



Neutral Citation Number: [2023] EWHC 1519 (Ch)

Case No: BL-2022-000486

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**BUSINESS LIST (ChD)**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 23 June 2023

**Before:**

**MASTER McQUAIL**

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**Between:**

**(1) BONVILSTON VALE LIMITED**

**Claimant**

**- and -**

**(1) AMSER BUILDING LIMITED**

**Defendants**

**(2) JAMES MICHAEL HILL**

**(3) JANE VICTORIA HITCHEN**

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**Mr Romie Tager KC** (instructed by **Brook Martin & Co**) for the **Claimant**  
**Mr Harry Smith** (instructed by **Acuity Law**) for the **Defendants**

Hearing date: 27 April 2023  
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**Approved Judgment**

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MASTER McQUAIL

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## Master McQuail:

### Introduction

1. This is my judgment following a hearing on 27 April 2023. I heard the application of the claimant for judgment in default or summary judgment dated 17 August 2022 which was originally listed to be heard on 2 December, 2022. I also heard the application of the defendants dated 1 December 2022, originally for an adjournment of that hearing, but also for an extension of time for filing evidence, permission to amend the defence and for the strike out of the claims against the second and third defendants and for relief from sanctions, if needed. The hearing listed on 2 December 2022 was adjourned by consent because of the making of the defendant's application; the parties agreed an order which included provision for the claimant to put in evidence in response to the defendants' application.

### Evidence

2. The claimant filed a witness statement of its solicitor Michael Martin of Brook Martin & Co dated 17 August 2022 in support of its application. The defendants filed the second defendant's witness statement dated 1 December 2022 in support of its application. Pursuant to the agreed directions witness statements of Florina Paun, bank and purchase ledger manager with the Acorn Group of companies, which includes the claimant, dated 4 January 2023 and a second witness statement of Mr Martin dated 6 January 2023 were filed. On 19 April 2023 a second witness statement of the second defendant was filed. The claimant objected to that witness statement being admitted. Following argument, for reasons which I gave at the hearing, I permitted the defendants to rely upon it.

### History

3. The first defendant is Amser Building Services Limited (**Amser**). The second defendant (**Mr Hill**) and his partner, the third defendant (**Ms Hitchen**), are the directors of Amser. Mr Hill runs Amser and Ms Hitchen works as a schoolteacher.

4. In January 2019, the claimant, Bonvilston Vale Limited (**Bonvilston**), engaged Amser pursuant to a contract incorporating the JCT Design and Build standard form in relation to a development project at Bonvilston (**the Contract**). RPA (**RPA**), chartered quantity surveyor, was appointed as the Claimant's agent. The Contract was varied on 14 May 2021 so as to extend completion dates, the latest being to 19 November 2021.

5. From March 2021, RPA issued valuations, Amser issued invoices and Bonvilston made payments as follows:

- (i) On 25 March 2021, Amser issued invoice 210390 in respect of RPA's valuation no.29, in the sum of £402,325.43;
- (ii) On 9 April 2021, Bonvilston paid Amser £140,000 against invoice 210390;
- (iii) On 14 April 2021, Bonvilston paid Amser £177,133.73 against invoice 210390;
- (iv) On 25 April 2021, Amser issued invoice 210496 in respect of RPA's valuation no.30, in the sum of £252,152.70;
- (v) On 14 May 2021, Bonvilston stated that it did not intend to pay the sum due as per valuation no.30. However, on 20 May 2021, Bonvilston did pay Amser £135,303.49.

6. The state of account between the parties on 20 May 2021 was therefore that a sum of £202,060.92 was ostensibly due from Bonvilston to Amser. If the final payment on 20 May were credited against invoice 210390 to discharge it in full the outstanding amount was all attributable to invoice 210496. If instead that payment were attributed only to invoice 210496 there would have been £85,211.71 outstanding on invoice 210390 and £116,849.21 outstanding on invoice 210496.

7. On 1 June 2021, RPA issued valuation no.31 apparently showing a significant reduction in the gross value of the development (from £11.4m to £11.05m) notwithstanding work that had been carried out since valuation no.30. On the same date, Bonvilston purported to terminate the Contract, because of allegedly non-compliant sprinkler systems. Mr Hill disputes the grounds of termination and therefore its validity

8. On 15 July 2021, Amser issued interim application no.32. Although this stated at the foot of the calculation that the sum due was £122,144.32, Mr Hill's evidence explains and it is reasonably clear from the face of the application and the accompanying documentation that that figure was an error and the payment sought was £1,187,794.59.

9. On 18 August 2021, Bonvilston says that it engaged WK Plasterers in place of Amser. The only documentation as to this engagement in evidence is the front page of a JCT agreement showing the date and the names of Bonvilston and WK Plasterers, but no signatures.

10. On 1 October 2021, RPA responded to Amser's interim application no.32 stating that the Contract had been terminated. The letter explained:

“Given the above, it's deemed that no further sums are due to be paid to [Amser], nor is there provision in the terminated contract for an application for payment or valuation. Therefore, no notices (payment or otherwise) will be issued against your application number 32 received on 16th September 2021, nor are there any monies due to be paid to [Amser].”

And concluded:

“once all costs are known and within 3 months of the making good of defects within the works, [Bonvilston] will prepare and issue to [Amser] a statement of account confirming the sum they believe to be due to either party”.

11. On 21 February 2022, Bonvilston received a drawdown of £200,726.33 from its lender. On 23 February 2022 at 17:07 Mr Rickard Eriksson, who is the finance director of the Acorn Group, sent an email to Ms Paun, asking her to “pay the contractor asap”. The particulars of claim wrongly assert that the instruction was to pay the specified sum of £202,060.91.

12. Ms Paun says that she did not recall WK Plasterers were the new contractor and when she went into Bonvilston's purchase ledger the only invoice she saw there from a contractor was that from Amser dated 25 April 2021 which showed as having been part paid leaving a balance due of £202,060.91.

13. Ms Paun's evidence is that she set up a CHAPS payment to Amser and that at 09:26 on 24 February she sent a note to Mr Eriksson that she had paid Amser the sum of £202,060.91 (**the Payment**). The email in the bundle to that effect is timed at 10:26. Ms Paun's statement goes on to say that she immediately received a response from Mr Eriksson timed at 09:28 stating "No", that email was not in the bundle. She adds that that was the end of her direct involvement in the matter.

14. The particulars of claim plead that Mr Eriksson's instruction to Ms Paun to pay "the contractor" was intended to refer to the new contractor and that when Ms Paun notified him of the Payment she had made, he at once realised it had been mistakenly made to Amser. The statement of truth verifying the particulars of claim is signed by Melanie Omirou, a director of Bonvilston.

15. Mr Martin's evidence is that Mr Eriksson has informed him that the partial May payment of £50,091.79 against invoice 210496 for £252,152.70 resulted in the ledger showing a balance of £202,060.91. In his first witness statement he said that that part payment was made in error. In his second witness statement he said that it was made to assist Amser in difficult circumstances.

16. Mr Martin's evidence does not deal directly with Mr Eriksson's claimed mistake in making the Payment.

17. The particulars of claim plead that Ms Paun attempted to recall the Payment but was told by the bank that that was not possible. Both the particulars of claim and Mr Martin's evidence go on to describe attempts by Ms Paun to speak to Amser's accounts department by telephone on 24 and 25 February, and being given apparently inconsistent accounts of Mr Hill's whereabouts.

18. At 13:04 on 24 February, Mr Eriksson emailed Mr Hill asking for the Payment to be returned. Mr Eriksson received Mr Hill's response timed at 14:06, stating that he would be away from the office with limited access to emails until 7 March 2022. On the following day Brook Martin sent letters to each of the defendants (to Amser and Mr Hill at Amser's address and to Ms Hitchen at the home address she shares with Mr Hill) asserting that the Payment had been made by mistake and for no consideration such that it was held on trust and should be returned. Brook Martin also sent letters to Amser's bank putting it on notice of the alleged mistake.

19. Mr Hill says that he was away from the office from 23 February 2022 to 7 March 2023 (sic), assisting a relative with building works. He says that he was only intermittently checking his emails and that he only became aware of the Payment on or about 28 February. Mr Hill's evidence is that he thought the letter dated 25 February seeking repayment was a "try on" and that there had been no mistake as he believed that the Payment was the final payment in relation to invoices 210390 and 210496.

### **The Claim**

20. The current proceedings were issued on 18 March 2022. The claim against Amser is for the return of the Payment. In addition, a declaration is sought that to the extent the Payment was used by Amser to reduce its indebtedness to Bank of Scotland PLC charged over a property at 54 Partridge Road, Cardiff (**Partridge Road**), Bonvilston is entitled to be subrogated to that charge and other equitable relief.

21. It is also claimed that Amser dissipated the Payment and that Mr Hill and Ms Hitchen dishonestly assisted Amser in that dissipation in breach of trust, in particular by applying the funds to satisfy the Partridge Road charge between 24 February and 1 March 2022, and so are liable to pay damages or equitable compensation.

22. It is apparent from Brook Martin's letter dated 11 April 2022 to Mr Hill that Bonvilston has been aware since at least that date that the Partridge Road charge was satisfied in late 2021 when Partridge Road was sold and accordingly that the particulars of claim might be in need of amendment. Mr Martin's evidence does not deal with this possible need to amend and his first witness statement maintains Bonvilston's claim to be entitled to be subrogated to the Partridge Road charge.

23. The early procedural history of the claim was unfortunate. Mr Hill acting in person for the defendants filed three forms of acknowledgement of service dated 30 March 2022 and in each case signed by him as director with the County Court Money Claims Centre where they were stamped as received on 4 April 2022. The forms seem to have had pre-typed into the box for the address to which documents should be sent to the defendants Brook Martin's address. The forms were sent by the CCMCC to Brook Martin who forwarded them to the defendants.

24. Mr Hill still acting in person for the defendant filed three forms of defence dated 6 April 2022 signed by him as director with the CCMCC which were stamped as received on 19 April 2022, the same address had been typed into these forms and they were once again sent to Brook Martin and back to the defendants. The handwritten defence in each case was to the effect that the Payment was made against the balances outstanding on invoices 210390 of £85,211.71 and 210496 of £116,849.21.

25. It was against that background that Bonvilston's application for judgment in default or summary judgment was made and listed for hearing on 2 December 2022. The defendants only engaged solicitors at the end of November 2022.

### **Position of the Parties at the Hearing**

26. At the start of the hearing Mr Tager pragmatically conceded that he must address the summary judgment test in order to obtain judgment on behalf of Bonvilston. He maintained the position that the only defence filed was that of Amser, as Mr Hill and Ms Hitchen did not personally sign their Defences.

27. In view of that concession there is no purpose in determining whether the defendants require relief from sanctions and whether relief should be granted or whether the defendants simply need to address the conditions of CPR Part 13 to avoid default judgment being entered.

### **Strike out/summary judgment**

28. CPR 24.2 and Lewison J's principles formulated in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15] are very familiar and I do not set them out here.

29. The terms of CPR 3.4 are also very familiar, and I do not set them out here.

30. In *Standard Life Assurance Ltd v Building Design Partnership Ltd* [2021] EWCA Civ 1793 Coulson LJ noted at [38] that:

“If a defendant is entitled to summary judgment because the claimant has no realistic prospect of success, then the statement of case discloses no reasonable grounds for bringing the claim and so should be struck out.”

31. Practice Direction 3A, paragraph 1.4(c) states, materially, that examples of cases where the court may conclude that the Particulars of Claim falls within CPR r.3.4(2)(a) include:

“those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant.”

32. In *Towler v Wills* [2010] EWHC 1209 (Comm), Teare J said [18]:

“The purpose of a pleading or statement of case is to inform the other party what the case is that is being brought against him. It is necessary that the other party understands the case which is being brought against him so that he may plead to it in response, disclose those of his documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he will not, or may not, be able to do any of those things. Time and costs will, or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the Court to understand the case which is brought so that it may fairly and expeditiously decide the case and in a manner which saves unnecessary expense. For these reasons it is necessary that a party's pleaded case is a concise and clear statement of the facts on which he relies...”

33. Practice Direction 16 paragraph 8.2(1) of the Civil Procedure Rules requires that any allegation of fraud must be specifically set out in the particulars of claim. Paragraphs 4.8-4.9 of the Chancery Guide 2022, provide that:

“4.8 Paragraph 8.2 of PD 16 requires the claimant specifically to set out any allegation of fraud relied on. Parties must ensure that they state:

- (a) full particulars of any allegation of fraud, dishonesty, malice or illegality; and
- (b) where any inference of fraud or dishonesty is alleged, the facts on the basis of which the inference is alleged.

“4.9 A party should not make allegations of fraud or dishonesty unless there is credible material to support the contentions made. Setting out such matters without such material being available may result in the particular allegations being struck out and may result in wasted costs orders being made against the legal advisers responsible.”

### **Summary Judgment**

34. To avoid Bonvilston obtaining summary judgment against them the defendants must satisfy me that

- (i) the defendants have a real prospect of establishing that the Payment was not made by mistake;
- (ii) the defendants have a real prospect of establishing that the Payment was made for good consideration;

- (iii) the defendants have a real prospect of establishing that Amser changed its position in good faith following receipt of the Payment;
- (iv) the defendants have a real prospect of establishing that Amser is entitled to a set-off under the Contract against any liability to Bonvilston;
- (v) Mr Hill and Ms Hitchen have a real prospect of establishing at trial that they did not dishonestly assist Amser acting in breach of trust in dissipating or retaining the Payment; or
- (vi) there is some other compelling reason for trial.

35. To succeed in striking out the claim against them Mr Hill and Ms Hitchen must establish that the particulars of claim disclose no reasonable grounds for bringing the claim, are an abuse of the process or fail to comply with a rule practice direction or court order. If there is no realistic prospect of success for the claim against Mr Hill and Ms Hitchen that will mean that there are no reasonable grounds for bringing the claim such that it should be struck out.

### **Mistake**

36. As to the question whether the Payment was made by mistake Mr Tager submitted that the evidence all goes one way. He said:

- (i) it was plain from the terms of Mr Eriksson's 23 February 2021 email that his intention was to pay the new contractor, his instruction being accompanied by instructions as to how future payments were to be made;
  - (ii) the 'Subject' of the email was 'Bonvilston drawdowns', which was nothing to do with paying Amser;
  - (iii) Mr Eriksson's "No" response demonstrates his immediate reaction to discovering that a mistaken payment had been made;
  - (iv) the evidence of Bonvilston's immediate and concerted attempts to recover the money support the case that a mistake was made;
- and
- (viii) if Mr Eriksson had suddenly wanted on 23 February 2022 to pay Amser, his email to Ms Paun would have been in very different terms and there would have been no rational reason to suddenly change his mind almost immediately as evidenced by the attempts to persuade the defendants and Amser's bank to repay the money.

37. Mr Smith argued that the evidence put forward by Bonvilston is not sufficient to establish a case to the standard that leaves the defendants with no real prospect of arguing that the Payment was not made by mistake:

- (i) Mr Erikson, the person who it is said made the mistake has not put in a witness statement. There is therefore no direct evidence as to his state of knowledge or intentions when he sent the email of 23 February 2022 to Ms Paun;
- (ii) Brook Martin's letters to the defendants on 25 February 2022 refer to the mistake occurring as a result of instructions given in writing to pay the contractor the sum of £202,060.91, which is the pleaded case. This was understood by the defendants initially to refer to a curious coincidence that Bonvilston happened to owe another contractor the same amount as the balance outstanding to Amser. In fact this seems to have been a misunderstanding of Bonvilston's initial instructions as no amount was mentioned in Mr Erikson's

email. The amount was simply that shown in the Bonvilston ledger as due to Amser;

(iii) Bonvilston has not provided full documentary evidence of the contract with WK Plasterers, or of the state of that company's account with Bonvilston as at 23 February 2022. Ms Paun's evidence is that the only invoice on the ledger from a contractor was that from Amser. There is, therefore, a lack of material evidencing the factual position said to underlie the mistake;

(iv) Ms Paun's evidence that Bonvilston's ledger showed "a balance due of £202,060.91" to Amser is, on the face of it, inconsistent with Bonvilston's case that it did not believe any further sums to be due to Amser and there is no explanation in the evidence;

(v) Ms Paun states that her belief that the Payment was due to Amser was "encouraged" by the fact that Bonvilston had just received a substantial payment from its lender which suggests a possible explanation for Bonvilston's conduct in delaying payments to Amser was cashflow, rather than a genuine belief that the sum shown on Bonvilston's ledger was not due;

(vi) Mr Martin's second-hand account of making the Payment is inconsistent, and conflicts with the evidence of Ms Paun.

He says:

(a) in his first statement, that Bonvilston paid Amser on 20 May 2021 "in error". The defendants' skeleton argument for the hearing of 2 December 2022, pointed out this would mean that Bonvilston had made two mistaken payments against the same invoice

(b) in his second statement, that the May 2021 payment was made, not in error, but because Bonvilston "wished to help [Amser] in difficult circumstances";

(c) in his first statement, that Ms Paun made several telephone calls to Amser over the course of 24-25 February 2022.

Whereas Ms Paun:

(d), makes no reference to any telephone calls and says that Mr Eriksson's email of 09:28 on 24 February 2022 was "the end of my direct involvement in the matter".

38. There is a further oddity in Bonvilston's evidence. Ms Paun refers to informing Mr Eriksson of the Payment at 09:26 and receiving his response "No" at 09:28. However, the email in evidence from Ms Paun is timed at 10:26. No explanation for this timing discrepancy appears in Bonvilston's evidence.

### **Mistake - Analysis**

39. I accept that the terms of Mr Eriksson's email anticipate that the contractor to whom he was instructing payment be made would be the recipient of further payments. I accept also that the documentary evidence after the Payment was made tends to support Bonvilston's claim that a mistake had been made or, at least, that Bonvilston wished to recover the Payment on the basis that it had been made by mistake.

40. However, the lack of a witness statement from Mr Eriksson explaining what he knew or intended when he sent his email on 23 February - did he know that there had been a change of contractor? - means I cannot conclude his evidence as to his claimed mistake will be accepted following cross-examination. The absence, before disclosure, of internal documents showing what occurred at Bonvilston leading up to the Payment



and immediately following it and of evidence showing how matters stood between Bonvilston and WK Plasterers means the underlying factual background against which Mr Eriksson's claimed mistake was made cannot be known at this stage.

41. Further the mismatch between Mr Martin's account and Ms Paun's account of what happened after the Payment was made in attempting to contact Amser and the timing discrepancy between Ms Paun's email report of the Payment and Mr Eriksson's apparent response are also matters which cause me to hesitate in determining without the cross-examination of Ms Paun and Mr Eriksson that would be likely to happen at trial the true sequence of events.

42. In my judgment following disclosure, in particular of internal Bonvilston material, and cross-examination of those who may be called to give evidence at trial there is a realistic prospect that Bonvilston will fail to establish its case that the Payment was made by mistake.

### **Good Consideration**

43. Mr Smith's submission was that money paid under a mistake is irrecoverable if it discharges a debt owed by the payer to the payee. He relied upon *Kelly v Solari* (1841) 9 M & W 54 per Parke B; *Aiken v Short* 156 E.R. 1180, *Barclays Bank Ltd v W.J. Simms Son & Cooke (Southern) Ltd* [1980] QB 677 per Robert Goff J; and *Leslie v Farrar Construction Ltd* [2016] EWCA Civ 1041 at [30]. In the *Barclays* case Robert Goff J said this having reviewed the authorities:

“ certain simple principles can, in my judgment, be deduced: (1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact. (2) His claim may however fail if (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; or (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt; or (c) the payee has changed his position in good faith, or is deemed in law to have done so.”

In the following paragraph the judge added by way of footnote to his numbered proposition (1): that if the money was due under a contract there can be no recovery unless the contract itself is void or is rescinded; and to his numbered proposition (2)(b): that even if the payee accepts the payment in discharge of a debt that transaction may be set aside if the mistake was induced by the payee or perhaps where the payee being aware of the mistake did not receive the money in good faith.

44. Mr Smith's primary argument was that the amount of the Payment was due to Amser under a contract. His secondary argument was that acceptance of the Payment by Amser in paying down the sum ultimately due from Bonvilston meant there was good consideration.

45. Mr Tager's argument was that where there is a mistaken payment title to the money paid does not pass and, as soon as the recipient is aware of the mistake, he is obliged to return the money because a trust is imposed. He relied on a passage at

paragraph 8-028 of *Lewin on Trusts* (20<sup>th</sup> edition), which cites *Chase Manhattan Bank v Israel-British Bank (London) Ltd* [1981] Ch 105 and *Westdeutsche Landesbank v Islington LBC* [1996] A.C. 669 at 715 in support. In the former case a payment due was mistakenly made twice and a trust was imposed on the mistaken second payment. In the latter case no trust was imposed because the money had been dissipated before the local authority's conscience was affected by knowledge that the relevant swap transaction was ultra vires and void.

### **Good Consideration - Analysis**

46. At their highest the cases relied upon by Mr Tager would mean that a trust or trust obligations requiring the return of the Payment might be imposed no earlier than Amser, by Mr Hill, becoming aware of the mistake, which he says was on 28 February 2022.

47. It is not possible at this summary stage on the evidence available to determine that there was no sum properly due to Amser under the Contract.

48. Neither of the cases relied upon by Mr Tager is clear authority on facts analogous to those present here that a trust will be imposed upon a mistaken payment, where there is an underlying contractual relationship and a real prospect of Amser establishing a debt due to it and therefore good consideration.

49. Even if I had concluded that Bonvilston's case on mistake was such as to shut out a realistic prospect of it being defended, I would not have concluded that a trust obligation arose which would compel ordering the return of the money to Bonvilston as the consequence of the mistake at this summary stage without it being possible to establish the true state of the account between Bonvilston and Amser at the date of the Payment. That matter cannot be determined without determining the proper value of Amser's work, the validity of Bonvilston's purported termination of the Contract and the effect of that termination.

### **Change of Position in Good Faith**

50. Bonvilston's pleaded case is that Amser acted in breach of trust by refusing to repay the Payment and that Amser has dissipated it by repaying indebtedness to Bank of Scotland. Amser denies there was any trust and therefore any breach. To determine whether Amser changed his position in good faith following receipt of the Payment cannot be determined without disclosure and in due course cross-examination.

### **Set-Off**

51. In support of a submission that set-off would not be available as a defence to a mistaken payment, Mr Tager relied on the decision of the Court of Appeal in *Guinness v Saunders* [1988] 1 WLR 863. That case, as is well-known, concerned a claim for the return of money paid to a director who was in breach of fiduciary duty and who unsuccessfully asserted a quantum meruit cross-claim.

52. The question of set-off only arises if Amser is liable to repay the Payment. I consider that the *Guinness* case, in which the recipient was a fiduciary whose own breach of duty was the cause of the wrongful payment, is distinguishable from the situation here and I would not have concluded that it was fatal to the prospect of Amser establishing an entitlement to a set-off for sums due under the Contract here. On the

face of it the Payment arises out of the same transaction or is sufficiently closely connected that set off would be permitted.

### **Case against Mr Hill and Ms Hitchen**

53. The claim against Mr Hill and Ms Hitchen is for damages or equitable compensation for dishonest assistance in Amser's breach of trust. Unless the Payment is prima facie recoverable from Amser no question of dishonest assistance in breach of trust can arise and so no claim lies against Mr Hill or Ms Hitchen.

54. Mr Hill and Ms Hitchen deny the allegations of dishonesty made against them and, argue that not only do they have a real prospect of succeeding on that case at trial, but that the claim pleaded against them is deficient and liable to be struck out.

55. The pleaded elements of the cause of action against Mr Hill and Ms Hitchen in paragraph 18 of the particulars of claim are that:

- (i) Amser held the Payment on trust, but dissipated it by satisfying the charge over Partridge Road;
- (ii) Mr Hill and Ms Hitchen agreed, authorised, directed and/or facilitated that dissipation;
- (iii) their conduct was dishonest, because:
  - (a) they were aware by 25 February 2022 when they received Brook Martin's letters that the Payment had been made to Amser by mistake.
  - (b) they had no honest belief that the money had been paid in settlement of sums properly due to Amser.
- (iv) it is also pleaded that Mr Hill "pretended that he was on annual leave" until 7 March 2022.

56. Mr Smith submitted that the claim against Mr Hill and Ms Hitchen is liable to be struck out because there is no sustainable allegation of dishonesty pleaded against them and the dishonest assistance claim must fail because:

- (i) the only fact alleged to constitute dissipation is the use of the Payment in satisfaction of the Partridge Road Charge, which case has been acknowledged to be wrong for over a year, accordingly the case that Mr Hill and Ms Hitchen assisted Amser in any such dissipation must also be wrong;
- (ii) the allegation of dishonesty relied on by Bonvilston relates to the Partridge Road Charge and is not sustainable;
- (iii) there is no credible material to support the allegation that Mr Hill and Ms Hitchen did not honestly believe the Payment to have been paid in settlement of sums properly due to Amser. The evidence is that:
  - (a) as at 20 May 2021, Bonvilston owed Amser £202,060.92.
  - (b) although Bonvilston stated on 1 June 2021 that it disputed that sum, it had previously paid a disputed a sum. In its pay less notice of 14 May 2021 it confirmed a balance due of nil after deductions, but followed that with a payment of £135,303.49 on 20 May 2021;
  - (c) Amser made an application on 15 July 2022 for £1,187,794.59.
  - (d) the possibility of a further payment to Amser by Bonvilston was expressly left open by the concluding paragraph of RPA's letter of 1 October 2021.

(iv) the further allegation that “it is to be inferred” that Mr Hill and Ms Hitchen directed the use of the Payment held on trust to pay down Amser’s bank borrowings is not adequately pleaded:

(a) apart from the incorrect Partridge Road allegations, it is not particularised, contrary to *Towler v Wills* and paragraph 4.8(a) of the Chancery Guide;

(b) if the Court is to be asked to infer dishonesty, the facts on which the inference might be based are not pleaded, contrary to paragraph 4.8(b) of the Chancery Guide.

(v) the allegation that Mr Hill “pretended he was on annual leave until 7 March 2022” does not go directly to the case of dishonest assistance and lacks reasonably credible supporting material (contrary to paragraph 4.9 of the Chancery Guide). Paragraph 31 of Mr Martin’s first witness statement makes clear that he is simply inferring that Mr Hill must have known Bonvilston wished to speak to him on 24 or 25 February and inferring from Mr Hill’s failures to respond to the 24 and 25 February letters and emails that the defendants were fully aware of the mistaken payment. No facts supporting either inference are pleaded, contrary to paragraph 4.8(b) of the Chancery Guide. Mr Hill’s evidence is that he had taken the time off to help family with renovation works to their home and was not checking his emails regularly.

57. Mr Tager said that the conduct of the defendants in failing to respond to the communications from Mr Eriksson and Brooks Martin are badges of their dishonesty and that no directors acting honestly would have behaved as Mr Hill and Ms Hitchen did in particular:

(i) Mr Hill’s evidence that he thought the Brook Martin letter of 25 February 2022 was a “try on” is incredible;

(ii) Mr Hill’s failure to respond to Mr Eriksson’s email or the Brook Martin letters of 24 and 25 February or otherwise engage and his failure to deal in any detail in his evidence with his reaction to those communications is not honest; and

(iii) that it is notable that Ms Hitchen has put in no evidence, at all

### **Dishonesty - Analysis**

58. The background that was known to Mr Hill (and Ms Hitchen) in February 2022 included:

(i) the termination of the Contract, for what Mr Hill considered to be impermissible reasons;

(ii) a history of Bonvilston stating that it would not make any further payment but nonetheless making payment shortly thereafter in May 2021

(iii) the amount of over £1m that had been sought by Amser’s application no.32 following termination of the Contract;

(iv) the manner in which RPA’s October letter left matters open; and

(v) a lack of any further contact from Bonvilston in the months that followed.

59. It is notable also that neither Mr Martin’s original explanation that the May 2021 payment was made by mistake nor his more recent explanation that that payment was made to assist Amser were known to Mr Hill (or Ms Hitchen) in February 2022.

60. I do not consider that the fact Ms Hitchen has not put in a separate witness statement reflects adversely on her. She is a director of Amser and owes duties accordingly. However, I do not consider that there is any reason to conclude that her state of knowledge or of mind would not have been informed by Mr Hill and would therefore have been identical to his.

61. Accordingly, I conclude that receipt of the exact balance due on the outstanding invoice between Bonvilston and Amser as at May 2021, a sum considerably less than the £1 million odd the subject of application no. 32, would not have led either Mr Hill (or Ms Hitchen) to conclude other than it was money due to Amser.

62. In the circumstances if as Mr Hill says he concluded that Bonvilston was “trying it on” that is a plausible and not dishonest explanation for not engaging with Mr Eriksson or the Brook Martin correspondence.

63. Bonvilston having acknowledged that the Payment was not used to pay Amser’s borrowing secured by the Partridge Road charge, the allegations of dishonesty that remain are not supported by any proper pleaded particulars. Nor are any other particulars set out in the evidence of Mr Martin. There are no facts pleaded or asserted in Mr Martin’s evidence on the basis of which any inference of fraud or dishonesty could properly be drawn by the Court.

64. Accordingly, I conclude that neither the Claimant’s pleading nor the evidence discloses any proper ground for an allegation of dishonesty being made out against Mr Hill or Ms Hitchen and the claim against them therefore has no reasonable prospects of success and is liable to be struck out.

### **Conclusions**

65. For the reasons I have explained I will not grant Bonvilston’s application for summary judgment against any of the defendants.

66. I must decide whether the claim against Mr Hill and Ms Hitchen should be struck out now, as Mr Smith urges, or whether to allow an opportunity to Bonvilston to amend.

67. Mr Smith points out that Bonvilston acknowledged its case required amendment over a year ago, but has neither withdrawn its allegations nor produced any amended case but has proceeded with its application for summary judgment on the basis that the allegations of dishonesty are true.

68. Against that it may be said that the defendants conspicuously failed to engage with the litigation process after Bonvilston had issued its August 2022 application until late November 2022.

69. Mr Tager urged that the particulars of claim could be saved and strengthened against Mr Hill and Ms Hitchen by amendment, but I am not convinced by his analysis once the central plank of the original pleading, namely the Partridge Road charge allegation is removed. I accept that it may be a new allegation might be plead-able against Mr Hill and Ms Hitchen following disclosure, but that is not a reason for saving the claim against them now when the material necessary to support any such claim is

absent. Accordingly, I will order that the claim against the Mr Hill and Ms Hitchen is struck out.

70. Amser seeks permission to rely on the Amended Defence included in the hearing bundle in accordance with CPR r.17.1(2)(b), subject to such modifications as may be necessitated by the strike out of the claim against Mr Hill and Ms Hitchen. Since my conclusions mean that the claim is to proceed against Amser, I will permit Amser to amend, subject to the proposed Amended Defence pleading, as it is required to do by CPR 16.5, to the allegation in Paragraph 18 of the Particulars of Claim that the Payment was dissipated by Amser.