

Case No: BL-2019-BHM-000071  
Neutral Citation Number: [2020] EWHC 3276 (Ch)

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

Priory Courts  
33 Bull Street  
Birmingham B4 6DS

Thursday, 15 October 2020

BEFORE:

**DISTRICT JUDGE KELLY**

BETWEEN:

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**HENDERSON & JONES LIMITED**

Claimant

- and -

**GARRY PATRICK PRICE**

Defendant

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**MR M BROWN** appeared on behalf of the Claimant

**MR G PRICE** appeared in person

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**JUDGMENT**  
(Approved)  
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THE DISTRICT JUDGE:

1. This is the hearing of a claim by which the claimant seeks the sum of £130,296.10. That sum is said to arise as a result of the defendant's director's loan account, which was overdrawn at the date of the liquidation of Hunnyhill Electrical Limited.
2. The claimant is represented by Mr Brown of counsel. The defendant appears in person but is assisted by his McKenzie friend, Mr Cruise. I have helpful skeleton arguments from both parties and a significant bundle of authorities from Mr Brown.

**BACKGROUND**

3. Hunnyhill Electrical Limited was formed on 26 November 1999. The defendant was initially the sole shareholder. The defendant was a director of the company between 1999 and 2012. He was the sole director between 29 November 1999 and 30 November 2006, and again sole director between 24 December 2009 and 31 December 2011.
4. In June 2012, Hunnyhill Electrical Limited received a substantial demand from HMRC as a result of the way that the company had been treating its workers as self-employed contractors. On 13 December 2012, the company entered into creditors' voluntary liquidation.
5. Throughout its period of operation, Hunnyhill Electrical Limited used QuickBooks accounting software. As at the date of liquidation, a ledger in the QuickBooks software titled, "Director's loan" showed a debit balance of £131,388.07. There had been regular withdrawals from the ledger since 1 October 2010.
6. On 3 June 2015, the liquidator's solicitor served a written demand on the defendant for repayment of the £131,388.07. The defendant did not accept that anything was due and instructed Neil Davies and Partners Solicitors to act on his behalf. Neil Davies and Partners responded in July 2015 denying that the defendant was liable for any sum.
7. On 13 September 2018, the claimant (who is a company that purchases legal claims) took an assignment of "all debts, actions, claims, rights, demands and set-offs" that Hunnyhill Electrical Limited has against the defendant. The validity of that assignment has been put in issue and I will return to that issue in due course. A notice of assignment, dated 9 November 2018, followed the deed.
8. On 7 June 2019, the claimant issued this claim seeking the sum of £130,269.10. The sum sought is a slight reduction from the figure of £131,388.07 that appeared on the ledger at the date of liquidation. The claimant concedes the difference to reflect the defendant having used his home as an office for part of the period.
9. The claimant's case is put on three alternative bases:

- a. The claimant's primary case is that the sum that appears on the ledger amounts to a debt and that the claimant, as assignee, is entitled to repayment.
  - b. Further or alternatively, the defendant's conduct amounted to breach of his statutory and fiduciary duties under the Companies Act 2006 such that damages in the same sum are due.
  - c. Further or alternatively, this is a case of unjust enrichment and the defendant must make restitution in the same sum.
10. On 8 November 2019 the defendant filed a defence to the claim. The defence was professionally drafted by counsel at a time when he still had his solicitors on record. The defence denies the claim and puts limitation in issue. Paragraph 20 of the defence sets out, by way of a number of subparagraphs, the defendant's response to the transactions on the ledger. Those fell to be considered under various categories.
- a. Payments for the benefit of the company including a £10,000 loan repayment to B Price (the brother of the defendant), payment of a deposit for a company car and payments to Tracey O'Garra as full-time payroll manager.
  - b. Reimbursement of certain individual expenses in the sum of approximately £600.
  - c. Payment of sums by way of income and remuneration, although the defence is wholly unparticularised as to what sums are asserted in that regard.
  - d. Entitlement to dividends, again the defence is unparticularised as to what, if any, dividends had been declared.
11. The defendant's solicitors continued to act until the early part of 2020. They appear to have been involved in the disclosure exercise but, by the time witness statements were drafted, the defendant was acting in person.

## ISSUES

12. The issues in this case are as follows:

- (1) Is the claim statute-barred?
- (2) Has there been a valid assignment?
- (3) Did the defendant receive sums of money from the company as recorded in the ledger and, if so, what amount?
- (4) Can the defendant demonstrate he had an entitlement to receive any such sum(s)?

(5) Was the defendant otherwise in breach of director's duties?

(6) Has the defendant otherwise been unjustly enriched?

## THE LAW

13. The claimant brings this case and has to prove the claim on the balance of probabilities. However, there is a shift of evidential burden if the claimant can establish that the relevant payments were made to the defendant in his capacity as a director.
14. The claimant relies upon the case of *Re Idessa (UK) Limited* [2011] EWHC 804, where Lesley Anderson QC addressed the burden of proof as follows:

"I am satisfied that, whether it is to be viewed strictly as a shifting of the evidential burden or simply an exchange of the well-settled principle that a fiduciary is obliged to account for his dealings with the trust estate, that Mr Aslett is correct to say that, once the liquidator proves the relevant payment has been made, the evidential burden is on the respondents to explain the transactions in question. Depending upon the other evidence, it may be that the absence of a satisfactory explanation drives the court to conclude that there was no proper justification for the payment. However, it seems to me to be a step too far for Mr Aslett to say that, absent such an explanation, in all cases, the default position is liability for the respondent directors. In some cases, despite the absence of an adequate explanation, it may be clear from other evidence that the payment was one which was made in good faith and for proper company purposes."

15. The case of *Re Mumtaz Properties Limited* [2011] EWCA Civ 610 considers the status of a ledger in the context of a case of this nature. In that case the company had been using an electronic Sage ledger described as a director's loan account. Arden LJ, at paragraph 17, stated as follows:

"... it was not open to the respondents to the proceedings in the circumstances of this case to escape liability by asserting that, if the books and papers or other evidence had been available, they would have shown that they were not liable in the amount claimed by the liquidator. Moreover, persons who have conducted the affairs of limited companies with a high degree of informality, as in this case, cannot seek to avoid liability or to be judged by some lower standard than that which applies to other directors simply because the necessary documentation is not available..."

16. Arden LJ continued at paragraph 57:

"In my judgment, he (*the judge*) was entitled to find, in the absence of evidence as to how and why the entry had been made, that it was what it appeared to be, namely a debit entry duly made and increasing Munir's liability on his director's loan account. Munir produced no evidence showing how the entry had come about and provided no explanation for the absence of such evidence. The judge was entitled to infer that he could have made enquiries about this entry if there was any evidence or explanation that would support his case."

17. The case of *GHLM Trading v Maroo* [2012] EWHC 61, considered by Newey J (as he then was), agreed with the proposition that the evidential burden shifted to the director to justify entitlement to sums of money appearing on the director's loan account. He said as follows:

"... once it is shown that a company director has received company money, it is for him to show that the payment was proper. In a similar way, it seems to me that, where debit entries have correctly been made to a director's loan account, it must be incumbent on the director to justify credit entries on the account."

18. The theme is continued in *Toone & Murphy v Robbins* [2018] EWHC 569 where Norris J said:

"... the mere fact that some lawful payment could be made and that this particular payment was made does not mean that this particular payment was lawful."

The case is of further relevance to the facts of the matter before me today in so far as Norris J went on to hold, at paragraph 40, that section 1157 of the Companies Act 2006 does not allow relief to be granted to a director to enable him to escape liability in respect of sums received by him.

19. The claimant further relies on *Re The Sky Wheels Group of Companies Limited* [2020] EWHC 1112, in which Snowden J, said as follows:

"49 ... It is frequently the case in small private companies that persons who are both directors and shareholders are paid only a relatively modest amount of remuneration for their work through the PAYE system. They then enter into an informal agreement or arrangement between themselves to draw sums of money from the company periodically during the year. Those sums are then debited to the directors' loan accounts in the expectation that, at the end of the year, the company will be in a position to declare a dividend. The intention is that the resultant debt created by the declaration of dividend (of the company to the shareholders) will be set off against the indebtedness of the directors on their loan accounts. Under such an arrangement, the periodic drawings are

not declared as remuneration for the purposes of PAYE and NIC. Instead, the directors and shareholders benefit from the more favourable tax treatment accorded to dividend payments.

50. In light of the manner in which such arrangements are presented to HMRC, in general terms, I do not consider that such periodic drawings can simply be re-characterised as remuneration as and when it might suit one of the recipients so to contend. Or at least that cannot be done without acknowledging that the manner in which they had previously been disclosed to HMRC had been incorrect, with all the consequences in terms of the payment of additional tax, interest and penalties that this might entail."

20. Both parties seek to rely on the *Duomatic* principle. *Re Duomatic Limited* [1969] 2 Ch 365 supports the proposition that, where all shareholders assent to some matter which at a general meeting could have been carried into effect, the agreement is nonetheless as binding as if it had been made by resolution. The defendant's position is that, given that he was the sole shareholder for large periods of time, he could decide to grant himself dividends and remuneration informally because the *Duomatic* principle ensures those decisions were as binding as if made by resolution. The claimant submits that there are limitations to the *Duomatic* principle relevant to this case. The claimant submits, firstly, that the defendant had to actually apply his mind and make the decision upon which he now seeks to rely. The need for actual application of mind is supported in *Re PV Solar Solutions Limited* [2017] EWHC 3228. Secondly, the claimant submits, the defendant cannot seek to rely on the *Duomatic* principle if the company was insolvent or such a decision would have rendered the company insolvent.
21. The claimant further seeks to rely upon *Wisniewski v Central Manchester Health Authority* [1998] EWCA Civ 596 in support of the proposition that it is permissible for the court to draw adverse inferences in certain circumstances. The claimant submits that the absence of evidence before the court from individuals who could have assisted the defendant is telling. In *Wisniewski* Brooke LJ stated:

"(1) In certain circumstances, a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If the court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on the issue.

(4) If the reason for the witness's absence or silence satisfies the court, then no adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his or her absence or silence may be reduced or nullified."

## **THE EVIDENCE**

22. On behalf of the claimant, I have heard evidence from two witnesses, James Stares (the joint liquidator of Hunnyhill Electrical Limited from January 2016) and Philip Henderson (the solicitor and director of the claimant company).
23. Mr Stares confirmed the contents of his witness statement dated 28 July 2020, a document which largely sets out the general background and addresses the explanations given by the defendant in his defence as to the various categories of payments under the ledger. He was cross-examined by the defendant. The thrust of that cross-examination was to the effect that there was a conflict of interest between Mr Stares' role as liquidator and his directorship of JWS Business Recovery. A Mr Bolger is also a director of JWS Business Recovery and had previously been the accountant for Hunnyhill Electrical Ltd. The defendant blames Mr Bolger for any confusion in the financial position of the company and the Quickbooks ledger. The cross-examination as to an alleged conflict of interest was, however, largely irrelevant to the issues that I need to determine.
24. Mr Henderson then gave evidence adopting the contents of his two witness statements dated 7 August 2020 and 5 October 2020. He has no first-hand knowledge of matters arising at the time the ledger was created. His witness statement provides an analysis of the documentation that has been produced through the disclosure exercise. In cross-examination, he agreed that there was no dividend shown on the ledger in respect of a £30,000 dividend which had been declared in 2011. He accepted that no accounts had ever been drawn for 2012.
25. The defendant also gave evidence. He had served two witness statements, dated 3 July 2020 and 3 September 2020. The content of those statements is identical save that the second in time has the updated wording for the statement of truth. The contents of the defendant's witness statements are surprising because they do not address the issues pleaded in the defence and, in particular the explanations given as to different classes of entry on the ledger. The defendant proffers a different case in his witness statement, namely that in around March 2012, a dividend had been declared by the defendant in the sum of £40,000 and, in August 2012, a further dividend of £75,000. Those were not matters which had been addressed in the pleaded defence or foreshadowed in any correspondence either pre- or post-action or addressed in the disclosure exercise.
26. I will return to the detail of the defendant's evidence in due course but a striking feature that arose from the cross-examination of the defendant was his degree of confusion as to the financial affairs of the company. It became apparent that the defendant was involved in a number of limited companies at the material time and that there was very little formality as to how the financial affairs of the company were conducted. At one

point of his evidence, the defendant stated that the £75,000 dividend in August 2012 may in fact have been in relation to a wholly different limited company. Later in his evidence, he said that the dividend in August may have been attributable to Hunnyhill Electrical Limited as to £37,000 but the remaining balance was a dividend from a different limited company, Spotless Cleaning Limited. Yet later in his evidence he sought to justify the debit balance of the ledger by reference to a dividend of £30,000 in 2011, £25,000 in 2012 and a further £35,000 or £37,000 later in 2012, plus wages that were due, plus a payment towards a car. What became clear was that his witness statement evidence differed wildly from the case pleaded in the defence. Furthermore, his oral evidence at times contradicted both his written statement and his pleaded case. The overall picture was that the defendant was unclear in his own mind as to what the financial position was.

**(1) Is the claim is statute-barred?**

27. I firstly consider whether the claim is statute-barred pursuant to the Limitation Act 1980. Paragraph 31 of the defence states that the claims are time-barred on the basis that the transactions all occurred on or before 28 September 2012, yet this claim was not issued until 7 June 2019, nearly seven years later. The defendant's skeleton argument did not expand upon the legal framework which supports his assertion that the claim is statute-barred but in his closing submissions, the defendant addressed the point to some extent.
28. The claimant's primary case is that the defendant has received money via a director's loan account and that that constitutes a loan repayable on demand. By section 5 of the Limitation Act 1980, an action on simple contract has a limitation period of six years from the date on which the action accrued. Section 5 has to be read in conjunction with section 6(2), which states:

"This section applies to any contract of loan which—

(a) does not provide for repayment of the debt on or before a fixed or determinable date; and

(b) does not effectively (whether or not it purports to do so) make the obligation to repay the debt conditional on a demand for repayment made by or on behalf of the creditor or on any other matter ..."

29. In my judgment the claimant's primary case amounts to a debt repayable on demand. There is no evidence of any provision that fixed or otherwise determined the date for repayment or made repayment conditional on a demand. Pursuant to section 6(3) of the 1980 Act, time does not begin to run until the day on which a demand was made. On the claimant's case, the written demand from the liquidators did not come until 3 June 2015. As such, the claim was issued within the six-year limitation period. Such an approach to limitation was approved in the first instance decision of *Re Mumtaz Properties Limited*, to which I have already referred.



30. In the alternative, the claimant asserts that the defendant acted in breach of his duties as a director and trustee of the company's money. By section 21(1)(b) of the Limitation Act 1980, there is no period of limitation in relation to an action by a beneficiary under a trust to recover trust property. The case of *Burnden Holdings (UK) Limited v Fielding* [2018] UKSC 14 confirmed (at paragraph 11) that company directors who have participated in misappropriation are trustees within the meaning of section 21(1)(b). Thus, the claimant's alternative basis of claim is also within time. It therefore follows that I am persuaded that the claim was brought within time and is not statute-barred.

**(2) Has there has been a valid assignment?**

31. Paragraph 4 of the defence puts the claimant to proof that there had been a valid assignment. The question of assignment is not addressed in the defendant's skeleton argument. It appears that, prior to the issue of proceedings, there was correspondence between the parties' solicitors wherein the defendant's solicitor asserted that the liquidator should have extended the offer of the sale beyond the claimant. That is not an issue which is pleaded or which has been pursued during the trial.
32. The deed of assignment before the court is dated 13 September 2018. Clause 2.1 of the deed assigns to the claimant absolutely "all rights, title, interest, from time to time in advance of the assigned claims". Clause 1.1 defines the "assigned claims" as "all debts, actions, claims, rights, demands and set-offs" that the company has against the defendant in respect of the director's loan account. "The defendant" is further defined as this defendant. Notice of assignment was given on 9 November 2018. There is nothing more before me to suggest that the assignment was invalid. I therefore conclude that the claimant is entitled to rely upon it so to have locus as to bring this claim.

**(3) Did the defendant receive sums of money from the company as recorded in the ledger and, if so, what amount?**

33. It is not in dispute that the company used QuickBooks electronic accountancy software. The defendant provided the liquidator with a copy of the ledger as at the date of liquidation. That printout showed a ledger titled "director's loan" with a negative balance of just over £131,000. There is evidence of the existence of a director's loan account in the year-end accounts for the company for 31 August 2009, 31 August 2010 and 31 August 2011.
34. At various times, the defendant appeared to question the accuracy of the ledger. However, paragraph 10(c)(1) of his defence accepts that the ledger was reconciled on a regular basis against the bank statements. Paragraph 25(h)(1) of the defence furthermore accepts that payments were received by the defendant for remuneration for work and that the defendant spent such money in the ordinary course of events to meet his personal outgoings and expenses. There therefore appears to be an acceptance on the face of the defendant's pleaded case that he did receive some sums of money from the company.

35. The defendant, in his witness statement, makes no denial of receipt of funds from the company. He instead explains that the sums he received were dividends. During cross-examination, the defendant accepted that the ledger reflected money he had received from the company albeit he later went on to clarify that not every payment he had received had been for his own purposes.
36. At no stage has the defendant sought to undertake a line-by-line analysis of the ledger, so as to particularise what sums he accepts receipt of and what sums he disputes. This matter has been pursued since 2015 and it is staggering that the defendant has never undertaken such a process if he wishes to challenge the accuracy of the recorded transactions.
37. As per *Re Mumtaz*, in my judgment the ledger provides the best evidence of the sums of money received by the defendant. The defendant's informality as to how he conducted the financial affairs of the company cannot be used as a means to avoid a finding that, on the balance of probabilities, the ledger does reflect the sums the defendant received. I therefore find as a fact that the defendant received the sums as set out in the ledger.

**(4) Can the defendant demonstrate he had an entitlement to receive any such sum(s)?**

38. Following *Re Idessa (UK) Limited*, the evidential burden of proof switches to the defendant to prove his entitlement to the sums I have found he received.
39. I firstly consider the defendant's pleaded case. Paragraph 20 of the defence seeks to justify his entitlement to the ledger sums as follows:
- a. Payments to B Price (his brother) were made in discharge of a company liability for a £10,000 loan.
  - b. Reimbursement for company expenses on 3 January 2011, 6 February 2011 and 3 March 2011 totalling approximately £600.
  - c. Payments made by the company in relation to a car.
  - d. Unspecified remuneration.
  - e. Unspecified dividends.
  - f. Payments made by the company to Tracey O'Garra, into a joint account which she held with the defendant, for work in her role as a payroll manager.
40. The defendant's witness statement does not address the pleaded case. It instead seeks to raise a new case that a dividend of £40,000 was paid to him in March 2012 and £75,000 in August 2012. As I have already indicated, his case appeared to shift in

cross-examination to concede that there was no dividend payment of £75,000 in August 2012 but one of £37,000.

41. I propose to consider the elements of the defendant's case on entitlement under the headings of remuneration, business expenses and dividends.

#### Remuneration

42. This is not addressed in the defendant's witness statement. It became apparent during cross-examination that the defendant appeared not to be fully aware of the difference between dividends and remuneration. He said he was very much reliant on his accountant to advise him, often retrospectively, as to how to deal with matters.
43. There is no evidence of any members' resolution dealing with the issue of remuneration for the defendant in his capacity as director. The company produced year-end accounts up to and including 31 August 2011. I have before me the accounts for the year-ends 2008, 2009, 2010 and 2011. All of those accounts record that the defendant's remuneration was zero. There were no year-end accounts for August 2012.
44. I am provided with a number of the defendant's tax returns. The tax return for year end 2011 states that the defendant's employment was with the Isle of Wight Council, for which he received no remuneration, and Hunnyhill Limited. Hunnyhill Limited is an entirely separate legal entity to Hunnyhill Electrical Limited. The tax return for year-end 2012 does record a sum of £5,700 remuneration from Hunnyhill Electrical Limited. The tax return for that year also has in support of it an attendance note prepared by the defendant's accountant seemingly in December 2011. The note record that there was an intention for the defendant to receive salary from the company from April 2011 but does not quantify the sum. Taking together the attendance note and the tax return for 2012, it appears that a decision was made that the defendant would receive remuneration of £5,700 for the tax year 2011 to 2012.
45. Bearing in mind the *Duomatic* principle, I am satisfied that the defendant, as sole director and shareholder, made a decision that he would receive £5,700 remuneration for the tax year-end 2012. On the balance of probabilities, in light of the timing of the attendance note, that decision was made at some point during the 2011-12 tax year. As at the year-end April 2012, there is no evidence the company was insolvent as the HMRC demand had not yet arrived and the company was well able to pay the modest sum of £5,700. I come to that conclusion notwithstanding that the matter was not properly particularised in the defence and not addressed in the defendant's witness statement. The position was nonetheless clear from the defendant's oral evidence. Therefore, I find that the defendant can demonstrate an entitlement to the limited sum of £5,700.

### Business expenses

46. There are various aspects to the “business expenses” line of argument.
47. The low-level expenses on the three occasions totalling circa £600 have not been evidenced at all by the defendant. They are not addressed in his witness statement or in his oral evidence and there is no relevant documentary evidence before me. Bearing in mind where the evidential burden lies, I am not persuaded that the defendant can prove an entitlement to these sums.
48. I turn to the payments to B Price, the defendant's brother. The defendant came very close in his closing submission to conceding that he had not put sufficient evidence before the court in respect of this issue. Mr Price has not provided a witness statement. There has been no disclosure in relation to these payments. The defendant's witness statement fails to address this issue. In those circumstances, the defendant comes woefully short of establishing that he had any entitlement to those monies.
49. The next alleged business expense relates to a payment of some £13,000 in relation to the purchase of a vehicle. Again, this issue is not addressed in the defendant's witness statement. A copy of the V5 registration document for the vehicle in question appears in the bundle. The V5 reveals that the registered keeper of the vehicle is Spotless Hotel Cleaning Limited. Spotless Hotel Cleaning is another legal entity which the defendant was involved in. The V5 further details that the previous registered keeper was Hunnyhill Limited, again another entity with which the defendant was involved. There is however no evidence of any link between the vehicle, the V5 and Hunnyhill Electrical Limited. Thus, there is simply no evidence before me that that payment was made for the benefit of the company such that the defendant can prove he was entitled the sum.
50. I turn to the question of Ms O'Garra. The defendant's pleaded case is that Ms O'Garra received substantial sums of money (£57,000) for her work as payroll manager but that this sum was reflected as a debit in the director's loan account ledger. Ms O'Garra has not been called to give any evidence despite being the partner of the defendant. It is curious that she has not prepared a witness statement or attended the trial to support that which the defendant asserts.
51. The defendant's position is not supported by Ms O'Garra's tax return for the year ending April 2012. This is the very time when she is said she was entitled to receive remuneration for her work as payroll manager. The tax return states she was employed by Kew Green Hotels (Portsmouth) Limited and also in receipt of Jobseeker's Allowance. There is no suggestion whatsoever that she was working for Hunnyhill Electrical Limited.
52. There is some confusion as to whether Ms O'Garra was a shareholder of Hunnyhill Electrical Limited. The pleaded defence accepts that the defendant was the sole shareholder. However, in giving evidence the defendant stated that Ms O'Garra became a shareholder in the company. There is no evidence before the court of any stock transfer. In any event, even if Ms O'Garra had become a shareholder, such status

would be immaterial to the pleaded case that she was receiving money in her capacity as an employee. Again, bearing in mind where the evidential burden lies, I am not persuaded that the defendant can establish that he had any entitlement to receive money on the ground that it was discharging a business expense arising from the employment of Ms O'Garra.

### Dividends

53. The first question to determine is whether any relevant dividends were declared and then paid. As will already be apparent, the defendant's case on this issue has been a moveable feast and it has been difficult to keep up with his conflicting accounts. The defendant's witness statement states that dividends were declared of £40,000 in March 2012 and £75,000 in August 2012. It is staggering that these large dividends had not been pleaded in the defence, despite the defendant having solicitors and counsel instructed. Indeed the same solicitors had been acting for nearly five years during which time there was no mention of the two alleged dividend payments.
54. There is simply no credible evidence before the court that dividends of either £40,000 or £75,000 were declared during the course of the financial year ending August 2012. I have before me a letter dated 4 March 2015 from the defendant's accountancy agent to HMRC referring to dividends being paid of £21,250 for Hunnyhill Limited and Hunnyhill Electrical Limited. The letter is wholly unclear as to what tax year is being referred to and how the sum was distributed between the two entities. The position is further complicated by the defendant's tax return for April 2012. The return refers to a dividend of £25,000 but does not say which company he received it from. The tax return is, of course, inconsistent with the defendant's case that a dividend of £40,000 was declared in March 2012.
55. The defendant submits that the HMRC conclusions in 2017 following an investigation into his tax affairs assists his case. HMRC concluded that the defendant had received dividends of £41,144 to the year-end 2013. That tax year would include any dividend paid in August 2012. After analysis of the defendant's bank statements, HMRC concluded that his income for that year had been just over £76,000 yet he had only declared £35,000 of it. They therefore concluded that in the absence of documents and further information they were driven to the conclusion that the balance of £41,144 must have been dividends. In my judgment, the conclusion reached by HMRC does not assist the defendant in discharging the evidential burden upon him to prove that the dividends he contends for were declared in 2012.
  - a. The documents that the defendant originally submitted in relation to his 2013 tax return are wholly inconsistent with his current case. The fact that he submitted incorrect information undermines his credibility.
  - b. Neither the tax returns or HMRC's conclusion detail which company the dividends were received from. It is apparent that the defendant was involved in a number of limited companies over the relevant time.

- c. HMRC's findings as to the year-end April 2013 do not tally with the defendant's case in his witness statement case that there was a dividend of £75,000 or indeed with his further varied case that there was a dividend of £35,000 or £37,000 in August 2012.
  - d. There were no interim final year accounts. It is notable that the dividends that the defendant now asserts were declared in 2012 are wholly out of line with the company's history of making dividends. The company declared a dividend of £9,000 in 2008, there were no dividends declared in 2009 or 2010 and a dividend of £30,000 in 2011. The suggestion that the company suddenly declared very substantial dividends of £115,000 or even £75,000 or £77,000 is inconsistent with past history.
56. The reality of this case is that the standard of bookkeeping for the company was extremely poor. The defendant conducted the finances in a very informal way. He appears to have been using the company's money as and when he needed it to meet his personal expenditure. I am persuaded that it probably was the defendant's intention, but for the liquidation, to have tried to regularise the position sometime after the end of the tax year. However, the question of declaration of dividends was simply not addressed before the company went into liquidation.
57. Bearing in mind that the evidential burden rests on the defendant to prove his entitlement to dividends, I am not persuaded that any dividend was declared in 2012. Accordingly there was no actual decision made so as to enable the defendant to invoke the *Duomatic* principle. Furthermore, by June 2012 Hunnyhill Electrical Limited was on notice of HMRC's very significant demand. The company initially planned to appeal the decision but thereafter decided not to pursue it. Therefore, even if I had been satisfied that a dividend was declared in August 2012, there can have been no possible justification for doing so taking into account the level of solvency of the company with the unpaid demand.
58. The question of dividends does not end there. The company accounts for the year-end August 2011 show a dividend payment of £30,000. The accounts also show that the amount owed by participating interests was £18,626. The defendant is the only obvious "participating interest." If one takes a £30,000 dividend plus £18,626 owed by participating interests, it totals £48,626. It strikes me as no coincidence that the QuickBooks ledger as at 1 September 2011, being the closest date to the year end, shows a debit balance of just under £43,000. Whilst the figures are not identical, they are similar. The payment of the dividend of £30,000 does not appear anywhere on the ledger. The "participating interest" figure is far too low if the dividend had been paid outside the ledger.
59. The claimant cautions the court from coming to the conclusion that a £30,000 was declared but not recorded on the ledger. The claimant points to a letter from the company's accountant dated 12 November 2014. The letter refers to a dividend of £27,777 on the April 2012 tax return but not one of £30,000. It also states that only £15,000 was attributable to Hunnyhill Electrical Limited. A further £15,000 was said to be attributable to Tracey O'Garra. However, I have already determined that Tracey O'Garra had no shareholding in Hunnyhill Electrical Limited so could not have been

entitled to receive a dividend. On the balance of probabilities, I am satisfied that a £30,000 dividend was declared, as evidenced in the accounts, in favour of the defendant as sole shareholder. Furthermore, given the coincidence in the ledger arithmetic as at 1<sup>st</sup> September 2011, I am satisfied that the £30,000 was not credited to the ledger.

60. In conclusion, I am therefore satisfied that the defendant can establish an entitlement to a £30,000 dividend for year-end August 2011 and £5,700 remuneration. Those sums should be deducted from the debit balance of £130,296.10 leaving the sum of £94,596.10 as to which the defendant has not proved any entitlement.
61. The defendant submits that section 1157 of the Companies Act assists him. Section 1157(1) states:

"If in proceedings for negligence, default, breach of duty or breach of trust against [an officer of a company] it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit."

62. However, applying the principle in *Toone & Murphy v Robbins*, section 1157 is not open to a defendant facing a claim in respect of sums received by him. The claimant's claims in debt or indeed for unjust enrichment cannot therefore be defeated by s.1157. The claimant is entitled, as assignee, to repayment of the debt in the sum of £94,596.10.

**(5) Was the defendant otherwise in breach of director's duties?**

**(6) Has the defendant otherwise been unjustly enriched?**

63. Given my findings on the claimant's primary case in debt, I only propose to deal shortly with the alternative bases of claim. The defendant, as director of Hunnyhill Electrical Limited, was subject to various statutory duties. For example, section 171 of the Companies Act 2006 requires that the company must:

"(a) act in accordance with the company's constitution; and

(b) only exercise powers for the purposes for which they are conferred."

By section 172, a director has to promote the success of the company. By section 174, the director is under a duty to exercise reasonable care, skill and diligence.



64. The difficulty for the defendant is that the financial affairs of the company were conducted in a wholly chaotic way. Even if I had been persuaded to find that dividends had been declared in 2012, there were no accounts to justify a dividend as required by section 836 of the Companies Act 2006. Given the lack of annual accounts for 2012 and indeed any interim accounts, the declaration of a dividend during 2012 would have been unlawful.
65. Furthermore, as I have already explained, any dividend declared after the substantial HMRC demand liability in June 2012 would have been unlawful in that it would have rendered the company insolvent. It must have been obvious to the defendant, notwithstanding his apparent lack of the grasp of the intricacies of director's duties, that to strip the company of its assets in August 2012 when money was owing to HMRC would amount to a breach of duty.
66. Given my finding that there was no dividend declared or remuneration due, save as to the £35,700, it follows that the removal of the balance could not be said to be consistent with duties owed under section 172 and 174. Furthermore, it would not be appropriate on the facts of this case to exercise the court's discretion under section 1157. The money in question was never declared to HMRC as either salary or dividend such that the defendant took the benefit without paying tax to the detriment of creditors in the insolvent liquidation.
67. For the sake of completeness, given my findings that the defendant had no entitlement to the funds save as to the limited extent I have indicated, I would have been persuaded that the claimant's alternative case in unjust enrichment was proved. It is not necessary for me to address the issue.
68. In conclusion, the claimant is entitled to judgment in the sum of £94,596.10. I will hear submissions as to interest.

**(After further submissions)**

69. The claimant's skeleton argument did not make it clear whether interest was to be argued from the date the sums were taken from the company or from the date of the demand. The claimant concedes that interest is only properly due from the date of the demand on 3 June 2015. That is a sensible concession and I see no reason why the claimant is not entitled to statutory interest from 3 June 2015.
70. The court has a discretion as to the rate of interest. It is pleaded at 8 per cent. Although 8 per cent is still the applicable Judgments Act rate, does not govern the position pre-judgment. Interest rates are historically low and 8 per cent would provide the claimant with an unjustified windfall. I propose to adopt a more realistic interest rate and allow 2 per cent.

**(After further submissions)**



71. An issue falls to be determined as to a part 36 offer that the claimant made. The claimant made a part 36 offer in January 2020 in the sum of £115,000. That offer is immaterial; it is not an offer that the claimant has bettered at trial. By letter dated 23 September 2020 the claimant made a further part 36 offer of £40,000. The sum of £40,000 was obviously far more favourable to the defendant than the judgment sum.
72. The part 36 offer was sent by email just after 7.00 pm on 23 September 2020. The claimant accepts that it would not have been deemed served until 24 September 2020. The claimant further concedes that the offer was therefore made less than 21 days before the start of the trial on 14 October.
73. The effect of CPR 36.17(7) is that the consequences of a part 36 offer that has been made less than 21 days before trial do not apply unless the court has abridged the relevant period. The claimant submits that the court should abridge the relevant period so as to allow for the consequences under subsection (4) in circumstances where:
- (1) this was the second offer that had been made, the claimant already having tried to resolve matters earlier on this year; and
- (2) the offer that was made of £40,000 was so attractive to the defendant that the defendant should properly have accepted it so as to avoid the need for this trial to take place.
74. The defendant is in person and I appreciate the difficulty he is in in trying to understand the complexities of part 36 and make submissions thereon. His general position is that he does not accept that the court should abridge time.
75. The court has a discretion as to whether to abridge time for service. In my judgment this is not an appropriate case for the court to exercise its discretion to abridge time. The starting point is that the part 36 consequences will not apply if an offer is made less than 21 days before trial. The earlier offer in January 2020 is of no relevance in circumstances where the claimant has not bettered the terms of that offer. When the offer was sent on 23 September 2020, the claimant was professionally represented and would have appreciated that, to have the favourable part 36 consequences, it had to be served not less than 21 days before trial. The claimant chose not to avail itself of that opportunity. There is a policy incentive in requiring litigants to make timely part 36 offers to encourage the settlement of claims. A defendant is entitled to time to consider the merits or otherwise of accepting or rejecting an offer. Taking those factors into account, I am not prepared to exercise my discretion to abridge time.

**(After further submissions)**

76. It falls to me to consider the cost consequences of this claim. The claimant has succeeded in its claim. The general rule under 44.2(2) is that the unsuccessful party will pay the costs of the successful party. There is no reason to depart from the general rule on the facts of this case. The issue between the parties is whether the costs should be paid on a standard or indemnity basis.

77. The claimant submits that the costs should be paid on the indemnity basis for the entirety of the claim or, alternatively, from a point either in July 2020 when the witness statements were prepared or when they were exchanged on 7 August 2020. The thrust of the claimant's submission is that the defendant has run this litigation in a chaotic manner, presenting one case in his defence and then wholeheartedly changing his position in his witness statements such that it has increased the claimant's costs in dealing with an evermoving target.
78. The defendant submits that any costs order should be on the standard basis in circumstances where he submits that the exchange of witness statements did not materially increase the costs for the claimant in preparing for and running the case to trial.
79. I am not persuaded that it is appropriate that the costs be paid on an indemnity basis for the entirety of the litigation. The defendant was entitled to instruct solicitors and file his defence in the manner that he did. I am, however, troubled by the change of tactic that the defendant adopted at the point of exchange of witness statements. The claimant had already been put to considerable expense drafting witness statements to address the case as pleaded in the defence. As it transpired, a lot of that work became redundant because of the position adopted by the defendant in his witness statement rested largely on the assertion that two very substantial dividends had been declared in 2012. From the point of service of that statement, the claimant's solicitors, and no doubt counsel, would have had to reconsider the merits of the case in light of the new case. That factor is, in my judgment, material.
80. This is a case that has been cost-budgeted. If the entirety of the costs were on the standard basis, it would be nigh on impossible for the defendant to depart in any meaningful sense from those budgeted costs. I am troubled that the defendant's presentation of the case has put the claimant in a position whereby it has had to prepare for trial on a multifaceted basis, not being entirely clear as to the basis upon which the defendant would present his case at trial. The intention of serving pleadings and witness statements is that all parties know in advance the case they have to meet.
81. I am persuaded that the defendant's conduct in the way that he has run the case since early August 2020 is such that this does call for a costs order outside the norm. I propose to order the defendant to pay the claimant's costs of the claim on a standard basis up to and including 7 August 2020 but on an indemnity basis thereafter.

**(After further submissions)**

82. The defendant's inability to pay is not a reason the court not to order an interim payment on account of costs. Enforcement is a matter for the claimant. This is a case in which the claimant is entitled to an interim award of costs. The costs were budgeted at £114,000. The budget reveals that the incurred costs were only about £41,000 and thus the estimated costs were £73,000. Most, if not all, of the £73,000 is likely to be recoverable on assessment, particularly as a lot of it will be assessed on the indemnity basis. Even if the £41,000 is assessed down by 25%, the claimant is likely to recover over £100,000. As such, I take the view that the claimant's submission that £75,000 be

paid on account is reasonable. The assessed costs are clearly going to be well in excess of that sum.

**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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**This transcript has been approved by the Judge**