Neutral Citation Number: [2020] EWHC 391 (QB)

Case No: QB-2017-005811

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2020

**Before** :

**MR JUSTICE FREEDMAN**

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**Between :**

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| **(1) Payroller Limited (In Liquidation)**<br>**(2) James Bernard Stephen and**<br>**(3) Shane Michael Crooks (in their capacity as joint liquidators of Payroller Limited)**<br>**Newbain Services Limited** | **Claimants** |
| **- and -** | |
| **(1) Little Panda Consultants Limited**<br>**(2) Christian Paul Burton**<br>**(3) Bluday Limited**<br>**(4) Keith Ellis**<br>**(5) Kellcon Construction Limited**<br>**(6) Leslie Thompson** | **Defendants** |

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**Matthew Cook** (instructed by **Pinsent Mason**) for the **Claimants**
**The Fourth Defendant did not appear and was not represented**

Hearing dates: 13 February 2020, 14 February 2020, 17 February 2020, 18 February 2020, 21 February 2020

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# JUDGMENT

**Judgment Approved by the court for handing down**

**Mr Justice Freedman** (11:11 am)**:**

## Introduction

1. The trial of this matter started on Thursday, 13 February 2020. The fourth defendant did not appear. The first and second defendants did appear. The case was not effective against the other defendants, whether due to judgments in default or to the relevant company being struck off.

2. There was at the outset of the case an application to amend the particulars of claim to include a further company, Newbain Services Limited, the fourth claimant. At that point, the fourth defendant was notified of the application and the application was in fact disposed of on the morning of 14 February 2020. The fourth defendant informed the claimants that he would not be attending court on 13 or 14 February 2020. He has been aware for some time about the fixture for trial commencing on 13 February 2020 with seven court days allocated to the case.

3. The claimant's evidence comprised the evidence of Mr Stephen, the second claimant, who was not cross-examined. He made several affidavits and witness statements, but the primary statement for the purpose of trial was his fourth witness statement, dated 16 August 2019, which was supplemented by his fifth statement.

4. After the second claimant had been called, the second defendant was called to give evidence. His evidence lasted most of Friday, 14 February 2020 and Monday, 17 February 2020. At the end of 17 February there were called two further witnesses on behalf of the first two named defendants, namely Mr Richard Macaulay, and Mr Marcus Kendrick. On Tuesday, 18 February 2020, there were due to be heard two further witnesses and expert evidence.

5. In fact, by the time the court started on Tuesday, 18 February 2020, the claimant and the first two defendants had come to terms as follows:
   (1) The first and second defendants admitted liability.
   (2) The first defendant submitted himself to an order to pay the first to third claimants the sum of £1,786,389.88 plus agreed interest in the sum of £109,960.
   (3) The second defendant submitted himself to an order to pay the first to third claimants the sum of £1,914,150 plus agreed interest in the sum of £117,825.
   (4) The costs of the action (save for those already ordered) were to be paid by the first and second defendants to the claimants, to be assessed on the indemnity basis if not agreed.
   (5) An interim payment was to be made in the sum of £682,935.
   (6) Various properties and accounts frozen as a result of the freezing injunction were to remain frozen but to be used in discharge or partial discharge of the above.

6. On 18 February 2020 the court ordered that the trial would continue on Friday, 21 February 2020 and in the meantime the claimant was permitted to issue a strike-out application against the fourth defendant with time being abridged.

7. That application was issued and served on the fourth defendant. The trial has resumed today on Friday, 21 February 2020. There has been no attendance by the fourth defendant, just as he did not attend the trial hitherto.

8. It is necessary to say something in relation to the strike-out application.

**Strike out application**

9. Since the trial against the first and second defendants came to an end and since the only matter which remained was the trial against the fourth defendant, the claimant sought that the defence of the fourth defendant should be struck out and that there should be a judgment in default. The court refused to do that there and then, expressing concern that the trial against the fourth defendant was still in progress and that any such change in approach from trial to strike-out should be notified to the fourth defendant, who should be able to respond.

10. In any event, the court required the opportunity to consider the relevant law as regards such an application. The matter now comes back to court for the remainder of the trial and for consideration of the strike-out application, which has been issued against the fourth defendant.

11. The claimant has helpfully prepared closing submissions, which embrace submissions in the nature of a final submissions at the end of the trial against the fourth defendant and submissions relating to the strike-out application. Pursuant to CPR39.3, if a party fails to attend the trial, the court may proceed with the trial in their absence but "if a defendant does not attend, it may strike out his defence or counterclaim (or both)."

12. The claimants submit that the correct approach is now as follows:
(1) pursuant to CPR39.3, the court has a discretion whether to proceed with the trial or order the striking out of the defence;
(2) if the court decides it is not appropriate to strike out the defence, the claimant has to prove its case in the normal way, although without the defendant's participation;
(3) if the court orders the defence to be struck out, the claimant should be entitled to a default judgment under CPR part 12 in exactly the same way as if no defence had been filed at all.
(4) pursuant to CPR12.5(2), a default judgment on a claim for a specified amount of money will be a judgment for the amount of the claim (less any payments made) and costs.

13. The claimants seek to justify this approach by saying that the position is analogous to a defendant who has not served a defence at all. It is also said that where a defendant fails to attend trial, he cannot expect the court to use its limited and valuable resources to consider the case. This is at odds with the commentary in the White Book, which was by reference to practice direction 39A. In fact, that practice direction was abolished with effect from 6 April 2019. By reference to the former practice direction, the commentary suggested that the claimant would still have to prove their claim. This would normally only entail referring to the statement of case or tendering witness statements.

14. In the circumstances of this case, in my judgment, it is appropriate to strike out the defence because the defendant has not attended the trial or provided evidence. In fact,

the only evidence which the fourth defendant provided was in answer to the freezing injunction, where he swore two affidavits relating to his assets and his means. Although he served a defence in this matter, he did not serve any evidence or provide witness statements as to the substance of the matter.

15. In those circumstances, the fourth defendant should not be able to rely upon the matters set out in his defence having decided not to provide evidence to the court or to attend the trial and without having explained his failure to do either.

16. However, the question then arises as to whether there should be a judgment in default of defence. The claimants have not sought at an earlier stage to have a judgment in default. On the contrary, they have come to court for a trial, among other persons, against the fourth defendant. The trial started without the fourth defendant and the claimant did not seek to pursue an application that the defence of the fourth defendant be struck out.

17. The helpful opening of the claimant dealt with the matter not only against the first and second defendants but also against the fourth defendant.

18. The application to strike out comes after the evidence had been adduced by the claimant against the first and second and fourth defendants and following the two days of evidence given by and on behalf of the first and second defendants.

19. The case having been opened through the opening skeleton argument, there is no reason not to give a judgment on the merits against the fourth defendant. That also accords with the election of the claimant to pursue the fourth defendant to trial and to have had the first three days of the trial in the absence of the fourth defendant without having made this application. The only change of circumstance is the admission of liability of the first and second defendants. That, as between the claimant and the fourth defendant, is neutral.

20. Having started a trial against the fourth defendant, and absent a change of circumstances as against the fourth defendant, it is logical for the claimant to be expected to finish.

21. In its skeleton argument against the fourth defendant, the claimant says that there is a point of general importance as to whether a default judgment is available following the abolition of CPR PD 39A. It is not necessary for the court to resolve that matter. At this stage, the difference in costs and time between giving a judgment on the merits and a default judgment is not significant relative to the costs of this expensive action as a whole. On the other hand, giving such a judgment avoids an unnecessary point of controversy said to be of "general importance". That matter can be resolved in another case. Accordingly, I will proceed to a judgment on the merits.

22. What then is the purpose of striking out the defence? It is that the court should register dissatisfaction about a party that puts in a defence but who without any explanation does not adduce evidence in support of the defence nor does he attend the trial. There is no reason why it should continue to allow allegations made in a defence to stand in circumstances where the defendant has chosen not to give evidence to support them or to attend trial in order to explain his position. It is an exercise of discretion in each case.

In the circumstances of this case, the discretion ought to be exercised against the fourth defendant and the defence ought to be struck out. It therefore follows that the court only needs to consider whether the allegations made in the particulars of claim against the fourth defendant have been proven.

## The VAT fraud

23. The VAT fraud is proven by the evidence of the second claimant. The first claimant, Payroller Limited, is a Scottish-incorporated company which is in liquidation. On 1 March 2017 the second and third claimants were appointed as joint liquidators of Payroller -- of the first claimant ("the liquidators").

24. The first claimant was controlled by two individuals, namely Mr Cullen and Mr Lang. The investigations of the second and third claimants have confirmed that the first claimant was used by Mr Cullen and/or Mr Lang as a vehicle for the commission of a large-scale VAT fraud in combination with the fourth claimant.

25. The first claimant provided payroll processing services on behalf of recruitment agencies. Although it traded for less than a year (between February 2016 and December 2016), during this period the first claimant collected a total of £46.5 million from clients, including over £7.7 million charged as VAT (using the VAT number belonging to the fourth claimant) and then retained this money, thereby defrauding HMRC of this sum.

26. The investigations of the second and third claimants revealed that the first claimant submitted invoices in the name of "Linear Services" using the VAT registration number belonging to the fourth claimant. The fourth claimant also traded as Linear Services and entered into its own contracts with recruitment agencies. The fourth claimant submitted to its clients invoices in the name of Linear Services. These invoices were in similar terms to the invoices of the first claimant, but they contained a more detailed breakdown of payments in relation to the workers. The invoices of the fourth claimant provided details of one of the bank accounts of the first claimant, to which payment of the invoices was to be made.

27. Following conversations between the second and third claimants and customers of the fourth claimant, it was revealed that customers of the fourth claimant had never heard of the first claimant. Thus, when they paid Linear Services, they thought that they were making payment to the fourth claimant.

28. The liquidators obtained what was called a "Commercial Agreement", dated 1 January 2016, between the fourth claimant through its director, Mr Newall, and the first claimant through its director. The first claimant agreed to act as financial facilitators and the fourth claimant agreed to pay a fee to the first claimant of 5 per cent on all transactions. It was acknowledged by both the fourth claimant and the first claimant that invoices would be raised subject to VAT and using the VAT number of the fourth claimant. Therefore, it was stated that the fourth claimant would have the sole responsibility for all treasury and fiscal responsibilities. Despite the fact that the two companies were registered in Scotland, the applicable law was that of England and Wales.

29. While the fourth claimant appears to have contracted directly with some recruitment agencies, the sums invoiced by the fourth claimant (including VAT) were then paid to the first claimant and neither the fourth claimant nor the first claimant accounted for the VAT received. The end result was, therefore, the same, whether the fourth claimant or the first claimant was the contracting party. Sums in respect of VAT (including both amounts properly charged and other amounts which were not fact due) were charged to customers and then wrongfully retained, subsequently dispersed by the first claimant.

30. The Commercial Agreement appears to be a sham document. It is not clear what is meant by "monies and Encashment Processing Agreement". It is also not clear what is meant by "Financial Facilitator". It is not clear to what the 5 per cent is attached. In any event, the fee actually charged by the first claimant appears to have been a fixed fee of between £4,000 and £6,000 per month rather than variable amounts calculated as a percentage. When questioned about the Commercial Agreement, on 4 January 2017, Mr Lang did not provide any further detail regarding the Commercial Agreement.

31. HMRC discovered the existence of the VAT fraud in early December 2016. As a result, the bank accounts of the first claimant were frozen at the start of December 2016 and the first claimant and the fourth claimant were put into liquidation. However, by this stage the majority of the £7.7 million, proceeds of the fraud had already been paid out of the first claimant.

32. Apart from the proceeds of the VAT fraud, the first claimant had no other substantial net income and consequently any substantial payments made by the first claimant outside its ordinary business would necessarily have involved (and would have been known by the individuals operating the first claimant to involve) the proceeds of the VAT fraud.

33. Mr Cullen was initially open about the existence of the VAT fraud and a series of predecessor companies which had carried out the same fraud, whilst trying to distance himself from it. However, once their own potential exposure became clear, both he and Mr Lang refused to provide the second and third claimants with any substantive information about the business of the first claimant. Further, they did not provide information in relation to the payments made by the first claimant, even though it is now clear that Mr Cullen in particular was directly involved in a number of the underlying transactions to which those payments related.

34. The second and third claimants therefore applied for orders pursuant to sections 236 and 237 of the Insolvency Act 1986, which allows the court to order a person who has relevant information in relation to an insolvent company to give evidence. Unsurprisingly, given their apparent participation in the fraud, the evidence eventually given under court order by both Mr Lang and Mr Cullen is self-exculpatory. The key parts of their evidence are, however, contradicted by the contemporaneous documents and do not, in any event, challenge the existence of the VAT fraud, merely their culpability for it. Furthermore, nothing in the evidence of either Mr Lang or Mr Cullen indicates that there was any good commercial reason for the vast majority of these payments made by the claimant, nor do they identify any substantial benefit which the first claimant received in return.

35. The second and third claimants, therefore, consider that the purpose of these payments was to put the proceeds of the VAT fraud beyond the reach of the creditors of the first claimant (in particular the HMRC) or otherwise prejudice their ability to recover the proceeds of the fraud. The income of the first claimant was very limited. Where it contracted directly with the recruitment agency, its fees were calculated as a fixed sum per worker. If that has been legitimately its business, its income was less than £80,000. Further, its invoices to the fourth claimant of a fixed fee between February and November 2016 give rise to a total sum invoiced of about £55,000. The second claimant says that the net income of Payroller, therefore, amounted to no more than £135,000 but in reality was likely to have been less than £100,000.

36. As indicated above, as a result of the VAT fraud, the first claimant wrongfully retained the VAT charged to customers. HMRC quantified the VAT withheld as over £7.78 million. Mr Cullen admitted in interviews conducted under section 236 of the Insolvency Act 1986 that Payroller did not account to HMRC for the VAT which it retained. Despite having several opportunities to provide an explanation for this, he failed to do so. In his evidence, the second claimant has demonstrated that Mr Cullen was not cooperative: see paragraphs 166 to 188 of the fourth witness statement of the second claimant.

37. In those paragraphs it was also shown that Mr Lang, the sole shareholder and sole former director of the claimant, was also not cooperative. Although Mr Cullen was not a director of the first claimant, and was only a consultant, the evidence shows that he controlled the bank accounts of the first claimant and was a de facto director of the first claimant.

38. The foregoing suffices to establish the existence of the VAT fraud. However, the fraud is reinforced by the fact that the proceeds of the fraud were dissipated to defendants in this action. The nature of the dissipation is entirely consistent with the existence of the fraud. The case was brought against the first and second defendants in relation to monies disbursed to them and led to the above-mentioned admission of liability. The case against the fourth defendant involves different monies but also involves the dissipation of the proceeds of the fraud.

39. In these circumstances, I find that the monies which the first claimant received were proceeds of a fraud. The first claimant did not do any legitimate business to justify the receipt of such monies. If there was any legitimate business, it may have been that of the fourth claimant, but the fourth claimant combined with the first claimant and/or facilitated the first claimant to collect monies and in particular the VAT and to divert the same from HMRC and/or creditors of the first and fourth claimants.

40. The first claimant was not entitled to collect the VAT. In treating the money as its own and/or dissipating the same to the defendants, the first claimant committed and perpetuated the VAT fraud. Mr Lang, as a director, and Mr Cullen, as a de facto director of the first claimant, acted in breach of fiduciary duty to the first claimant in creating the VAT and in dissipating the proceeds. There was an alternative case brought on behalf of the fourth claimant. If and insofar as the moneys dissipated were those of the fourth claimant, I am satisfied that the fourth claimant combined with the

first claimant and/or facilitated the fraud of the first claimant, and that Mr Lang and Mr Cullen acted in breach of fiduciary duties in enabling this to take place.

41. The question in the case against the fourth defendant concerns the nature and extent of his knowledge about the source of the monies and/or the breaches of fiduciary duty.

**Dissipation of the proceeds of the fraud.**

42. The evidence of the second claimant is that the majority of the proceeds of the VAT fraud had been paid out of Payroller before it went into liquidation in December 2016. At that time Santander froze Payroller's bank accounts. About £2 million remained in the accounts. In his evidence the second claimant details monies paid away to various individuals and/or companies by the first claimant.

43. It is not necessary in this judgment to deal with the evidence against the first two defendants, which led to the above-mentioned admission of liability settlement of that claim. The court here has to concentrate on the evidence as regards the claim against the fourth defendant.

**The claim against the fourth defendant.**

44. Whilst the claim against the fourth defendant stands to be considered separately from the claim against the first two defendants, it is still to be viewed in the same context, namely that there was VAT fraud as described above and that there was dissipation of the proceeds of the VAT fraud.
The question which must be decided as between the claimant and the fourth defendant is in respect of the monies which were paid to him and to companies owned and controlled by him, of which he was the sole director, namely the fifth defendant and a company called Odinvale.

45. There were payments from the bank accounts of the first claimant totalling £1,806,623.22 between February and November 2016, comprising: (1) payments by the first claimant to the fifth defendant; (2) payments by the first claimant to Odinvale; (3) payments by the first claimant to the fourth defendant.

**(1) Payments by the first claimant to the fifth defendant.**

46. Documents obtained from Companies House show that the fourth defendant was the director and sole shareholder of the fifth defendant. The payment schedules of the claimant show that between 17 February 2016 and 25 November 2016 the fifth defendant received £1,176,500.95 from the first claimant. An order for the winding-up of the fifth defendant was made on 8 May 2019, following a petition by HMRC. As a result of this, the claim against the fifth defendant was stayed pursuant to section 130 of the Insolvency Act 1986.

47. The business of the fifth defendant was property investment and development, construction and refurbishment, ship fitting and plant hire throughout the UK. In a section 236 interview it was confirmed that there was no business relationship between Payroller and the fifth defendant.

48. In his section 236 interview Mr Cullen confirmed that there was no business relationship between the first claimant and the fifth defendant. There was no apparent business justification for these payments. Repeated requests for information from the claimants eventually elicited a response from the fourth defendant on 25 August 2017, enclosing copies of invoices for the payments received and trusting that ""These justify the reason for payment." The invoices from 25 September 2015 to 4 February 2016 were for "Supply of management and services". These invoices do not explain why the monies were paid by the first claimant to the fifth defendant, in that: (1) the invoices were made out to the fourth claimant, not the first claimant; (2) the invoices cover a different period prior to February to November 2016; (3) it's not apparent what services or management, let alone to such an enormous value, were provided by the fifth defendant to the first claimant or the second claimant. Mr Lang confirmed that he did not know what services were provided. Mr Cullen confirmed that the first claimant was not getting anything in return for these payments.

**(2) Payments from the first claimant to Odinvale.**

49. The payment schedules of the first claimant show that between 4 March 2016 and 30 August 2016 payments totalling £524,868.49 were transferred from the first claimant to "Odenvale"(this appears to be a spelling error for Odinvale Limited). Odinvale Limited was incorporated on 3 July 2015 by the fourth defendant as the sole shareholder and director. Odinvale was dissolved by voluntary strike-off on 18 April 2017. In his defence the fourth defendant has admitted that between 4 March and 30 August 2016 Payroller paid £467,130.58 to Odinvale. I refer to the defence for this admission notwithstanding the fact that it has now been struck out. Mr Cullen confirmed in his section 236 interview that payments of about £524,000 were paid from the claimant to Odinvale on the instruction of the sixth defendant and that Payroller got nothing in return. Likewise, Mr Lang stated in his affidavit that he did not know what services were provided by Odinvale. The second claimant has not found any evidence of a commercial relationship between Odinvale and the first claimant.

**(3) Payments by the first claimant to the fourth defendant personally.**

50. Between 25 February 2016 and 4 March 2016, a sum of £30,000.95 was paid by the first claimant to the fourth defendant personally. This was admitted by the fourth defendant in his defence save as to 25p. The second claimant has not found any evidence of a commercial relationship between the first claimant and the fourth defendant. Mr Cullen said that the payments were all made under invoice. The fourth defendant, on 24 August 2017, provided invoices submitted to the fourth claimant for "management consultancy services". In his struck-out defence the fourth defendant stated that he was engaged by the sixth defendant to carry out an appraisal of land in Bathgate, Scotland and a feasibility study about its redevelopment. In fact, the monies were paid by the first claimant and not by the fourth claimant. It is also not apparent what management consultancy service was provided. It will now be shown that the explanations for these payments are inadequate and replete with contradictions.

**Explanations for payments**

51. The exclamations given have been inadequate and contradictory, they are the subject of analysis by the second claimant in his fourth witness statement at paragraphs 245 to 255. As regards the payments made to the fifth defendant, the fourth defendant confirmed that the previous invoices related to invoices raised to the fourth claimant for services provided to Bravo Business Limited. They do not help because the invoices were made out to the fourth claimant and not the first claimant and there were no management or services required by the fourth claimant or the first claimant by the fifth defendant.

52. I adopt here the analysis of the claimants in its closing submissions against the fourth defendant at paragraphs 39 to 45. The points made are borne out by the uncontradicted evidence led by the Claimants, which evidence I have found to be cogent and compelling.

53. Paragraphs 39-45 of the closing submissions read as follow:
"The case against Mr Ellis.
"39. As set out above, the Claimants rely on the evidence of Mr Stephen to show that the extent and nature of the VAT Fraud and the fact that Mr Cullen and Mr Lang (who were respectively the de facto and de jure directors of Payroller) dissipated the proceeds of the VAT Fraud.
"40. As set out at paras 41-44 of the Particulars of Claim [G/2], Mr Cullen and Mr Lang owed Payroller:
"a. The general duties under sections 171 to 175 of the Companies Act 2006;
"b. Fiduciary duties in their capacity as directors and with their control over Payroller's bank accounts;
"41. By paying the proceeds of the VAT fraud to third parties, Mr Cullen and Mr Lang acted in breach of those duties, since Payroller did not receive any value in return and so was left unable to meet its liabilities to HMRC.
"42. As explained by Mr Stephen:
"a. In relation to the payments to Mr Ellis, the Liquidators have not found any evidence of a commercial relationship between Payroller and Mr Ellis and are not aware of any services that Newbain or Payroller would have required from Mr Ellis;
"b. In relation to Kellcon, the Liquidators are not aware of any services that Newbain or Payroller required from Kellcon (particularly services to such an enormous value) and it does not appear that Payroller received anything in return;
"c. In relation to Odinvale, the Liquidators have not found any evidence of a commercial relationship between Payroller and Odinvale and it does not appear that Payroller received anything in return.
"43. The Claimants also rely on the fact that the documents which have been produced by Mr Ellis in purported justification of the payments in fact do nothing of the kind. On the contrary, the inconsistencies and inadequacies of these documents indicate that these were payments made in relation to sham transactions in order to dissipate the proceeds of the VAT Fraud.
"44. As explained by Mr Stephen in Stephen 4, paras 239, 249 and 250:
"a. Nearly £1.2 million was paid by Payroller to Kellcon.
"b. When originally asked about these payments, Kellcon produced weekly invoices for the period 25 September 2015 to 4 February 2016. These were addressed to Newbain, not Payroller and despite totalling hundreds of thousands of pounds, the only information about the basis for the invoices was the description "Supply of Management and Services". These invoices were, therefore, addressed to a different

company and covered a different period to that covered by the payments made by Payroller.

"c. Mr Ellis/Kellcon subsequently produced a different set of weekly invoices covering the period 12 February 2016 to 25 November 2016 [E5/8/522-604] which they relied upon as justifying the payments made by Payroller. However, these were still addressed to Newbain and not Payroller and included the same uninformative description of the services provided.

"d. Mr Ellis/Kellcon subsequently produced documents which they relied upon as justifying the payments received. For each week, Mr Ellis/Kellcon produced an invoice (or invoices) issued by Mr Thompson/Mr Milne in the sum (or totalling) £20,000 [E4/410-477], with an attached single page weekly timesheet [E5/478-521]. Each weekly timesheet listed the client as Newbain and recorded that the same 16 individuals worked exactly 40 hours each week for around 44 weeks, with the listed roles ranging from programmers, surveyors, assets controllers, engineers and safety manager. The same five day week was recorded even if there was a bank holiday in the week and none of the individuals listed appears to have ever taken time off for holiday or sick leave.

"e. As Mr Stephen explains in Stephen 4 at para 250 [C/23], there is no good commercial reason for Newbain to have required these 16 staff, nor any evidence that the listed individuals ever did any work for Newbain and the identical weekly timesheets are unbelievable. Furthermore, Mr Thompson has failed to provide any explanation for these payments, which he should readily have been able to provide if there was any legitimate basis for the sums claimed.

"f. The timesheets also claimed VAT at 20% although there was no VAT number given.

"g. Kellcon then invoiced the total amount in the timesheets (incl VAT) to Newbain along with a further 20% added on for VAT. This led to VAT wrongly being charged twice.

"h. There is no sensible reason why Kellcon needed to be inserted as an intermediary if there was a legitimate supply of staff to Newbain and even if there had been a legitimate supply of staff, there was no reason for Payroller to pay for services provided to Newbain.

"i. While the timesheet for each week is identical and claims exactly £20,000.16, Kellcon generally invoiced Newbain with multiple invoices in variable amounts, which overall totalled £20,000 (plus the extra £4,000 of VAT added by Kellcon). So, for example:

"(i) The timesheet for the week ending 7 February 2016 is for a total of £20,000.16 (including the 20% VAT added) [E5/478]. The invoice from Mr Thompson is for exactly £20,000 [E4/410].

(ii) However, Kellcon then issued Newbain on 12 February 2016 with two invoices. One for £11,750.36 (incl VAT) [E5/522] and one of £12,250 (incl VAT) [E5/523] i.e. a total of almost exactly £24,000.

"j. The obvious explanation in the present context for Kellcon having issued invoices to Newbain in varying amounts, rather than the round numbers received from Mr Thompson was in order to provide a more credible pattern of payments than the same round number each week. This strongly indicates that Mr Ellis/Mr Kellcon knew that the supply was not legitimate.

"45. The evidence, therefore, indicates that these invoices were simply a sham and did not relate to any actual supply of staff (still less a supply of staff to Payroller) and were simply a conduit for the dissipation of the proceeds of the VAT fraud. In that context, it

is likely that the other explanations provided for the payments to Mr Ellis personally and to Odinvale are also untrue and that these payments were also just a conduit for the dissipation of the proceeds of the VAT fraud."

**Conclusions.**

54. If the payments made could be justified, then it would be expected that the explanations would be straightforward and that the contemporaneous invoices and related documentation would support that account. In fact, the documentation does not provide any justification and Mr Cullen and Mr Lang have provided no justification outside the documentation. Further, the failure of the fourth defendant to attend trial or to provide a witness statement or to give evidence is telling.

55. In my judgment, in these circumstances the court is entitled to draw an inference that the fourth defendant has no honest explanation for the receipt of these monies both by himself and his companies.

56. The Court of Appeal held in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 that in the absence of a good explanation for the absence or silence of a witness who might be expected to have material evidence to give on an issue in the case, the court may draw adverse inferences from the absence or silence of that witness. This inference may go to strengthen the evidence adduced by the other party on that issue or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to have been called. There must, however, be some evidence adduced by the opposite party on the matter in question, which raises a case to answer, before the court is entitled to draw the desired inferences.

57. There are many cases where inferences have been drawn too easily. This case is not one of those. The claimants, through the evidence of the second claimant, have provided strong evidence against the fourth defendant and, at very lowest, a case to answer. The fourth defendant would clearly have had material evidence to give, since he could have given direct evidence in relation to his own knowledge and actions in relation to each of the payments, this being central to a claim for dishonest assistance/knowing receipt.

58. The fourth defendant has chosen to call no evidence and has not even attended the trial to challenge the claim. There is no explanation, let alone a good one, put forward for the fourth defendant's failure to attend the trial and/or failure to adduce evidence. The fourth defendant is clearly aware of the trial and the claims against him. In these circumstances, the court should infer from the fourth defendant's failure to attend and failure to put forward evidence that he has no answers to these claims. This is strong evidence that he has no answers to the claims made against him.

59. In these circumstances, I am satisfied that: (1) there was a VAT fraud; (2) the majority of the proceeds of the VAT fraud were dissipated before the first claimant was wound up by HMRC; (3) there is an absence of evidence that there was the supply of the services or staff identified, let alone anything which would justify the payment of such vast sums; (4) that there has been an absence of any good commercial reason for the

claimants to make these payments; and (5) the fourth defendant failed to give evidence or to attend court to provide any alternative explanation.

60. Thus, I am satisfied that the transactions were entered into as part of the dissipation of the VAT fraud and that the fourth defendant either knew or turned a blind eye to the fact that there was no good reason for these payments to be made.

**Causes of action**

61. The causes of action claimed against the fourth defendant are as follows:
(1) dishonest assistance;
(2) knowing receipt of trust monies;
(3) section 423 of the Insolvency Act 1986;
(4) restitution.

62. The position of the claimants as explained by Mr Cook, counsel on their behalf, is that it suffices for their claim against the fourth defendant to pursue the dishonest assistance and knowing receipt of monies. If judgment is given on that basis, it is then unnecessary for them to seek judgment in respect of the claims under section 423 of the Insolvency Act 1986 or restitution.

63. The pleading raises the question of Scottish law. The primary submission is made that English law is applicable on the basis that Mr Ellis and his companies are habitually resident in England and/or incorporated in England and that the damage to the first claimant occurred in England since the relevant payments were made from accounts of the first claimant held at Santander in Merseyside and/or the payments were received in England.

64. Although the pleading referred to an alternative case in relation to Scottish law, none of the defendants in the defences pleaded the application of Scottish law. I therefore find that either English law applies, or if it did not, that there is no evidence that Scottish law is materially different. To the extent that Scottish law was pleaded, it does not appear to lead to different consequences from English law. The case therefore falls to be determined according to English law.

**Dishonest assistance.**

65. Where a defendant dishonestly lends assistance to the commission of a breach of trust or a breach of fiduciary duty, it is personally liable for the losses suffered by the person to whom the fiduciary duty is owed. This principle has been applied to breaches of fiduciary duty by the directors of a company: see *Baden v Société Générale* [1993] 1 WLR 509 at 573. Accordingly, those who assist in money laundering after the breach of trust, as first occurred, may be made liable for dishonest assistance. This is because the money laundering itself is part of a further act of the money laundering, as the money is transferred from the trust company to a third-party account by the trustee/fiduciary. A defendant is only liable if he acts dishonestly, which is judged according to the standards of an ordinary honest person, rather than the defendant's own standards.

66. The matter was recently summarised by the Supreme Court in *Ivey v Genting Casinos* [2017] UKSC 67 per Lord Hughes at paragraph 74 as follows:
*"The test of dishonesty is as set out by Lord Nicholls in Royal Brunei Airlines Sdn Bhd v Tan and by Lord Hoffmann in Barlow Clowes: see paragraph 62 above. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct is honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."*

66. For this purpose knowledge and a deliberate choice by the defendant not to confirm his submissions are treated alike: however, negligence is not enough: see Snell's Equity, 34th edition, at paragraph 30-079: *"The defendant need not appreciate the precise legal significance of the transaction as amounting to a breach of trust. It is enough that he realises that the person whom he assists is misappropriating money over which he does not have a right of free disposal"*

67. In *Twinsectra Limited v Yardley* [2002] 2 AC 164, Lord Millett stated at paragraph 137:
*"The gravamen of the charge against the principal is not that he has broken his word, but that having been entrusted with the control of a fund with limited powers of disposal, he has betrayed the confidence placed in him by disposing of the money in an unauthorised manner. The gravamen of the charge against the accessory is not that he is handling stolen property, but that he is assisting a person who has been entrusted with the control of a fund to dispose of the fund in an unauthorised manner. He should be liable if he knows that the arrangement by which that person obtained control of the money and that his authority to deal with the money was limited and participates in a dealing with the money in a manner which he knows is unauthorised ..."*

68, In *Barlow Clowes v Euro Trust International Limited* [2005] UKPC 37 at 28 Lord Hoffmann said the following:
*"First, it was not necessary ... that Mr Henwood should have concluded that the disposals were of monies held in trust. It was sufficient that he should have entertained a clear suspicion that this was the case. Secondly, it is quite unreal to suppose that Mr Henwood needed to know all the details to which the court referred before he had grounds to suspect that Mr Clowes and Mr Cramer were misappropriating their investors' money. The money in Barlow Clowes was either held on trust for the investors or else belonged to the company and was subject to fiduciary duties on the part of the directors. In either case Mr Clowes and Mr Cramer could not have been entitled to make free with it as they please."*

69. It is therefore not a necessary part of the claim against the fourth defendant that he should have known about the existence of the VAT fraud. It is sufficient that he knew or at the very least turned a blind eye to the fact that the funds being received by their companies involved a breach of fiduciary duty on the part of the directors of the first claimant or the fourth claimant, in this instance, though, a wrongful dissipation of the assets of the first claimant or the fourth claimant.

70. Applying the foregoing to this case, in my judgment there was a deliberate breach of fiduciary duty on the part of Mr Cullen and/or Mr Lang. This is the consequence of the findings above about the VAT fraud. In particular, it was a part of that duty for the monies not to be paid out of the first claimant to the fifth defendant or to Odinvale or to the fourth defendant with nothing in return for those payments or nothing bearing any resemblance to the amount of monies that were paid out.

71. In the circumstances, the paperwork in the nature of the invoices that have been shown to the court were a sham to cover up the wrongful nature of these transfers.

72. I am satisfied that the fourth defendant assisted the breaches of fiduciary duty by causing companies which he owned and controlled to receive the monies. He did so at least by providing the invoices and the details of the relevant bank accounts. It is to be inferred that he did far more than that. He must have liaised with Mr Cullen and/or Mr Lang about the transactions under which the monies would be transferred. Such large sums of monies can only have been transferred following extensive arrangements between the fourth defendant and Mr Cullen and/or Mr Lang.

73. The involvement of the sixth defendant Mr Thompson in this matter does not in any way absolve the fourth defendant or negate his liability for dishonestly assisting the breaches of fiduciary duty.

74. The court does not have evidence of the nature of the communications between the claimant and between Mr Cullen and/or Mr Lang of the one part and the fourth defendant. That is in part because of the paucity of information provided by Mr Cullen and/or Mr Lang. More germanely to the fourth defendant, it is a consequence of his decision not to give evidence in this matter and not to participate in the trial.

75. The defence of the fourth defendant was mainly a series of denials and non-admissions. He purported to say that the payments were justified to the fifth defendant as a supply of management and services and identifying development projects on which the fourth defendant and the fifth defendant worked. References were made to site visits, appraisals, planning checks and feasibility studies. The defence did not begin to provide particularity such as would give any credence to the notion that such large sums were expended for a legitimate commercial purpose. In any event, the fourth defendant failed to take the defence further by evidence and by attending at the trial. It was in these circumstances that in the exercise of the court's discretion, the defence has been struck out and those matters contained in the defence were incapable of being taken further. However, even if the defence had not been struck out and those matters remained for consideration, the court would have reached the same conclusion because those bare assertions were not developed at all in any evidence.

76. I am satisfied that the assistance of the fourth defendant was dishonest. He was aware at the time of the relevant receipts and that there were no legitimate grounds to receive the payments and/or he wilfully closed his eyes to that fact. He knew that neither he nor the fifth defendant, nor Odinvale, had provided valuable consideration or undertaken any work in return for any of the payments received by Payroller or to the extent that any work was undertaken at all, that there was no work that bore any relationship to the large amounts of money which were paid over. There is no evidence

of any contractual relationship between the fourth claimant and the fourth defendant and any of his companies, nor is there any evidence of any obligation or liability to make any of the payments.

77. Despite requests through solicitors, the fourth and fifth defendants failed to provide any proper explanation for any of the payments. The absence of sensible documentary evidence to support the payments, bearing in mind their size and frequency, is indicative of the dishonesty of the transactions and of the fourth defendant's dishonest participation in the same.

78. The fourth defendant must have known that the directors of the first claimant and/or the fourth claimant were not free to dissipate the monies of those companies. He must have known that they owed fiduciary duties to those companies. He must have known and/or turned a blind eye to the fact that they had been in breach of fiduciary duty to have transferred the monies to the fourth defendant and to the fifth defendant and to Odinvale without any return for the same.

79. In all those circumstances, dishonesty is established.

80. The consequence of the fourth defendant's dishonest assistance was that the above sums were lost by the first and fourth claimants and, accordingly, the fourth defendant is liable to those claimants to restore the monies and/or for compensation in equity.

**Knowing receipt.**

81. In respect of the monies paid to the fourth defendant, the defendant is liable for knowing receipt if he receives monies in breach of trust and he either knew that there was a breach of trust or wilfully decided to overlook a possible breach of trust or deliberately failed to make reasonable enquiries as to such possibility: see Snell's Equity, 34th edition, 30-072. It is not necessary for the defendant to know all the facts associated with the wrong and it is sufficient that he knew enough of the facts surrounding the misapplication of the property to make it unconscionable for him to retain the benefit of the receipt.

82. In the instant case the fourth defendant knew that there was no legitimate basis for receiving the sum of just over £30,000, which he received. He must have known that the monies were disbursed to him in breach of trust and/or breach of fiduciary duty. He is therefore liable to restore the money to the first and/or the fourth claimants.

83. I am satisfied on the basis of the evidence that the fourth defendant did know enough surrounding the misapplication of the property, particularly receiving such large sums without any corresponding benefit in return, as to make it unconscionable for him to retain the benefit of the receipt. He, therefore, is liable in knowing receipt to the first and/or fourth claimant.

84. For all those reasons, I am satisfied that the case of the claimants has been proven against the fourth defendant the claim for knowing receipt in the sum of £30,000.95.

85. It follows in view of the findings above of liability of the Fourth for dishonest assistance and knowing receipt that the fourth defendant is liable for the sums claimed of £1,806,623.22, and that, accordingly, there will be an order requiring the fourth defendant to pay to the first claimant this sum together with interest. I shall now hear consequential submissions about interest and costs.