[2021] EWHC 413 (QB)

Case No: QB-2019-001688

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Date: 01/03/2021

Before :

MASTER THORNETT

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Between :

THE LORD CHANCELLOR
(as Successor to the LEGAL SERVICES COMISSION)

Claimant

- and –

(1) ASTRID HALBERSTADT-TWUM (t/a CLEVELAND SOLICITORS)

(2) JOSEPH TWUM

Defendants

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Miss Nicola Rushton QC (instructed by **Michelmores**) for the **Claimant**
Mr Lee Schama (instructed by **MAK Solicitors**) for the **Defendants**

Hearing dates: 28 January 2021

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JUDGMENT

Master Thornett :

1. By an Order sealed on 21 August 2019, judgment was entered against both Defendants ["the Default Judgment"] as follows :

    1.1 At Paragraph 1, as against the First Defendant, two sums respectively of £4,844,691.54 and £40,128.68 plus interest;
    1.2 At Paragraph 2, as against the Second Defendant, the sum of £40,128.68 plus interest;
    1.3 At Paragraph 3, the Claimant's costs were payable by the Defendants.

2. By their Application dated 27 September 2019 ["the Defendants' Application"], the Defendants now seek to set aside or vary the Default Judgment such that :

    2.1 Paragraph 1 should only refer to the sum of £40,128.68 as against the First Defendant, with the remainder of that paragraph being set aside;
    2.2 Paragraph 2 is set aside;
    2.3 The costs order against them is set aside.

3. *The Claim*

    The background to the claim is that by a Claim Form issued on 10 May 2019 the Claimant, as successor to the Legal Services Commission, claims monies (and interest) in respect of breach of contract, fraud, breach of fiduciary duty, unjust enrichment and/or recoupment of payments on account under the Standard Civil and Standard Crime Contracts.

    The First Defendant had operated a solicitors practice, as a sole practitioner, in Whitechapel Road, London E1 from about 1998 until December 2013. She employed her husband as a Practice Manager there. She was contractually engaged by the Claimant to provide legal services under terms of the Access to Justice Act 1999.

    The detailed Particulars of Claim, extending to 72 paragraphs, expressly pleads the relevant contractual terms, including how the First Defendant would receive standard monthly payments ("SMPs") and that she could apply for payments on account ("POAs") providing they did not exceed 75% of properly incurred profit costs. By Clause 14.12, however, the Claimant could issue a notice of assessment in the event it had made an "overpayment or mispayment", as contractually defined. Further, the contract provided how a POA might become repayable, and also that "overpayments or mispayments" became repayable, at the end of the contract.

    In November 2013, the Claimant notified the First Defendant it had decided to open an Official Investigation in relation to the Civil Contract. This was because a selection of sample files requested by the Claimant in May 2013 suggested that claims for payment made on them were not true and accurate. It is alleged that there was only

partial compliance by the First Defendant with the Claimant's investigation. The Claimant formally terminated the Civil Contract with effect from 31 December 2013 owing to the First Defendant's failure to co-operate.

On 10 July 2018, the First and Second Defendants were each convicted of the offences of conspiracy to defraud the Claimant and of perverting the course of justice. They were sentenced to 3 years and 2 and a half years in prison respectively. The criminal prosecution related to approximately 50 immigration files where the First and Second Defendants had submitted claims to the Claimant for payment for work allegedly conducted, but where either the person did not exist or the First Defendant's practice had not been engaged by the alleged client at any time and so no work had been carried out for them. The monetary value of the works in respect of which the First and Second Defendants were convicted of conspiracy to defraud was £40,128.68, hence this sum being separately claimed in the Prayer to the Particulars of Claim because it can be based directly on the convictions.

The civil claim then relies upon the convictions more broadly as evidence (among other things) of breach of contract and fraud but also proceeds fully to plead its case in terms of civil causes of action. In this wider context of claim, it is alleged that owing to some 5,795 cases where there was no match between claims made by the First Defendant for immigration work and records of any immigration application at the Home Office, the total value of the claims submitted by or on behalf of the First Defendant, and wrongly paid by the Claimant, was £4,097,768.20.

Paragraph 41 pleads that as at the date of termination the net overpayment of SMP's amounted to £758,255.88 and how the First Defendant had failed to account in response to the Claimant's demand for repayment.

Paragraph 48 in the Particulars of Claim is clear that in respect of these "No Match" cases, the First Defendant was in breach of contract of the Standard Terms 2013 in that the claims submitted were not true, accurate and/or reasonable. Further or alternatively, the Claimant had made an overpayment or mispayment to the First Defendant within the meaning of clause 14.13 because these were sums the Claimant was not required to pay or to which the First Defendant was not entitled to claim for work as allegedly carried out. Further still or in the alternative, the sum of £4,097,768.20 is claimed as monies in respect of which no consideration has been provided "and/or according to principles of unjust enrichment".

4. *Service of the Claim Form and entry of Default Judgment*

The Claim Form, Particulars of Claim and Response Pack were served on the First Defendant at her then address of HMP Peterborough and the Second Defendant at HMP Wandsworth by way of covering letters dated 15 May 2019 from Michelmores, who have been the Claimant's solicitors throughout.

5. The First Defendant acknowledged service of the claim by notice received by the court on 30 May 2019. The Acknowledgment was completed by a firm of solicitors,

Stokoe Partnership, and signed on 29 May 2019. The Acknowledgment stated that the First Defendant intended to defend all of the claim.

6. The same firm signed and filed an Acknowledgement in like terms on behalf of the Second Defendant. That was date stamped as received by the court on 31 May 2019.

7. In each case, the pro-forma as required completion of the *"Address to which documents about this claim should be sent (including reference if appropriate)"* was completed (in hand) as being the Stokoe Partnership and with their address and reference.

8. By these Acknowledgments, I conclude that the First and Second Defendants notified both the Claimant and the court that Stokoe Partnership represented them and Stokoe Partnership so went on the court record as acting. This is clear from CPR 42.1. Where a party provides a business address of solicitors for service of documents, that firm is treated as on the record as acting for those parties. This is irrespective of any limitations that may or not have been agreed between the part(ies) and their solicitors in terms of solicitor-client retainer. That status remains at least until there is either a change of solicitor by notification to both the court and the other parties to the litigation or the part(ies) similarly notify both court and other parties that they now act in person.

9. I am therefore satisfied that Stokoe Partnership went on the record following service of the Claim Form and that both Defendants stood as legally represented for the purposes of the litigation until notice otherwise per CPR 42.

10. The first witness statement of Miss Emma Maguire on behalf of the Claimant, dated 30 November 2020 and in response to the Defendants' Application, draws attention to steps the Claimant had taken to facilitate the preparation and filing of a defence (or defences) in the circumstances. The extent of these steps can hardly be challenged given the documents concerned form part of the 500 or so documents annexed to the First Defendant's witness statement dated 27 September 2019 in support of the Defendants' Application.

11. Before considering the 1st Defendant's witness statement in support of the Defendants' Application generally, it is important first to refer to the party-party correspondence during the period following service of proceedings through to judgment and then the Defendants' Application. I note that both parties have reproduced more or less the same sequence of correspondence. The picture seems complete.

12. The correspondence clearly establishes this is not a case where judgment has been entered, for example, against litigants in person who have been confused as to the process, or perhaps to whom documentation did not immediately come to their attention despite valid service. It is not a case where that uncertainty continued for a while after judgment was entered and so explains the date when an application to set-aside was made. It is a case where, as I find, judgment was entered against defendants

who were legally represented (and one whom was a qualified solicitor). Legal representation continued after judgment, on the face of the documents without cessation regardless of how the Defendants now present matters. I am satisfied this background remains highly relevant to explanations of how the default arose.

13. Following the Defendants' prosecution and convictions, Michelmores approached the Stokoe Partnership by e-mail on 19 March 2019 explaining that they acted for the Claimant and were instructed to issue civil proceedings. They remarked that they understood that Stokoe Partnership had represented the Defendants in the criminal prosecution. On 9 May 2019 Michelmores asked Stokoe if they were instructed to accept service of the civil proceedings. I infer there was no reply and so the Claimant served each Defendant in person when they were in prison. In an e-mail dated 20 May 2019 to Stokoe, Michelmores referred to the letters dated 15 May 2019 serving the Defendants with the Claim Form and documentation and again asked whether Stokoe Partnership were instructed to accept service. Given service of the Claim Form had by then occurred, the obvious meaning of that enquiry was to refer to receipt of documents in the civil case as now proceeding. Either way, of course, Stokoe were to go on the record when they filed the Acknowledgments of Service.

    13.1 Stokoe replied on 3 June 2019 to confirm they acted for both Defendants and were instructed to accept service. They asked for copies of some of the Claim Form documentation "by return to enable us to consider the claim and to take our clients instructions on the same". Michelmores provided the material by e-mail the same day.

    13.2 Correspondence between the firms at this time also concerned the Claimant's application for a Freezing Order as returnable on 7 June 2019. So the same firm, Stokoe, who had represented the Defendants in their criminal prosecution not only went on record as acting in respect of the defence(s) of the civil claim but also represented them in respect of this separate injunctive process. The potential correlation between criminal convictions and civil process must surely have been clear to both Stokoe and at least the First Defendant by this stage.

    13.3 It is significant that at no point during this sequence did Stokoe suggest that the basis of the claim ought to be subject to further elaboration or exchange before any defence became due. To explore, as it were, a pre-issue type protocol. Although the Defendants now suggest this should have happened, they do not explain why they did not raise such a suggestion at the time. Without more from the Defendants, the inference is that the civil claim hardly came unexpectedly from nowhere but was the logical sequence to a principle (dishonesty) already litigated in the criminal process.

    13.4 On 3 June 2019, the Claimant prepared an Application (returnable at the Freezing Application on 7 June 2019) for permission to add to the Particulars of Claim two Schedules that, although expressly referred to at Paragraphs 41

and 46 in the Particulars of Claim itself, had not been included in the documents as served. The Application was drafted and presented as an Application "to amend" the Particulars of Claim.

13.5 I questioned during the hearing Miss Rushton why this was so, given the problem concerned missing documents but as were still referred to within the pleading. As such, the Defendants had an obvious entitlement to them and, if there was any delay in providing them, that surely went to the time for preparation and filing of defences. Did the pleading itself truly need amendment?

Miss Rushton, who attended before Mr Justice Kerr on the freezing Order application, informed me that Mr Justice Kerr had similarly queried the need for an Application in this form when granting the Claimant permission. The intended strategy was, it seems, chosen as a counsel of perfection in order to ensure that there had been judicial endorsement of the provision of the missing materials rather than simply providing them only in correspondence.

13.6 The Defendants' response to this Application, through their solicitors, is significant in the context of what is now said about it as part of the Defendants' Application.

13.7 On the day the Application was issued, 3 June 2019, Stokoe were also notified about it and provided with the missing Schedules. The Defendants, through Stokoe, therefore physically by then had all that they were intended to be served. The request for permission to amend, to achieve confirmation from the court of the step having been achieved, only remained.

Stokoe replied by letter of the same day asking for an adjournment of the Freezing Injunction application. They referred to the recently provided Schedules and commented how the imprisonment of both the Defendants made taking instructions difficult. They noted the Defendants' "*Defence*" (no distinction then being made as to the potentially different interests of the Defendants) was due on 14 June 2019 and asked for an extension of time for the "Defence" to 26 July 2019. A response was requested by midday the next day. Significantly, no point was taken about a need for formal reservice of the "Amended Particulars of Claim" as it had so become. Still less was there any suggestion that the "amendment", as so described, was opposed. Their reply indicates it was instead a question of time for preparation of the response. The overwhelming inference is that the Defendants saw this, as had the Claimant and indeed the court at the time of the Application, as being simply a formal ratification of something that by then had occurred rather than a significant change in the nature or basis of the claim.

13.8 Michelmores replied on 4 June 2019 to say they would agree an extension of "time for service of the Defences but only by 5 July". Following a telephone

call to Michelmores on 11 June 2019, an extension was instead agreed to 12 July.

13.9 Very obviously, Stokoe were continuing to act on behalf of the Defendants in securing an extension of time. This was entirely consistent with the Acknowledgments of Service they had filed.

13.10 I am clear that service had been effected on the Defendants and so time was running to file a Defence at least to the Claim Form and Particulars of Claim as served. Any difficulty caused by the missing schedules between service and their provision at the hearing on 7 June 2019 could have been remedied by a justified request for a more generous extension of time for the Defence(s). Indeed, Defences could have been filed before 7 June 2019 expressly taking issue with the missing schedules and hence an inability properly to plead in response.

13.11 Reliance by the Defendants on this satellite episode only at this late stage, in support of their Application, as somehow undermining the process of service through to due date for the Defence(s) is, I find, unconvincing. I reject the submissions of Mr Schama that there remained a lack of clarity about the due date for the Defence(s). I do not accept the submission that doubt existed about re-service of the Particulars of Claim "as amended" such that time for filing any defence had somehow become suspended.

13.12 In the period through to the due date for the Defences, as extended by agreement, Stokoe did not apply for a declaration that they had ceased to act, as would have been a requirement, if applicable, under CPR 42.1. Neither was any notice filed by the Defendants saying they now acted in person. Neither did any new firm come on the court record as acting and so clarify that Stokoe had ceased to act.

14. Regardless of how the Defendants and Stokoe saw their solicitor-client relationship, no defences were ever filed and the Claimant applied on 22 July 2019 for judgment in default of Defence. On 14th August 2019, Master Gidden approved the entry of the default judgment on the basis of the Claimant's written request.

15. I consider the background of these events highly relevant when noting how another firm of solicitors, Julia & Rana, had then written to Michelmores on Tuesday 16 July 2019 referring to having received "*initial instructions*" from the Defendants who remained in prison and so were, apparently because of the Freezing Order, unable to make a payment on account to their firm. This date was, of course, after the due date for the Defence(s) but before any request for judgment had been made by the Claimant.

16. In the letter, Julia & Rana confirm how they were accordingly "*not in a position to place ourselves on record with the court as acting and also not in a position to submit a Defence let alone any Counter Claim for either of our clients".*

Despite this somewhat opaque introduction of themselves in professional terms, the firm went on to conclude their letter by requesting that *"no further action is taken with regard to your client's claim submitted to the High Court on 17/05/19 until Mrs Astrid Halberstadt Twum and Mr Joseph Twum are able to make a payment on account to ourselves, and we are fully instructed with regard to their Defence and Counterclaim if any".*

The consequence of this letter serves to confuse the picture of who was advising and who was actually representing the Defendants at the time. To the extent that the Claimant, through Michelmores, responded by attempting to assist by way of information and notice to Julia & Rana rather than Stokoe, serves to the Claimant's credit. Michelmores could simply have commented that Julia & Rana were not on the record and so could not receive information or comment.

Either way, this introduction ultimately does not, in my judgment, provide the Defendants with any valid explanation for defences not having been filed. On the following analysis, it is unsustainable for the Defendants to go further and now seek to argue that the Claimant somehow acted unfairly, if not improperly, during this period.

16.1 The Julia & Rana 16 July 2019 letter clearly evidences an awareness that Defences were overdue and so "further action" might be taken in consequence. To even a newcomer to civil litigation procedure, the consequence of judgment being entered in default of a defence would seem a basic and fundamental step one should anticipate. It is hardly an obscure or uncommon procedure. The clear overwhelming inference, therefore, is that "further action" connoted an application for judgment in default.

16.2 The letter is less clear about the existing status of Stokoe who, to reiterate, still remained on the record as acting. The letter seems to adopt a professionally unsteady path between (i) making clear they do not formally represent the Defendants but wish to introduce their potential, possibly imminent, formal instruction and (ii) direct involvement in the civil litigation by requesting that default judgment is not entered.

16.3 The significance of this ambiguity is considerable. A recipient firm such as Michelmores would not know whether to still communicate with Stokoe or Julia & Rana, perhaps in not unreasonable anticipation that formal Notice of Ceasing to Act would be received shortly and may well be filed at court in the interim. Michelmores chose to communicate with and respond to the firm Julia & Rana in terms of the providing information about the civil claim post service.

16.4 I do not think this was unreasonable. Despite the opening tone of the Julia & Rana letter, the letter concludes by seeking a response from Michelmores in the claim and so ultimately presented to Michelmores as evidencing instruction (implied or express) to act on behalf of the Defendants. The more formal alternative, to reply to Julia & Rana by referring to Stokoe as still on the record and so declining otherwise to correspond with Julia & Rana, would clearly not have been helpful to the Defendants.

16.5 During the hearing I questioned whether, even if a formal Notice of Acting had not been filed, a firm of solicitors can be taken as acting if they enter into correspondence that represents the interests of a party. In short, as Officers of the Court, they how can they reserve an equivocal professional status if they choose to enter the procedural forum. In proceeding to request (by implication) that no action be taken by way of request for default judgment, objectively speaking had not Julia & Rana gone on the court record as acting?

Mr Schama did not agree with this and commented that there was no authority for it.

I invited counsel to submit any written submissions after the hearing on the point. I did not receive any. I conclude that despite their attempt to reserve or qualify their professional status, Julia & Rana had gone on the record as acting because they had asked the Claimant not to enter judgment whilst they clarified funding issues and further developed their instructions.

16.6 However, even if I am wrong on this, the counterbalancing feature is that Stokoe remained on the record.

16.7 There therefore can be no doubt – as objectively identifiable at least as far as the Claimant and the court were concerned – that there ever arose a point between the Acknowledgments of Service and the agreed date when Defences were due when the Defendants acted in person.

17. Michelmores' reply (by return) referred to the provisions in the Freezing Order whereby legal expenses were permitted to be paid. The firm therefore asked, again not unreasonably, why the Defendants "*had not been able to put you in funds*".

17.1 One might have thought that reply was sufficient enough to prompt Julia and Rana to reconsider their stance in suggesting that the Defendants were unable to instruct them and so, in turn, urgently to review the continuing requirement for a Defence to be filed, if judgment was to be avoided.

17.2 Despite this, however, in what might be described as a punctilious regard for the Overriding Objective and to assist other parties, Michelmores wrote separately on 16 July making entirely clear to Julia & Rana that "*Unless we*

have a substantive response by midday on Monday 22 July, we will apply for a default judgment".

17.3 With Michelmores' response the Defendants, even if informally and through the less than clear medium of Julia & Rana, obtained a further extension of time and so saw delay to any default judgment application. Had the Defendants filed Defences before midday on Monday 22 July 2019, judgment in default would not have been entered.

17.4 Michelmores informed Julia & Rana by both e-mail and post on 22 July 2019 that default judgment had been applied for. They did not have to do so. Neither did they have to inform Stokoe.

17.5 It is odd in this context for Julia & Rana to have written to Michelmores on 24 July 2019 to express disappointment *"that you have now sought pre-emptively default judgement against unrepresented opponents, one of whom remains detained in prison".* I also note that they resume their earlier observations about apparent funding problems, despite Michelmore's reference to the provisions of the Freezing Order.

18. Mr Schama drew my attention at the hearing to the opening complaint in this letter and the standard wording at the foot of Julia & Rana's notepaper that they did not "accept service by fax and e-mail".

I do not follow the relevance of either. In summary, the Defendants had been served in person. A firm of Solicitors, Stokoe Partnership, had then gone on the record as representing them. They therefore were not "unrepresented opponents". There was no obligation on the Claimant to notify the Defendants, through solicitors or otherwise, that they had failed to file Defences although this did, in fact, occur. Michelmore's notification was addressed to Julia & Rana because that firm had directly requested the Claimant "*that no further action is taken with regard to your client's claim*" until they could make a payment on account and provide instructions. So even if Julia & Rana (i) are not be treated as having gone on the record and (ii) had made clear that they were not instructed to draft Defences, they surely had an obligation as Officers of the Court to report to the Defendants the recent correspondence from Michelmores' (in particular warnings as to proposed entry of judgment) and also ascertain the status of Stokoes.

19. This sequence of events therefore has nothing to do with service of documents in the CPR Part 6 sense and the note at the foot of Julia & Rana's correspondence is irrelevant.

20. Following judgment, the First Defendant directly e-mailed Michelmores on 5 September 2019 to state that she and the Second Defendant had *"discontinued with the instructions of Mr Matthew Goldborough of Julia & Rana Solicitors and have now instructed Mr Paul Oliver of Stokoe Partnership"*. Significantly, this document :

(i) Directly contradicts the opening line of Julia and Rana's 24 July 2019 letter about the Defendants being unrepresented;
(ii) Confirms continuity of legal representation of both Defendants from the date of the Acknowledgement of Service;
(iii) Undermines if not contradicts the qualified introduction and involvement presented by Julia & Rana, as was much emphasised by Mr Schama at the hearing;
(iv) Rebuts the Defendants' own submissions at the hearing that the 27 September 2019 set-aside Application could not have been earlier because both Defendants had initially both been in prison and there then elapsed only a short period when then the First Defendant, being the legally qualified of the two defendants, had "only just" been released from prison.

21. The First Defendant's first witness statement confirms it is submitted on behalf of both herself and the Second Defendant, her husband. She confirms that she was released from prison on 27 August 2019 and her husband on 6 June 2019.

21.1 From Paragraph 22, the First Defendant acknowledges she and her husband were served with proceedings when in prison. She confirms she instructed the Stokoe Partnership "in respect of the freezing injunction *and the claim* [my emphasis]" on 28 May 2019. (As stated Stokoe had acknowledged service on behalf of both Defendants two days' later).

21.2 She acknowledges that an extension of time had been agreed for "the Defence" (referred to in the singular) until 12 July 2019.

21.3 At Paragraph 29 the First Defendant refers to difficulties in "*accessing funds to pay our legal fees*" and, at Para 30, "*Stokoe was forced to come off the record, and we were unable to retain counsel".*

It will be seen from the above analysis that Stokoe in fact did not come off the record. The lack of clarity and transparency in this suggestion from the First Defendant is surprising. I am satisfied that the correct legal sense and meaning of a solicitor coming off the record will be known and understood to the First Defendant. Indeed, the First Defendant remained on the Roll of Solicitors during this period until she was struck off on 10 December 2019.

21.4 The First Defendant asserts at Paragraph 32 that *"the focus was inevitably on the freezing injunction application rather than the deadline for service of the Defence. I was still in prison at the time, and so was unable to have much input into the process".*

21.5 At Paragraph 33, the First Defendant is quite explicit in saying that on 1 July 2019 she contacted Matthew Goldborough at Julia & Rana to ask "*if he could assist with preparing our defence to the claim"*. At a meeting with her in

prison on 9 July 2019 "*Mr Goldborough agreed to act pending funds being released*".

She confirms at Paragraph 34 that Mr Goldborough had "*instructions from me regarding our case and our defence"*. In this (and the previous paragraph) the first Defendant refers to selected copy WhatApp messaging between her and Mr Goldborough at the time concerning such instructions.

21.6 The First Defendant explains that Julia & Rana agreed to act pending funds being released for their representation in the civil claim. The First Defendant says nothing about provisions for the payment for legal representation in the Freezing Order but instead perpetuates the same point as presented by Julia & Rana.

21.7 I note the First Defendant repeats that this correspondence is disclosed "without waiving privilege". I was not directly taken to this correspondence in the hearing by Mr Schama, a decision as perhaps reflects – a point of which I am satisfied in any event – that selections of correspondence can provide only a selective picture. That said, the First Defendant is clear as to service, recognition that Defence(s) were due and that before expiration of time for filing two firms of solicitors had been instructed to act for the Defendants in the civil claim.

21.8 The First Defendant then blames Mr Goldborough for not ensuring that the Defence(s) were filed on time and suggests that Mr Goldborough had unreliably assured them about the modest consequences of the deadline passing.

21.9 The 1st Defendant refers to an e-mail dated 12 July 2019 sent by the 2nd Defendant to the court on *qbenquiries@justice.gov.uk* explaining how they both "*wished to notify you that we dispute the claim and intend to defend the above claim brought against us by the Lord Chancellor……We have recently instructed Mr Matthew Goldborough of Julia & Rana Solicitors….Our full defence statements shall follow on the 15 July 2019".*

21.10 This attempt to preserve the Defendants' position, even from the viewpoint of an entirely lay person, was quite pointless. The standard Response Pack as served with the Claim Form is drafted so as to make entirely clear what is required and so as to be understood by the legally unqualified. Both Defendants should have appreciated that but even more so the First Defendant.

21.11 The First Defendant admits at Paragraph 40 that this was "*not a valid way to defend a claim under the CPR"*. Such concession seems only realistic. However, significantly, the First Defendant offers no explanation why she did not seek to take matters into her own hands by either filing a Defence that at least set out the basis of her case (she having apparently already considered

the same in providing Mr Goldborough with "her instructions") or applied formally for an extension of time.

21.12 I do not find the First Defendant's alternative narrative, relying upon apparent continued problems with funding, her husband's lay efforts and Mr Goldborough's responses as explaining what happened through to the entry of default judgment, at all convincing. They seem largely a distraction from the admission [from a qualified solicitor] that inadequate steps were being taken to defend the claim. I therefore do not follow how, at Paragraph 48, the First Defendant can assert on the Defendants' behalf that *"It came as a very unpleasant shock to Joe when we received copies of the Default Judgment".*

21.13 The First Defendant explains how attempts in the immediate period following the default judgment to discuss with Mr Goldborough what had happened and what could be done proved ineffective. In doing so, the First Defendant clearly admits that she was entirely aware of the significance of events at the time. It follows that the issue of promptness of the Defendants' Application has to be considered against this admission.

21.14 At Paragraph 50, the First Defendant explains how she came out of prison on 27 August 2019 and "*after settling back in at home*" she and her husband decided "*we should instruct a new solicitor*". The First Defendant continues to rely upon funding problems to explain why a Defence was still not filed but asserts at Paragraph 53 that she believes she and her husband "*have acted with promptness in all the circumstances in seeking to set aside the Default Judgment".*

21.15 The balance of the statement sets out various observations on the merits of the claim and likely points of Defence. I note at Paragraph 83 the First Defendant refers to her criminal conviction and states "*Whilst I maintain that I did not defraud the LAA, I do not intend to contest this aspect of the claim which directly overlaps with the Criminal Proceedings, particularly given its relatively small size compared with the two main elements of the claim".*

I take this to mean that the First Defendant accepts the fact of her conviction, though still maintaining her innocence. There is no suggestion in this First Statement whatsoever that an appeal against conviction either had been or is now contemplated.

21.16 As the Claimant points out, however, in the period between this 27 September 2019 statement and the hearing on 28 January 2021, no formalised draft Defence has ever been produced.

21.17 Paragraph 10(3) of the Freezing Injunction Order sealed on 26 June 2019 expressly provided for up to £15,000 for the payment of legal fees. In the absence of explanations distinguishing or explaining away this provision,

either from solicitors representing the Defendants at the time or from the Defendants directly since, I am unpersuaded that the filing of a Defence was materially prevented owing to funding problems.

22. *The Defendants' steps following Default Judgment through to their Application and Hearing*

This is a case where the issue of promptness is not limited to the period between the default judgment and the relevant Application but also the period through to the listing of and the hearing itself. This is because of the required procedure in the Queen's Bench Division of the High Court. Failure properly to follow that procedure, the Claimant submits, can also be taken into account on the issue of promptness because, as distinct from the County Court, it remains for an Applicant to ensure that further relevant steps are taken beyond the issuing of an Application. An Applicant in this Division cannot simply sit back and attribute any delay in seeing the Application listed as purely reflecting the workings of the court system. I agree with that submission.

22.1 For the reasons stated, the Defendants saw judgment being entered against them despite being legally represented and yet when there came a point when they were aware few if any relevant steps were being taken.

22.2 The Defendants fail to establish any explanation why they did not ensure a Defence or Defences were filed by the due date.

22.3 The Defendants fail to explain and justify why then in excess of a month elapsed between the default judgment on 21 August 2019 and their Application. Indeed, a month elapsed between the First Defendant coming out of prison and the Application. Save for remarking how she was "*settling back at home*" and that she and her husband were arranging to instruct another solicitor, the period seems to be assumed by the First Defendant to be as without any requirement to further elaborate at all.

22.4 Taking if only the period between judgment and the Defendants' Application, I find the Defendants failed to act promptly.

22.5 Stokoe Partnership electronically submitted the Defendants' Application and it was date stamped by the court as received on 27 September 2019. The Application sought a hearing with a time estimate of 3 hours.

22.6 What followed thereafter was also far from prompt.

22.7 Because the Defendants' time estimate was in excess of 30 minutes, in terms of Queens' Bench practice[1] that meant the hearing was unsuitable for the

[1] As is subject to publicly accessible introduction and explanation in the Queens' Bench Guide, both online and in paper format

Urgent and Short Application list heard by Masters twice daily and instead needed to be judicially listed following provision by the Applicant Defendants of a Private Room Appointment ["PRA"] form. A PRA form provides (or ought to provide) both Applicant and Respondent's time estimates (if different) and preferred dates of availability.

22.8 This procedure was clearly set out in the (then applicable) 2018 edition of the Queens' Bench Guide at Chapter 9 and Paragraph 9.3 in particular. It marks the significant and, as is ordinarily well understood, important distinction with County Court practice that the High Court[2] does not serve Applications. It is for Applicants to ensure that they become effective through to a listed hearing and that the applicable Respondents are notified *by the Applicant* of that hearing date upon formal service of the issued Application. Whilst the court sends out a Notice of Hearing, that serves more to confirm the date and time of the hearing.

22.9 For reasons that still remain unexplained by or on behalf of the Defendants, however, no PRA form was supplied as part of the Defendants' Application at the time of issue and so no hearing date was provided. This is despite, according to Miss Rushton, Michelmores having provided their information to Stokoe in October 2019 following receipt of the issued Application.

22.10 The missing link, to so speak, therefore appears to be the Defendants' failure to then act upon the issued Application and the completed PRA form by seeking a listing. Because this did not occur there was no judicial direction that a hearing should be listed and so no Notice of Hearing went out. The Application remained latent in the hands of the Defendants. In short, the Defendants through their solicitors created an impasse of their own making.

22.11 I am satisfied that there is no obligation on a Respondent to incur time and expense in formally responding to an Application that has only ever been sent to them in draft. Only until a Respondent knows they are being summonsed to a hearing can they be expected to file and serve, for example, their evidence in response.

22.12 I therefore reject criticisms of the Claimant that the Claimant failed promptly to respond to the Defendant's Application.

22.13 Indeed, it was not until an e-mail dated 4 November 2020 that a new firm of solicitors, MAK Solicitors, asked for an update in respect the Defendants' Application and referred to an annexed a letter dated 16 October 2020 that they had apparently sent to the court. I note that letter is headed "By Recorded Delivery" and addressed simply to "High Court, Royal Court of Justice, Strand, London, WC2A 2LL".

[2] As distinct from its regional emanations, the District Registries

I note no such letter appears in the electronic court file, filing of correspondence in respect of which has been compulsory for professional users in this Division since 18 November 2018. Further, the letter was not correctly addressed in any event even if MAK hoped that their hard copy letter would ultimately be correctly directed.

22.14 These errors of procedure are not subject to any explanation in the Defendants' submissions. Nonetheless, by their e-mail the Defendants' Application became revived and saw progress, although there still remains a degree of uncertainty about preceding events as referred to by MAK. The 16 October 2020 letter refers to having "*previously requested the court to allow use more time as newly instructed solicitors to prepare ourselves in readiness for the hearing to set aside the default judgment and to proceed further with the matter. Unfortunately, it took us longer than expected"*. The letter goes on to "*request the court to fix the matter for a half-day hearing to set aside judgment in default*" and provides "*common dates from both parties*". Perhaps with an unintended irony, the letter comments that the firm awaits "*to hear from the court at the earliest convenience".*

22.15 I can find no "previous requests" on the court electronic file as amount to "previous requests" from MAK either. However, on any view such references entirely ignore the fact that the Application was not live anyway and so no hearing date had become operative. Whether by way of correspondence or telephone calls, references to needing more time in respect of an inchoate Application would make no sense and so have no effect in this Division.

22.16 My conclusion is that, as perhaps was the case with Stokoe Partnership, MAK Solicitors had County Court procedure in mind and so believed that a hearing date was due to be provided by the court at some stage and that the interim delay had been nothing to do with the Defendants as Applicants. If this is correct, then this seems to mark another point of error in the sequence of the events as ultimately attributable to the Defendants.

22.17 Nonetheless, the MAK 30 October 2020 letter served to provide the outstanding information (even if not in required format) for the PRA form. As the Assigned Master, the letter was referred to me on 11 November 2020 and an instruction to list directed on 12 November 2020. The Notice of Hearing for the hearing on 28 January 2021 was dated 12 November 2020.

Once it had been correctly presented, therefore, the Application saw due process.

22.18 I note that MAK had informed Michelmores in an e-mail on 3 August 2020 that they were in the process of making an application to set aside judgment and asking for counsel's availability (even though an application had already been issued) [617]. Ms Maguire replied on 20 August 2020 asking for an

update and warning that the Claimant would be opposing the application on grounds of delay. I note in the final paragraph of this letter Ms Maguire's trenchant description of the Application having been "*sat on for a year and we have not received any correspondence from you during that time in relation to a hearing date for an application to set aside".*

22.19 There is no explanation from the Defendants why it had taken MAK solicitors until November 2020 effectively to write to the court, despite their e-mail dated 3 August 2020 to Michlemores and the very clear warning of opposition from Michelmores in reply on 20 August 2020. I do note, however, that the Claimant had issued statutory demands on 22 October 2020 and infer that the timing of their 30 October 2020 letter was not co-incidental.

22.20 Despite this sequence, the Application presented at the hearing on 28 January 2021 remained that as issued although, as Miss Rushton was clear to point out, the skeleton argument as sent by Mr Schama late in the afternoon before the hearing did seek to present it on a different basis.

23. Three days before the hearing, the First Defendant signed her Second Witness Statement. It was served on the Claimant's at 11.00pm on 25 January 2021.

This is her response to the First Statement of Emma Maguire, as had been submitted in response to the Application once it had been served. It seeks to gainsay remarks in Ms Maguire's statement about the way in which the original investigation was conducted and the 1st Defendant's involvement.

23.1 It is clear that this statement reflects submissions made by Mr Schama at the hearing and as featured in the skeleton argument he sent to the Claimant and the court late in the afternoon before the hearing.

23.2 Contrary to the impression of acceptance of criminal conviction at Paragraph 83 in her First Statement, the First Defendant at Paragraph 11 in this lately served Second Statement remarks that she and her husband are now seeking to appeal their convictions. No other details are provided.

23.3 It is also in this lately served second statement that the First Defendant, for the first time, seeks to argue that the omission of the Schedules in the period between service and (i) their provision to Stokoe on 3 June 2019 and (ii) at the Freezing injunction hearing on 26 June 2019 is of material significance in explaining the failure to file a Defence.

23.4 Without any elaboration on the pertinent facts and events, at Paragraph 24 the First Defendant suggests that "*a large part of the delay in this application being heard was due to the global coronavirus pandemic*" and implies that the Claimant ought to have acknowledged this.

23.5 There is no developed or reasoned discussion about the various and considerable delays in the Application at its various junctures. Whether or not as affected by Covid-19.

24. *The status of the Judgment and the relevant procedure*

24.1 The Application is made under CPR 13.3, the relevant provisions of which being well known :

"13.3 (1) In any other case, the court may set aside or vary a judgment entered
under Part 12 if –
(a) the defendant has a real prospect of successfully defending the claim; or
(b) it appears to the court that there is some other good reason why –
(i) the judgment should be set aside or varied; or
(ii) the defendant should be allowed to defend the claim.
(2) In considering whether to set aside or vary a judgment entered under Part 12,
the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly.
(Rule 3.1(3) provides that the court may attach conditions when it makes an order)…"

24.2 However, by way of (only) Mr Schama's skeleton argument served the evening before the hearing, the Defendants sought to deny that the judgment was regular.

24.3 The Defendants refer to the fact the default judgment arose from an N244 Application by the Claimant dated 22 July 2019 as had sought a hearing at which judgment in default would be entered. That Application was drafted somewhat ambiguously in requesting (N244 Question 5) a decision "*without a hearing"* but then adding (Question 6) that the Claimant Applicant thought the hearing would last 2 hours. Question 9 was completed that the "Defendants" should be served with the Application.

24.4 Mr Schama sought to argue that because this Application was never served, the judgment therefore obtained under it was irregular and should be set aside as of right. The Application for variation of the default judgment was only in the alternative.

24.5 The Defendants seek to link this submission with uncertainty arising from the amendment to the Particulars of Claim in July 2019. I have already dealt with that latter point.

24.6 The procedure for obtaining a default judgment is set out at CPR 12.4. For a judgment on a specified sum(s) of money such as in this case, it is achieved by a Claimant requesting the court to enter judgment using a standard "practice form" : CPR 12.4(1). A defaulting defendant is not required to be notified either in fact or by way of a formal application under Part 23 unless, by CPR 12.4(2), the judgment as requested is :

"(a) on a claim which consists of or includes a claim for any other remedy; or
(b) where rule 12.9 or rule 12.10 so provides"

Neither of these requirements applied in this case and so no notice was required to be given to the Defendants. No "other remedy" is sought. Neither was this a request for judgment for costs only (r.12.9) or against a protected party, spouse or civil partner, against a defendant out of the jurisdiction or others as listed in r.12.10.

24.7 The request for judgment therefore did not require a Part 23 Application and it is clear from the Court File that the request was processed not as a Part 23 Application and so as not requiring a hearing. Master Gidden was referred to the Application and granted the default judgment accordingly.

24.8 Some time was spent with Mr Schama at the commencement of the hearing seeking to establish (i) how and why the court and Respondent Claimant should entertain such a significant change in the basis of the Application at a late stage without any apparent prior notice and request to amend the Application (ii) the procedural basis for the proposition, given there was no procedural requirement for the request for default judgment to have been a Part 23 Application anyway.

24.9 Mr Schama argued that it had or ought to have been "plain" to the Claimant that the Application was being put on a wider basis, not least from his skeleton argument. He submitted the Claimant did not require any, or much, extrinsic evidence to consider or with which to respond. The fact it was not raised earlier might, at best, go to costs. However, he conceded that the Defendants had never expressly notified the Claimant of an intention to change the basis of the Application.

24.10 I reject these submissions and decline to accept this late and, as I find it, fundamentally different basis for the Application. I do not follow the submission that the point should have been anticipated. It strikes me as a very different point. There also has been chronic delay before it being presented at the 11th hour. If one takes as the starting point the date of the Application when this different type of Application should have been presented, the Defendants and their representatives still had a period of approaching 16 months in which they could have sought to amend and so introduce a different basis for their Application.

24.11 Further, even had the submission been made earlier and properly proposed, it would seem to have little prospect of success. I fail to see how a claimant that unnecessarily prepares a more elaborate document but presents it[3] according to the more simple required procedure for requesting judgment in default – as the court in consequence recognised and processed – facilitates an argument to a defendant presumably based on some form of procedural estoppel or election [and yet in respect of which they were entirely unaware and so took no part]. In short, the defendant in this scenario is no better nor worse than they always would have been if a simple pro-forma request for judgment had been filed. Save for perhaps having a point on costs in distinguishing the additional preparation of the request as if it were a Part 23 Application.

24.12 I am satisfied that this is a regular judgment and that the Application to set it aside should be considered on this basis.

24.13 The Claimant refers me to the confirmation of the Court of Appeal in *Gentry v. Miller* [2016] EWCA Civ 141 that an application under CPR 13.3 to set aside a judgment entered in default of defence under CPR 12.3 is one to which the relief from sanctions regime in *Denton v. TH White* [2014] EWCA Civ 906 applies. Though well known, these are that the court should apply a 3-stage test in deciding whether to exercise its discretion to set aside judgment. Namely, in the context of this Application, to ask :

i. Whether the breach (to file a Defence) was serious and significant?
ii. Whether there is any valid explanation for it?
iii. Whether relief should be granted in all the circumstances, including the factors under CPR 3.9(1)(a) and (b): the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules and orders.

24.14 The *Denton* criteria thus overlaps with, and complements, the test under CPR 13.3.

25. *The involvement and relevance of the Defendants' legal advisors*

The Claimant refers to *Mullock v. Price* [2009] EWCA Civ 1222 in submitting that failures by a legal representatives cannot provide an adequate excuse for a defendant failing to act promptly in an application under CPR 13.3, a defendant having a personal obligation to make the application.

In *Mullock*, the Court of Appeal was satisfied [Para 22] that it was wrong that a party should shield behind his representatives in such an Application. Ward LJ agreed with

[3] In other words, without being accompanied by a PRA form following service of the Application on the Defendants in draft

the comments of Peter Gibson LJ in *Training in Compliance Ltd (t/a Matthew Read) v Dewse (t/a Data Research Co)* [2001] C.P. Rep. 46 that :

> "in general, the action or inaction of a party's legal representatives must be treated under the Civil Procedure Rules as the action or inaction of the party himself. So far as the other party is concerned, it matters not what input the party himself has made into what the legal representatives have done or have not done. The other party is affected in the same way; and dealing with a case justly involves dealing with the other party justly. It would not in general be desirable that the time of the court should be taken up in considering separately the conduct of the legal representatives from that which the party himself must be treated as knowing, or encouraging, or permitting."

26. At Paragraph 23 Ward LJ observed that r.13.3 explicitly refers to "the person" making the application and that the CPR "impose duties on the parties to the litigation, and it seems to me that must mean the parties themselves irrespective of the help and advice they are or are not receiving. Their duty under CPR r.1.3 is this: "The parties are required to help the court to further the overriding objective." One of those objectives is of course to ensure that the case is dealt with expeditiously…"

27. In the context of r.13.3, therefore, the First Defendant's selected references to electronic communications between her and her solicitors before judgment was entered in seeking to shield her and her husband and to shift the blame are irrelevant.

28. Despite this conclusion, I believe it has been necessary to analyse and deconstruct the submission made by the Defendants, drawing upon the suggestion in Julia and Rana's early correspondence, that they were *unrepresented* at the material time.

29. On any view, the month that elapsed between the First Defendant coming out of prison on 27 August 2019 and the date the Application was issued is less easy to blame on solicitors. The First Defendant on her own admission had by then come to learn that matters had not gone as she says were intended. Plainly, the Defendants were by then clearly on notice that their solicitors appear not to have acted in their best interests[4] and yet still saw a month elapse without issuing their Application. The Defendants offer no explanation for this period of delay other than to explain how the First Defendant had to "settle in" on return home and they needed to consider the instruction of new legal advisors.

    One wonders how long that process would have taken anyway, given the Defendants returned to Stokoe, such that it was that firm that issued their Application.

30. If the relationship between the Defendants and their respective firms of solicitors can appropriately be separately and independently considered, perhaps as part of the third

[4] I express no direct suggestion or finding of negligence by the solicitors, this being irrelevant to the Application. Further, even inference of negligence would be unreliable without all, rather than selected, information about the solicitor-client history at the time.

test in *Denton* despite the very clear comments in *Mullock* in the context of r.13.3, I conclude that the personal involvement of the Defendants and about matters that remained in their hands are inadequately explained.

31. Whatever the interplay between two firms of solicitors being involved between service of proceedings and Application to set judgment aside, nothing material is said about the period between the issue of the Application and it finally becoming effective. I note no reference from the First Defendant (there being no witness commentary at all from the Second) to monitoring the progress of her Application and questioning, as a qualified solicitor, why nothing happened for over a year. This episode is well distanced from blame attributed to the original default and the immediate period that followed.

32. I am satisfied that both by way of dicta in respect of r.13.3 in *Mullock* and separately having regard to the overall circumstances of the case in *Denton*, the Defendants remain central and answerable for the delay in the issue and presentation of their Application.

33. *Severity of Breach and Promptness*

There seems no realistic suggestion that a failure to file a Defence such that judgment is entered is not a serious breach.

As to promptness, for reasons I have set out in some detail, there equally seems no rational basis for the Defendants to suggest that their Application has been prompt. To the contrary, there has been continuous delay from the outset. Despite the First Defendant's attempts to distinguish between her efforts and interests as a solicitor and those taken by solicitors acting on her and her husband's behalf, I am not satisfied sufficient or persuasive explanation is provided.

34. *Realistic prospect of success*

The Claimant submits that the factor of delay in this case overrides considerations of whether the proposed defences, as at least can be followed by way of submission even if not draft Defence(s) put before the court, have realistic prospects. Miss Rushton refers me to the recent decision of HHJ Pelling, sitting as a Judge of the High Court, in *Core-Export v. Yang Ming Marine Transportation Corp.* [2020] EWHC 425 (Comm). In that case a defendant had failed to engage in the claim such that the claimant could understand the defendant's position, despite chasers and there was then inaction and delay in bringing an application to set aside judgment [the delay being eight weeks after service of the Claim Form and over three weeks after having become aware of the judgment]. Though recognising that the proposed defence had realistic prospects, the history and delay of the defendant was sufficient to refuse the Application following *Denton* criteria.

35. The Claimant also reminds me that the burden is on the Defendants to show that they have a realistic prospect of defending the various heads of claim against them and that this means having a defence which is more than merely arguable.

36. *Absence of Defence* :

    The Claimant refers to remarks by the trial judge in the criminal prosecution that the fraud extended over four and a half years from May 2007 to November 2011.

    The Claimant submits that the First Defendant is the one who should be producing records to show that she has a defence with realistic prospects of success, to rebut the prima facie evidence of the "no match" schedule, if she has any defence to raise. The First Defendant cannot rely upon her own failure to cooperate with the LAA's Official Investigation and consequent unavailability of records to avoid explaining why a reasoned defence has never been produced.

    Neither has the First Defendant made any attempt over the past seventeen months to obtain the expert evidence she claims she would need to draft a defence. Whilst the First Defendant seeks to make great play of potential issues with the Home Office data, and the matching of it with data from the LAA's computer records, suggesting she needs to look at the underlying case files and so claims it is necessary to await disclosure by the LAA on these issues. The Claimant observes, however, that the LAA does not have copies of other case files (whether electronic or paper) because of the very refusal by the First and Second Defendants to attend or cooperate during the Official Investigation into their firm in November 2013. The prosecution was obliged to rely upon only the paper case files obtained by Mr Armstrong in June 2013 and Ms Begum in March 2013 i.e. such paper case files the LAA had managed to obtain from the Defendants. The Claimant submits that the suggestion that the formulation of the Defence has been delayed and is still reliant upon Disclosure is unrealistic and unpersuasive.

37. These submissions have considerable force. The Defendants position to-date, despite the considerable lapse of time, has been never directly to seek to factually or arithmetically gainsay the claim. The location of the files they say they would need to consult is not discussed. The extent to which the Defendants might still be able to refute the methodology or calculation relied upon by the Claimant is entirely unacknowledged. The sum total of the Defendants position appears to be that proposed by Mr Schama in his skeleton argument.

38. Those submissions can be approached as follows.

39. By way of overview, the judgment sums break down into the following heads of claim. The Claimant gives credit for certain arithmetical recalculations now accepted as should be applied to the sums claimed :

29.1 Judgment for fraud against both Defendants joint and severally, for £40,128.68;

29.2 Judgment against the First Defendant alone for £4,844,691.54 made up of:

29.2.1	"Controlled Work" overpayment of sums on account:	£758,255.88
29.2.2	"Controlled Work" claims where there was no proper claim because the client did not exist:	£4,097,768.20
29.2.3	"Licensed Work" (cases under legal aid certificates) where no final claim was submitted:	£13,791.56
29.2.4	Net bill credits on "Licensed Work" cases:	(£20,627.05)
29.2.5	Credit on crime contract:	(2,557.00)
29.2.6	Credit for Crown bills:	(1,940.05)

40. *The fraud judgment*

Critically, the only two potential points of defence to this part of the judgment appear in the First Defendant's somewhat late tendered witness statement dated 25 January 2021. Before dealing with these points in principle, it is therefore relevant to note that until this statement (as developed in Mr Sacha's skeleton argument), the Defendants have not:

(i) Sought to amend their Application, which still accepts that this part of the judgment can remain;

(ii) Consistent with the Application, sought to explain away the First Defendant's First Witness Statement where liability for this sum is admitted at Para 83;

(iii) Sought to resile from the admission of this sum on behalf of both Defendants in Stokoes' 4 December 2019 letter to Michelmores ["Our clients accept that the sum of £40,128.68 should be retained as Judgment for which both our clients are jointly liable"].

41. It is correct to note that the two possible defences were also raised in correspondence consequent upon the Claimant having served Statutory Demands in October 2020. Such mention, in my judgment, hardly qualifies the sequence of three events I have just mentioned. The Defendants' failure to embrace, either sufficiently or at all, relevant points in the civil claim is hardly mitigated by their reference in a different context.

42. The first proposed defence is that they would be inviting the CPS to agree to an appeal out of time against the convictions for conspiracy to defraud because the Defendants are husband and wife, and their alleged co-conspirators had been acquitted at a retrial on 17 December 2019. Under s.2(2)(a) of the Criminal Law Act 1977, a person is not to be guilty of conspiracy to commit an offence if the only other person with whom he agrees is his spouse.

43. There is, I find, a degree of academic artificiality about this proposed defence. As Miss Rushton points out, more than a year after the acquittal of their co-defendants on 17 December 2019 the Defendants have not taken any steps actually to appeal. In her Second Witness Statement, the First Defendant annexes a letter from MAK solicitors dated 27 November 2020 to the CPS submitting that the Defendants' convictions "*must inevitably be quashed, and we write to invite you to support an out-of-time application to appeal against the said convictions*". The CPS response [letter dated 11 December 2020 although said not to have been received by MAK until mi-January 2021] made clear that the Crown's case in conspiracy was not limited to the Defendants (i.e. as in this case) and their two co-defendants (as acquitted) but was put as forming part of a team involving others. The point that the case against each defendant individually had to be considered separately by the Jury was apparently made and repeated by the Trial Judge in summing up.

44. One would have thought that if the Defendants have strength in their conviction of a proposed appeal, it would have been lodged (or permission for it sought) before now. That would not require the acquiescence of the CPS and the 27 November 2020 letter to the CPS need have been written only by way of cross-check and notification to a process that could have been commenced. It is telling, I find, that no such process has been commenced.

45. I agree with the Claimant's further submissions that (i) even if such appeals have merit on grounds of criminal law, this hardly undermines the conclusion from the convictions that they each defrauded the Claimant (ii) the Defendants had also been convicted of perverting the course of justice and such convictions related to the falsification of costs as submitted to the Claimant.

46. The prospect of a potential criminal appeal does not, I am satisfied, of itself establish a defence to the civil claim ; nor still one that has a realistic prospect of success.

47. The second suggested defence is that the claim in fraud is statute barred because Mr Armstrong, a Legal Aid employee and prosecution witness, had said in the criminal proceedings that in February 2013 there had been noticed an unusual pattern of claims by the First Defendant's firm, Cleveland, and this merited further investigation. Mr Armstrong had requested 50 identified files from Cleveland on 30 May 2013, which were received on two dates in June 2013. From these, Mr Armstrong had discovered letters which appeared to be duplicates of other letters, but with changes to the names and birth dates, and unexpected errors which would not be expected in a genuine letter. These caused Mr Armstrong to check with the Home Office whether the case

references on these files were genuine (which the Home Office confirmed they were not).

48. The submission is that these events in February 2013 amounted to the discovery of the fraud for the purposes of s.32 of the Limitation Act 1980 and so was more than 6 years before the date the Claim Form was issued on 10 May 2019.

49. Section 32 of the Act stipulates that the period of limitation for an action based upon fraud does not run until the claimant "has discovered the fraud….or could with reasonable diligence have discovered it".

50. Mr Schama draws upon commentary in *Chitty on Contracts* at 28-090 in seeking to argue that the objective test of reasonable diligence was made out and hence time ran from February 2013. *Chitty* comments that a claimant is not required to use all means of discovery available to them but only do that which an ordinary prudent person, having regard to all the circumstances, would do. Hence, it is suggested by the Defendants, that in taking the steps initiated by Mr Armstrong, it follows the Claimant acquired knowledge.

51. I do not follow the asserted logic of this. A claimant surely can take reasonable steps in consequence to an irregularity but still have insufficient evidence of fraud for the purposes of limitation. To draw from a citation in *Test Claimants in the Franked Investment Income Group Litigation v Revenue and Customs Commissioners* [2020] UKSC 47 at [213], indeed an authority on mistake relied upon by Mr Schama, "time runs from the point in time when he knows, or could with reasonable diligence know, that he made such a mistake "with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice and collecting evidence".

52. I can find nothing beyond the bare assertion of this limitation defence, unsupported as it is by any particularised pleaded Defence, that establishes that the preliminary investigative steps taken by the Claimant's predecessor beyond the six-years preceding issue were sufficient to constitute knowledge and so the Defendants have an arguable case having realistic prospect of success. I reject the Defendants' proposed limitation point drawing upon knowledge as to fraud. The early events from February 2013 to receipt of the files in question may well establish how the Claimant (as his predecessor) led to a decision that further enquiries were required but this hardly constitutes discovery of fraud for the purposes of limitation. It amounts to something falling considerably shorter than that. Mere knowledge that some unspecified deception has taken place is insufficient. It is instead knowledge as to the fraud as is alleged to have been perpetrated, a point Miss Rushton observes is made in *McGee on Limitation* at 20.013.

53. *Controlled Work : overpayment, wrongful claims and "Breach of Contract"*

The Defendants argue that the "bulk" of the claim is for breach of contract and is "fatally flawed as a matter of law". The Defendants note that the contract was terminated by the Claimant on 4 December 2013 and that the Claimant then raised eight debit notes in July 2014. Later in July 2014, it then demanded payment of the debt notes by way of a Statement of Account. Selectively citing only the first sentence of Para 43 in the Particulars of Claim ["In breach of contract, the First Defendant has failed to pay the aforesaid debit notes to the Claimant"], Mr Schama argues that the Claimant cannot possibly rely upon a breach of contract some 7 months after termination and so "*this aspect*" of the claim must fail as a matter of law.

54. Further contractual points are raised, the Defendants observing that there can have been no breach of Clause 26.5 to support the claim for breach of contract in respect of the "No Match Cases" because no notices were ever issued to the First Defendant pursuant to Clause 14. The alleged breaches of contract that might support a claim for breach of contract in the "No Match Cases" took place at the time when the First Defendant submitted its claims to the Claimant and so were limitation-barred by the time the Claim Form was issued.

55. Mr Schama reminds me that the Defendants do not have to prove that these points are bound to succeed but sufficient if they establish a realistic prospect of success.

56. In recognition that the Claimant may portray the claim as in restitution by way of unjust enrichment, Mr Schama submits that such cause of action is not properly pleaded or particularised. Until it is, and the Defendants have had an opportunity to set out their defence to it, there can be no argument that the Defendants have no arguable defence.

57. Miss Rushton submits that the Defendants misunderstand the basis of the claim. It is not a claim for breach of contract but for repayment of overpaid sums on account, as received pursuant to a contract. Therefore such a claim overrides and is separate to the event of the contractual termination. Indeed, the nature of the claim is such that it cannot be accurately calculated until the contract is finally terminated.

58. I have to agree that it would seem a novel point that just because parties' mutual obligations under a contact as to performance have come to an end means that all entitlements, rights and interests simply disappear.

59. In any event, the Claimant's entitlement to pursue repayment of sums post termination of contract was an express term in the contract. Clause 26.8 of the Standard Terms 2013 provided that :

"Subject to the provisions of this Contract, the suspension or ending of this Contract is without prejudice to any of your or our accrued rights (including our rights to Assess your Claims and to recover any overpayments to you and your rights to recover in respect of any underpayments by us)...".

Reliance upon this clause is made clear in the Particulars of Claim at Para 25. Similarly, Paras 26 and 59 rely upon Clause 26.5 of the Standard Terms 2013, as particularised for ease of reference within the pleading as follows :

"When this Contract ends all "overpayments and mispayments" (as described in Clause 14) become repayable to us and we may assert our rights in Clause 14.11 [to set off any amount payable by the Claimant to the First Defendant against any amount payable by the First Defendant to the Claimant, under the Civil Contract or otherwise]"

Paras 50 and 51 in the Particulars of Claim makes entirely clear the Claimant's case that clause 26.5 entitles the Claimant to claims monies from the First Defendant in respect of the cases as pleaded.

60. Further still, the entitlement of the Claimant to rely upon on provisions within the 2013 Standard Terms post-termination was confirmed by Mr Justice Pepperall in *The Lord Chancellor v Blavo & Co Solicitors Limited (in Liquidation)* [2018] EWHC 3665 (QB) at Para 181.

61. I have carefully re-read the Particulars of Claim in the context of the Defendants' submissions. It seems to me entirely clear and predictable that such a pleading should particularise the contractual terms and, acting upon those, the Claimant commenced its investigations. It is similarly clear that the events alleged are pleaded as breaches of the relevant contractual terms in order to establish the basis for other causes of action as pleaded. So, fraud (Paras 38 and 52), claims for overpayment of monies (para 41), monies paid for which there was no consideration and/or according to principles of unjust enrichment (Paras 43, 62 and 65). The Prayer to the Particulars of Claim is not in damages, as would have to be pursued were this exclusively a claim in contract but in the absence of any liquidated damages clause, but for specific sums. The basis for the claim of those sums, I find, having been quite clearly pleaded.

62. Whilst the entitlement of the Claimant to pursue sums falling due under the now terminated contract, is clear as part of the contractual terms, I am quite satisfied that other and contiguous causes of action are relied upon. I reject the submission that the claim is "fatally flawed" because it is based upon notions of contractual breach post termination of that contract. This is an incorrect analysis even in respect of the contractual provisions. Any proposed Defence based on this submission has no realistic prospect of success.

63. Further, it would seem that even putting the Defendants' submissions about post-contractual reliance at their highest, they could only ever serve to argue against that "aspect" of the claim, as so described. Save for a rather generalised suggestion that the claim for unjust enrichment is not sufficiently particularised, the Defendants are silent in response to the other ways in which the case is very clearly pleaded against them.

64. *Other reason*

Although included as part of the Defendants' submissions, I can recognise no separate or discrete reason why the judgment should be set aside. The repeat of the same arguments but as if drawing upon this alternative provision within r.13.3 do not assist.

65. *Conclusion*

The Defendants do not present a defence or defences that have reasonable prospects of success. They have not made their Application promptly. The gross delay in this case is such that even if points of proposed defence might have reasonable prospect, the case is such that I am satisfied it would not be just that liability be re-opened and the judgment set aside even if the proposed defence or defences might have some prospect of success.

66. *Costs and draft Order*

The hearing concluded on the basis that I would hand down a reserved judgment. Costs therefore remain to be decided and assessed.

If the Defendants propose to argue that costs should not follow the event, then they must file and serve written submissions and the Claimant should respond. I will then decide the principle of costs. The timescale for that I would hope to leave the parties to negotiate but, if there is no prompt agreement, I ask that the Claimant (having carriage of the claim overall) to inform me and my clerk by e-mail and I will further direct.

If there is agreement as to principle but not amount, I ask that the Paying Party e-mails both me and my clerk with a request either to list for a short telephone hearing, at which costs will summarily be assessed, or for me to assess the same without a hearing. The choice will probably depend upon the nature of, and how extensive are, the Paying Party's submissions.

Miss Rushton did set out in some detail the basis for there being some arithmetical credit due to the calculation of (but not as alters liability for) the judgment sum. I did not hear any submissions from the Defendants in response and so assume that the revised judgment figure can be agreed before a draft Order is concluded.