Neutral Citation Number: [2024] EWHC 2791 (Ch)

Claim No: BL-2023-001601

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: 5th November 2024

Before :

James Morgan KC sitting as a Deputy High Court Judge

Between :

SCENIC INTERNATIONAL GROUP LIMITED (IN PROVISIONAL LIQUIDATION)	**Claimant**
- and –	
(1) RICHARD ADENAIKE **(2) ANDREW PETERS** **(3) AIGG HOLDINGS Ltd** **(4) EMPLOYMENT LAW & HR SOLUTIONS LTD** **(5) JOYCE EZED** **(6) BRASAA CORPORATION U.K LIMITED** **(7) SAM ADENAIKE (ALSO KNOWN AS SAMUEL ADENAIKE AND SAMUEL BABS ADENAIKE AND ALSO KNOWN AS SAMMO ADENAIKE)** **(8) LEAH ADENAIKE**	**Defendants**

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Christopher Brockman (instructed by **Wedlake Bell LLP**) for the **Claimant**
The **First Defendant** appeared in person and also represented the **Fourth Defendant** and the **Sixth Defendant**

Hearing dates: 15th and 16th October 2024

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APPROVED JUDGMENT

This judgment was handed down at a hearing and then released to The National Archives.
The date and time for hand-down is 10.30am on Tuesday 5th November 2024.

Mr James Morgan KC sitting as a Deputy High Court Judge:

Introduction

1. This is a claim based on alleged large scale labour supply fraud. By application notice dated 7th May 2024 (**"Application"**), the First Defendant (**"D1"**) applied to set aside default judgments entered, for differing amounts, against himself, the Fourth Defendant (**"ELHR"**), the Fifth Defendant (**"Ms Ezed"**) and the Sixth Defendant (**"BCUK"**) (together **"Applicants"**) on 25th March 2024. The Claimant company (**"Company"**) opposes that Application.

2. No similar application has been made on behalf of the other Defendants, namely, the Second Defendant (**"Mr Peters"**), the Third Defendant (**"AIGG"**), the Seventh Defendant (**"Sam Adenaike"**) and the Eighth Defendant (**"Leah Adenaike"**).

3. D1 is a director of ELHR and BCUK and, at the start of the hearing, I permitted him to represent them. I should record that D1 made submissions on behalf of himself and those two companies with care and courtesy, for which I am grateful.

4. Ms Ezed, who is D1's wife, did not file any evidence in her own name and did not sign the draft defence. Despite me causing an email to be sent to D1 on the day before the hearing identifying the likely difficulty in him being able to represent her (c.f. *Practice Guidance (McKenzie Friends: Civil and Family Courts*) [2010] 1 WLR 1881), she did not attend. After hearing from D1, I declined to allow him to make submissions on behalf of Ms Ezed on the basis that (i) he had no right of audience, (ii) I was not satisfied there was any good reason why she could not have attended and (iii) I was concerned that his interests did not necessarily coincide with hers. I have nevertheless considered carefully the written material relevant to her position and raised what appeared to me to be relevant points with Mr Brockman, who appeared for the Company.

The parties

5. The Company was incorporated on 7th November 2008. At all relevant times, D1 has been a director of the Company. His occupation is listed at Companies House as "*Certified Chartered Accountant*". Although he does not appear in the ACCA directory of accountants, he has stated that he qualified in Nigeria. Mr Peters was appointed as a director of the Company on 10th May 2019, but the Claimant's position is that he was a director in name only. D1 has stated that Mr Peters provided administrative services to the Company from an office in Nigeria.

6. Notwithstanding its high levels of turnover, the Company was not registered for VAT during its period of trading. Instead, it purported to use AIGG's VAT registration number.

7. AIGG was incorporated on 1st July 2014. According to Companies House records, AIGG has been a person with significant control of the Company since 1st October 2016. D1 is AIGG's sole director and, according to Companies House records, owns 75% or more of its shares. AIGG registered for VAT with effect from 1st March 2017, declaring its business to be "*leasing services*". Its last set of filed accounts (for the period to 30th June 2022) record that it was dormant.

8. For at least some period (there is a dispute as to the timing of her resignation), Ms Ezed was a director of ELHR. D1 has been a director of that company since October 2013 and is currently the sole shareholder.

9. D1 has been a director of BCUK since May 2012 and the Company is its sole shareholder.

10. Sam Adenaike is D1's brother. He was a director of the Company for periods during 2008 to 2015. Leah Adenaike is the daughter of Sam Adenaike.

The facts - outline

11. The Company has been described as an "umbrella company" by which it is meant that it acted as the employer of workers supplied by employment agencies to end user customers. The end user customers were predominantly in the public sector, in particular in the health sector.

12. IR35 is legislation designed to stop so called "disguised employees" getting a tax advantage by working through a personal services company. In very broad terms, if a worker's engagement was deemed to be "employment" then they would be within IR35 and a liability arose for PAYE / NIC. Conversely, if the worker could properly be recognised as an independent contractor then they would be outside IR35. Under IR35, liability for PAYE / NIC was originally on the worker but, since 2017 in the public sector and 2021 in the private sector, determinations have been the end user's responsibility and unpaid tax can be recovered from the fee payer, usually the employment agency.

13. Properly run umbrella companies are a solution to these issues. By joining an umbrella company, a worker becomes an employee and therefore placed outside the scope of IR35. As the employer, the umbrella company is responsible for deducting PAYE / NIC. In turn, this provides protection to the recruitment agency and to the end user against non-payment or under-payment of PAYE / NIC and the resultant financial or regulatory issues. In return, the umbrella company will generally be entitled to a fee. As discussed in more detail below, the employment agencies with which the Company dealt therefore sought (and obtained) contractual protection and other assurances from the Company that it was indeed employing the workers and deducting PAYE / NIC.

14. In the present case, there is no dispute that:
    i) The Company charged the recruitment agencies for the gross salary of the worker and, as a supply of services, this was subject to VAT at the standard rate of 20%;
    ii) Invoices were self-issued by the recruitment agencies and they used a VAT number that was registered under the name of AIGG;
    iii) The Company was legally required to declare and account for VAT on a quarterly basis, but it did not so (or at least not on its own account);
    iv) Certain sums received from the recruitment agencies were paid by, or on behalf of, the Company to its workers, but on numerous occasions they were paid gross with no PAYE / NIC being deducted.

15. Related areas of dispute include:
    i) The reason for, and consequences of, the Company not registering for VAT in its own name and not submitting its own VAT returns;
    ii) The reason for some workers being paid on a gross basis.

16. In around late 2022 or early 2023, following concerns regarding the Company's failure to submit VAT returns and under-declaration of PAYE / NIC, HMRC commenced an investigation. As part of that investigation, HMRC obtained bank statements for accounts operated by the Company with Lloyds Bank plc (covering the period from 3 April 2017 to 10 April 2019) (**"Lloyds Accounts"**) and NatWest Bank plc (covering the period from 15 March 2018 to 28 January 2020) (**"NatWest Accounts"**). These show that around £9m passed through those accounts.

17. HMRC also obtained bank statements for accounts operated by ELHR with HSBC Bank plc (covering the period from 31 March 2017 to 20 January 2023) (**"ELHR Accounts"**) and for accounts operated by BCUK (covering the period from 15 November 2019 to 4 April 2023) (**"BCUK Accounts"**). These four sets of accounts are together referred to as the **"Accounts"**.

18. At some point, which was no later than January 2020, the Company started to use the ELHR Accounts because it had experienced banking problems with Lloyds and NatWest as a result of a "CIFAS" mark having been put on D1's credit file by Lloyds. D1 stated in his evidence, and for the purposes of the Application I accept, that the Company was unable to open any new accounts and was forced to use the ELHR Accounts. An issue arose as to whether example bank statements for the ELHR Accounts – which were sent to the recruitment agencies as part of the compliance process – had been doctored by D1 in order falsely to show the Company's name on them. That is not an issue that I consider it is appropriate or necessary to resolve.

19. Further, at some point (the precise date is not clear to me), Company funds also started to be passed through the BCUK Accounts. D1's explanation, which again for the purposes of the Application I accept, is that there were bank-imposed limits on the amount of payments that could be made out of the various Accounts and it was therefore necessary to use the BCUK Accounts to assist in getting around these limits.

20. It is clear from the evidence that £10,662,219 passed through the ELHR Accounts during the period covered by the bank statements. It is also clear that this included £6,958,682.07 paid into those accounts by recruitment agencies that had contracted with the Company as well as substantial payments of at least £3,710,504.03 out to workers. However, the ELHR Accounts also show credits and debits from multiple sources, the provenance of which cannot, in my judgment, properly be determined on a summary basis. For example, D1 said that the credits included income from different businesses, including management consultancy and vacation rentals in France. A similarly muddy picture appears from the evidence in relation to the BCUK Accounts.

21. In any event, by late 2023, HMRC had concluded that the Company had failed to pay any VAT and that it had failed to declare PAYE / NIC of £3,619,253 for the period 6th November 2017 to 5th April 2023 (**"Tax Liability"**). On 16th November 2023, having registered the Company for VAT with effect from 1st May 2017, HMRC assessed that it was liable to pay VAT of £2,047,797 (**"VAT Assessment"**).

Procedural events

22. On 7th December 2023, these Part 7 proceedings were issued, ex parte injunction orders were made against certain of the Defendants and a provisional liquidation order was made against the Company. The injunctions were continued on 20th December 2023.

23. On 15th February 2024, the Company served Particulars of Claim (**"PoC"**) on the Defendants. Judgments in default were obtained on 25th March 2024 (**"Default Judgments"**) in the following sums:
    i) D1: £8,258,682.0;
    ii) Mr Peters: £4,016,304;
    iii) AIGG: £2,096,719.71;
    iv) ELHR: £7,607,841.59;
    v) Ms Ezed: £7,868,544.57;
    vi) BCUK: £796,996.30;
    vii) Sam Adenaike: £260,889.32;
    viii) Leah Adenaike: £78,481.20.

24. On 30th April 2024, post-judgment injunction orders were made against certain of the Defendants.

25. The Application was made on 7th May 2024. It was initially supported by:
    i) A short witness statement from D1 dated 1st May 2024 (**"D Statement 1"**);
    ii) A draft defence prepared by way of commentary on the PoC (**"Draft Defence"**);
    iii) A short skeleton argument (**"D Skeleton"**).

26. Since then, D1 has served further rounds of (unverified) documentation on the Company, which have been collated in Bundle B for this hearing.

27. The Company's evidence in answer was set out in the first witness statement of one of the joint liquidators, Louise Brittain, dated 4th September 2024 (**"Brittain Statement"**). This exhibited the first witness statement of Andrew Siddle dated 24th November 2023 (**"Siddle 1"**), filed in support of the application for the appointment of provisional liquidators, and a further witness statement of Mr Siddle dated 15th August 2024, filed in support of the ongoing petition (**"Siddle 2"**). D1 replied by way of a second witness statement dated 18th September 2024 (**"D Statement 2"**). The Company also relied on the first affidavit of Louise Brittain dated 5th December 2023, filed in support of the injunction applications (**"Brittain Affidavit"**).

The claim - outline

28. The claim is based on the alleged fraudulent evasion of VAT and PAYE / NIC by the Company during the period from 2017 to 2023. It is pleaded that the failure to pay or under-declaration and under-payment of tax was deliberate and was carried out by or at the direction of D1 and/or Mr Peters (para 38). The detail of the allegations may be summarised as follows:
    i) In the period from 3rd April 2017 to 28th January 2020, £9,019,262 was paid out of the Company's bank accounts. Further, in the period from around March 2017 to February 2023 at least £10,622,219 of money due to the Company from its customers was diverted into the ELHR Accounts (**"Diverted Payments"**) (paras 39-44);
    ii) The fraud was deliberately concealed in various ways including: non-registration for VAT, non-submission of VAT returns, the use of AIGG's VAT number, under-

declaration of PAYE / NIC, the Diverted Payments and the filing of false accounts (paras 45-54);

iii) The proceeds of the fraud were misappropriated or misapplied from accounts held by the Company and ELHR (paras 55-60);

iv) By reason of those matters, D1 and Mr Peters were in fraudulent breach of their duties as directors and the Company is entitled to equitable compensation from them (paras 61-63);

v) ELHR and BCUK dishonestly assisted those breaches of fiduciary duty by receiving payments, acting as conduits or vehicles for the labour supply fraud and making payments out in misapplication of the Company's funds. AIGG dishonestly assisted by knowingly permitting the use of its VAT number. The Company is entitled to equitable compensation from each of them (paras 65-70);

vi) Ms Ezed dishonestly assisted those breaches of fiduciary duty by causing or permitting ELHR to be involved as alleged and also by receiving payments from the Company, ELHR and BCUK to which she had no entitlement. The Company is entitled to equitable compensation from her (paras 71-73);

vii) The Defendants are liable to account to the Company for their receipt of its monies on the grounds of knowing receipt or by the process of tracing (paras 74-80);

viii) The Company has suffered loss and damage and/or is entitled to equitable compensation (paras 81-83).

The Defence - outline

29. The Draft Defence contains numerous general denials of wrongdoing and takes the following points in particular:

i) AIGG was part of a "*group of companies*" including the Company (e.g. paras 4, 50.8) and trading was "*under claimant's group of companies*" (para 29);

ii) VAT output tax should be set-off against input tax (e.g. paras 9, 31);

iii) Employee's PAYE / NIC are only due if they have actually been deducted (e.g. para 31);

iv) Over 80% (and as high as 90% in one case) of the payments paid to D1, Ms Ezed, BCUK and Sam Adenaike were "*used for the claimant's group of companies operations*" and credit should be given for the inflow and outflow of funds (paras 7, 18, 20, 22, 50.9, 58);

v) Monies received by ELHR was paid to "candidates", i.e. employees (paras 13, 40-43);

vi) Payments from the Company's accounts to certain of the Defendants "*did not only come from employment agencies payments, but also generated from other businesses*" (para 57).

30. These points were elaborated upon to a certain extent in D Skeleton, D Statement 2 and orally by D1.

The law: setting aside

31. There is no dispute that the Default Judgments against the parties making the Application were regular. In those circumstances, the court may set aside or vary them if (a) the defendant has a real prospect of defending the claim or (b) it appears to the court that there is some other good reason why they should be set aside or varied, or the defendant should be allowed to defend the claim: *CPR 13.3(1)*.

32. Although the court must consider whether the person seeking to set aside judgment made the application promptly (*CPR 13.3(2)*), Mr Brockman did not take any separate point as to this.

Likewise, there was no argument from him by reference to the fact that such an application is one for relief from sanctions: *FXF v English Karate Federation Ltd* [2022] EWCA Civ 891, [2024] 1 WLR 1097.

33. The battleground between the parties was whether there was a "real prospect" of defending the claim. The relevant principles may conveniently be taken from *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. I do not set them out here, but note in particular that the court (i) must not conduct a "mini-trial" and (ii) must take into account not only the evidence actually placed before it on the application, but also the evidence that can reasonably be expected to be available at trial.

34. Where, as here, the court is dealing with claims in fraud or dishonesty, the court should be very cautious in resolving matters on a summary basis – see Cockerill J in *King v Stiefel* [2021] EWHC 1045 (Comm) at [23]-[24]. But, as the judge also made clear at [21]-[22], that does not prevent the court from some evaluation of the evidence.

Preliminary points

35. It is helpful to deal with the following preliminary points.

36. First, the state of the evidence before me. The evidence relied on by the Company is very detailed and includes ostensibly careful analysis and conclusions in relation to the key issues regarding VAT and PAYE / NIC as discussed in more detail below. Further, the Applicants have had a lengthy period of time to consider and respond to that evidence, some of which dates back to the end of 2023. Notwithstanding that, much of the Draft Defence is in general terms and the Applicants' evidence does not engage with the detail of the evidence put forward against them. Whilst the court should take into account the evidence that can reasonably be expected to be available at trial, it is also entitled to take into account the fact that the Applicants have not taken the opportunity to try to rebut important evidence put forward against them.

37. Second and relatedly, in his oral submissions, D1 made complaint that he had not had access to, or been able properly to analyse, the statements for the Accounts. It is correct to note that the Company's evidence in relation to the Accounts was by way of summary analysis and did not generally exhibit the underlying documents. This included a helpful summary of the categories of transactions passing through the ELHR and BCUK Accounts. However, D1 accepted that he could have asked the Company for copies of the statements, but did not do so. In any event, in my judgment (i) further analysis of the Accounts would not assist the Applicants in relation to liability, but (ii) in dealing with the question of relief, I have made all appropriate allowances in their favour.

38. Third, there can be no dispute that the Company is bound by the VAT Assessment. Its turnover was such that it should have been registered for VAT from at least 1st May 2017: Schedule 1, *Value Added Tax Act 1994* (**"VATA 1994"**). HMRC was therefore entitled to register it for VAT from that date and to make an assessment: s.73(1), *VATA 1994*. That assessment is deemed to be the amount of VAT due from the Company: s.73(9), *VATA 1994*. Further, because the Company did not submit any VAT returns, as explained by Siddle 2 at para 10, it is unable to appeal the assessment at all: s.83(1)(p), *VATA 1994*. I refer below to further detail regarding the calculation of the VAT Assessment.

39. Fourth, the question of attribution. The Company pleads in para 26 of the PoC that D1's acts and knowledge are to be treated as the knowledge and acts of it, ELHR, BCUK (and AIGG). This is drafted very widely and somewhat ambiguously. However, D1 does not dispute in terms that his knowledge is attributable to those companies. Further:
    i) In general, information relevant to the company's affairs that comes into the possession of one director, however that may occur, can properly be regarded as information in the possession of the company itself: *Lebon v Aqua Salt Co* [2009] BCC 425 at [24]-[26];
    ii) It is clear from the evidence that D1 was the directing mind and will of each of the Company, ELHR, BCUK (and AIGG) and their affairs were intertwined. Therefore this is a clear case for attribution to each company of at least such knowledge as was obtained by D1 in the course of his duties for these companies;
    iii) However, D1's knowledge as a director of the Company will not be attributed to the Company for purposes of denying it a claim against him for breach of duty: *Bilta (UK) Limited (in liquidation) v Nazir (No.2)* [2015] UKSC 23, [2016] AC 1.

The alleged fraud

The case against the Applicants

40. On the face of it, the Company has set out a compelling case that it was used as a vehicle for labour supply fraud for at least the following reasons.

41. First, although its turnover far exceeded the £85,000 threshold the Company was not registered for VAT during its period of trading and therefore did not file any VAT returns. The Company instead purported to use the VAT registration of AIGG.

42. Second, although the Applicants have claimed that AIGG's VAT registration was intended to be a "group" registration so as to (honestly and fairly) include the Company's business, this is flatly contradicted by the contemporaneous evidence. In particular:
    i) The application to register AIGG was made on 24th April 2017 and listed D1 as the "Applicant" in his capacity as director;
    ii) Section 6 of the application stated that AIGG's business activities were "*leasing services…office machinery and equipment rental and operating leasing*", but there is no evidence that it ever carried on such a business. Although the Applicants' case is that income from businesses other than labour supply passed through the various Accounts, neither their evidence nor D1's oral submissions suggested that this extended to "leasing services" as so described;
    iii) This is underlined by the fact that AIGG failed to submit any corporation tax returns to HMRC and has submitted mainly dormant accounts to Companies House;
    iv) Section 13 of the application stated that the registration was voluntary and was being made because "*Intend to make taxable supplies in the future*". Given the preceding points, the fact that the Company opened the Lloyds Account in early April 2017 and that during that month it started to receive payments from recruitment agencies (e.g. MedicsPro Ltd), the only realistic conclusion is that the registration was intended to provide a VAT number for the Company to use;
    v) But it was clearly intended that this would be concealed from HMRC: Section 4 contained provision for a "*Group Registration*", but the box was left unticked. Section 6 made no mention of labour supply; Section 7 required details to be provided of "*Other Business Involvement*", but it was left blank; and Section 20 gave an estimate of turnover of just £100,000. Moreover, in reply to the important compliance question "*Does the business supply a provision of labour?*" the answer was marked "*N/A*";

vi) When, in May 2017, D1 requested variations to the registration, to include a trading name of "*Scenic International Group*", there was no amendment to the section headed "*Business Activities*". Even if, as D1 suggested, it was not possible to change those details as part of the variation request itself, there was nothing to stop him from manually informing HMRC that the business included the provision of labour. Indeed, given its importance to HMRC's monitoring, he clearly should have done so;

vii) Although AIGG did file quarterly VAT returns for the periods from May 2017 to May 2021, they stopped at this point. In oral submissions, D1 attempted to explain this by saying that VAT receipts had been "*used to grow the business*" and there were cashflow problems resulting from payment on 60-90 terms, but that they were going to submit assessments when money came back in. At best for the Applicants, it amounts to an admission that monies due to HMRC were intentionally used for other purposes and this fact was deliberately covered up by the non-submission of returns;

viii) The analysis in Siddle 1 at paras 132 to 150 shows that even if the VAT returns filed by AIGG were in respect of the Company's trading and credit is given for all input tax claimed (which is unrealistically high given the nature of the business), there was still a very large under-declaration (and consequent under-payment) of £738,545.25.[1]

43. Third, the evidence points all one way in terms of the Company being the employer of the workers and therefore contractually and legally required to deduct PAYE / NIC before making payments to them. I have set out above the underlying reason for recruitment agencies engaging umbrella companies, such as the Company. Mr Brockman took me through worked examples for two recruitment agencies that dealt with the Company. In relation to The ID Medical Group Ltd, in summary:

i) There were terms of engagement signed by D1 on 10th January 2018. These included provisions that the Company would engage workers on contracts of employment (§5.1.3), that it would comply with the legislation requiring the deduction of PAYE / NIC (§5.1.4) and that it would meet all tax liabilities falling on it, including VAT (§5.1.6);

ii) An example employment contract between the Company and a worker supplied to The ID Medical Group Ltd provided that the Company was required to make deductions from their pay for PAYE / NIC (§5.4);

iii) On 17th May 2019, Mr Peters signed a compliance certificate in which the Company confirmed that for all candidates it had deducted all appropriate PAYE / NIC and did not transfer any pay to any other entity or organisation without deduction of the same;

iv) An example payslip for a worker showed the deduction of PAYE / NIC.

44. The evidence was similar in relation to the other example, Your World Recruitment Group. It may be noted in particular that, on 4th July 2017, the Head of HR at the Company (Richard Bentley) signed a compliance questionnaire which in Section 13 included confirmation that the Company treated all earnings by workers as subject to PAYE / NIC and that workers could not receive remuneration through other solutions including "*trusts, companies or partnership agreements*". The Company's evidence was that these examples were fairly representative of its arrangements across the board.

45. Fourth, payments were made to the Company's workers from the various Accounts held by the Company, ELHR and BCUK. Analysis of the bank accounts shows that there does not

[1] The difference between this figure (£738,545.25) and the VAT Assessment (£2,047,797) is £1,309,251.75. That difference is equivalent to costs of £7,855,510.50 being claimed as input VAT. It is fanciful to suggest that the Company could, as an umbrella company trading at the level that it did, incur that level of input costs.

appear to be any correlation or pattern between the entity paying the workers and the information listed on the payslip. Indeed, the majority of the individuals listed on the payslips did not appear on the relevant Real Time Information (**"RTI"**) returns to HMRC. There is no good reason for accurate, or at least broadly accurate information, not appearing on the RTI returns.

46. Fifth, HMRC's detailed analysis of its RTI system for declarations of PAYE / NIC made by the Company, ELHR and BCUK shows that, from October 2017 to March 2023, the total combined taxable pay is £1,224,416.84 as compared to £8,309,056.99 in fact paid to workers through the various identified bank accounts. This leads to an under-declaration calculation of £3,619,253.55, namely, the Tax Liability.

47. Sixth, the labour supply business operated by the Company should have been simple. It received monies from recruitment agencies for the workers it supplied. It was entitled to deduct its fee and was required to pay over to HMRC the applicable PAYE / NIC and VAT. The balance was due to the worker. When the Company went into provisional liquidation it had large liabilities to HMRC and no material assets. It is submitted with force that such a massive failure is only consistent with the operation of a fraudulent scheme to evade the payment of tax, including the dissipation of monies that would otherwise have been available to discharge the Company's liabilities to HMRC.

48. Seventh, whilst the Company's use of bank accounts held by ELHR and BCUK is not something that I am prepared on a summary basis was an intrinsic part of the fraud, it is evident that the activity in the Accounts used by the Company is complex. The intermingling of other business interests and the scale of transactions without a proper reconciliation, coupled with the absence of the provision of accurate information to HMRC via the RTI and/or VAT returns, is consistent with a fraudulent scheme and obfuscation designed to try to hide it.

The Applicants' response

49. As already indicated, the Applicants' response is limited and generally lacking in detail. Although they have acted without legal representation, D1 is an apparently experienced businessman and has accountancy qualifications. He struck me as being an intelligent and articulate person. The following points arise.

50. First, the Applicants' main point in relation to VAT was that AIGG's registration was intended to be on behalf of a group which included the Claimant. I have already set out above my analysis of that issue. The Applicants' case as to this is incredible and fanciful.

51. Second, the Applicants relied on the fact that the VAT returns submitted by AIGG did, as a matter of fact, relate to the Company's business. As the Company was not registered for VAT, as a matter of law, those VAT returns do not affect the VAT Assessment. Insofar as the submission of returns was relied upon as showing an honest intention to account to HMRC for VAT properly due (and hence to undermine the case that there was a fraudulent scheme) that has no merit. Even allowing for unrealistically high levels of credit for input tax, as already set out above, the VAT returns contained an under-declaration of £738,545.25.

52. Third, given the evidence, D1 did not dispute that there were many instances of the Company paying workers on a gross basis, i.e. without deduction of PAYE / NIC. His explanations for this were at times difficult to follow, but his essential argument was that this was done (i) by

agreement with the workers (said to be recorded in WhatsApp chats on his mobile telephone that is in the possession of the Company) and (ii) in accordance with the assignments from the recruitment agencies which stated whether or not the engagement fell outside IR35.

53. Even assuming point (i) to be correct as a matter of fact, that is not an answer to the lawfulness of paying the workers on a gross basis. That is a matter between, on one hand, the Company and on the other, the recruitment agencies (according to their contracts) and HMRC (according to tax law). As Mr Brockman pointed out, it is entirely consistent with a fraudulent scheme for the Company to agree gross payments with workers and thereby encourage more business. This in turn generates more fees and tax, which is then not accounted for.

54. In relation to point (ii), the very purpose of the Company employing of workers (and paying all applicable taxes) was to ensure that IR35 did not apply. Further, the suggestion of something different by reference to "assignments" was flatly contradicted by the representative examples of ID Medical Group Ltd and Your World Recruitment Group. Upon the hearing being adjourned overnight, I invited D1 to draw to my attention the next day to any contractual terms or other documents that showed a different position to those examples. He was unable to do so. D1 did take me to a contract with Arcadia Healthcare which provided for the Company to pay "*any applicable*" PAYE / NIC (§5.4) and suggested this did not require deductions. But §8.2 of the same contract provided that the worker was the "employee" of the Company. Subject to the tax thresholds applicable to the particular employee (which is why the Company was provided with their tax codes, as shown on the payslips), the Company was required as a matter of tax law to deduct PAYE / NIC.

55. Fourth, D1 was not able to advance any coherent explanation for incoherent and inaccurate information as set out in paragraph 45 above.

56. Fifth, although I accept D1's submission that the various Accounts do appear to show credits and debits relating to other businesses as well as other transactions that could be the subject of detailed consideration at trial, that does not affect my decision as to the existence of a fraudulent scheme. They are matters going only to relief (see further below).

Conclusion

57. Taking into account all the evidence before me and making due allowance for further evidence that could reasonably be expected to be presented at trial, I am satisfied that the Applicants have no real prospect of defending the claim that Company was used as a vehicle for the fraudulent evasion of VAT and PAYE / NIC during the period from 1st May 2017 until it went into provisional liquidation.

The specific claims

D1: liability

58. It is pleaded that D1 was subject to the duties in sections 171 to 175, Companies Act 2006 (**"CA 2006"**). In his oral submissions, Mr Brockman made it clear that the Company relied on fraudulent breach of duty and did not seek to advance alternative arguments based on the interests of creditors having intervened at a particular point (c.f. *BTI 2014 LLC v Sequana SA* [2022] UKSC 25, [2022] 3 WLR 709) or negligence (c.f. s.174, *CA 2006*).

59. It is sufficient to focus on the core fiduciary duty contained in s.172, *CA 2006*. This requires a director to act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole and in doing so, to have

regard to the specified matters. The duty is ordinarily regarded as subjective, but that test only applies where there is evidence of actual consideration of the best interests of the company. Where there is no such evidence, the proper test is objective – whether an intelligent and honest man in the position of a director could, in the circumstances, have believed that the transaction was for the benefit of the company: *Regentcrest plc (in liquidation) v Cohen* [2021] 2 BCLC 80 at [120]; *Re HLC Environmental Projects Limited* [2013] EWHC 2876 (Ch), [2014] BCC 337 at [92].

60. If, as I have found, the Company operated the fraudulent scheme then that must have been brought about by D1 as its director. It is obvious that causing the Company to enter into a fraudulent scheme to evade tax cannot promote its success for the benefit of its members. Insofar as necessary, it would also be in disregard of (i) the likely consequences of that decision in the long term, (ii) the need to foster the Company's business relationships with suppliers, customers and others and (iii) the desirability of the Company maintaining a reputation for high standards of business conduct.

61. There is no evidence that D1 ever actually considered the best interests of the Company and so the objective test would apply. Even if the court were to apply the subjective test, D1 cannot have believed that this scheme was for the benefit of the Company.

62. Although not raised by D1, I have considered the fact that the shareholding in the Company appears to have been held by him or companies under his control – see paras 14 to 17 of the Brittain Affidavit. It might therefore be argued that, absent any reliance on the interests of creditors having intervened, there was informal membership approval of what the Company was doing under the *Duomatic* principle. In my judgment, there is a simple answer to this: that principle does not apply to conduct of a fraudulent character – see *Company Directors: Duties, Liabilities and Remedies* (4th ed, Mortimer) at 20.62 to 20.68. It is not necessary to explore the precise limits of that principle, which clearly applies to this form of conduct.

63. I therefore find that there is no real prospect of D1 successfully defending the claim for breach of his director's duties.

D1: relief

64. Excluding interest and court fees, the Default Judgment against D1 was based on the capital sum of £8,055,660. Mr Brockman explained that this was equitable compensation calculated by reference to (i) the sum of £6,958,682.07 paid into the ELHR Accounts from recruitment agencies which had contracted with the Company, plus (ii) the sum of £1,096,978 which D1 received personally from the Company.

65. In *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503 at [116], Lord Reed referred to the "*orthodox view that equitable obligation arising from a breach of trust affecting the trust fund is to restore the fund to the position it would have been in but for the breach, and that the measure of compensation, whether it is payable into the trust fund or directly to the beneficiary, should be assessed on that basis*".

66. During the course of Mr Brockman's submissions, I raised with him certain difficulties thereby arising with the calculation of the amount of the Default Judgment against D1. In particular, it is apparent from the summary of the transactions passing through the ELHR Accounts that, although it did indeed receive the £6.9m odd from recruitment agencies, it also paid out at least £3.7m to workers. Even if many of these payments improperly included

PAYE / NIC that should have been deducted, that would still leave substantial net payments to which the workers were properly entitled in any event. D1 submitted, and I accept that it is entirely possible on a detailed review of the evidence at trial, that there were other payments out that could be regarded as legitimate payments on behalf of the Company. If one reasonably treats the ELHR Accounts as having been operated on behalf of the Company, I can see no reason why credit should not be given for such payments. To order otherwise would go beyond restoring the fund to what should have been there "but for" the breach of duty.

67. Indeed, at a more fundamental level, I am not prepared to find on a summary basis that directing payment from the recruitment agencies to the ELHR Accounts was, of itself, a breach of duty on the part of D1, i.e. a necessary part of the fraudulent scheme. I have set out above the explanation for the use of the ELHR Accounts. It likely follows that (i) ELHR was always intended to hold those monies as nominee or bare trustee for the Company and (ii) whether or not D1 was in breach of his duty to the Company should probably be assessed by reference to the propriety of how those monies were subsequently applied.

68. In my judgment, the appropriate way to deal with these issues would be to vary the judgment to one on liability only and to direct an assessment of damages. As I indicated to Mr Brockman, I would be willing to accompany that order with one for an interim payment pursuant to *CPR 25.7(1)(b)* at a level to be the subject of further argument.

69. In light of these indications, Mr Brockman advanced an alternative approach to assessment, which was by reference to the total of the VAT Assessment and the Tax Liability, i.e. £5,667,050.55. Leaving aside some minor differences in the figures, that claim is pleaded in the PoC at paras 81 and 83.1. Mr Brockman said that if the judgment against D1 was varied to that lower sum (plus interest and costs), the Company would not seek to pursue its claim further against him. He finds support for such an approach to the assessment of equitable compensation in the decision of HHJ Johns KC in *Mercy Global Consul Ltd v Adegbuyi-Jackson* [2023] EWHC 3203 (Ch) at [40].

70. In my judgment, there is no real prospect that a court would find the Company's liability to HMRC to be less than the sum of £5,667,050.55. As already noted, the VAT Assessment is binding on the Company. The Tax Liability was initially said to represent HMRC's "*best judgement estimation*", taking into account all the PAYE / NIC paid by the Company, ELHR and BCUK. Siddle 1 stated at para 171 that it will be pursued by HMRC "*once brought into charge by way of formal determination*". The Tax Liability now forms part of the pleaded claim. Siddle 2 confirms the same figures and refers to Determinations and Section 8 Notices issues by HMRC, which have not been appealed.

71. However, it seems to me that the incurring of that liability did not, of itself, cause the Company loss. It was part of a series of transactions that involved it receiving equivalent assets in the form of payments from the employment agencies. In my judgment, the necessary other side of the coin is that the Company diverted or dissipated an equivalent level of cash so that it did not have the assets to meet that liability. It is not possible on the evidence before me to determine precisely when and how that happened. However, it seems to me that (i) this must have happened during the relevant period (D1 at all times being a director) and (ii) it was an inevitable feature of the fraudulent scheme that this would be the case. To put it another way, as a result of the intended operation of the fraudulent scheme, the Company has

suffered loss in the amount for which it is liable to HMRC (and in respect of which it has no matching assets).

72. In those circumstances, in my judgment it is correct to vary the Default Judgment to the sum of £5,667,050.55 plus interest and court fees.

ELHR

73. The claim against ELHR is for dishonest assistance and/or knowing receipt.

Dishonest assistance: liability

74. The ingredients of the former were set out by Cockerill J in *FM Marino Capital Partners Limited v Marino & Co* [2018] EWHC 1768 (Comm) at [82]. They are:
    i) A trust or fiduciary obligation owed by the trustee / fiduciary to the claimant;
    ii) A breach by the trustee / fiduciary;
    iii) The breach by the trustee / fiduciary need not be dishonest because the liability of the third party is fault-based, what matters is the nature of their fault;
    iv) The third party must have assisted in, induced or procured the breach. It is necessary to show that the relevant assistance played more than a minimal role in the breach, but there is no requirement to show that the assistance provided would inevitably have resulted in the beneficiary suffering a loss;
    v) The third party must have acted dishonestly in providing the assistance as set out in *Ivey v Genting Casinos (UK) t/a Crockford* [2017] UKSC 67, [2018] AC 391 at [74].

75. I have already addressed i) and ii) above. It is obvious that ELHR provided material assistance in relation to D1's breach of duty by allowing its bank accounts to be used in furtherance of the fraudulent scheme: crucially, by the diversion or dissipation from them of sums paid by way of VAT and/or from which PAYE / NIC was required to be deducted. Given D1's central role in that scheme and the attribution of his knowledge to ELHR, it follows that ELHR must also have acted dishonestly in providing that assistance.

76. I therefore find that there is no real prospect of ELHR successfully defending the claim for dishonest assistance.

Dishonest assistance: relief

77. ELHR is therefore liable to compensate the Company for the losses resulting from D1's breach of duty. Compensation is not limited to the loss caused by its assistance, but extends to the loss resulting from the relevant breaches of fiduciary duty. It is inappropriate to become involved in attempts to assess the precise causative significance of the dishonest assistance in respect of either the breach of duty or the resulting loss: *FM Capital Partners* at [84]-[85].

78. Excluding interest, the Default Judgment against ELHR was based on the capital sum of £7,430,328. Mr Brockman explained that this was equitable compensation calculated by reference to (i) the sum of £6,958,682.07 paid into ELHR from recruitment agencies which had contracted with the Company, plus (ii) the net sum of £471,646 which ELHR received directly from the Company.

79. For reasons already explained in relation to D1, it would not be appropriate for me to allow judgment to stand in that sum. Mr Brockman again sought the alternative sum of £5,667,050.55. Whilst compensation is not limited to the loss caused by the assistance, it does need to be loss resulting from the relevant breaches of fiduciary duty. ELHR has a real

prospect of establishing that it did not provide any assistance to the Company until it allowed it to use its bank accounts. That point in time is not clear on the evidence before me, but it was certainly no later than January 2020 and may well have been during 2019 – see the redacted statement bearing the Company's name at page 1088 of Bundle A.

80. In my judgment, ELHR therefore has a real prospect of establishing that it is only liable for loss resulting from D1's breaches of fiduciary duty from the point in time when it allowed the Company to use its bank accounts (which remains to be established on the evidence). Certainly by 2019 / 2020, the Company had already incurred substantial (unpaid) tax liabilities to HMRC. It seems likely, if not to say inevitable, that by then there had already been diversion and dissipation of assets and that *may* already have left the Company without the assets to meet the pre-assistance liabilities. In those circumstances, I do not consider that it would be appropriate to vary the Default Judgment to the alternative sum sought by Mr Brockman. Rather, the level of compensation resulting from the relevant breaches of duty (i.e. those after ELHR started providing assistance) needs to be the subject of an assessment.

81. I am also willing to accompany that order with one for an interim payment pursuant to *CPR 25.7(1)(b)* at a level to be subject to further argument. My provisional view is that it would be appropriate to order an interim payment at the level of the VAT and PAYE / NIC liabilities incurred by the Company after January 2020 as I can be satisfied that the assessment will result in at least such an award: *Umbrella Care Ltd v Nisa* [2022] EWHC 86 (Ch) at [115].

Knowing receipt

82. The ingredients of knowing receipt were also set out by the Judge in *FM Capital* at [89]:
    i) The claimant 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 claimant and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty;
    ii) Unlike dishonest assistance, dishonesty, even in the objective sense need not be shown. The critical question is whether the defendant had such knowledge as to render it unconscionable for him to retain the benefit of the receipt;
    iii) The defendant's liability is restitutionary, thus he remains liable even if he dissipated the original property.

83. For the reasons already set out above, I am satisfied that ELHR has a real prospect of defending claims which are based on the mere receipt of monies into the ELHR Accounts. That covers the £6,958,682.07 paid into ELHR from recruitment agencies which had contracted with the Company. It is unclear to me from the evidence as to when and in what circumstances the additionally claimed sum net sum of £471,646 was received by ELHR and whether all or part of it was subsequently properly applied for the benefit of the Company. These are matters that should, if pursued, be properly investigated at a trial.

84. I am not persuaded that it is appropriate to uphold any part of the Default Judgment against ELHR on the basis of the alternative claim for knowing receipt.

Ms Ezed

85. The claim against Ms Ezed is for dishonest assistance and/or knowing receipt.

Dishonest assistance: liability

86. The claim is pleaded against Ms Ezed firstly in terms that she provided assistance by causing or permitting ELHR to be used as a conduit for the fraudulent scheme. This on the basis that she was a director of that company. As to the evidence regarding that:

i) She was recorded at Companies House as being a director from 7th July 2013, but filed a notice of resignation dated 23rd December 2023 claiming that she had resigned on 1st March 2016;

ii) The Draft Defence states at para 14 that she had no involvement in ELHR since 1st March 2016 and "*resignation was an accidental oversight*", by which it must mean that her failure to resign at an earlier point in time was an oversight;

iii) However, ELHR's accounts for 2017 (signed on 21st August 2018) and 2018 (signed 29th August 2019) are both electronically signed by Ms Ezed. Further, ELHR's accounts for 2019, 2020 and 2021 all state that she was a director;

iv) The Draft Defence states at para 16 that these "*would have been auto added as the resignation was not filed until afterwards*";

v) In my judgment, in light of the contemporaneous evidence and Ms Ezed's failure to provide any proper explanation for events, she has no real prospect of establishing that she was not a director of ELHR until 23rd December 2023. There is no evidence that she in fact resigned at an earlier date: on the contrary. The fact that the purported retrospective resignation came after the appointment of provisional liquidators and the Company obtained injunctions, including against Ms Ezed, is highly unlikely to be coincidental.

87. Whether a person assists in a breach of trust / fiduciary duty is a question of fact. It would seem to follow that it would not be a defence to a claim for dishonest assistance for the defendant to rely on the fact that they were acting as an officer of a company (and that only the company could be liable). That was the conclusion of the Privy Council in *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11. As Lord Mance said at [50]:

> *"Acting as an officer of one company, a person may dishonestly procure or assist a breach of duty by the director of another company, in which case such person may make liable for dishonest assistance both himself personally and the company of which he is an officer. Otherwise, individuals acting as officers of a company could never commit any wrong, tortious or equitable. What matters in the present context are, in short, the factual questions whether the respondents procured or assisted Mr Taylor's breaches of duty, what knowledge they had when giving such assistance, and whether any honest person(s) in their position giving such assistance with that knowledge could have believed that the relevant transaction was in IAMF's interests."*

88. In light of the above, I consider that Ms Ezed has no real prospect of defending this aspect of the pleaded claim against her. She was a director of ELHR as well as D1's wife. She has given no explanation that could exculpate her from liability as pleaded.

89. The claim is also pleaded against Ms Ezed in terms that she personally received money from the Company (£80,092), ELHR (net sum of £164,711) and BCUK (£10,000) as part of the fraudulent scheme. Although they constitute receipts, a defendant may be concurrently liable for both dishonest assistance and knowing receipt. This will be so, for example, where the receipt of trust assets by the defendant is part of a dishonest plan between the trustee and the defendant: *Byers v Saudi National Bank* [2023] UKSC 51, [2024] 2 WLR 237 at [150]. The position may be different where there is merely passive receipt: *Brown v Bennett* [1999] 1 BCLC 649 at 659.

90. The position with regard to Ms Ezed's receipts is complicated by the fact that there is some evidence that she operated an agency called "Principal Choice Services" and D1 submitted that the payments to her related to that. The ELHR Accounts do separately record payments in (£189,247.01) and out (£213,679.30) to Principal Choice Services. However, the very fact that these were separately recorded calls for a proper explanation as to why Ms Ezed was also receiving substantial payments in her own name.

91. D1, as a director of the Company, has the burden of showing that payments out of the Company (particularly to family members) were proper: *GHLM Trading Ltd v Maroo* [2012] EWHC 61 (Ch), [2012] 2 BCLC 369 at [149]. In my judgment, he has manifestly failed to do so. Further, Ms Ezed has not provided any exculpatory evidence. The "high point" is the Draft Defence at para 18 which states that over 80% of the payments to Ms Ezed were used for "*the claimant's group of companies operations*". Whilst I have given the Applicants the benefit of the doubt as to the use of accounts held by ELHR and BCUK, there is no reason why money should have been paid to Ms Ezed for onward use on behalf of the Company. Further (i) there is a complete absence of evidence of how Ms Ezed applied the monies from her own accounts and (ii) in any event, this amounts to an admission that she used some of the monies for her own purposes (without any basis being identified for her entitlement to do so).

92. I am therefore satisfied that Ms Ezed has no real prospect of defending the dishonest assistance claim on the basis that at least some of the payments were made to her by the Company, ELHR and BCUL pursuant to fraudulent scheme.

Dishonest assistance: relief

93. In my judgment, as with ELHR, the Default Judgment against Ms Ezed should be varied to one of liability only. I am likewise willing to accompany that order with one for an interim payment at a level to be subject to further argument. Again, my provisional view is that it would be appropriate to order an interim payment at the level of the VAT and PAYE / NIC liabilities incurred by the Company after January 2020.

Knowing receipt

94. It follows from paragraphs 89-92 above that I also find that Ms Ezed has no real prospect of defending the claim for knowing receipt. It seems to me that proper quantification would require an assessment. Whether, in light of my findings above in relation to dishonest assistance and the fact that the knowing receipt claim is likely to be lower in value, the Company would in fact pursue it is something to be considered following the handing down of this judgment.

BCUK

95. The claim against BCUK is for dishonest assistance and/or knowing receipt based on its receipt of the net sum of £778,400 from ELHR, which in turn is alleged to derive from Company monies. In my judgment it is safe to proceed on the basis that this net sum did derive from the recruitment agencies because D1's own explanation for this use of the BCUK's Accounts was to avoid the limits on the operation of other Accounts and thereby facilitate the payment of workers.

96. However, the other side of the coin is that the BCUK Accounts recorded payments out to workers of £780,335.03, i.e. slightly more than the net sum from ELHR. So, it may be argued,

these overall transactions did not amount to breach of duty on the part of D1 and/or did not cause the Company any loss, which is relevant to whether and to what extent BCUK is liable.

97. In my judgment, the short answer to this is that at least some of the payments out to workers must have wrongly included PAYE / NIC that should have been deducted. BCUK knew that because of the attribution of knowledge of D1. By knowingly allowing its accounts to be so used for that diversion or dissipation as an intrinsic part of the fraudulent scheme, it is clear that BCUK dishonestly assisted in the breaches of duty. I note that although BCUK paid £30,620.83 to HMRC it was a net recipient of over £148,000 from the latter.

98. BCUK must also have knowingly received at least the amounts of the PAYE / NIC that should already have been deducted and paid to HMRC. Whilst I can see a reasonable argument that it was a knowing recipient of the entire net sum of £778,400 (the only purpose in it receiving the money being to distribute to workers as part of the fraudulent scheme), I consider it would be going too far to conclude that on a summary basis.

99. Returning to dishonest assistance, as BCUK received Company monies from ELHR it must have assisted for a similar time period to the latter. I have indicated above my provisional view as to minimum amount for which ELHR should be liable. It could therefore have been argued that BCUK was liable in the same amount. As noted, it is inappropriate to become involved in attempts to assess the precise causative significance of the dishonest assistance in respect of either the breach of duty or the resulting loss. Providing that the sum of £778,400 is not more than the calculation of that minimum amount, it provisionally seems to me that BCUK has no real prospect of being found to be liable for less.

100. In light of these provisos, I shall deal with the precise form of relief against BCUK following the handing down of this judgment and upon hearing further submissions.

Conclusion

101. The Application to set aside the Default Judgments is refused on the basis that the Applicants do not have a real prospect of defending the claims on liability. I can also see no other good reason why they should be set aside, or the Applicants should be allowed to defend the claims. However, in respect of D1, ELHR and Ms Ezed, the Default Judgments should be varied as indicated above. Whether or not the Default Judgment against BCUK should be varied requires further consideration.

102. There will need to be a consequential hearing to deal with matters arising from this judgment and that will take place immediately following handing down.