-calculate the Available Amount (which it has).

26. If s.22 applies, the Court must make a new calculation of the Available Amount and calculate the Available Amount by reference to evidence at the date of the making of the new calculation. If the new calculation exceeds the previous calculation then the Court is vested with discretion to vary the original Confiscation Order to such amount as the Court believes is "just", provided that the variation does not exceed the amount found to be the Defendant's Benefit from the original conduct concerned: s.22(4).

Determining the "just" amount

27. In deciding what is "just", the Court must have regard to the matters set out in s.22(5), none which apply in this case. In *John* [2014] EWCA Crim 1240, Supperstone J (giving the judgment of the Court) gave some guidance on determining the just amount, speaking of a sum paid to the defendant in settlement of a personal injury claim arising out of a road traffic collision which followed the confiscation order made:

> "22. We do not accept Mr Thomas' submission that no distinction can properly be drawn between special and general damages … The special damages as a whole relate to specific expenses that have been incurred, or it has been calculated will be incurred, by reason of the injuries caused to the appellant in the collision. We do not consider it to be just for these sums to be included in the available amount under section 22. In reaching this decision we emphasise that the exercise to be conducted in each case is fact specific.
>
> 23. However, having regard to the statutory regime and the legislative policy to which we have referred, we do not consider that the general damages element of the settlement can be excluded. As Lord Brown made clear in *Peacock* at paragraph 29, how a defendant came by any increased wealth is, in principle, immaterial. It matters not whether the source of the new assets is as a result of the defendant having worked hard to set up a legitimate business (as in *Padda*), or by way of gift inheritance or some other windfall (see observations in the majority in Peacock at paragraph 34). In our view, there is no good reason for treating the part of the settlement in the present case relation to general damages any differently. That part of the judge's order was neither wrong in principle, nor was the sum involved manifestly excessive.

24. We do wish to stress that it is important for judges when determining applications under section 22 of POCA to assess carefully in each case the competing considerations in order to decide what course is truly just. In cases such as the present, not involving a 'windfall' gain the consideration should be particularly anxious."

28. It matters not whether an asset was acquired by the Defendant before or after the Confiscation Order was made, but what requires close scrutiny by the Court on this Application is whether an asset has, in fact and law, been acquired by the Defendant such that an uplift of the Available Amount is just and should result.

Tainted gifts

29. In making the Confiscation Order, this Court found that the Defendant had a criminal lifestyle. This is relevant insofar as s.9 of the Act is concerned (which, as I mentioned, provides the statutory mechanism for determining the "available amount"), and s.77, which goes on to define tainted gifts as follows:

> "(1) Subsections (2) and (3) apply if—
>
> …
>
> (b) a court has decided that the defendant has a criminal lifestyle.
>
> (2) A gift is tainted if it was made by the defendant at any time after the relevant day.
>
> (3) A gift is also tainted if it was made by the defendant at any time and was of property—
>
> (a) which was obtained by the defendant as a result of or in connection with his general criminal conduct, or
>
> (b) which (in whole or part and whether directly or indirectly) represented in the defendant's hands property obtained by him as a result of or in connection with his general criminal conduct."

30. Section 77(9)(a) of the Act defines "relevant day" as the first day of the period of six years ending with the day when proceedings for the offence were started against the defendant. "Property" is defined in the Act to include things in action and intangible or incorporeal property (s.84(1)(c)), and is held by a person if the person hold an interest in it (s.84(2)). It is transferred by one person to another if the first person transfers or grants an interest in it to the second person (s.84(2)(c)). An interest in property includes rights, including that of possession (s.84(2)(h)).

Interested parties

31. Section 10A of the Act make provision for determining the extent of a defendant's interest in property:

> "(1) Where it appears to a court making a confiscation order that—

(a) there is property held by the defendant that is likely to be realised or otherwise used to satisfy the order, and

(b) a person other than the defendant holds, or may hold, an interest in the property, the court may, if it thinks it appropriate to do so, determine the extent (at the time the confiscation order is made) of the defendant's interest in the property."

32. Although in embarking on an uplift application under s.22 the Court is not "making a confiscation order", it is reconsidering the "available amount" of a confiscation order already made, and I find it appropriate to adopt the provisions of s.10A in determining this Application.

Burden and standard of proof

33. The standard of proof in determining applications such as this is the civil standard, on the balance of probabilities: see, *e.g.*, *Forte* [2020] EWCA Crim 1455, which considered the burden and standard of proof in applications under s.10A of the Act. As the party making the assertion, it is for the Applicant to establish to that standard the "available amount" in s.9 as modified by s.22.

34. The Court must decide the case on the evidence which there is, but it is entitled to have regard to the fact that a party who could have contradicted the opposing case has chosen not to do so.

<u>The Applicant's case</u>

35. The Applicant's case relies upon the evidence of Ian Price, an accredited financial investigator with the Serious Fraud Office (**"SFO"**). Mr Convey (who appeared for the Applicant) adduced Mr Price's five witness statements (dated 2 August 2021, 29 September 2021, 22 December 2021 (Defendant), 22 December 2021 (Interested Party), and 26 February 2022 (Interested Party)) and their exhibits as Mr Price's evidence-in-chief. I was also referred to a number of documents in the parties' agreed Core Bundle, and to the documents in the Hearing Bundle itself (which ran to almost two thousand pages). Mr Price was cross-examined by Mr Evans KC (who appeared for the Defendant) on two discrete areas, to which I shall come shortly. Mr Price's evidence was, otherwise, unchallenged by the Defendant and the Interested Party. Neither the Defendant nor the Interested Party asked for any other SFO witness to be called or tendered by the Applicant.

36. Mr Price's evidence was that, during the course of the frauds which resulted in the Defendant's conviction on Counts 1 and 21 on 16 January 2013, the Defendant donated £250,000 in total (the **"Donation"**) in two tranches (£75,000 and £175,000) to the Francis Holland (Church of England) School Trust (the **"School"**). (I shall at times refer to the school and the school trust as the School, because the distinction between the two makes no difference for the purposes of this Application.)

37. During the course of the confiscation proceedings, the Defendant made a witness statement dated 26 March 2013 in which he said this:

"*Transfers/gifts made by the* [HST]

I do not have access to information about specific transfers and Michael Becker will be in a better position to provide precise details. I can give the general nature of transfers by way of gifts from the [HST] *since 23 February 2004.*

... a theatre in [the School] (£250,000) …".

Remarkably to my mind, nowhere in his witness statement did he say that this transfer or gift made by the HST was other than on his account. He did not disclaim any personal interest in the transfers or gift which he mentions; rather, they appear to have been expressly referred to by him within the context of the confiscation proceedings for the offences of which he had been convicted. He made no mention of the transfers or gifts referred to being anything other than transfer or gifts in relation to those personal proceedings against him.

38. At the time the Donation was made, his daughter, Erinoula Kallakis, was attending the School at its Sloane Square site. Mr Price said the monies were donated by the Defendant in response to a fundraising campaign by the School for the construction of a new wing to its Sloane Square premises.

39. Included within the development was a new theatre. A letter from the School dated 17 June 2005 requesting the payment of the promised Donation was sent to the Defendant alone. It was sent to his office address, not his home address, *i.e.* not that of the Kallakis family. The minute of the School's meeting held prior to this letter being sent equally refers only to the Defendant as being the source of the funds.

40. In acknowledgment of the Defendant's donation, the School named the new theatre "The Kallakis Theatre". As I mentioned, payment of the donation to the School was made in two tranches: the first, on 14 July 2005, in the sum of £75,000; the second, on 11 November 2005, in the sum of £175,000. Mr Price says both payments came from a Swiss bank account operated by the Defendant's co-conspirator Becker.

41. On 4 June 2020, the Interested Party issued proceedings in the Queen's Bench Division of the High Court of Justice to recover the Donation (the **"QBD Proceedings"**). The QBD Proceedings followed the removal of the Kallakis name from the School's theatre. The Interested Party claims to be able to recover the Donation on the basis that, as a member of the Kallakis family, he was part of an unincorporated association consisting of the family members on whose behalf the Donation had been made. The Interested Party was in his minority at the time of the Donation.

42. Mr Price noted the Interested Party's claim in the QBD Proceedings as to the existence of an unincorporated association was not advanced by the Defendant in agreeing the Confiscation Order. The particulars of claim in the High Court assert that the payments to the School were made "*as a result of negotiations by the Defendant*":

"***The Family***

4. ... the Family [i.e., the Kallakis family, which includes the Interest Party as the son of the Defendant]*, is and was at all material times an unincorporated association comprising members made up from* [the Defendant] *his wife* [Pamela Kallakis] *and their children. ...*

…

8. In or about spring 2005 [the Defendant]*, having learnt of* [the School's] *running fundraising exercises, expressed an interest to* [the School's then head of the junior school] *in making a donation on behalf of the Family. The School* [and the School trust] *suggested an interest in the creation of a new theatre at the School. …*

9. [The Defendant] *was introduced to* [the School's] *Headmistress … and the Bursar …* [who] *negotiated the terms of* [the Donation] *with* [the Defendant] *on behalf of* [the School and the School trust]."

43. In cross-examination by Mr Evans KC, Mr Price said that he had seen nothing (such as a contract or the like) to suggest that any conditions attached to the Donation at the time it was made in 2005, and that he had not seen reference in any of the historic correspondence to naming rights attaching as a condition to the gift. The first reference Mr Price had seen to the Kallakis name being attached to the theatre was in an email from the School's bursar to the Defendant on 24 August 2005, which said this (my emphasis):

> "*I can confirm safe receipt in our Jersey account on 20 July of the first tranche of <u>your donation</u>, i.e. £75,000 transferred in the name of Michael Becker. Many thanks indeed.*
>
> *As <u>you</u> would become the major donor to this project I can confirm that* [the School] *would be delighted to associate <u>your name</u> with the performing arts/lecture theatre.*
>
> *The precise name has yet to be established but it is likely to be either 'The Kallakis Theatre', 'The Kallakis Lecture Theatre' or 'The Kallakis Hall'. I hope to be able to let <u>you</u> know about this in early September.*"

44. It is noteworthy from this email that the Bursar appears to have been proceeding on the basis that the Defendant was the donor, rather than the HST or including the wider Kallakis family. This is plain to me from his reference to "*your donation*", as opposed to the HST's donation or the Kallakis family's donation, and the Bursar's reference to the Defendant becoming the major donor and associating his name with the development, again as opposed to that of the HST or the Kallakis family. The email was, of course, written by the Bursar with his apparent knowledge that the Donation had come from funds transferred in Becker's name, and yet still he referred to the Donation as the Defendant's and made no reference either to the HST or the Kallakis family. The email was not copied to anyone else. The School's records subsequent to this email also refer to "*The Kallakis Lecture Theatre and Performing Arts Studio*", "*The Kallakis Performing Arts Centre*" and "*The Kallakis Theatre*"; again, no reference was made to the HST or the Kallakis family. And, in a letter from the Bursar to the Defendant's wife dated 21 November 2012, the Bursar wrote (again, my emphasis):

> "*Following your request I am writing to confirm that two generous donations were made to* [the School]*, <u>by Mr Kallakis</u> – a donation of £74,993.00 on 20 July 2005 and a further donation of £174,993 on 17 November 2005. Both values are as received after deduction of charges.*"

Again, no reference was made by the Bursar either to the HST or the Kallakis family.

45. On 6 July 2021, the School and the Interested Party reached a settlement to compromise the QBD Proceedings (the **"Settlement Agreement"**). Under the terms of the Settlement Agreement, the School agreed to pay the Interested Party the sum of £104,500, being £92,500 (the **"Settlement Amount"**) plus £12,000 costs. The Settlement Amount is being held by the Interested Party's solicitors on an undertaking pending this Court's determination of this Application.

46. The claim set out in the QBD Proceedings and the Settlement Agreement which followed appears to have resulted from a pre-action letter sent not by the Defendant or the Interested Party but by the Defendant's wife, Pamela Kallakis, to the School dated 4 March 2020, which said this in relevant part (my emphasis):

> "***Introduction***
>
> *My name is Pamela Kallakis. I am the mother of Erinoula Kallakis who was a student at* [the School] *from approximately 2004 to 2012.*
>
> ***My Claims***
>
> *In the Summer of 2005 my family held intense discussions with the school regarding a family donation that we were looking to make in order to support the arts. ... Specifically, we discussed the donation of £250,000 to fund the entirety of the construction of a new theatre at* [the School]. *The sole condition of this donation was naming-rights, in that the theatre was to be name The Kallakis Theatre in perpetuity, and be recognised as such by means of a plaque to be placed in a prominent and conspicuous part of the new theatre reflecting the donation, to include the Kallakis name and opening date.*
>
> *The terms were agreed and the funds remitted to the school, in two payments, as agreed: £75,000 on 20th July 2005 and £1750,000 on 17th November 2005.*
>
> *The theatre was built, the plaque placed in a prominent position and a small ceremony held to officially open the theatre. ...*
>
> *However, it has just this week come to my attention that the school has removed the plaque and does not consider it to be name The Kallakis Theatre anymore. This is in breach of the contracted agreement that we agreed, and made good on, in 2005. ...*
>
> ***Conclusion***
>
> *As a result of all of the above, it is my intention to initiate legal action to recover the donation that was given to the school as part of the contracted agreement, as the school has breached the terms that were specifically agreed.*
>
> *Furthermore, I will seek to recover interest on any damages either at the statutory rate of 8% per annum or at a commercial rate of compound interest at the discretion of the court.*

> *It is in my sincere hope that litigation can be avoided in this matter, however if I do not receive a positive response from you within 14 days of the date of this letter, that is by close of business on (18th March 2020), indicating your willingness to settle this matter with an outline settlement proposal then I will issue litigation without further notice to yourselves.*
>
> *Please confirm in your response that you have put your insurers on notice for* [sic] *this claim.*"

47. Parts of this letter coincide with parts of the claim advanced in the QBD Proceedings, but both the letter and the claim diverge from the School's contemporary documents in a number of material aspects: as I mentioned, the School's contemporary documents make no mention of a family donation, or discussions with anyone outside of the Defendant. Indeed, those documents speak only of the Defendant and his desire to make a donation on his part. But, more particularly, those documents do not record any term or condition of the Donation which required the development to be named in honour of him or the Kallakis family. Moreover, I saw nothing in the papers before me to suggest that the Defendant or anyone member of the Kallakis family ever sought to correct the obvious misapprehension that the Bursar and/or the School – on the Defendant and the Interest Party's cases now before me – was apparently labouring under.

48. In the event, the School entered into the Settlement Agreement with the Interested Party to settle the QBD Proceedings. This followed meetings between the School and the Defendant and the Interested Party on 26 November 2020 and 10 June 2021. In the meeting of 26 November 2021, the School challenged the Interested Party's status as claimant on behalf of the Kallakis family, and said in effect that only the person who made the Donation could be the proper claimant. In a contemporaneous meeting note taken by the School's solicitors, the Defendant is recorded as saying that he had made the agreement with the School, and that he settled his obligation to the School by asking the HST to pay the amounts comprising the Donation for him.

49. Immediately prior to the Defendant's wife's pre-action letter of claim, the Defendant and the Interested Party entered into a deed of assignment dated 2 March 2020 by which the Defendant assigned to the Interested Party his "beneficial interest" in the "cause of action" referred to in the agreement, which is defined as:

> "*any Cause of Action that* [the Defendant] *(or* [the Defendant] *acting on behalf of his family or any associated entity owned or controlled by him) has against* [the School] *and/or any associated entity arising from the donation of £250,000 to* [the School] *... by [the Defendant] (or* [the Defendant] *acting on behalf of his family or any associated entity owned or controlled by him).*"

50. That this assignment referred to choses in action held by the Defendant in his own right and for and on behalf of anyone else in itself is not unusual in documents of this nature, but it does show that the Defendant and the Interested Party considered that he held such choses in his own right rather than on behalf of anyone else, and that of course would include any cause of action which the Defendant had against the School had the Donation come from him personally.

51. The School also contemplated that the Defendant and/or Becker held claims against it in relation to the Donation, and provided for this in the Settlement Agreement by making the Defendant and Becker provide undertakings not to bring either in "*any individual or representative capacity or otherwise*" "*any claim or procure another party to bring a claim in any jurisdiction on any basis against the School, whether now or in the future*". Again, in itself that is not an unusual provision in agreements of this nature, but again it does show that the School considered that the Defendant held such choses in his own right rather than on behalf of anyone else.

52. On that basis, Mr Convey submitted that the chose in action which resulted in the Settlement Amount formed part of the Defendant's free property at the time which the Confiscation Order was made, and is available to him as realisable property and, as such, should form part of the Available Amount. In the alternative, the Applicant contends that if the Settlement Amount is an asset of the Interested Party, then its represents a tainted gift to him now within the meaning of s.77 of the Act and, as such, is recoverable from the Interested Party pursuant of s.9 of the Act. Whichever the position, the Applicant applies to the Court pursuant to s.22 of the Act for a reconsideration of the Available Amount, and invites the Court to order that the value of the Available Amount has increased by £92,500. In that event, the Applicant invites the Court to set a new default term of imprisonment pursuant to s.39(4) of the Act.

The Defendant's position

53. The Defendant's position can be shortly put. His evidence was adduced by Mr Evans KC, who appeared on his behalf, through a signed witness statement dated 12 November 2021 and its exhibits, and he was cross-examined on it by Mr Convey.

54. He admits that, in July and November 2005, he caused the Donation to be made to the School by payment transfers made from an account held in the name of HST. He admits that the Donation was made during his offending. While he says he cannot gainsay the Applicant's case that the provenance of the Donation was but a small part of the AIB loan obtained by his fraud, he denies that his concession that the realisable assets held by the HST which went to make up the Available Amount was an admission by him that the trust itself was a sham.

55. The Defendant says, however, that it makes no difference to the Application whether the Donation was made with criminal property or not, because the Settlement Amount does not derive from the proceeds of the fraud; the funds were paid out of School's own (untainted) resources. It follows that the only issues the Court needs to determine are (1) whether the Interested Party holds the funds as his nominee and, if not, (2) whether the funds in his hands amount to a gift as defined by s.77 of the Act.

56. As to the former, the Defendant's position is that the Interested Party does not hold the Settlement Amount as nominee, agent or trustee for the Defendant. He says the evidence strongly suggests the Interested Party holds the Settlement Amount for himself and intends to use it to fund proceedings which he has brought[2] against AIB in

[2] The basis for the Interested Party's claims against AIB (in which he sues not only the bank, but the Defendant and Becker) are set out in the judgment of Moulder J in *Kallakis v AIB Group plc* [2020] EWHC 460 (Comm), at [17]. It is:

(a) in his personal capacity as a beneficiary of the HST;

the Commercial Court to recover loss and damage the Interested Party says he suffered caused by the bank repossessing the properties it financed.

57. As to the Applicant's alternative case, the Defendant says there is no basis for contending the Settlement Amount is a tainted gift within the meaning of the Act.

The Interested Party's position

58. The Interested Party's position can also be shortly put. He made two witness statements in these proceedings which stood as his evidence-in-chief: the first dated 12 November 2021 and its two exhibits, and the second dated 28 February 2022. Each was adduced on his behalf by Mr Bedloe, and the Interested Party was also cross-examined by Mr Convey.

59. As to the nature of the Donation, the Interested Party points to the School's defence filed in the QBD Proceedings, which admitted that the School was engaged in fundraising in 2005 for the construction of a theatre, and that a donation was made in 2005 of £250,000 by or on behalf of the Interested Party. This, he says, supports his claim that, while the Defendant was directly involved in making the Donation (as an advisor to the HST) and in assisting to procure the Settlement Amount, it was in his capacity as agent for the wider Kallakis family, *i.e.* the Defendant, Pamela Kallakis, and their children, not the Defendant personally, in which the Defendant acted. The Interested Party said the Settlement Amount resulted from a claim which he brought in various alternative guises, none of which were derivative of any right held personally by the Defendant, and not merely because the Defendant was not a beneficiary of the HST. The Interested Party intended to use the Settlement Amount to advance his personal and derivative claims against AIB, as the Defendant claimed in his evidence before me. To that extent, the Interested Party said he was not the Defendant's nominee and that he brought the claim against the School on his own behalf and on behalf of the wider Kallakis family.

60. Insofar as the Applicant's alternative claim that the Settlement Amount is a tainted gift, Mr Bedloe submitted the Settlement Amount was neither a gift nor was it made by the Defendant. In those circumstances, it is not free property held by the Defendant, nor is a tainted gift, such that the available amount remains as it was when the Confiscation Order was made.

Discussion and analysis

61. It is common ground between the parties that the question or questions which arise for me to determine within the context of this Application are as follows:

    (1) Does the Interested Party hold the Settlement Amount as the Defendant's nominee?

    (2) If not, is the Settlement Amount a tainted gift, as defined by s.77 of the Act?

(b) on behalf of the trust pursuant to an equitable assignment;
(c) on behalf of the trust by way of a derivative action; and
(d) in his personal capacity by way of a derivative action on behalf of the Defendant's companies.

62. In reaching this position, the parties agree that the conditions in s.22(1)(a)-(c) are properly met, and neither the Defendant nor the Interested Party contends it would be unjust for the Court to vary the original Confiscation Order such that the Available Amount is increased by £92,500 to include the Settlement Amount.

63. I turn then to consider those dispositive questions.

(1) Does the Interested Party hold the Settlement Amount as the Defendant's nominee?

64. Having considered the evidence before me, I find that the answer to this question is yes for the following reasons.

65. I take as my starting point the contemporaneous documents, viewed in the context of the evidence given by Mr Price, the Defendant, and the Interested Party. Viewed in isolation, the contemporaneous exchanges between the Defendant and the Bursar are, in my judgment, sufficient to show that the Defendant made the Donation (or caused it to be made) in his own right. It is the Donation itself and the circumstances in which it was given that gives rise to any right of action which resulted in the Settlement Amount. Those circumstances require close scrutiny.

66. As I have mentioned, the first reference to the Kallakis name being attached to the theatre is the 24 August 2005 email from the Bursar to the Defendant, which refers to "*your donation*" "*transferred in the name of Michael Becker*". No mention is made by the Bursar of the HST, or of the Donation being made on behalf of the Kallakis family as the Interested Party now claims. This email was written by the Bursar in the knowledge that the Donation had come in Becker's name, not the Defendant's, and yet still he referred to the Donation as the Defendant's and made no reference either to the HST or the Kallakis family. This pattern is repeated by the Bursar in the letter written to the Defendant's wife some years later, dated 21 November 2012, where again he refers to the Donation being made by the Defendant, and not by the HST or the wider Kallakis family.

67. Other evidence goes to support the position set out by the Bursar in his correspondence:

    (a) Viewed in the round, the Defendant's connection as opposed to that of the wider Kallakis family is clear from the Interested Party's Particulars of Claim in the QBD Proceedings, which relied upon the following matters:

        (i) only the Defendant's daughter attended the School at the time of the Donation;

        (ii) discussions with the School about a donation were initiated by the Defendant;

        (iii) there had been a number of previous charitable donations to the School "*largely negotiated and arranged by* [the Defendant]";

        (iv) the terms of the Donation were negotiated between the School's Headmistress and Bursar on one part and the Defendant on the other;

        (v) the Defendant agreed with the Headmistress that a donation would be made to the School in the amount of £250,000 to fund the creation of a theatre.

(b) Moreover, the minutes of the meetings held by the School at the time of the Donation and the construction of what was called the Bowden Wing Development (*i.e.* what came to be called "The Kallakis Theatre") make no mention of the Interested Party, Pamela Kallakis or her children with the Defendant. The only references are to "*Kallakis*" and "*Mr K*".

(c) It is also of note that the proposition for funding by the Defendant started as a business proposal, not a personal or family one.

(d) The Defendant's criminal proceeds were the source of the payments to the School:

(i) The payments came from a Swiss bank account operated by the Defendant's co-conspirator Becker.

(ii) The Swiss account, held at the Lugano branch of the Banca Coop (ending 895-3), made two payments to the School, the first on 14 July 2005 for £75,000 "*FHS Bowden Wing Appeal*"; the second on 11 November 2005 for £175,000 "*FHS Bowden Wing Appeal*".

(iii) The Lugano account was used by the Defendant to receive excess sums from the dishonestly obtained loans from AIB. About £743M was raised in finance by AIB for the Defendant between October 2003 and November 2007. The money was for mortgages for companies registered in the BVI and supposedly part of the HST. Each of the companies were part of a group arrangement whereby Becker was the director but the Defendant was the real ultimate beneficial owner. Williams was the:

> "*interface between Becker,* [the Defendant] *and various firms of solicitors acting for both AIB and* [the Defendant]"

(see the excerpt from the witness statement of Julia Graham Ambler dated 5 May 2010, exhibited to Mr Price's witness statement dated 29 September 2021). Of the monies raised, £642.8M was paid out in respect of property purchases. That left a total of £92.6M, which remained unspent. Of that sum, £3,205,076 was paid direct to Becker's client account in Lugano for the Defendant. In addition to those funds a further £18.9M was paid into the Lugano account from other dishonestly excessive AIB loans. Thus, a total of £22M of AIB generated funds was paid into the Lugano account.

(iv) In particular, the following payments into the account were made shortly before the payments comprising the Donation were made to the School:

(A) in July 2005, £1,857,329 from Carter Lemon Cameron Solicitors, acting on behalf of the Defendant, in relation to the purchase of Hanover House by Andromeda Alliance Inc.;

(B) on 25 October 2005, £3,569,610 again from Carter Lemon, in relation to the purchase of Astral Towers by Diamond Valley Acquisitions Corporation.

(e) The same Swiss account was used by Becker for payments to the joint American Express card of the Defendant and his wife, Pamela Kallakis. Between September 2003 and January 2006, Becker paid £352,450 and $3,870,140 in settlement of their American Express bill from the Lugano accounts.

(f) Over £350,000 in payments were also made from this account to a Hong Kong based Citibank account of Williams.

(g) Both the Interested Party and the School thought it necessary to directly involve the Defendant in the settlement of the QBD Proceedings in the way in which they did, with the Interested Party taking an assignment of the Defendant's causes of action against the School on the basis which I have set out in this judgment, and the School requiring the Defendant's (and Becker's) undertaking not to sue.

68. From all this I am satisfied that the Donation to the School came from the surplus monies of the fraud committed by the Defendant and his co-conspirators. They were the proceeds of his crimes.

69. The Defendant maintains that the monies under the control of the HST have nothing to do with him and that the sole beneficiaries of the HST are his children with Pamela Kallakis. The Applicant maintains that the trust is sham device used by the Defendant and Becker to disguise their proceeds of crime and to make them remote from the reach of the courts of this country. Insofar as the HST held assets which were not conceded by the Defendant as forming part of the Available Amount in the Confiscation Order, whether or not those assets are realisable assets outside the Settlement Amount is not a question I need determine on this Application.

70. Had I needed to make any finding of fact and in law on that question beyond the Settlement Amount, I might have been persuaded that the entirety of the HST-held portfolio is, in fact and law, beneficially held by the Defendant, or at least it was at the material time. That conclusion could be reached based on a document exhibited in translated form to a further witness statement made by Mr Price on the final day of the hearing before me. This exhibit, marked "IP/06", is a copy of an original document provided by Banca Coop in response to a request for mutual legal assistance by the SFO. In his witness statement, Mr Price says this:

> "*The document was found within the material provided by Banca Coop relating to KYC ... material for the* [HST] *accounts. Also within the file is an identification document for Michael Becker.*
>
> *The translated document relating to the beneficial ownership of the* [HST] *accounts was previously produced for the confiscation proceedings where an agreed confiscation order was made. It has subsequently been reproduced for these proceedings.*"

The original Banca Coop document to which Mr Price refers in his exhibit (found at p.487 of the Core Bundle) is in the Italian language. It says this, in material part:

> "*Numero base: 492592*
>
> *La seguente dichiarazione vale per*

...

seguenti conti risp. Depositi ...492.592.310895-3 ... tutti rubricati [HST]

Contraente

AVV. MICHAEL BECKER

STUDIO LEGALE E NOTARILE

...

Determinazione dell'avente diritto economico

...

Con la presente il contraente dichiara:

...

che l'avente/gli aventi diritto economico dei valori patrimoniali è/sono:

...

1.

Cognome, nome rips. ragione sociale

Achilleas M. Kallakis

Data di nascita

3.9.68

Nazionalità

GB

Indirizzo del domicilio/sede

8, Carlos Place

Mayfair London

Stato

GB

Il contraente si obbliga a comunicare volontariamente ogni cambiamento alla banco.

La compilazione intenzionalmente falsa del presente formulario è punibile (art. 251 del Codice penale svizzero, falsità in documenti; pena prevista: reclusione sino a cinque anni o detenzione)."

The document is then signed, presumably by Becker, and dated Lugano, 23 May 2005.

71. The corresponding parts of the English translation relied upon the Applicant at p.959 of the Hearing Bundle says this (my emphasis):

"*Base number: 4025?2*

The following declaration applies to

...

The following accounts or deposit accounts ...492.592.310<u>895-3</u> ... <u>all registered</u> <u>[HST]</u>

Holder

AVV. MICHAEL <u>BECKER</u>

STUDIO LEGALE NOTARILE

...

<u>Identification of Beneficial Owner</u>

...

<u>The Holder hereby declares</u>

...

<u>that the beneficial owner(s) of the assets is/are</u>

...

1.

Surname, name or company name

<u>Achilleas M. Kallakis</u>

Date of birth

3.9.68

Nationality

GB

Home address/registered office

8 Carlos Place

Mayfair London

Country

GB

The Holder undertake to notify the bank of any changes.

Knowingly supplying false information on this form is an offence (Art. 2?1 of the Swiss Criminal Code, filing false documents, liable to imprisonment of up to five years or detention)…."

72. The accuracy of the English translation of this document was not challenged by the Defendant or the Interested Party, although those parties maintain that it is not a true statement of the position and that the only beneficiaries of the HST at the material time were the children of the Defendant and his wife Pamela Kallakis. Notably, this document is dated less than two months before the first payment of the Donation was made by Becker. Despite the Defendant and the Interested Party's assertions and the evidence on which they relied, I consider it is a fair inference that, given (a) the bank was apparently dealing directly with Becker in relation to operation of the HST account from which the payments comprising the Donation were made, and (b) this document came from the bank, the document was completed, signed and sent to the bank by Becker and revealed his knowledge of the true state of the HST's affairs as at the date he signed it, *i.e.* two months before the first payment to the School, this document properly reflects the true state of affairs at the material times: the only beneficiary of the HST at the time the Donation was made was the Defendant.

73. The Defendant and the Interested Party gave evidence otherwise. The Defendant maintained that he was not a beneficiary of the HST at the times material to the confiscation proceedings, and that the only role he played was that of advisor. He maintained that, on occasion, he had "advised" Becker to take a course of action about which Becker then took his own decision. He maintained that the only beneficiaries of the HST were his children with Pamela Kallakis. I found it difficult to reconcile the Defendant's evidence on these matters with the contemporaneous documents, which I prefer. Of course, it suits the Defendant to adopt the position which he now does, distancing himself from what might otherwise form part of his realisable assets, and in assessing the credibility and reliability of his evidence I bear in mind his two convictions for offences of dishonesty. He could have called Becker as a witness in these proceedings to support his case about the HST, but he did not.

74. As to the Interested Party, I did not find his evidence helpful on these points. As he readily acknowledged in his witness statement, he knows little about the case against the Defendant other than what he has read in the papers he has and what he has learned generally. His dealing with Becker are limited, and appear to be brokered at times by the Defendant. He did not think it necessary to call Becker in support of his case.

75. I am mindful that the documents upon which the Applicant relies to establish its case comprise hearsay evidence, and I have considered the admissibility and weight of those documents. The ordinary rules of criminal evidence do not strictly apply in

confiscation hearings because the proceedings are quasi-civil in nature. Even so, I have had regard to the legislative steer set out in s.114(2) of the Criminal Justice Act 2003 in deciding this evidence ought to be admitted, and I have weighed it, accordingly, bearing in mind fairness to all the parties who have had the opportunity to adduce evidence on and to make submissions about those documents.

76. Taking all those matters into account, I find that, (a) at least when the Donation was made, the Defendant was the only beneficiary of the HST, and (b) the Donation was made by the Defendant for his own benefit, and not for the wider Kallakis family as the Defendant and the Interested Party now maintain. In those circumstances, the only person who could properly bring any claim against the School in relation to the Donation was the Defendant.

77. I am fortified in this conclusion by the apparent public change in position adopted by the Defendant since the QBD Proceedings were pursued. Remarkably, during the course of the confiscation proceedings the Defendant did not earmark that the Donation was made other than on his own account, albeit via money channelled through the HST and Becker as the HST's trustee. The Donation appears to have been expressly referred to by him within the context of the confiscation proceedings for the offences of which he had been convicted, and yet (as I have observed) he made no mention in those proceedings of the transfers or gifts referred to – including the Donation – being anything other than transfer or gifts in relation to those personal proceedings against him.

78. Having said that, whatever rights the Defendant held against the School in connection with the Donation, he purported to transfer those rights to the Interested Party by way of the deed of assignment dated 2 March 2020 (which, I note, on its face precedes Mrs Kallakis's letter before action to the School by two days). If that deed is a valid instrument in law and was effective to transfer to the Interested Party all the Defendant's rights against the School relating to the Donation – a transfer at law and in equity in the very broadest of senses – then the Interested Party now holds the Settlement Amount in his own right and not for the Defendant as the Defendant's nominee. No argument was made before me by the Applicant as to the deed of assignment being anything other than a lawful assignment by the Defendant to the Interested Party of his rights against the School, but it requires careful examination to determine what, if any, rights, were purportedly transferred to the Interested Party.

79. The assignment relevantly provides as follows:

> "***BACKGROUND***
>
> *The Assignor* [*i.e.*, the Defendant] *has an interest in a Cause of Action against Francis Holland School (**FHS**) and/or Francis Holland Schools* [sic] *Trust (**FHST**) and/or any associated entities for acts against him, entities owned or controlled by the Assignor, or his family. The Assignor has agreed to assign such Cause of Action to the Assignee on the terms of this deed on the date of this deed.*
>
> ..."

Pausing there, that is a positive assertion by the Defendant (accepted by the Interested Party) that, at least as at the date of the deed – 2 March 2020 – the Defendant

personally held the interest which he was purporting to assign. Moreover, it is an implicit acknowledgement by the Defendant that, to the extent such an interest is held that the assignment extends to "*entities owned or controlled*" by him which, as I have found, in reality extends to the HST at the material time as its sole beneficiary. "*Cause of Action*" is defined in clause 1.1 of the deed to mean:

> "*any Cause of Action that* [the Defendant] *(or* [the Defendant] *acting on behalf of his family or any associated entity owned or controlled by him) has against FHS/FHST and/or any associated entity arising from the donation of £250,000 to FHS/FHST/Any associated entity by* [the Defendant] *(or acting on behalf of his family or any associated entity owned or controlled by him).*"

Of course, it is trite to say that the recitals to an agreement do not form a binding part of the agreement, although they may go to show the parties' intention in entering the agreement. I should discount this recital in construing the operative provisions of the deed itself, unless there is some ambiguity within the document which may be resolved by reference to it.

80. The deed has the hallmarks of being drafted by someone inexperienced in drafting such things. The capitalised term "*Cause of Action*" is used within its own definition to create a circularity. The Defendant is defined as both "*AMK*" and the "*Assignor*". The draftsman goes on to provide for the "*Assignment & Consideration*" in clause 2 as:

> "*The Assignor assigns his Beneficial Interest to the Assignee* [*i.e.*, the Interested Party] …".

This wording inevitably begs the question: precisely what does the Assignor assign his "*Beneficial Interest*" in? Why did the draftsman not seek to go on to say, "*Cause of Action*", as defined? Did the parties intend something else? Or did they mean the "*Cause of Action*" referred to in the recital, and as defined in clause 1.1 but not otherwise referred to in what is the core provision of the deed in clause 2? And what, in any event, does "*Beneficial Interest*" mean, capitalised as it is but without definition?

81. None of the parties made any submissions as to the meaning and effect of the deed of assignment. Doing as best I can in the absence of submissions, it seems to me that, in reading the recital together with the provisions of the deed as a whole, the parties' intention was to assign the Assignor's "*Beneficial Interest*" in the "*Cause of Action*" to the Assignee. As I mentioned, the term "*Beneficial Interest*", although capitalised (which might otherwise suggest it is a defined term in the agreement), is not defined. In the premises, I must take the term to have its ordinary and natural meaning at law. At law and in equity, a beneficial interest is quite different to a legal interest. To my mind, the distinction between the Defendant's beneficial interest and his legal interest in the "*Cause of Action*" as defined in the deed of assignment is underscored by the provision in clause 4 for notice of the assignment to be given to the School (as I have defined it in this judgment) "*as soon as practicable*", although there is of course no requirement in law for notice of an equitable assignment to be given. I consider, however, that by this deed the Defendant expressly reserved his legal title in the "*Cause of Action*" such that it remained with him, but that the assignment of his beneficial interest in it permitted the Interested Party to pursue the "*Cause of Action*" but not otherwise enabling the Interested Party to resolve it on his behalf without his direct participation as holder of the legal estate. That is why, no doubt, the School obtained

the undertaking it did from the Defendant, and did all it could to try and make the Defendant a party to the Settlement Agreement. Accordingly, I am satisfied that the Defendant retained legal title to any claim against the School.

82. If, as I have found, the Interested Party now holds the Defendant's beneficial interest in the Settlement Amount, I find that he holds that money as the Defendant's nominee as part of the Defendant's free property and, applying s.22 of the Act, I find that the Settlement Amount forms part of the Defendant's recoverable amount under s.9 of the Act. Having made those findings, I need not go on to consider the provisions of s.10A of the Act.

83. For those reasons, I find the Applicant has proved it more likely than not that the Interested Party holds the Settlement Amount as nominee for the Defendant. As I mentioned, the Defendant does not suggest that it would be unjust to include the Settlement Amount in the new calculation. There are no considerations which weigh against a finding that it would be just to do so. In all the circumstances, I believe it is just to include the Settlement Amount in the new calculation.

(2) If not, is the Settlement Amount a tainted gift, as defined by s.77 of the Act?

84. If I am wrong in my analysis on question (1) and the Defendant transferred not only his beneficial interest in the "*Cause of Action*" against the School but also his legal interest in it too, I need go on to consider whether the Settlement Amount, resulting as it does from that chose in action, is a tainted gift within the meaning of s.77 of the Act. I find that the answer to this question is yes for the following reasons.

85. I have already set out the provisions of s.77 of the Act at [29] above, and I need not rehearse them again here. In his written submissions, Mr Evans KC took issue with the Applicant's position that the Settlement Amount is a tainted gift: he submitted there is no legal basis for treating the settlement paid by the School to the Interested Party as a tainted gift made by the Defendant.

86. I disagree. Had the Defendant had the sole cause of action against the School in relation to the Donation from which the Settlement Amount derives (as I have already found), then his assignment of the legal and beneficial estate of that chose in action meets the requirements of s.77 of the Act as a tainted gift, for the following reasons:

    (1) this Court has determined the Defendant has a criminal lifestyle (s.77(1)(b));

    (2) the Defendant's transfer of the "*Cause of Action*" by the deed was made after the relevant day (s.77(2)); and

    (3) it was made by the Defendant at any time and was of property which was obtained by him as a result of or in connection with his general criminal conduct (s.77(3)(a)).

87. In the premises, I find it more likely than not that the Defendant's assignment of the "*Cause of Action*" is a tainted gift within the meaning of s.77 of the Act, and that the Settlement Amount is the result of a tainted gift from the Defendant to the Interested Party. Applying s.22 of the Act, I find that the Settlement Amount forms part of the Defendant's recoverable amount under s.9 of the Act. Accordingly, I find the

Available Amount must be increased by the amount of the Settlement Amount, and, for the reasons which I have already cited, I believe it is just to include the Settlement Amount in the new calculation.

Disposal

88. Having found the new calculation exceeds the relevant amount by £92,500 on the basis put by the Applicant, I order the Confiscation Order be varied by substituting the figure of £3,342,500 for the amount required to be paid. I grant the Application accordingly.

89. I grant the Defendant 28 days to pay the sum of £92,500. As I must do, I fix a term of 12 months' imprisonment in default of payment in accordance with s.129 of the Sentencing Act 2020.

90. I invite the parties to agree a minute of an order reflecting this judgment, and to agree any consequential orders, including any order as to costs.