

Neutral Citation Number: [2022] EWHC 274 (Comm)

Case No: CC-2021-MAN-000061

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN MANCHESTER**  
**CIRCUIT COMMERCIAL COURT (QBD)**

Date: 10 February 2022

Before :

**HIS HONOUR JUDGE PEARCE SITTING AS A JUDGE OF THE HIGH COURT**

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Between :

(1) RAPID DISPLAYS INC  
(2) ESOP MANAGEMENT AND TRUST  
SERVICES LIMITED

**Claimants**

- and -

(1) DR DOMINIQUE AHKYE  
(2) D AHKYE LIMITED

**Defendant**

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Mr NEIL BERRAGAN (instructed by BBS LAW LIMITED) for the CLAIMANT

Mr JASON PERRIN (instructed by BERKELEY ROWE LIMITED) for the DEFENDANT

Hearing dates: 7, 10 February 2022  
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**JUDGMENT**

**This judgment was handed down on 10 February 2022. I direct that, pursuant to CPR PD 39A para 6.1, no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.**

**His Honour Judge Pearce:**

1. This is my judgment on the application by the Defendants for relief from sanction and the cross application by the Claimants for summary judgment following hearing the parties' submissions on 7 February 2022.

## INTRODUCTION

2. On 23 September 2021, the sum of US\$500,000, intended for the First Claimant, was transferred into a bank account at the National Westminster Bank in the name of the Second Defendant, and in respect of which the First Defendant was the authorised signatory. After the deduction of charges, the sum of £363,471.90 was credited. Thereafter, the monies were in large part paid out to others, although a small element (about £18,000) was retained by the Second Defendant, simply reducing an existing overdraft.
3. It is the First Claimant's case that they were victims of a fraud and that the Second Defendant had no right to the money. In contrast, the Defendants' case is that the money was paid to the Second Defendant in circumstances in which the Defendants believed it to be a genuine investment in a project and that the Defendants innocently paid the money out in several tranches, believing those payments to be pursuant to the proposed investment project. Whilst the Defendants accept that the First Claimant has been defrauded and that in fact the Second Defendant had no right to the money paid to it, the money is no longer available to be repaid (subject to a repayment of just over £18,000 that it has already been made), that the Defendants dealt honestly with the money and that the Defendants therefore have a good defence to the Claimants' claims.
4. For the purpose of these applications, I had the following witness statements:–
  - i) On behalf of the Claimants from Mr Ruben dated 30 September 2021, 14 October 2021, 21 October 2021, 27 October 2021, 4 November 2021, 12 November 2021 and 2 December 2021; and from Ms Odelia Pollak dated 2 February 2022. (Ms Pollak's statement was served less than 3 working days before the hearing, but the Defendants took no issue in respect of this.)
  - ii) On behalf of the Defendants, from the Second Defendant dated 22 October 2021, 3 November 2021, 9 November 2021 and 24 November 2021.
5. Counsel both filed skeleton arguments and, in Mr Perrin's case, a supplemental skeleton dealing with matters raised in the late statement of Ms Pollak. Both

provided bundles of authorities and certain additional authorities were referred to during the hearing. I am grateful to them both for their detailed submissions.

#### THE PARTIES AND THEIR INVOLVEMENT

6. The First Claimant is based in Illinois. It contracted by an agreement dated 13 April 2021 to purchase shares in a company, Outform Limited. The counter parties to that agreement were various shareholders in that company. The agreement, entitled “Securities Purchase Agreement”, is contained in the Supplemental Bundle before the court. One of the shareholders who were selling his shares was Mr Ariel Haroush. Mr Haroush was also named as the representative for the sellers collectively. The sale consideration was in part retained, to be paid to the sellers or the First Claimant (as purchaser) dependent on certain accounting issues. The agreement provided for this portion of the consideration to be held in an escrow account.
7. The escrow agreement, dated 13 April 2021 and contained in the main bundle, is between the First Claimant as purchaser, Mr Haroush as representative for the sellers generally and the Second Claimant, which is named as the escrow agent. The amount of the escrow was \$2,875,000. The bank account of the escrow agent is said to be Bank Leumi in Tel Aviv, the account name being given as Excellence Nessuah Brokerage Services Limited. Ms Pollak says at paragraph 3 of her statement that the name of this company was later changed to Excellence Investments Management and Securities Limited. Both the Second Claimant and Excellence Investments Management and Securities Ltd are stated to be subsidiaries of Excellence Investments Limited.
8. It is the Claimants’ case that the funds in the escrow account were held by the Second Claimant on trust in accordance with the escrow agreement. This is relevant to an issue of standing taken by the Defendants, which is dealt with later.
9. On 14 September 2021, instructions were given for the release of \$2,500,000 from the escrow account to the First Claimant. It has not been disputed that this was a genuine instruction. The escrow release note, signed on behalf of the First Claimant and by Mr Haroush on behalf of the sellers, instructs payment to the First Claimant’s bank account. Again, it is not disputed that this is genuine.

10. However, by email dated 22 September 2021, the escrow agent was told that the payment of the whole sum to the Bank of America would give rise to a tax liability that was unacceptable and that therefore the instruction was changed to pay \$2,000,000 to the Bank of America and the other \$500,000 to what is described in the email as an “*alternative bank in United Kingdom.*” It can be seen that the email address of the sender, purportedly Batia Shaham, the CFO of Outform Ltd, uses the email address \*\*\*\*\*@outform.com (that is to say with an “r” between the “f” and “o”) rather than the correct version that can be seen in other emails, \*\*\*\*\*@outform.com. The account details for the payment of \$500,000 relating to a bank in the United Kingdom were for an account held by the Second Defendant with National Westminster Bank in Chatham. The revised escrow release note giving those details states the account to be in the name of the First Claimant, but otherwise correctly provides the account details.
11. Thus, on 23 September 2021, a payment was made from the escrow account which, though due to the First Claimant, was in fact paid to the Second Defendant. The Defendants adopt the Claimants’ case that this was a fraud.
12. The First Defendant is a doctor. He explains in his first statement that he has over 20 years of experience working in internal medicine in the United Kingdom. He is currently a consultant within the National Health Service. He states (and I accept) that he is a man of good character who has no criminal record and has never faced proceedings brought by his professional regulator. This good character, both in terms of the absence of involvement of the professional regulator and the absence of any criminal conviction, is a significant factor to be borne in mind in considering the issues on this application.
13. The First Defendant states that he has developed a portable device to monitor respiratory and cardiovascular disease. To this end, he prepared a business plan, a copy which has been exhibited, as well as a promotional video. The link to the promotional video is given in paragraph 4 of his first statement and I have viewed that. The video is said to have been produced “*with a colleague.*”
14. The video comes from a company called Virtual Health Ltd. It is co-presented by the First Defendant and Mr John Bakker. Towards the end, the First

Defendant describes himself as the Medical Director of Virtual Health Ltd and Mr Bakker describes himself as its CEO.

15. The First Defendant says that he met a gentleman called Mr Saad around five years prior to the statement (therefore around 2016). He was introduced as a sales representative for NAPP Laboratories (which the First Defendant describes as a “*respectable, well-known business*”) and presented himself as a “*representative agent of investment companies*”. The First Defendant thought that he might be able to assist in contacts and expertise for the development of the monitor. Nothing came of the contact at that time, but the First Defendant said he had no reason to doubt Mr Saad’s integrity.
16. It is the First Defendant’s case that, in May 2021, he prepared a business plan. It was annexed to his first witness statement. It relates to a product called “EQ 02 + Life Monitor”. (In the First Defendant’s witness statement, he calls it EP02 not EQ02 – this would appear to be simple error.) The letters “EQ” seems to be a reference to Equivital. Certainly the business plan refers to the use of “Equivital<sup>TM</sup> Manager” (which is said to be “a data management and configuration tool”) and “eqView Software.”
17. Although the reference to trademarked products (and indeed the reference to a video prepared with a colleague) would tend to suggest to the casual reader of the witness statement who took the trouble to read the Business Plan that this was not simply the First Defendant’s project alone, the first witness statement does not reveal that in fact the product referred to in the Business Plan was already in existence. In his sixth witness statement, Mr Ruben produces compelling evidence that a company called Equivital had already developed the product. Mr Ruben spoke to Mr Anmoi Sood, Director of Equivital and states this of their discussions at paragraph 4(d):

*“[Mr Sood] was angered to learn from me that the Defendants were seeking to use their name and product. The name “Equivital” is a tradename and yet it appears that the First Defendant has sought, earlier this year, to incorporate a company called “Equivital Healthcare Limited” the exact same name as a company previously held by Mr Sood as part of his Equivital group and which company was dissolved in 2016. Mr Sood’s company does not actively trade but*

*the tradename is used by the trading company Hidalgo Limited...Mr Sood confirmed orally that the Defendants did not and do not have any authority to use the name, and that he will be arranging for his company lawyers to take appropriate steps. As far as the Monitor is concerned, he also confirmed that the Defendants have no interest in its development, its associated intellectual property or marketing rights. He had no rights to utilise the material on the monitor set out on the company website. He explained that he came across Dr Ahkye back in approx. 2013/14 when, as a doctor, he expressed interest in entering some form of venture together advance (sic) telemarketing of healthcare products including those of Equivital. It was in this content he believes that Virtual Health Limited was founded and the promo video to which Dr Ahkye has referred was created. In fact, nothing came of those discussions and no formal arrangements were ever established. In fact, Mr Sood fell out with Dr Ahkye after he realised he was a 'problematic character' and has not heard from him for many years. I am expecting a written response from Mr Sood shortly."*

18. By email dated 18 November 2021, Mr Sood said to Mr Ruben, *"To confirm, Dominique Ahkye has nothing to do with Hidalgo Ltd or Equivital products. I was in discussions with him, via Virtual Health Ltd, about 6 or 7 years ago and he was interested in investing in the business but instead, he ended up taking money from me and the business, and disappearing. His claims of inventing or being part of the business are completely baseless and false."*
19. The First Defendant deals with the information allegedly from Mr Sood in his fourth witness statement. He acknowledges that the monitor was to be developed through another company to be called Equivital Healthcare Limited, an intended subsidiary of the Equivital group of companies, of which the First Defendant was to become CEO. He denies that the two fell out, though accepts that they had business differences. He says that his involvement was central to the development of the monitor because a clinician was needed to trial the device.
20. The Business Plan contains an Organisational Chart for the Second Defendant. The First Claimant is named as Chairman. The vice chairman is said to be Ms Laure-Christine Belvisi and the financial director is said to be Mr Faisal Ben

Amara. Mr Ruben has contacted Mr Ben Amara who, in an email dated 2 December 2021 stated, *“Please find the NDA attached that has been signed between D AHKYE Limited and the broker Mr Teddy Poncelet who was dealing with the investment fund Easy Loan HK. The company D AHKYE Limited did not receive any investments or any funds for the project. After this transaction failed, we were looking to find an investment solution for his project, but he deliberately shared the business plan and the project to other counterparts. He was hiding this information to the team, and he used the document for a suspicious activity with unknown counterparts. It is a breach of the NDA signed between us.”* Mr Ben Amara also denied that Ms Belvisi had any involvement with the Second Defendant.

21. The First Defendant deals with this issue in his fourth witness statement at paragraph 6(g): *“Nowhere in the business plan. Do I refer to either Mr Amara or Ms Belvisi as ‘...key individuals [involved in the Second Defendant]?’ They were simply individuals involved in banking and finance who I approached to source international investment for the medical device. They had no roles in relation to the company and nowhere do I suggest that they did.”*
22. In June 2021 (see the third witness statement of the First Defendant) or early July 2021 (see his first witness statement), the First Defendant says that Mr Saad contacted him by telephone and explained that he wanted to introduce a potential investor, Mr Shah, or possibly two potential investors, Mr Shah and Mr Mustafa. (It is only the third witness statement that mentions Mr Mustafa’s potential involvement at this stage. However, this difference in his account and the difference noted above as to the date of the contact in 2021 are to my mind immaterial – either, for other, more striking, reasons considered below, the First Defendant cannot be considered a reliable witness, in which case these inconsistencies would not add to that conclusion or, taken alone, they are simply typical of minor inconsistencies that may arise, particularly on peripheral issues. I would certainly not see the apparent inconsistencies as bolstering the case on dishonesty.)
23. A meeting was arranged for a Saturday afternoon late in July at a hotel in King’s Cross. At the meeting, the First Defendant said he was impressed by Mr Shah, who had read his business plan, had asked pertinent questions and appeared able

to raise significant sums by way of finance. Mr Shah brought with him various documents relating to investment companies and said he could draw up the relevant legal documents. The First Defendant said that he needed approximately £1,000,000 for the successful development of the monitor and Mr Shah said that he would complete a Client Information Sheet and required a copy of the passport as part of the due diligence measures that would be necessary for investment.

24. In his third witness statement, the First Defendant says that he was asked to complete a Client Information Sheet at this meeting. He refers to it in paragraph 8 and exhibits a copy of such a document signed by him. It is dated 28 January 2021, some 6 months before the meeting. Clearly it could have been backdated, but the First Defendant has provided no explanation of how this came about. Further, the Client Information Sheet refers not to the NatWest bank account apparently opened by the First Defendant for the receipt of investment funds such as this, but rather an account apparently with Barclays Bank (the sheet says “BARCLSYS BANK”) in Canterbury, rather than the Sydenham branch of the National Westminster Bank (the location of the account to which the funds were in fact paid).
25. The First Defendant says that he signed the investment contract without seeking legal advice as to its terms. The document was signed as a counterpart. He was told that the investors would sign the document and it would be produced to him in short order. No document has ever been produced.
26. At paragraph 6(f) of this fourth witness statement, the First Defendant responds to Mr Rubin’s statement that draws attention to the fact that monies were paid into the Business Reserve account not the Business Current account (as to the details of which see below). He says that he provided details of the reserve account at that meeting, although the first witness statement refers only to the details of the current account.
27. On 23 September 2021 according to the bank statements the sum of \$479,942.50 (sterling equivalent £363,471.90) was received into the Second Defendant’s bank account. (The date of the payment was 24 September 2021, according to the statement of the First Defendant, though nothing turns on this difference



which may well result from the payment being made late on 23<sup>rd</sup> but the First Defendant discovering it had occurred early on 24<sup>th</sup>). Mr Shah called the First Defendant, who explained that the monies had come from investors. This was one half of the investment. The First Defendant checked the business account at Mr Shah's suggestion and confirmed receipt of the funds.

28. The use of a business current account would be perfectly normal for the receipt of investments. Indeed, the First Defendant said that the Second Defendant had used a business account with NatWest bank numbered \*\*\*\*\*421 (which I shall call "the Current Account") to receive investment funds. In fact, the funds were not received into that account. They were received into a business reserve account numbered \*\*\*\*\*107 ("the Reserve Account"). Prior to this payment on 23 September 2021, the Reserve Account had a balance of £90.29. On the same day, the Current Account was overdrawn to the tune of £32,266.65.
29. On 24 September 2021, the following transactions took place:
  - i) £500 was paid from the Current Account to Simpsons Mobile Ltd;
  - ii) £32,266.50 was transferred from the Reserve Account to the Current Account;
  - iii) £32,266.50, was transferred back from the Current Account to the Reserve Account; and
  - iv) £500 was paid to R & A International Ltd from the Current Account.
30. On 26 September 2021, the First Defendant met Mr Shah again, together with another man, Mr Mustafa. This meeting took place at the First Defendant's office in a hospital. Mr Shah had recommended that the investment funds be placed in large part with Circle Global Ltd who would outsource the development of the microchips for the monitors. A significant deposit in their account would show commitment to the project and would lead to the bulk manufacture of the monitors proceeding.
31. The First Defendant says that, "*upon the advice and direction of Mr Shah and Mr Mustafa*", he placed a deposit in the account the details of which he had been given. He was further told that there would be a deduction if overall cost if he used American Express because of a long-standing relationship that Circle

Global Ltd had with that business. He made several deposits as requested, and was provided with invoices.

32. The First Defendant describes Mr Shah and Mr Mustafa as persuasive and knowledgeable with business expertise. They wore expensive clothes and drove a large Mercedes car. He believed them to be successful investors and business people, finding them to be highly plausible.
33. On 27 September 2021, the following transactions took place in the following order:
  - i) £1,000 was paid to Circle Global Limited from the Current Account;
  - ii) £235,000 (in three tranches, two of £100,000 and one of £35,000) was transferred from the Reserve Account to the Current Account;
  - iii) £30,023 was paid to American Express by CHAPS transfer from the Current Account;
  - iv) £500 was transferred from the Reserve Account to the Current Account;
  - v) £1,000 was transferred from the Current Account to a personal account of the First Defendant;
  - vi) £40,000 was transferred from the Reserve Account to the Current Account;
  - vii) £200,023 was transferred from the Current Account to Circle Global Limited;
  - viii) £500 was paid to American Express by CHAPS transfer from the Current Account; and
  - ix) £50,000 was transferred from the Reserve Account to the Current Account.
34. On 28 September 2021, the following transactions took place:
  - i) £6,360 was paid into the Current Account by Your World Recruit, a company which appears to be that to which the First Defendant's salary as a consultant is paid;

- ii) £4,700 was transferred from the Reserve Account to the Current Account;
  - iii) £11,750 was transferred from the Current Account to the First Defendant's personal account; and
  - iv) £50,000 was paid from the Current Account to Simpsons Mobile Ltd.
35. On 29 September 2021 the following transactions took place:
- i) £42,000 was transferred from the Current Account to the Reserve Account; and
  - ii) £10,000 was transferred from the Current Account to the First Defendant's personal account.
36. Finally, of relevance to the issues before the court, on 30 September 2021:
- i) Interest of £21.83 was charged to the Current Account;
  - ii) £45,000 was transferred from the Second Defendant's personal account to the Current Account;
  - iii) £50,000 was paid from the Current Account to Circle Global Ltd;
  - iv) A service charge of £9.10 was applied to the Current Account; and
  - v) Interest of £0.37 was credited to the Reserve Account.
37. The net consequence of all these transactions was that, at close of business on 30 September 2021:
- i) The Current Account was overdrawn to the tune of £14,766.93; and
  - ii) The Reserve Account was £0.37 in credit.
38. In his first witness statement, the First Defendant referred to payments to Circle Global Limited, either directly or via American Express. He said that those payments were evidenced by a receipt for £251,100. In fact, the payments direct to Circle Global (excluding any payments to American Express) were £251,123. It is asserted (and not contradicted) that the £23 is the cost of transferring the money. This is probably correct, since it is noticeable that it is a figure that appears in a number of other dealings that would otherwise be round figures. Thus, the Claimants contend that it is unlikely that the payments to American

Express related to Circle Global as alleged by the First Defendant since the payments to American Express would take the total paid to Circle Global to considerably more than the amount of the invoice.

39. In his third statement, the First Defendant purports to show how the payments to Circle Global Limited and its associated companies (including payments via American Express, and to R & A International Ltd and Simpson Mobile Ltd) total £345,794. He states in respect of the two companies not mentioned in the first statement that, at the second meeting on 26 September 2021, *“I was told that Rapid Displays Inc also had a number of subsidiary companies, which could assist in the development of the mobile device. Specifically, these companies were identified as Circle Global Limited, Simpsons Mobile Ltd and R & A Intl Ltd.”* The Claimants point to the fact that this is inconsistent with the total on the invoice and further was not an account given in the first witness statement. They also note that the first payments to Simpsons Mobile Ltd and R & A Intl Ltd were made on 24 September 2021, before the meeting at which the First Defendant was allegedly told of the role of these companies. Mr Rubin says of these companies that Simpsons Mobile Limited was only incorporated in August 2020, has never filed accounts and is subject to a notice to be struck off the Register; and that R&A International Limited is a company in Birmingham dealing with the wholesale of clothing and footwear.
40. On 1 October 2021, the first freezing injunction was obtained by the Claimants. The First Defendant says that he first became aware of the injunction when he discovered, on 4 October 2021, that his bank account was frozen. On 8 October 2021, he received a phone call from Mr Shah, who said that a second investment of \$464,000 had been paid into the Defendant’s account. The First Defendant replied that the account had been frozen. No such sum was in fact received into that account.
41. Later the bank notified the First Defendant that the payment was received in his account from a company called Rapid Displays Inc. He showed the receipt of the deposit to Mr Mustafa, who said that he was an agent of that company.
42. By now, the First Defendant says that he was beginning to have concerns. An attempt to arrange a meeting with Mr Shah and Mr Mustafa on 12 October 2021,

was unsuccessful, because the First Defendant was working, but they turned up unannounced at the hospital on 13 October 2021, insisting that the freezing of the bank account was an administrative error. On 14 October 2021, Mr Shah and Mr Mustafa, *“appeared at my partner’s house unannounced, which I find highly disconcerting as I had not provided them with this address.”* He accused them of being responsible for his account being frozen but they sought to reassure him. Mr Mustafa said. *“Dr Dominique, don’t worry, I am the boss here and I will sort it out. The court injunction is a scam, so don’t worry about it. I’ll talk to my friend at the investment company.”* The First Defendant says, *“after this instance I was positively alarmed and really quite worried. They kept pressing to attend the bank with me to resolve the situation and I was starting to feel heavily pressurised.”*

43. Shortly before the hearing before Judge Halliwell on 15 October 2021, the First Defendant says that he spoke to Mr Shah on the telephone and said that he intended to attend the hearing. Mr Shah said that he need not worry about what was going on because they had sufficient influence to resolve matters. The First Defendant describes Mr Shah’s tone as being aggressive and *“he told me I needed to sort out the court order into can in order to confirm the investments.”*

#### THE HISTORY OF THE LITIGATION

44. On Friday 1 October 2021, the Claimants issued proceedings against unnamed Defendants seeking a freezing injunction. His Honour Judge Cadwallader made a without notice order on the application. The order was served on the NatWest Bank, following which the Second Defendant was identified as the account holder and the First Defendant was notified of the proceedings.
45. On 7 October 2021, the First Defendant emailed the Claimants’ solicitors, attaching a document relating to the funds, indicating that the beneficiary of the funds was the First Claimant, the funds being transferred by order of Excellence Investment Management and Securities Limited. There followed a series of emails, of which these are the highlights:
- i) The Claimants’ solicitor, Mr Rubin, emailed the First Defendant stating, *“If, as seems the case that our client’s monies are indeed now held in your account, and you have no issue in them being returned to our client*

*(which for the avoidance of any doubt, did not authorise the transfer to you, nor does it have any interest in investing in your business plan), then we can see a suitable and appropriate way to resolve this litigation promptly and without further expense.”*

- ii) The First Defendant replied, *“Unfortunately, I have to get a reply from the investor to make sure that it’s really their money as I just cannot return the funds without proof of the sender. They may just be a scammer and once I transfer the money they will run away with it. I never received any court injunction letter about this and out of the blue you told me all this which to me does not make sense. What I know is that you have compromised my business and my upkeep by keeping this blockage onto my account and that is an insult and immoral. Hence, I need all the proofs.”*
- iii) Mr Rubin replied, stating that the funds belonged not to an investor but to his client.
- iv) The First Defendant responded in an email that *“you have wrongly accused my company when it’s up to the investor who should be the culprit. The investor is in the bank notice I gave you.”*
- v) Mr Rubin pursued the argument that his client was entitled to the return of the money and, later on the same day, the First Defendant emailed Mr Rubin saying *“please provide me copies of your clients proof of funds and I will ask the company finance director to release the same amount to your client.”*
- vi) The monies were not forthcoming, and, in an email of 12 October 2021, Mr Rubin pressed the First Defendant for repayment. In that email, he said that he would join the First Defendant as a Defendant to the claim and that the First Defendant was in breach of the existing order and liable to be found to be in contempt of court. The First Defendant replied, requesting a copy of the order and saying, *“I am prepared to return the money as long as I get proof that it’s been sent incorrectly into my account. So please send me proof and the money will be returned.”*

46. The matter came back before the court on Friday, 15 October 2021 in a hearing before His Honour Judge Halliwell, which took place remotely by video. The First Defendant was not represented at that hearing, but a lawyer, Mr Pook, attended on his behalf. The First Defendant was substituted as the name of the Respondent in place of the previous descriptor.
47. A transcript has been obtained of this hearing because, the Claimants contend, the First Defendant made a number of significant statements.

- i) Judge Halliwell asked the First Defendant, whether he was happy for an order to be made along the lines being sought by the Claimants. The First Defendant responded:

*“DR AH-KYE: Not very happy about this order to be made because out of the blue money came into my account. Out of the blue, my account had been frozen, and that amount, me, working as a doctor in the NHS, patients are more priority, looking after Covid patient, because I am a respiratory specialist. So, all these have, you know, have made me very, very stressed. So, I do not know anything about this, and then even the bank did not tell me anything about it until late last week, and that it was me who contacted Mr Ruben to find out what is going on, and then I got all these documents, all these papers, thrown at me and the Court order, the injunction, as if I am the perpetrator of all these things. In fact, I am also not culpable of all these things because, you know, if you was supposed to be correct, to be right, I just return the money back if it is not supposed to be into my account, but I am sorry but I am not prepared, and I will need for more time, for me and to discuss it with my solicitor and then ...then I will be able to understand more what is going on here. I am very sorry because I am a clinician, and my patients are priority.*

*JUDGE HALLIWELL: Yes. Can you then confirm, is the money that was transferred into that account still standing to the credit of that account?*

*DR AH-KYE: It is there, yes. I did not touch it and the bank has frozen the account anyway, so, you know, it is the question of, okay, it was sent wrong in my account; return it back. Fair. Why do you want to put an injunction on me? I am just a clinician.”*

- ii) During the hearing, Judge Halliwell adjourned for a short period of time to allow the First Defendant to speak to Mr Pook. Following that discussion, when the hearing resumed, the First Defendant said:

*“My Lord I intend to return whatever does not belong to me... If Mr Rubin can give me the bank account of the company that sent the money in, I will just straightaway tell the bank to return that money back instantly... I want it to be resolved so I can return the money and that is it, end of story.”*

It is the Claimants’ case that these comments and the First Defendant’s explanation to the court as a whole during this hearing was a clear assertion that the money was still in the Second Defendant’s bank account.

48. Judge Halliwell made an order continuing the freezing injunction until the following Friday, 22 October 2021, and requiring the First Defendant to file and serve a witness statement explaining the circumstances in which the monies came into his account, whether he had made any payments out of the monies and providing written signed authorities for the disclosure of any of the Defendants’ bank accounts relating to transactions since 22 September 2021. The statement was required to be filed by 4 pm on Monday, 18 October 2021.
49. The matter came back before me on 22 October 2021. The First Defendant was on this occasion represented by a solicitor. He had not complied with the order for service of a witness statement by 18 October, but a statement dated 22 October 2021 was filed. (The late service of that statement, though a breach of a court order, was not argued to be a reason for me not to consider its contents.) Certain bank statements were annexed to the statement, showing that not only had the monies being received into the Second Defendant’s account, but that substantial payments out had been made. The Second Defendant was accordingly joined as a party to the action.
50. The witness statement of the First Defendant set out details of how it was that the Defendants had come into receipt of the monies and how payments out had been made at the request of the so-called investors who had arranged the payment in of the monies. At paragraph 30 of the witness statement, the First Defendant said, *“I have been tricked into receiving money that I am now told*



*was not intended for me and I am no longer in possession of any funds sent by the Claimants other than approximately £18,000 which I am more than happy to return.*” Whilst I do not have a transcript of the hearing on 22 October 2021, it is accepted that during that hearing I was told by the solicitor acting for the Defendants that £18,000 was available for repayment. The position of the Claimants was that the First Defendant had lied at the previous hearing about still having the monies that had been transferred into the Second Defendant’s account.

51. An issue arose at the hearing before me about the failure of the First Defendant to file an Acknowledgement of Service. The First Defendant explained that the failure to acknowledge service in time flowed from the handling of his case by his former solicitors. In any event, an Acknowledgement of Service had been served before the hearing on 22 October 2021 and, as is apparent from the terms of CPR12.3(1), judgment in default in favour of the Claimants is not available where an Acknowledgement of Service has in fact been served, even if service was late. Given that I am dealing with, amongst other things, an application for relief from sanction, it is of significance to note that there was a failure to comply with a rule relating to Acknowledgement of Service, which led to the need for an application for relief from sanction by the First Defendant. However, in the scheme of this litigation, this particular default is minor in nature. It has understandably not featured as any significant part of the Claimants’ opposition to the application for relief from sanction.

52. I again made an order continuing the freezing injunction and further made an ‘unless’ order in the following terms:

*“Unless the Respondents by 4pm on Wednesday, 27 October 2021 (1) pay or cause to be paid the sum of £18,000 to [the Claimants’ solicitors bank account] ... the Respondents and each of them will be debarred from defending this claim, and the Claimants will be at liberty to enter judgment without further application notice.”*

Hereafter I shall refer to this as the Unless Order.

53. The monies were not paid by 4pm on 27 October 2021. Rather, the Defendants issued an application for relief from sanction. (The application was filed on 27

October 2021, as is apparent from the court file, although, given certain events recorded on the notice of application, it must have been filed out of office hours.) The substance of the application was that the First Defendant had contacted the bank and attempted to arrange the transfer, but that he had been unable to do so, apparently, for reasons relating to the freezing order. The First Defendant had offered to pay the money by obtaining a loan from a work colleague. It is common ground that, whatever the difficulties created by the freezing injunction, the Second Defendant did not in fact have the money standing to its credit, sufficient to make the transfer so as to comply with the Unless Order.

54. On 27 October 2021, the Claimants issued the summary judgment application.
55. The application for relief from sanction came before His Honour Judge Cawson QC on 8 November 2021. The First Defendant appeared in person, but it is apparent from the court file that the solicitors who were on record had intended to attend but were unable to do so. The hearing was adjourned, to be heard immediately before the summary judgment application, with an order for costs against the Defendants. It is common ground that His Honour Judge Cawson QC commented that there might be benefit in hearing both applications at the same time, given that the merits of the case were potentially relevant to both.
56. On 16 November 2021, I made an order with the consent of both parties, adjourning the summary judgment application (and therefore implicitly the application for relief from sanction) to 9 December 2021, providing for the service of witness evidence by the Defendants by 4pm on 22 November 2021, with reply evidence by 4pm on 24 November 2021.
57. By application dated 24 November 2021, the Defendants sought relief from sanction in respect of the failure to serve a witness statement by 4pm on 22 November 2021. The statement from the First Defendant upon which the Defendants wish to rely was dated the same date, 24 November 2021. The application notice also recorded that the Defendants had paid £18,000 pursuant to the Unless Order. (It was common ground at the hearing before me on 7 February 2022, that this payment was made on 8 November 2021. The payment was said to have been funded by a private loan.)

58. On 29 November 2021, His Honour Judge Halliwell considered on paper the application dated 24 November 2021 for relief from sanction relating to the late service of the witness statement. He granted that application. This then was the third occasion upon which the Defendants had been in breach of a rule or court order (the first relating to the Acknowledgment of Service and the second to the service of a statement pursuant to the order of HHJ Halliwell of 15 October 2021). Given that the statement was dated only two days after the date by which it was due to be served and that the application was made on that same date, it was clearly not the most serious of breaches.
59. On 9 December 2021, the application for relief from sanction relating to the Unless Order and the Claimants' application for summary judgment came before me. The bundle before the court was seriously non-compliant with the Guide for the Preparation and Service of Bundles in Manchester (which guidance was referred to in the notice of hearing) and further the Claimants had not served Particulars of Claim, notwithstanding the duty to do so within 14 days after service of the Claim Form pursuant to CPR7.4. The Claimants produced draft Particulars of Claim which were subject to adverse comment by counsel for the Defendants. Given the failure to serve the Particulars of Claim, Defences had not been filed. The Claimants required relief from sanctions for the failure to serve Particulars of Claim, which I granted, but I adjourned the hearing, given the combined problems from late service of the Particulars of Claim and the inadequacy of the bundle. I ordered that the Claimants pay the costs thrown away.
60. The adjourned application then came on for hearing before me on 7 February 2022. Given that I had made adverse comments about the preparation of the bundle for the hearing before me on 16 November 2021, it came as a considerable surprise to find that the Second Defendant's first witness statement was not in the main bundle and had to be incorporated in a supplemental bundle. Mistakes such as this can happen, though one might have expected that greater care would have been taken, given the previous history. In the event, no great harm was caused beyond the presumably limited additional costs flowing from the need to add this statement to a supplementary bundle that would have needed to be prepared in any event.

## APPROACH TO THIS APPLICATION

61. With respect, I agree with HHJ Cawson QC that the merits of the claims against the Defendants may be relevant. It is clear from the authorities that the strength of the underlying claim may be a relevant factor in considering the third stage of the test in Denton v TH White Ltd [2014] EWCA Civ 906 (“the Denton test”), at least where the party in default has a strong enough case to obtain summary judgment (see HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd [2014] UKSC 64).
62. There is a further interplay between the two applications before the court. The Claimants contended that the circumstances in which the Unless Order were made involved the First Defendant lying in the witness statement relied upon in the hearing before me on 22 October 2021 as to whether the Defendants were still at that time in possession of any of the monies from the payment that had been due to the First Claimant. The Claimants contend that the First Defendant had lied on the same issue in the hearing before HHJ Halliwell on 15 October 2021, and that these two occasions of lying lend support to the contention that the Claimants are entitled to summary judgment on a claim based on the Defendants’ dishonesty.
63. Logically speaking, the determination of the application for relief from sanction must precede determination of the application for summary judgment in the case of each Defendant, since, unless each Defendant gets relief from sanction, the Claimants are entitled to enter judgment against that Defendant regardless of the outcome of the summary judgment application. On the other hand, as I have indicated, the issues on the summary judgment application are closely related to the relief from sanction application and, if the Defendants are correct in their submissions, they would, one or both, be entitled themselves to summary judgment. I therefore propose to consider the merits of the summary judgment application first, before dealing with the Relief from Sanction application, and finally determining the appropriate order.

## SUMMARY JUDGMENT – THE LAW

64. CPR24.2(a)(ii) provides that the court may give summary judgment against a defendant on the whole of the claim or on a particular issue if it considers that

the defendant has no real prospect of successfully defending the claim or issue and there is no other compelling reason why the case or issue should be disposed of at a trial.

65. The principles to be applied on such an application are well established and are conveniently set out in the White Book at paragraph 24.2.3, where the authors summarise the principles formulated by Lewison J, as he then was, in Easyair Ltd v Opal Telecom Limited [2009] EWHC 339 (Ch):

- i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: Swain v Hillman [2001] 1 All ER 91;
- ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];
- iii) In reaching its conclusion the court must not conduct a “mini-trial”: Swain v Hillman;
- iv) This does not mean that the court must take at face value and without analysis everything that a party says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];
- v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No.5) [2001] EWCA Civ 550;
- vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence

available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 3;

- vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.

66. To this statement of principles might be added:

- i) The burden of proof lies upon the party applying for summary judgment - ED & F Man Liquid Products v Patel; and
- ii) If the applicant produces credible evidence in support of the application the respondent become subject to an evidential burden of proving some real prospect of success, for which purpose of the standard of proof is not high – it suffices merely to rebut the applicant’s statement of belief that there is no real prospect of success.

67. Given that this is an application that depends upon the Claimants proving that the Defendants have no real prospect of success in defending the assertion that the First Defendant (and through him, the Second Defendant) was dishonest, it is important to bear in mind both the test to be applied in making a finding of dishonesty and the caution about making findings of dishonesty (or findings that a person has no real prospect of success of defending an allegation of dishonesty - close to, but not exactly the same thing).

- i) The test for dishonesty is set out in the unanimous judgment of the Supreme Court in Ivey v Genting Casinos UK Ltd [2017] UKSC 67: *“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 was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people.”*

- ii) The care to be taken in considering allegations of dishonesty on disputed facts and the need to avoid conducting an inappropriate mini trial was neatly summarised by Sir Geoffrey Vos in Allied Fort v Ahmed [2015] EWCA Civ 841: “[81] *although summary judgment is not precluded in a case in which the honesty of one or more of the parties is in issue, particular caution should be exercised before depriving a party of the opportunity of rebutting allegations of dishonest conduct.*”
- iii) Both the significance of a finding of dishonesty and the risk of a court wrongly deriving a party of the opportunity to proceed to full oral hearing because it considered an argument to be hopeless were considered by Sir Igor Judge PQBD in Wrexham Association Football Club Ltd v Crucialmove Ltd [2006] EWCA Civ 237, cited with approval by Sir Geoffrey Vos in Allied Fort v Ahmed: “*I do not underestimate the importance of a finding adverse to the integrity to one of the parties. In itself, the risk of such a finding may provide a compelling reason for allowing a case to proceed to a full hearing, notwithstanding the apparent strength of the claim on paper, and the confident expectation, based on the papers, that the defendant lacks any real prospect of success. Experience teaches us that on occasion apparently overwhelming cases of fraud and dishonesty somehow inexplicably disintegrate.*” (Of course, Sir Igor Judge was making a statement of principle. On the facts of the case in front of him, he found that the first instance judge was entitled to give summary judgment on an allegation of fraud. In contrast, in Allied Fort, Sir Geoffrey Vos considered that the judge had overstepped the bounds in doing so.)
- iv) In King v Stiefel [2021] EWHC 1045 (Comm), Cockerill J considered the authorities relating to the evaluation of evidence in a summary judgment application and concluded:

*“[21] The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that - even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial.*

*[22] So, when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up.”*

68. Many of the authorities cited above predate the judgments of Leggatt J (as he then was) in Gestmin v Credit Suisse [2013] EWHC 3560 and Blue v Ashley [2017] EWHC 1928. He considered the necessary caution as to the weight to be placed on oral evidence in commercial litigation, in particular where there is relevant contemporary documentation. Though those cases were concerned largely with the question of the reliability rather than the honesty of witnesses, it might be thought that the principle more generally would direct the court to focus on the documentary evidence and the inherent plausibility of the parties' cases rather than what witnesses have to say in the witness box. However, the care to be exercised in that regard was referred to by Floyd LJ in Kogan v Martin [2019] EWCA Civ 1645 when, citing the judgment of HHJ Gore QC in CXB v North West Anglia Foundation NHS Trust [2019] EWHC 2053 as to the caution to be exercised in applying the above passage from Gestmin particularly in the context of non-commercial disputes, he said "*a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence.*" That emphasis on the need to focus on what witnesses may have to say applies with particular force in the context of allegations of dishonesty.



SUMMARY JUDGMENT – THE SUBMISSIONS

69. The Claimants have made clear that they put the case for summary judgment against both Defendants not on the basis that either was a party to the original fraud that caused the money to be diverted to the Second Defendant's bank account (although the Claimants will, if necessary, pursue that contention at trial) but rather that they were allegedly dishonest after the money had been received in a manner that means that they have no real prospect of successfully defending the claim.
70. The submissions of the parties in respect of the summary judgment application can be broken down into five main areas:
- i) The nature of the claims that the Claimants bring;
  - ii) The standing of the Claimants to bring such claims;
  - iii) Whether, if the First Defendant (and through him, the Second Defendant) is shown to have acted dishonestly in the dealings with the payment subsequent to its receipt, the Claimants show that the Defendants have no real prospect of success of defending the claim;
  - iv) Whether the Claimants show that the Defendants have no real prospect of success of defending the allegation that the First Defendant (and through him, the Second Defendant) was dishonest; and
  - v) Whether, if the grounds for summary judgment are made out, there is some other compelling reason why the case should be disposed of at a trial.
71. The Claimants plead the following claims against the Defendants:
- i) A claim in fraud on the basis that the First Defendant was a party to the fraudulent diversion of the monies away from the Claimant to the Second Defendant. As indicated, the Claimants do not seek summary judgment on this cause of action.
  - ii) A claim in mistake based on the assertion that the money was paid to the Second Defendant by mistake and that the Claimants are entitled to restitution.

- iii) A claim based on the unconscionability of the Defendants retaining the monies when they were received subject to a constructive or resulting trust (because of the fraud), on the basis that the Defendants are jointly liable for the breach of trust and/or the Defendants were in knowing receipt of monies paid in breach of trust.
72. In oral submissions, Mr Perrin for the Defendants complained that the Claimants' application for summary judgment appeared to encompass three other claims that had not been pleaded:
- i) Dishonest assistance in a breach of trust. In essence, for the purpose of the summary judgment application, this allegation revolves around the assertion that the Defendants acted dishonestly by causing the dissipation of the fund after they had received it but at a time when they knew or should be treated as knowing that it had been paid to the Second Defendant fraudulently and/or breach of trust.
- ii) Joint liability of the First Defendant with the Second Defendant for the Second Defendant's breaches of trust where their acts in breaching the trust involved a common design.
- iii) A liability on the First Defendant for receipt, on the ground that the receipt by the Second Defendant was in truth receipt by the First Defendant, making him potentially liable to give restitution for the monies that were received by him as a result of a mistake.
73. Mr Perrin pointed to a passage from the judgment of Mummery LJ in Boake Allen Ltd v HMRC [2006] EWCA Civ 25 at [131]:

*“While it is good sense not to be pernickety about pleadings, the basic requirement that material facts should be pleaded is there for a good reason - so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for decision for the benefit of the parties and the court. Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. The definition of the issues has an impact on such important matters as disclosure of relevant documents and the relevant oral evidence to be adduced at trial. In my view, the fact that the nature of the grievance may be obvious to the respondent or that*

*the respondent can ask for further information to be supplied by the claimant are not normally valid excuses for a claimant's failure to formulate and serve a properly pleaded case setting out the material facts in support of the cause of action."*

74. In response, Mr Berragan contended that the claims were adequately pleaded, though he conceded that there was an element of running together causes of action in the Particulars of Claim. He pointed out that the Particulars of Claim were drafted at a time when the factual picture was less clear than it is now and that in part the criticism of the Defendants was as to the labelling of causes of action rather than whether they were pleaded at all.

75. Turning to the standing of the Claimants to bring the claim, Mr Perrin refers to paragraph 42–008 of Lewin on Trusts (20<sup>th</sup> edition), which states, under the heading “Claim by beneficiaries based on mistaken payment of trust money”:

*“The cause of action at common law is prima facie vested in the trustee who made the payment, not the beneficiaries who paid nothing, and it is doubtful whether the beneficiaries prejudiced by the payment can bring a direct action at law against the wrongly paid or overpaid beneficiary. A beneficiary may bring an administration action against the trustee to compel him to recover from the overpaid or wrongly paid beneficiary, or in special circumstances bring a derivative action against the overpaid or wrongly paid beneficiary, joining the trustee as defendant. But it is doubtful whether a claim in equity may, in the absence of special circumstances, be brought by a beneficiary directly against the overpaid or wrongly paid beneficiary, on the basis that the claim is in reality an action for money had and received, so as to circumvent the restrictions applicable to the Diplock personal remedy considered below, which does not carry interest and cannot be brought unless the beneficiary has first exhausted his remedy against the trustee.”*

The decision of Warrington J in Re Robinson [1911] 1 Ch 502 is cited in support of this proposition.

76. The payment of £363,471.90 was made by Excellence Investment Management Trust as is apparent from the transaction documentation. That company is not a party. Thus, says Mr Perrin, the claim cannot succeed as currently formulated.

77. The Claimants responded that this misunderstands the true position. The Second Claimant, is the escrow agent, holding the money on behalf of the purchaser and the seller. It is true that the Second Claimant has deposited that money in a trust account with Excellence, but the trust account is in the name of the Second Claimant and is wholly controlled by it.
78. On the nature of the claims brought against the Defendants, the Claimants contend that, so long as dishonesty is made out, the Defendants have no defence to the restitutionary claim. The Claimants' money has been received by the Defendants and accordingly they are liable on conventional restitutionary principles, subject only to a defence of change of position. However, that defence itself would only be available if the change of position were in good faith (see Lipkin Gorman v Karpnale [1991] 2 AC 548), an argument which is doomed to failure if the Claimants make out dishonesty on the part of the Defendants.
79. As to the claim based on knowing receipt of trust monies paid in breach of trust, the Claimants contend that the diversion of monies held by the Second Claimant on trust for the First Claimant created a breach of trust and in any event, gave rise to a constructive or resulting trust of the monies in favour of the First Claimant. This analysis is drawn from the judgment of Hoffman LJ as he then was in El-Ajou v Dollar Land Holdings Plc (No.1) [1994] BCC 143: *"This is a claim to enforce a constructive trust on the basis of knowing receipt ... For this purpose, the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty."* It cannot seriously be argued that the diversion of money held by the Second Claimant on trust for the First Claimant did not involve a breach of fiduciary duty. Thus, once the Defendants knew or should have known of the breach of trust, they are liable for the wrongful receipt of the monies. They would be further liable for dissipating the monies, had the monies been transferred out at a time when the Defendant knew or should have known that a third party was beneficially entitled to the funds. Thus, again, a finding of

dishonesty by the Defendants in dealing with the monies would necessarily make out this cause of action.

80. On the restitutionary claim, the Defendants contend:
- i) The Second Defendant (but not the First Defendant) was the recipient of the monies. Any receipt by the First Defendant was no more nor less than ministerial receipt of the kind referred to in Goff and Jones on Unjust Enrichment at paragraph 28.07: “*A defendant is not liable for knowing receipt if he acts in a ministerial capacity when he knowingly receives misdirected trust property or property that has been paid away in breach of fiduciary duty, i.e. if he receives the property as agent for a principal to whom he owes an immediate duty to account for the property (or an equivalent sum), and who himself incurs a liability to the claimant at the moment when the defendant receives the property.*” Such a defence is probably best explained by the fact that the person who receives money only to hand it over to his principal is not enriched by the receipt.
  - ii) The Second Defendant (and the First Defendant if in fact he was in receipt of the money other than pursuant to the doctrine of ministerial receipt) is entitled to rely on a change of position defence, which can be neatly summarised by asking the question posed by Munby J in Commerzbank AG v Gareth Price-Jones [2003] EWCA Civ 1663 at [56], “*Has the position of the payee so changed that it would be inequitable in all the circumstances to require him to make restitution, alternatively, to make restitution in full?*” The answer to that question is that there is a real prospect of success of the Defendants succeeding with the defence because, if the court accepts the case that they were not complicit in the fraud and were in fact innocent parties, it would be wholly inequitable to order the repayment of monies which the Defendants no longer have.
  - iii) In any event, it is submitted that the restitutionary claim is not properly pleaded, the Claimants having failed to plead how the Defendants had been enriched in circumstances where they have not had the benefit of the money and the Claimants having failed to plead how the enrichment

is unjust in circumstances where the Defendants themselves are victims of the fraud.

- iv) Finally, it is said that it would be inequitable to require the Defendants to make restitution for funds, when they may prove that they themselves were the victims of the fraud.

81. As to the claim for breach of trust, the Defendants contend:

- i) The monies are not pleaded to have been subject to a trust and were not in fact subject of a trust. Thus there can be no claim for knowing receipt.
- ii) It is a prerequisite of a claim in knowing receipt that the disposition to the recipient was itself in breach of trust or fiduciary duty. However, the payment to the Second Defendant was not a breach of trust or fiduciary duty, hence there can be no claim in knowing receipt.
- iii) The monies were received by the Second Defendant not the First Defendant and therefore the claim against the First Defendant must fail.
- iv) Since the Defendants acted in good faith until the monies were paid out, they are not liable for breach of trust.

82. In support of the application for summary judgment, the Claimants invite me to consider the material provided by the Defendants to support their case that the Second Defendant was formed to develop a medical product. I have described the video earlier. The Claimants note that the product demonstrated on the video appears identical to a monitor called the “eq life monitor” which the Claimants show to be observable as a product of Equivital on its website. In the video in which the First Defendant and Mr Bakker appear, the Claimants point out that at 0.41, the demonstrator’s thumb is placed exactly where the Equivital logo would be on the eq life monitor. The Claimants make the following points:

- i) The video was produced in 2014;
- ii) Virtual Health Ltd was dissolved in 2016;
- iii) Mr Bakker “*has been approached and has indicated that he fell out with the First Defendant during their time together at Virtual Health Limited following the First Defendant borrowing from him and following the first Defendant unilaterally borrowing on behalf of Virtual Health a sum in*

*excess of £100,000 which led to the demise of that company. Further, he explained that the First Defendant was found to be lying about matters relating in a loss of trust, which lies, he claimed, seemed to involve the notion of serious overseas investors who did not exist” (paragraph 4(c) of the sixth statement of Mr Rubin).*

83. The Defendants rightly point to the extreme caution to be exercised in taking into account what Mr Bakker is alleged to have said. If true, it would of course provide significant corroboration for various aspects of the Claimants’ case. But this is ill-identified hearsay evidence, since the route by which Mr Bakker’s alleged statements came to Mr Rubin is not set out. If a party wishes material of this nature to be relied on as truthful, even in an interlocutory application, they are liable to be unsuccessful if they cannot at the very least produce direct evidence that the third party made the statements concerned. I disregard those parts of the material advanced by the Claimants.
84. But there are further points from the video that undermine the Defendants’ case:
- i) In his first statement, the First Defendant speaks of the video as though it related to his current business plan with a current colleague. In fact, he and Mr Bakker worked together for 3 to 4 years, ending their business relationship in 2014.
  - ii) It is difficult to see that a reference back to a promotional video that relates to a proposed business more than 6 years earlier can have much relevance to the Defendants’ business plans in 2021 save to support the general assertion that the First Defendant has a track record of seeking to develop products in this area. From his first statement, the reader would naturally assume that this promotional video represented the First Defendant’s current project and that the Second Defendant had been incorporated in order to develop it. In fact, as paragraph 6(b) of the First Defendant’s fourth witness statement makes clear, the product on the video was called the Visio RT and was the precursor to what the First Defendant says he was developing in 2021.
  - iii) In making the point that he was seeking to develop the device in his fourth statement, he refers to slides presented to delegates in Mauritius.

Those slides have been produced but they again are of little more than historic interest since they relate to matters prior to December 2014, as evidenced by the fact that they anticipate regulatory approval in Singapore by December 2014.

#### SUMMARY JUDGMENT - DISCUSSION

85. In considering the causes of action pleaded by the Claimants, it is important to distinguish between the position of the First Defendant and that of the Second Defendant. As noted above, the Second Defendant is effectively the corporate *alter ego* of the First Defendant. In Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705 at p. 713, Viscount Haldane LC said, “... *A corporation is an abstraction. It has no mind of its own, any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.*” Whilst this principle can create difficulties in some contexts, there is no dispute here but that the First Defendant was “*the directing mind and will*” of the Second Defendant. If the First Defendant was dishonest in conducting the affairs of the Second Defendant, then the Second Defendant was itself dishonest. Thus, a finding of dishonesty against the First Defendant in the conduct of such affairs would itself amount to dishonesty by the Second Defendant.
86. That is not to say that all acts or omissions of the Second Defendant, even though a consequence of the acts or omissions of the First Defendant, necessarily give rise to liability on the part of both of them. In particular, in respect of omissions, it is quite possible that the First Defendant will persuade the court that no liability on his part arises. To conclude otherwise risks piercing the corporate veil. The Defendants cautioned me against doing so here where there is no pleading that I should take that course of action. As Lord Sumption said at paragraph 34 of his judgment in Petrodel Resources Ltd v Prest [2012] UKSC 34, “*the corporate veil may be pierced only to prevent the abuse of corporate legal personality. It may be an abuse of the separate legal personality of a company to use it to evade the law or to frustrate its enforcement. It is not an abuse to cause a legal liability to be incurred by the company in the first*



*place. It is not an abuse to rely upon the fact (if it is a fact) that a liability is not the controller's because it is the company's. On the contrary, that is what incorporation is all about."*

87. As Mr Berrigan pointed out for the Claimants, Petrodel v Prest is not the last word of the Supreme Court on the issue of piercing the corporate veil – see Hurstwood Properties Limited v Rossendale BC [2021] UKSC 16. But in truth, the parties' submissions were not addressed in detail to the finer points of this argument. The simple point made by Mr Perrin on behalf of the Defendants is that there is no piercing of the corporate veil referred to in the pleading and that the court should, in considering the potential liability of the First Defendant, therefore consider only his acts and omissions in his personal capacity, not the acts and omissions of the company.
88. As pleading points, there is force in the submissions made by Mr Perrin in respect of each of the causes of action in dishonest assistance, liability for ministerial receipt and joint liability for breaches of trust.
89. On the dishonest assistance issue, this is simply not pleaded. On the face of it, it is difficult to see what defence either Defendant could have to a claim that it is liable on conventional equitable principles to give restitution of the benefit that either of them received if the Second Defendant, as recipient of the monies, came to realise that the monies were not its to dispose of, yet it, through the agency of the First Defendant and with his knowledge that the Second Defendant had no right to the monies, dishonestly caused the monies to be paid to third parties whom they did not believe to be entitled to the monies. As was conceded in argument, the Second Defendant would be in breach of its duties as constructive trustee and the First Defendant would be liable for dishonest assistance in the breach of trust. The factual scenario for that claim is pleaded at paragraph 10 of the Particulars of Claim, although it is true to say that the pleadings do not expressly assert, still less condescend to the particulars, of any allegation of dishonesty in the dealings.
90. But I do not see how the Claimants could obtain summary judgment on a cause of action that could have been pleaded, but has not, most particularly where a proper pleading of the cause of action would involve giving particulars that go

beyond the current Particulars of Claim. This is not a simple act of labelling, as suggested for the Claimants. The Defendants are entitled to know the cause of action being advanced.

91. A similar point applies to the contention that there is joint liability for the alleged breaches of trust which are stated in paragraph 113 of the Claimants' skeleton argument to involve assistance in the breach of trust. Although paragraph 13 of the Particulars of Claim pleads a joint liability for breach of trust, the breach referred to is the receipt of the money, not the subsequent dealing with it. Yet paragraph 113 of the Claimants' skeleton argument refers to the allegation that, "*The company's actions have all been directed and undertaken by Dr Ah-Kye. He did not act honestly. Both are jointly liable for breach of trust.*" Each of these statements may individually be correct, but the Claimants seek summary judgment on a point, namely dishonest assistance in the breach of trust, that is not pleaded. Summary judgment is not appropriate in those circumstances, even if the Claimants are able to show that there is no real prospect of success of the Defendants defending the assertion that the First Defendant acted dishonestly.
92. For these reasons, I limit my consideration of the summary judgment application to the claims in restitution for mistake and for knowing receipt/breach of trust in the receipt of the monies.
93. The next issue to consider in respect of these claims is the standing of the Claimants to bring the claim. In my judgment, the position taken by the Defendants is wholly unmeritorious. Whilst there is good reason to ensure that a trustee is joined in the action where trust monies are wrongly diverted, in particular where that diversion is to another beneficiary, I can see no grounds either in principle or in practice to prevent a company in the position of the Second Claimant bringing the claim here. It holds the escrow fund on trust for the purchaser and sellers. It is true that it has deposited that fund with a third party, which itself may create a trust, meaning that it is beneficiary of that trust but it remains at the very least a sub-trustee of the entirety of the fund for the benefit of the First Claimant. Its involvement as a party, if necessary (and it probably is necessary in light of paragraph 42–008 of Lewin on Trusts and the judgment in Re Robinson), must be sufficient for the fair resolution of the issues that arise.

94. The third issue to consider is the causes of action relied upon. For the reasons identified above, I limit myself to considering the claims in restitution for mistake and for knowing receipt/breach of trust in the receipt of the monies.
95. As against the First Defendant, even if he acted dishonestly, it is arguable that he was not in receipt of monies in circumstances that either make him liable to make restitution or make him liable in equity for knowing receipt or breach of trust. The money is not pleaded to have been received by the First Claimant. Factually this is correct. It was received by the Second Claimant. Admittedly, both of them dealt with the money and it is not obvious that the First Defendant could have any defence in knowing assistance of a breach of trust. If in fact he acted dishonestly in causing payments to be made out of the Second Defendant's account, that would seem to be the clearest case of knowing assistance to which no equitable defence would arise. On the factual case advanced by the Claimants, it might be said that a finding that the Defendants had no real prospect of successfully defending the allegation of dishonesty would inevitably lead to a finding of knowing assistance, a cause of action which I have identified is not open to the Claimants because it is not pleaded.
96. The pleaded case requires consideration of the circumstances of the receipt of the money. Certainly, a party who, having received money, later discovers that it was paid in breach of trust or fiduciary duty and deals with the property inconsistently with the terms of the trust may, by reason of that knowledge become liable for knowing receipt (see for example Lewin on Trusts at paragraph 42-111). The Claimants have averred that the Defendants dealt with the funds in a manner inconsistent with the terms of the trust (see paragraph 10 of the Particulars of Claim).
97. But "knowing receipt" requires proof of the party against whom relief is sought being the recipient. The First Defendant was not, as I say, the recipient of the money, at least, absent a finding that justifies the corporate veil being pierced. On the concept of liability based on an allegation of receipt of the monies by the First Defendant personally, apparently invoked in paragraph 111 of the skeleton argument of the Claimants, where reference is made to the First Defendant having "*knowingly or recklessly participated in the receipt ... of stolen money*" and in paragraph 112 to the money being "*wholly under Dr Ah-Kye's personal*

*control at all times*”, the passage from Petrodel v Prest cited above emphasises the caution to be exercised in finding liability that appears to pierce the corporate veil. The Particulars of Claim pleads that the payment was to the Second Defendant. It cannot be right for the Claimants to obtain summary judgment on the alternative argument that receipt by the Second Defendant was in truth receipt by the First Defendant when that is not pleaded and in any event might be questionable in law.

98. In any event, a finding that he acted dishonestly might justify the court invoking the principle in Petrodel v Prest but it is far from clear that it would do so and certainly is not a matter fit for a summary judgment application.
99. It follows from my analysis, that, as the case is currently pleaded, even if the Claimants show that the Defendants have no real prospect of success in showing that they were not dishonest in their dealings with the monies, the Claimants are unable to show that the First Defendant has no real prospect of success in defending the claim and the application against him must fail.
100. The position against the Second Defendant is quite different. It was in receipt of the money. If the Claimants are able to show that they can deliver a knock out blow on the issue of the dishonesty of the Defendants through knowledge that they were not entitled to receive or deal with the money before the monies were paid out, it would follow that the Second Defendant was knowingly in receipt of monies that were not its own that it should account for. The Second Defendant would be liable, whether in restitution or knowing receipt, unless it showed some defence.
101. The defence of change of position would not be available if the Defendants were dishonest in the manner alleged by the Claimants for the purpose of this application, namely that they knew that the monies were not theirs to deal with before they paid the monies out. It is not seriously argued that the defence of change of position could be relied on in those circumstances, the Defendants’ case being posited on the argument that they were just as much the innocent victims of fraud as the Claimants.
102. For the avoidance of doubt, I do not accept the argument that the enrichment of the Second Defendant is not adequately pleaded. The Second Defendant

received the transfer of £363,471.90. That is exactly the enrichment that is unjust. The defence to it being unjust to give relief for that enrichment because of a change of position on behalf of the Second Defendant supposes that the Second Defendant did not change its position knowing that it was not entitled to deal with the money as it chose. Yet that is exactly the position that would be defeated by the finding on the issue of the dishonesty that the Claimants seek. It has not been asserted on behalf of the Defendants that the defence of change of position would be available if, at the time of that change of position, the Defendants knew or believed the monies not to be theirs to deal with in accordance with the instructions of Messrs Shah and Mustafa.

103. Equally, I do not see that there would be any inequity in requiring either Defendant to make restitution if in fact it dissipated the Claimants' money at a time when they knew they were not entitled to do so. Again, the Defendants' argument has supposed innocence on the part of the First and Second Defendants which is the very basis upon which the Claimants pursue the application and seek summary judgment.
104. The fourth issue is as to whether Claimants can in fact show that the Defendants have no real prospect of successfully defending the assertion that the Defendants have been dishonest in their receipt and handling of the monies.
105. I start by considering the First Defendant's account to Judge Halliwell in the hearing on 15 October 2021. At paragraph 28 of his first witness statement, the First Defendant says in respect of this, "*When I gave my evidence at court I did not mention Mr Shah and Mr Mustafa but I was honest in my evidence. I did not refer to them because I still felt they were best placed to resolve the issues with my account. Prior to the hearing they had also promised me that we would all meet together with the company's CEO that Saturday (16 October 2021). I remained confident that they could sort out this misunderstanding. I did not really understand or know the meaning of what was going on and after the hearing, despite charging for the privilege of their attendance at the hearing my solicitor said they would not act. I did not get good advice and it is only now that I understand what is happening.*"
106. This is implausible for several reasons:

- i) Whilst I accept that a court hearing is a stressful occasion for participants, especially non-lawyers, the First Defendant is a consultant in the National Health Service for many years and the person who has apparently been attempting to develop a business opportunity relating to medical device. The video promotion of the medical device referred to in paragraph 4 of the First Defendant's witness statement of 9 November 2021 demonstrates that he can speak clearly and in complex English, as one would expect of a person in his professional position. I can see no suggestion that either the stress of the hearing or language difficulties led to a situation in which the First Defendant could not understand and straightforwardly answer questions, including as to the current whereabouts of the money. (In fairness, the doctor has not suggested that his understanding or ability to communicate English is a cause of any misunderstanding in this case.)
- ii) It was not simply in the hearing that the First Defendant had said the money could be repaid, even though it had already left the Second Defendant's account. In the exchange of emails with Mr Rubin on 7 October 2021 and following referred to above, he had asserted by clear implication that the money was available to be repaid. Thus the fact of him making this assertion cannot be attributed to the specific circumstances of the court hearing.
- iii) The description given by the First Defendant of his contact with Messrs Shah and Mustafa leading up to this hearing is anything other than reassuring, such as to lead a person to think "*they could sort out this misunderstanding*". He himself expressed concern about their attitude, mentioning that the attendance at his partner's house was "*disconcerting*", that in the meeting on that day he was "*starting to feel heavily pressurised*" and that in the telephone call shortly before the hearing on 15 October 2021, Mr Shah "*became more aggressive.*" If those descriptions are correct, it is difficult to see how, at the hearing before Judge Halliwell, the First Defendant could genuinely have thought that Mr Shah and Mr Mustafa were likely to sort matters out.

- iv) Failing to mention in the hearing the involvement of Mr Shah and Mr Mustafa (if true) was not “*honest*.” To the contrary, by the standards of ordinary decent people it was dishonest, since it failed to give to the court the full account of what was going on. If the First Defendant’s account in his witness statement that he felt they were the best placed people to resolve the issues is true, then unless he thought that they were fraudsters, he had no reason not to mention them. The ordinary decent person would do so. If he thought that they were or might be fraudsters, which is the impression given by much of the first witness statement, there was all the more reason to tell the truth to the judge. If, at the extreme (and this is not the evidence before the court) he thought they were fraudsters, but was intimidated by them, one would expect him to say that now. He has not done so.
- v) Further, the failure to give the true position in respect of the dissipation of the assets has not been explained. By the standards of ordinary decent people, the failure to mention the fact that the vast majority of the money had already been paid out is not on the face of it honest. If there were some fact or belief that made it honest (and, beyond the suggestion that the First Defendant was intimidated, I cannot see what that fact or belief might be), the First Defendant has failed to identify it. These are matters peculiarly within the knowledge of the First Defendant. In the absence of any explanation, the overwhelming inference is that there is no good explanation for this and that the First Defendant was being dishonest when he failed to tell the true story to Judge Halliwell.
107. The First Defendant cannot escape the inference that he has no real prospect of success in defending the Claimants’ assertion that he lied to Judge Halliwell by saying that the court should not conduct a mini trial. The court is entitled to use its critical faculties when analysing the material before it. If a party who, on the face of it, has misled the court fails to explain in any plausible fashion how this came about, other than through that person’s own dishonesty, the court may be entitled to conclude that the party has no real defence to the allegation of dishonesty. Further, in the absence of any attempt even to explain why he said what he said, I can see no grounds for thinking that material will come to light

that will put this issue in any different context. Quite simply, the First Defendant made an assertion about the fund, which is accepted to be untrue. Only he could explain why he said it, yet he has failed to take the opportunity to do so. In the absence of any explanation from him, there is no reason for his having misled the court.

108. I conclude that the First Defendant has no real prospect of showing that he was not being dishonest when he told Judge Halliwell that the funds were available. Of course, the fact that he was dishonest in this regard does not mean that either he or the Second Defendant has a defence to the summary judgment application that is brought. The Claimants rightly make clear that they do not contend that they can obtain summary judgment unless the evidence shows that the First Defendant, and through him the Second Defendant, *“cannot have honestly believed that the payment was an investment into [the Second Defendant’s account] to be used to develop and produce his medical device. At the very least he was on notice that these funds might not be intended for him or his company, so that an honest person would have made further enquiries.”* However, this assessment has a significant bearing on other issues, since, where the evidence points overwhelmingly to a finding of dishonesty against a party, the court will look with considerable caution at other aspects of that party’s evidence.
109. Turning to the Defendants case more generally, having read the First Defendant’s statements several times, I am left entirely unpersuaded that he had any serious plan in respect of the monitor in mid-2021. I accept that he appears to have had some historic interest in developing the life monitor and, this being so, it is perfectly plausible that his interest may have continued in 2021. However, his assertions as to his business plans in 2021 have not stood up to examination.
- i) He produced a link to a video relating to a company that he accepts is no longer operating, relating to a product that is no more than the precursor to what he says he was seeking to develop in 2021 and involving somebody who is described in the first witness statement as a colleague (in a way that suggests he is an existing colleague) yet, with whom he has not been working since 2014. The First Defendant has made no attempt to explain why he referred to historic material as supporting his



business plans in 2021. The overwhelming inference is that it was an attempt to give an illusion of current business plans that were not accurate.

- ii) The First Defendant's dealings with Equivital are a mystery. On his own evidence he has "business differences" with Mr Sood of Equivital. He simply fails to explain how he could develop the life monitor referred to in the business plan if he is not working with Equivital, and he shows no evidence that he was in fact working with that company. If there were any objective evidence of this, it is overwhelmingly likely that that would have been brought forward before the court. It follows that the only plausible case that the First Defendant will make out is that he hoped he would be able to develop this device with Equivital. In the context of a summary judgment application, I could not say that he had no real prospect of success in persuading the court that he subjectively had that hope, but the absence of any objective support for the reality of the hope is of significance to the Claimants' arguments. (The Defendants have argued that I should disregard Mr Sood's evidence, in part as hearsay that they cannot fairly respond to and in part because Mr Rubin, it is suggested, put words in Mr Sood's mouth. I reject the second suggestion but, for the purpose of a summary judgment application, I agree that I can place very little weight on material that could be contradicted at trial. However, it is the First Defendant's own response to the account of what Mr Sood has had to say that demonstrates the weakness of his case, rather than Mr Sood's own allegations.)
- iii) The Business Plan gives an inaccurate impression in another respect. It clearly identifies Ms Belvisi as vice chairman and Mr Ben Amara as financial director. The First Defendant's assertion in his witness statement that he did not suggest that they had any roles in relation to the company is simply wrong. As with the assertion that he lied before Judge Halliwell, I cannot see it as anything other than a dishonest statement, given the absence of any plausible honest explanation for it.

110. The following further matters point to dishonesty by the First Defendant in his account:

- i) He has produced a Client Information Sheet, purportedly given to Messrs Shah and Mustafa which cannot in fact have been the one produced to them, given its date and the account details on it. The obvious inference from the production of this document and the failure to produce a true Client Information Sheet is that no such document exists and that this document has been produced to give verisimilitude to an untrue case.
- ii) He has not explained how the people who arranged the transfer came to be in possession of the Second Defendant's Reserve Account details, when he originally stated that the payment was to be to the Current Account. Whilst taken alone this is not a particularly powerful point, since the exact destination of the monies within the Defendants' account would not seem to matter, the failure to give a true account suggests that the First Defendant is prone to saying anything that might help his case.
- iii) The failure to produce a signed investment contract is highly surprising. Significant sums of money were changing hands, yet there is no indication of what reassurance the investors had as to the Defendants' competency and/or intentions. Even the suggestion of signing a contract at the meeting on 26 September 2021 is highly improbable. One would not expect a legitimate investor to wait until the money had been paid before requiring a signed contract.
- iv) There is no evidence that the investors sought or obtained any security for their investment. It is inconceivable that a legitimate investor would pay over sums of this magnitude without any security being sought or even considered.
- v) If the Defendants' case is correct, the putative investors paid over £360,000 to the Second Defendant, which remained in its bank account for several days without any direction as to how the money was to be used. This is implausible. (It might be thought at least as implausible that fraudsters would allow the money to remain in the Second Defendant's account unless the First Defendant was party to the fraud itself, but that is not an issue for today's purposes.)

- vi) The named beneficiary on the payment advice was Rapid Displays Inc. The First Defendant does not identify any material (other than the say-so of the alleged intermediaries) that Rapid Displays Inc had any contact with the kind of medical equipment supplier that it seems would have been needed for it being named as the payee.
- vii) The First Defendant appears to have made no investigation at all into the companies to which he was transferring monies, nor had any communication with them – certainly he has not disclosed or referred to any such communication. This is simply implausible.
- viii) Two of the companies, Simpsons Mobile Ltd and R & A International Limited were not even mentioned as intended payees of the money when the First Defendant gave his initial account of his dealing with the money.
- ix) On any version of events, his dealing with those two companies was two days before the meeting with Mr Shah and Mr Mustafa in which he first says that those companies were discussed. If he is telling the truth about his dealings with Mr Shah and Mr Mustafa, there must have been other communications with them which have not been disclosed. Given that the Claimants have repeatedly raised allegations of inconsistencies in his story, it is inconceivable that he would not have referred to such communications if in fact they had taken place.
- x) There are no documents at all relating to two of the companies (Simpsons Mobile Ltd and R & A International Limited) and an invoice but no receipt or other documentation from the third, Global Circle Ltd. Even the invoice was only received “*after many requests*” (paragraph 17 of the First Defendant’s first witness statement).
- xi) The First Defendant caused monies to be moved between accounts in a manner which is not consistent with his version of events. Apart from the fact that he paid Simpsons Mobile Ltd and R & A International Ltd before he had (apparently) heard of those companies, his first act was to pay substantial monies to discharge the Second Defendant’s overdraft

without any explanation as to how that was a legitimate use of investors' monies.

111. Against this I balance the material on which reliance is placed to indicate that the First Defendant was at least arguably not dishonest.
- i) Much the most persuasive of these is his good character and professional standing. Is it probable that someone would put in jeopardy their good standing and professional career by becoming involved in a fraud?
  - ii) There is material that clearly supports the contention that he has, at least historically, had some interest in developing a medical product along the lines of the one referred to here.
  - iii) His successful efforts to raise the money to comply, albeit belatedly, with the Unless Order supports the contention that he is doing what he can to put right the harm done by his company's receipt of the monies to which it was not entitled.
  - iv) Whilst the assertion that the Second Defendant continued to hold approximately £18,000 in funds was not correct, it was the case that the Second Defendant continued to have the benefit of about that sum (through the reduction in its overdraft). The First Defendant believed that the money could be drawn down using the overdraft facility and, therefore, the assertion that the sum could be repaid was, even if badly worded, nevertheless a reflection of his genuine belief.
  - v) Given the many inconsistencies and gaps in the story that the First Defendant has given, this cannot be said to be sophisticated piece of dishonesty. For example, there is no evidence that the First Defendant was involved in the creation of the fraudulent email that led to the diversion of the monies in the first place.
  - vi) Much of the material that is said to support the assertion that the First Defendant has acted dishonestly comes as hearsay evidence introduced by Mr Rubin of which he has not personal knowledge. Some of these matters may be resolved by oral evidence from and cross examination of the relevant people at trial.

112. However, weighing these factors in the balance, I am bound to conclude that the account given by the First Defendant of his dealings with this money is simply not credible or honest. His assertions to Judge Halliwell contained proven lies and some of what he says in his statements is clearly untrue, as identified above. Other parts of his story are seriously implausible. Taking that evidence together, I come with regret but no hesitation to the conclusion that the Defendants have no real prospect of proving that the First Defendant has not lied repeatedly in his account of coming into receipt of this money and his dealing with it.
113. In detailed submissions, Mr Berragan for the Claimants has raised these and other points in support of his argument that the Defendants have no real prospect of success in defending the allegation of dishonesty. In so far as I have not expressly referred to those points, they are points which, either, I do not find persuasive, or which do no more than lend support to the conclusion I have already reached on the material referred to above.
114. That causes me to stand back and look at the overall plausibility of what is being said. Putting aside any question of his having lied, the Defendants received this money out of the blue in respect of proposed payments to company of which nothing was known, for products that had not been discussed, with no documentation other than one unreceipted invoice, on the instructions of agents of whom the Defendants knew next to nothing, without any written record of the investment, without any terms as to how investment were either being made or were to be repaid and with no agreed terms as to the process by which the parties to whom the money was to be paid were to manufacture the goods. That is a wholly implausible set of circumstances which drive me to the conclusion, coupled with the First Defendant's lies, that the Claimants are right to say that the inescapable conclusion here is that the First Defendant knowingly participated in the receipt and disposal of stolen money once he was aware of its receipt.
115. As indicated above I am not asked to base any conclusion on the Claimants' contention that the First Defendant was involved in the fraudulent obtaining of monies from the Claimants from the outset. It must be said that the manner in which he has put his case together to defend this claim would suggest that he would not have the necessary skill and knowledge to have committed such a

fraud alone. It could be that this was an opportunistic piece of dishonesty once the money was credited to the Second Defendant's account and I am not able to, nor am I asked to, make any finding on the issue of participation in the original fraud. However, I am satisfied that the First Defendant must have realised from the moment that he became aware of the payment of the money into the account that he was participating in the receipt and disposal by the Second Defendant of money which was probably stolen and/or to which those paying the money over to his company were not entitled.

116. The knowledge of the First Defendant must be that of the Second Defendant, given that he was its sole human agent. It follows that the Second Defendant has no real prospect of defending a claim based upon its receipt of the money which is the subject matter of this claim and the Claimants are entitled to summary judgment against it, unless there is some other compelling reason for the case to proceed to trial. I shall deal with that issue later.

#### RELIEF FROM SANCTION – THE LAW

117. The power to give relief from sanction arises from the court's general case management powers in CPR Part 3. CPR 3.8(1) states:

*“Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction.”*

CPR 3.9(1) further provides:

*“On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or Court order, the Court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –*

*(a) for litigation to be conducted efficiently and at proportionate cost; and*

*(b) to enforce compliance with rules, practice directions and orders.”*

118. The proper approach to applications for relief from sanction is to apply the three-stage test set out by the Court of Appeal in Denton v TH White [2014] EWCA Civ 906:

- i) The Court should first identify and assess the seriousness of the breach giving rise to the sanction. If the breach is neither serious nor significant, the Court is unlikely to spend much time on the second and third stages.
  - ii) The court should then consider why the default occurred.
  - iii) The court should finally consider all of the circumstances of the case so as to enable it to deal justly with the application.
119. It is relevant to note, when considering the just disposal of the application that dealing justly with an application includes, pursuant to the overriding objective, the following, pursuant to CPR1.1(2):
- i) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;
  - ii) saving expense;
  - iii) dealing with the case in ways which are proportionate to the amount of money involved, to the importance of the case, to the complexity of the issues and to the financial position of each party;
  - iv) ensuring that it is dealt with expeditiously and fairly;
  - v) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
  - vi) enforcing compliance with rules, practice directions and orders.
120. In oral submissions, Mr Perrin drew my attention to the reference in paragraph 3.9.1 of the White Book to Momsom v Azeez [2009] EWCA Civ 202. In that case, as here, the court was concerned with non-compliance with an “unless” order, in that case imposing a sanction if the defaulting party failed to comply with a disclosure application. The appellant argued that it was incumbent upon the court by reason of article 6 of the European Convention of Human Rights to consider whether the debarring order was proportionate, conceding that the refusal to grant relief under CPR3.9 would not contravene Article 6 if it was proportionate and for a legitimate purpose. The Court of Appeal, noting that compliance with the order was necessary for a fair trial to occur, held that it was compliant, noting “*Any other conclusion would mean that litigants could with*

*impunity avoid compliance with court orders made for the purpose of the holding of a fair trial.”*

121. It is not normal in applications for relief from sanction to consider the merits of the underlying claim, save in the particular circumstances addressed in Al Saud v Apex Global Management cited above. The reason for this is clear from paragraph 3.9.20 of the White Book – the court declines to embark on an investigation of the merits when dealing with relief from sanction because of the inappropriate waste in costs and time that this would involve. However, in this case, the merits are being dealt with in any event, because of the application for summary judgment. Where the court is able to reach firm conclusions on the merits of the claim, those it seems to me would be matters to be taken into account in the third stage of the Denton test.

#### RELIEF FROM SANCTION - SUBMISSIONS

122. The sanction from which the Defendants seek relief is judgment pursuant to the Unless Order made by me on 22 October 2021. Mr Perrin acknowledged that that the order had not been complied and made clear that he was not seeking to challenge the order itself.
123. In written submissions, he made the following five points:
- i) The First Defendant had attempted to comply with the order by either attending or contacting the Second Defendant’s bank on several occasions – see paragraphs 6 to 11 and 15 of his statement of 3 November 2021 and his letter to the bank dated 25 October 2021. His accounts were frozen because of the injunctive relief obtained by the Claimants and his attempt to obtain monies were hindered by the fact that he did not have a sealed copy of the order. As he summarises at paragraph 16 of his statement of 3 November 2021, *“I wholly understand that I have failed to make the payment, but it is entirely out of my hands of responsibility rests with the bank.”*
  - ii) Once it became apparent that he was not able to meet the deadline, he offered to pay the money by obtaining a loan from a friend, as referred to in an email of 27 October 2021 from his solicitor to the Claimants’ solicitors. The Claimants’ response to that offer was to raise objection to



that means of raising the money (see paragraph 12 of Mr Rubin's statement of 4 November 2021).

- iii) The First Defendant would be "*significantly prejudiced*" if relief is not granted. It is said that he could face bankruptcy, professional ruin and other consequences if a finding of fraud is entered against him.
- iv) The Claimants would not be prejudiced by relief from sanction being given.
- v) The sum of £18,000 has now been paid to the Claimants.

124. During oral submissions, Mr Perrin responded to the Claimants' contention that the Defendants had not explained why it was that the First Defendant had spoken in his first witness statement of still being in possession of approximately £18,000. He said that this was a figure that could be "*deduced*" from the Defence. As I understand this argument, one supposes that the First Defendant, being aware that the sum credited to the Second Defendant's account was £363,471.90, then deducted the transfers that had been made by or on behalf of the Second Defendant, supposedly on the instruction of Mr Shah, and as set out at paragraph 14 of each of the defences. Those figures total £345,294 and therefore, it is suggested, the First Defendant concluded that £18,177.90 was the amount available for transfer.

125. In response, the Claimants make the point that the Defendants have failed to show a good reason for non-compliance with the order. The problem lay not with the existence of the freezing injunction or any delay on the part of the bank, but rather the fact that, as is apparent from the bank statements that have been produced, the Second Defendant did not have sufficient funds with NatWest bank to make the payment. The First Defendant in fact, stated that the sum available for return was £18,173, as referred to in his solicitor's email of 27 October 2021 and as requested of the bank (the statement of 22 October 2012 having referred to the figure of "*approximately £18,000*"). However, the First Defendant has not explained how he calculated this figure, nor how he came to assert that he was "*no longer in possession of any funds sent by the Claimants other than approximately £18,000, which I am more than happy to return...*" In paragraph 30 of his statement of 22 October 2021. Further, whilst the email of

27 October 2021 refers to the money being obtained via an overdraft, the First Defendant has not explained the detail of any overdraft facility, nor why the bank was obliged to provide him with the funds.

126. In truth the current account was overdrawn at the time that I made the Unless Order and there is no evidence of either Defendant having funds elsewhere to fund compliance with the order. Thus, not only can the Defendants not show a good reason for failure to comply, they cannot show how it came about that the First Defendant provided misleading information which led to the order being made in the first place.
127. For the sake of completeness, I bear in mind the production by the Defendants during the hearing (not by way of admissible evidence, but in any event accepted by the Claimants) of a letter from the National Westminster Bank confirming an overdraft facility on the current account. The letter is dated 14 August 2020 and refers to the facility expiring on 1 September 2020 albeit with an automatic renewal for 12 months. I accept that the Second Defendant did have an overdraft facility on the Current Account at least until 31 August 2021 and probably thereafter.

#### RELIEF FROM SANCTIONS - DISCUSSION

128. It is a striking feature of the application for relief from sanctions that the Defendants have not explained how it was that the First Defendant asserted that the Defendants remained in possession of £18,000 in his first witness statement. The submission on his behalf that the figure was based upon a calculation of the original sum received less the figures paid out is by no means implausible. The result of that calculation is almost exactly the sum proffered by the First Defendant to the Claimants (albeit after the Unless Order was made) and it is perfectly possible to see how someone, aware of the original sum received and the amounts paid out, might assume (without further knowledge) that this sum must be available.
129. It is distinctly unfortunate that the First Defendant himself has not explained this in evidence. A party who is seeking relief from sanction can be expected to come before the court with a full explanation of how the need for the application comes about. It is not for the parties' advocate to have to postulate matters that

are not verified in evidence on a central issue, where the party is seeking the court's indulgence.

130. But the problem goes further here. As the Claimants point out, the more fundamental question is, how it came about that the First Defendant said that the money was in his (or the Second Defendant's) "possession". On his behalf, Mr Perrin, in valiant submissions, sought to argue that he might have thought that the money was in his possession because it had reduced the company's overdraft. This was not what the First Defendant said in the witness statement and had he meant this, I would have expected him to say it. The witness statement was a clear attempt to show that his dealings with the money, were purely at the instruction of Mr Shah and had only resulted in benefit to third parties, save for the £18,000 which could be returned. In fact, he could not return the money, at least not without making arrangements with the bank for a further overdraft.
131. I am left with no adequate explanation for the non-compliance with the Unless Order. If the First Defendant's witness statement of 22 October 2021 is to be believed, he had around £18,000 in his possession (or in the possession of the Second Defendant) which could have been repaid to the Claimants. It was offered to the Claimants. The natural inference is that in fact the Defendants did have this money. However, it is not disclosed in any of the bank statements before me. On the other hand, the bank statements appear to indicate a position where the money simply went to reduce an overdraft, in which case the statement that the Defendants still had the money in their possession was wrong and misleading.
132. This issue is all the more significant, given what the First Defendant had said Judge Halliwell on 15 October 2021. Given my finding that the First Defendant lied to Judge Halliwell on what is a closely related issue, I am forced to conclude yet again that the First Defendant has lied to the court, this time in a witness statement.
133. The mere fact that the Unless Order in respect of which relief from sanction was made was in fact the consequence of the court being misled by untrue information does not prevent the Defendants getting relief from sanction. In

fact, ironically, it is probably the case that the Unless Order would not have been made had I known the true position. However, when one comes to consider all of the relevant circumstances of the case for the third stage of the Denton test, the provision of misleading information is a significant factor.

134. The breach of the Unless Order has not imperilled a hearing date. As Mr Perrin rightly says, such imperilment is often a significant reason not to give relief from sanction because of the emphasis in CPR3.9 on the efficient conduct of litigation. But the manner in which this litigation has been conducted by the Defendants has been anything other than efficient, even if no hearing date has been imperilled.

- i) This is the sixth interlocutory hearing in the case. Whilst the need to adjourn the previous hearing cannot in any way be laid at the door of the Claimants, the other five have been complicated by the Defendants pursuing an untruthful case and the First Defendant misleading the court, causing considerable time to be spent in considering a case which, in respect of the Second Defendant, is indefensible.
- ii) This is not the first occasion where the Defendants have required relief from sanction or at least been in breach of a court order. I have identified above that they failed to file the first statement or the acknowledgment of service in time and required relief from sanction relating to the late service of the First Defendant's fourth witness statement. None of these were serious breaches that, of themselves, or even together merited any sanction beyond the costs order in respect of the late witness statement, but they are relevant to the exercise of the judgment on the third stage of the Denton test.
- iii) If I were to grant relief from sanction, there is a very real risk that the First Defendant would continue to mislead the court. He has done so on two occasions now, without seemingly any insight into the harm that this does not only to the litigation process generally but to his own case.
- iv) In respect of the First Defendant, whilst I do not consider that the Claimants are entitled to judgment for the pleading issues raised above, in fact I have not been able to identify any defence that he may have to

a claim in unlawful assistance. His assistance, though unpleaded, is indisputable. Given my findings on the issue of dishonesty, I see no prospect of him showing that any acts were those of the limited company alone and not him. It follows that to give relief from sanction would simply to delay the inevitability of a further summary judgment application which with an amended pleading would inevitably succeed. That would not be consistent with the overriding objective.

- v) In respect of the Second Defendant, if I granted relief from sanction, the Claimants would, in light of my analysis above, immediately be entitled to summary judgment (subject to the “some other compelling reason” exception which I deal with below in any event) and therefore nothing would be achieved by the grant of relief.

135. I have considered with care the Defendants’ argument that the First Defendant faces professional ruin if “*a finding of fraud is entered against him.*” That is both a circumstance of the case that I should have regard to on a relief from sanction application and potentially a compelling reason to allow the case to go to trial. I deal with the two issues together since the answer to both should be the same.
136. Technically of course I have made no such finding, though the distinction between a finding that the First Defendant was dishonest and that he has no real prospect of success in showing that he was not dishonest might be so narrow as to be in truth indistinguishable. But the finding I make is that neither he nor the Second Defendant has a real prospect of successfully defending the claim that, once the money was paid into the Second Defendant’s bank account, he knew that it was money that the Second Defendant was not entitled to, yet he nonetheless caused it to pay the money out. That is probably rightly characterised as a type of fraud, but it is not necessarily a type of fraud that would lead to the ruin of a professional person. In any event, for reasons identified below, notwithstanding my findings on the evidence, the judgment that I shall order flows in fact from the non-compliance with a court order rather than being a judgment against the Defendants on an allegation of fraud.

137. In any event, it is not for me to determine what the consequences of any such findings are beyond the strict bounds of this case, which would be a finding that the Claimants are entitled to the relief that they seek. Any judge dealing with a case such as this thinks long and hard before delivering a judgment that may lead to a person's bankruptcy or to career damage. That is no more the case where the party is a doctor than where he or she is a hospital porter.
138. Having anxiously scrutinised the material before the court, I have reached the conclusion that there are no good grounds for relief from sanction. I do so with a heavy heart as to the consequences it may have for the First Defendant but with confidence that on the evidence before me it is the appropriate conclusion. I were to grant relief from sanction or to decline to enter summary judgment on my firm conclusions on the matter before me, I would simply be imposing further expense on the parties before the inevitable conclusion to the litigation was reached.

#### CONCLUSION

139. It follows from my reasoning above that I do not grant relief from sanction. For that reason, the Claimants remain entitled to judgment pursuant to my order of 22 October 2021. Whilst I would have entered summary judgment for the Second Defendant but for the Unless Order, it is not necessary to do so.
140. I shall hear submissions from the parties as to consequential matters.