Neutral Citation Number: [2024] EWHC 2824 (Ch)

Case No: BL-2022-BHM-000049

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN BIRMINGHAM
BUSINESS LIST (ChD)

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 6 November 2024

Before :

HHJ RICHARD WILLIAMS
(sitting as a Judge of the High Court)

- -

Between :

MR MAGHSUD AZHDARI

Claimant

- and –

MR FARHANG ADJARI

Defendant

- -

Amardeep Dhillon (instructed direct access) for the **Claimant**
Timothy Deal (instructed by BW Solicitors) for the **Defendant**

Hearing dates: 29, 30 and 31 May 2024
(written closing submissions filed sequentially by 19 August 2024)
(draft judgment circulated to the parties by email dated 30 October 2024)

JUDGMENT

HHJ Richard Williams:

Introduction

1. The dispute centres around a mixed use property at 12a Clarendon Avenue, Leamington Spa, Warwickshire CV32 5PZ ("***the Property***"), which comprises:

   i) a ground floor takeaway restaurant ("***the Commercial Premises***"); and

   ii) residential accommodation in the two floors above ("***the Flat***").

2. Mr Maghsud Azhdari ("**C**") claims that he (i) was an equal partner in a business that operated from the Commercial Premises, and (ii) is an equal beneficial owner of the long leasehold title of the Flat registered in the sole name of D.

3. Mr Farhang Adjari ("***D***") denies C's claims. It is D's case that he (i) operated the business as a sole trader, and (ii) is the sole legal and beneficial owner of the long leasehold title of the Flat.

Background

General

4. C and D are first cousins, who grew up together in Iran. Before this dispute arose, they were very close and treated each other as brothers.

5. In 2000, C arrived in the UK as a refugee before becoming a British Citizen in 2006. He has worked in the UK largely as a taxi driver.

6. D arrived in the UK as a refugee in 2007. C was hugely supportive of D by:

   i) allowing D to live with C for a period of 6 months;

   ii) giving D money to buy clothes;

   iii) acting as guarantor for D's flat;

   iv) finding D employment; and

   v) assisting D in acquiring a good credit rating and British Citizenship.

Initial lease of the Property

7. By a lease dated 14 November 2014 the then freehold owner, Revelan Estates (Wigston) Limited ("***Revelan***") granted a lease of the Property to D for the term of 20 years ("***the 2014 Lease***"). C acted as D's guarantor under the 2014 Lease.

8. It is not disputed that the 2014 Lease was acquired with the plan of operating a Mexican takeaway business from the Commercial Premises, whilst renting out the Flat above ("***the Business***").

9. C claims that the Business was an equal partnership between him and D, whereas D claims that it was his sole venture with no involvement of C other than him acting as guarantor under the 2014 Lease.

10. It was the written evidence of C that:

    i) It had been agreed that the Business would be an equal partnership between him and D.

    ii) C arranged for his friend, Amir Nankali, who was a structural and civil engineer, to help with negotiating the terms of the 2014 Lease and in making the necessary planning application.

    iii) The 2014 Lease was put into D's sole name for the "simple reason…to allow [D] to build his credit; for him to become independent; secure British Citizenship – there was no other reason."

    iv) The landlord was not happy with D's credit rating and was concerned that D was not a British Citizen with no savings or assets in his name. Therefore, C was required to act as guarantor under the 2014 Lease because C had a house, savings and shares in an existing business.

    v) The Property was in a very poor condition, and substantial renovation works were undertaken before the Business opened in January 2015.

    vi) C sold his interest in Sky Taxi and used the proceeds (£22,500) together with borrowings of £10,000 to invest in the Business and to renovate the Property.

    vii) D also borrowed £12,000 from Tesco Bank to contribute towards the cost of renovations.

11. It was the written evidence of D that:

    i) It was never agreed that C be a partner in the Business.

    ii) D was the sole purchaser of the 2014 Lease. He paid the exiting tenant the sum of £13,000 funded by way of savings and a personal loan from Tesco Bank of £12,000.

    iii) From the outset D worked on the Business with his close friend, Isabella Zurawaska-Novak, with absolutely no contribution made by C other than C acting as guarantor under the 2014 Lease.

    iv) Shortly after the Business opened in January 2015, C was having marital problems such that D allowed C to move into one of the rooms in the Flat and to take food from/cook in the kitchen of the Business.

12. D called Mrs Zurawaska-Novak as a witness. It was her written evidence that:

    i) She met D in college in 2009 and they became close friends.

ii) Before D bought the 2014 Lease, she viewed the Property with D and they discussed its suitability for the Business.

iii) From the outset, she helped D with designing the Logo and menu, ordering aprons, packaging and decorations, food design/preparation including adding Polish herbs to the standard recipes to introduce new flavours.

iv) The first time she met C was when he attended the Business on its opening day to congratulate D. After a few weeks, she saw C accessing the Flat and also collecting food from/cooking in the kitchen of the Business. D told her that C was going through some family problems and so he had given him permission to live upstairs as C could not afford other accommodation at the time.

v) D continued to support C financially by paying for C's personal shopping out of the takings of the Business.

Purchase of the Property and splitting the freehold title

13. In 2018, Revelan offered the freehold of the Property for sale at a price of £185,000 plus VAT.

14. A company, El-Paso Leam Limited ("***EPLL***") was incorporated to purchase the freehold of the Property and in order to avoid incurring any VAT liability. The co-directors and equal shareholders of EPLL were D and Bashir Ahmad, who was a good friend of C. Mr Ahmad became involved as it was felt that his involvement would increase the prospects of being able to raise commercial borrowing against the Property in order to fund the acquisition.

15. After the commercial lender withdrew the offer of finance, Mr Ahmad was removed as a director of EPLL and his shares transferred to D on 21 March 2018.

16. Also, on 21 March 2018, EPLL completed the purchase of the Property. The purchase price was raised largely from short term loans from friends and associates.

17. On 14 August 2018, EPLL granted a 99-year lease of the Flat to D ("***the 2018 Lease***"). As a consequence, D became the long-leasehold owner of the Flat, whilst EPLL remained the freehold owner of the Flat and the Commercial Premises.

18. It is C's case that it was agreed with D that the Property be purchased again as a joint venture and the Business thereafter be operated through EPLL. In reliance upon that agreement, C contributed the majority of the purchase price, which he largely raised by way of short-term personal loans from his friends and associates. It is D's case that there was never any such agreement and C made no financial contribution towards the purchase price. D purchased the Property alone with his purchase largely being funded by way of personal loans including from associates of C, who were introduced to D by C for that purpose.

19. It was the written evidence of C that:

i) C and D agreed to purchase the freehold of the Property again as a joint venture. It was further agreed that EPLL be used both to acquire the freehold and to operate the Business going forward.

ii) After the commercial lending fell through, neither C nor D had enough money to complete the purchase, and so the only option was to borrow from third parties to supplement their own funds.

iii) The funds required for completion were £189,235. C's contribution towards those funds comprised –

a) £17,500 being C's ½ share of the profits in the Business;

b) £20,000 from C's personal savings transferred from his personal bank account to D's personal bank account on 13 March 2018; and

c) the further total sum of £85,500, which C borrowed from various people he knew. Those monies were handed to D in cash, or transferred to D's personal bank account, or transferred to the bank account of the conveyancing solicitors all in the period from 4 March 2018 to 14 March 2018;

thereby making a total contribution of £123,000.

iv) A residential mortgage broker, Marc Holden, advised upon splitting the title in order to raise a residential mortgage against the leasehold title of the Flat. The mortgage monies could then be used to pay off the personal borrowings. It was decided to put the leasehold title of the Flat in D's name as he was a first-time buyer, and C already had a residential mortgage in his name.

v) The mortgage application was refused because the Flat and the Commercial Premises shared the same electricity and water supplies. C was coming under increasing pressure to repay his personal borrowings, and on 28 November 2018 a meeting took place between C, D and C's wife ("***the Meeting***"), which was recorded by C. During the course of the Meeting, it was proposed that C's family home be sold in order to raise money to pay off C's borrowings. However, C's wife was reluctant to agree to this course of action, and so D offered in return to transfer C's 1/2 share in the Property to C's wife.

vi) D failed to put C's share of the Property in C's wife's name, and so the family home was not sold. Instead, on the advice again of Marc Holden –

a) The family moved out of their home into rented accommodation;

b) The family home was re-mortgaged on a buy-to-let mortgage and then rented out; and

c) C raised £78,033.77 from the re-mortgage of the family home, which completed on or around 3 October 2019. That sum was then used to repay the personal loans that C had taken to help fund the purchase of the Property.

20. C called the following witnesses:

i) Saeed Atogalia Homayon, who stated in his written evidence as follows –

a) He has known C for over 20 years and has worked with C as a taxi driver for the past 7 years;

b) In March 2018, C approached him to borrow money that C urgently needed in order to complete the purchase of a property otherwise the sellers would pull out of the sale. C promised to repay the money once C was able to remortgage the property after it was purchased;

c) On or around 4 March 2018, he gave C £15,000 in cash from savings; and

d) On 7 November 2019, C repaid him the money by transfer into his bank account. This was later than expected, but he was okay with that as he knew there were some delays with the remortgage.

ii) Mr Ahmad, who stated in his written evidence as follows –

a) He has known C for approximately 23 years, and they are good friends;

b) In January 2018, C approached him and said that he needed to borrow some money for his ½ share to purchase the Property. He said he could lend C about £20,000. He understood at that point that the remainder of the money was being secured by a mortgage;

c) He was subsequently told that it was not possible to take out a mortgage because of C's age and D's credit status. Therefore, C asked him if he was prepared to act as guarantor. He agreed because of his good relationship with C, and so he became a director and equal shareholder of EPPL. There was a clear understanding that he was holding his shares in EPPL for C and which he would transfer to C once the finance was obtained. He and C had complete trust in each other;

d) The offer of finance was withdrawn, and so C had to approach many individuals to take personal loans to complete the purchase. He personally loaned C the sum of £20,500, which was transferred direct to the conveyancing solicitors. C said that he

would repay the loan within a few weeks once he was able to organise some refinance;

e) There were some problems with the refinance, which meant that he was not repaid until 5 November 2019. At his direction, C transferred £20,000 to Mr Wahid Wali, whom he owed money to, and the balance of £500 was repaid in cash; and

f) He only recently became aware that he was removed as a director and shareholder of EPPL on 21 March 2018. He is unsure how this change was made at Companies House.

iii) Rashid Mali, who stated in his written evidence as follows:

a) He is a businessman with his main interest in property. He has known C for over 20 years;

b) In March 2018, he became aware that C was looking to purchase the Property with D, whom he does not know. C said he was short of money and needed to complete the purchase urgently or the sellers would pull out;

c) He agreed to lend C £35,000 to be paid direct to D's account because the purchase was urgent. He arranged for a family member of his, Bano Tasha, to send the £35,000 on or around 13 March 2018;

d) He loaned the money on the trust he has for C, and on his say so. As far as he was concerned he was lending the money to C only; and

e) C has now repaid him the entire money as promised.

21. It was the written evidence of D that:

i) He purchased the Property alone and it was never agreed that C would have any interest in it or the continuing Business.

ii) Mr Ahmad was a 50% shareholder of EPPL solely for the purpose of acquiring the bridging loan for the purchase as he had a good credit history. When the bridging loan was rejected, Mr Ahmad got himself removed from the company amicably on 21 March 2018 and thereafter D became the sole owner and director of EPPL.

iii) C did not make any financial contribution towards the purchase of the Property, which was funded solely by D by way of -

a) personal savings of £30,000;

b) the proceeds of sale of his motor vehicle being £8,500; and

c) personal loans:-

- £20,000 from Barclays Bank,
- £15,000 from Santander Bank,
- £20,000 from his friend Mr Mehdi Bijannejad,
- £35,000 from Mr Rashid. C, acting as an intermediary, put D in touch with Mr Rashid,
- £15,000 from Mr Halim,
- £5,000 from Mr Sheikh,
- £20,000 from various friends.

iv) In 2019, D took out further loans to pay back the loans he had taken in 2018.

v) C's transcript of the recording of the Meeting is misleading. D was drunk and he was in no fit state to understand what C was implying at the time.

22. It was the written evidence of Mrs Zurawaska-Novak that:

i) D shared with her that he was interested in buying the Property. She asked how he was going to fund the purchase, and he told her from savings and loans.

ii) D took out some loans from various sources in 2018 such as Santander, Barclays and Tesco Banks plus from various friends. She personally helped him to organise the Tesco loan.

iii) C made no financial contribution, and the only role he played in the purchase of the Property was introducing D to a friend, who lent some money to D.

<u>Indirect transfer of ½ ownership of the freehold Property to C</u>

23. In 2019, D fell ill suffering with cancer. On 9 October 2019, D travelled to Iran for treatment where he remained until 27 May 2021 when he returned to the UK. During this time, C was appointed a director of EPLL. In addition, 50% of the shares in EPLL were transferred to C.

24. It was the written evidence of C that:

i) When D fell ill, C was extremely worried with all the delays with the NHS, and so it was decided that it would be better for D to go back to Iran to get private medical care.

ii) It was agreed that C would be looking after the Business in the meantime. C would need access to the various accounts, and so he asked D to appoint him as a director and shareholder.

iii) On 5 October 2019, C was appointed as a director of EPLL. This was the first time that C became aware that Mr Ahmad was no longer a director or shareholder of EPLL. C was under the impression that his shareholding had been transferred to him at the same time he was appointed as a director

iv) C started to look into the business affairs and became concerned about what had been going on with the profits from both the Business and the Flat. As a result, in around July 2020, he appointed new accountants, who then advised C that he was not a registered shareholder of EPLL. Therefore, in August 2020, C's wife went back to Iran and presented to D for signature the paperwork to transfer the shareholding to C.

v) There was a delay in registering C's shareholding, which was finally registered on 15 July 2021.

vi) C continued to chase D to put the 2018 Lease into both their names, but D delayed until finally, in around June 2021, D told C directly that he was not going to do so.

25. It was the written evidence of D that:

i) C convinced D that he would deal with D's business matters whilst D was receiving treatment in Iran. D trusted C and left everything to him as he was suffering from a life threatening cancer.

ii) However, in D's absence and without his consent, C changed all the company bank accounts to his personal name.

iii) C neglected the Business and failed to pay the bills. On D's return to the UK he was faced with hundreds of letters from banks and debt collectors.

iv) D asked C to leave the Flat and to return his shareholding to D, who was now able to resume management of his Business. At this time, C started claiming ownership of the Property and the Business. C sought to take advantage of the fact that D was still recovering from his illness and was suffering severe financial problems.

26. It was the written evidence of Mrs Zurawska-Nowak that:

i) As D's condition worsened in 2019, D decided to go to Iran for treatment. D told her that –

a) C advised D that treatment in Iran was better and less cumbersome;

b) C assured D that he would look after the Business like an elder brother; and

c) C insisted upon being appointed a co-director so he could look after the business in D's absence.

ii) After D left for Iran, she stopped visiting the Business.

Procedural history

27. On 26 May 2022, C issued this claim.

28. After completing the oral evidence there was insufficient time available at the trial of the claim to hear oral closing submissions, and so counsel was required to file written closing submissions. At the request of the parties, I granted an extension of time for the filing of those closing submissions to allow the parties the further opportunity to negotiate a settlement. I did so for two reasons:

    i) Whatever my decision on the present case, the parties will, as equal shareholders of EPLL, remain deadlocked in relation to the freehold of the Property, which itself represents a substantial development opportunity; and

    ii) Having heard the parties give their oral evidence, I warned them that there was a real risk that I might make very serious adverse findings against both of them.

29. Notwithstanding the extra time that was made available, the parties were unable to reach a negotiated settlement.

30. The trial bundles extended to 1257 pages. I am unable in the course of this judgment to refer to all the evidence and argument relied upon by parties but I have taken it all into account in reaching my decision.

Applicable law

31. The applicable law is not in dispute, which I summarise as follows:

    i) C seeks a declaration that he and D operated the Business by way of a partnership, which was dissolved on 14 February 2018 when the Business was thereafter undertaken by EPLL. Section 1(1) of the Partnership Act 1890 defines a partnership as "the relation which subsists between persons carrying on a business in common with a view to profit". A partnership does not have a separate legal personality, but is a relationship between the partners. In ***Hurst v Bryk*** [2002] 1 A.C. 185 at 194, Lord Millett expressed the following view –

    > "…while partnership is a consensual arrangement based on agreement, it is more than a simple contract (to use the expression of Dixon J in ***McDonald v Dennys Lacelles Ltd***, 48 C.L.R. 457, 476); it is a continuing personal as well as commercial relationship."

    ii) C seeks a declaration that he beneficially owns 50% of the 2018 Lease. In ***Matchmove Limited v Dowding and Church*** [2016] EWCA Civ 1233, the Court of Appeal held that -

> "[29]…..a common intention constructive trust could arise where (i) there was an express agreement between parties as to the ownership of property (ii) which was relied upon by the claimant (iii) to his or her detriment such that (iv) it would be unconscionable for the defendant to deny the claimant's ownership of the property."

32. Ultimately this case turns upon a factual dispute and what, if anything, was agreed between C and D in respect of the Business and the acquisition of the Property. C alleges that he and D agreed by spoken words to establish the Business and thereafter acquire the Property, including the 2018 Lease, as a joint venture. In reliance of what was agreed, C allegedly made substantial investments into the joint venture.

33. D denies that there were any such agreements such that, and in particular, i) prior to the incorporation of EPLL, D operated the Business as a sole trader, and ii) he is the sole legal and beneficial owner of the 2018 Lease.

Burden and standard of proof

34. C bears the burden of proving the alleged agreements.

35. This is not a Criminal trial where the standard of proof is beyond reasonable doubt so that I must be sure before making a finding of fact. Rather, I must apply the lower civil standard of proof being the balance of probabilities. In other words, in making a finding of fact, I must be satisfied that more likely than not it is true. In ***Re B [2008] UKHL 35***, Baroness Hale said:

> "[32.] In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof."

36. It has not been an easy task on the available evidence, and in particular having regard to the large/multiple cash payments that were allegedly received/made by both parties, to piece together events and conversations going back so long. However, in the words of Baroness Hale, I cannot sit on the fence, but must decide, on balance, which of the competing narratives I prefer as being more likely than the other.

General observations upon the evidence of witnesses of fact

<u>Indicators of unsatisfactory witness evidence</u>

37. In ***Painter v Hutchinson*** [2007] EWHC 758 (Ch) at [3], Lewison J (as he then was) identified a non-exhaustive list of indicators of unsatisfactory witness evidence including:

i) Evasive and argumentative answers;

ii) Tangential speeches avoiding the questions;

iii) Blaming legal advisers for documentation (statements of case and witness statements);

iv) Disclosure and evidence shortcomings;

v) Self-contradiction;

vi) Internal inconsistency;

vii) Shifting case;

viii) New evidence; and

ix) Selective disclosure.

Lucas Direction

38. I remind myself that witnesses can often lie and for different reasons. Lies in themselves do not necessarily mean that the entirety of the evidence of a witness should be rejected. A witness may lie in a stupid attempt to bolster a case, fear of the truth, misplaced sense of loyalty and torn loyalties, but the actual case nevertheless remains good irrespective of the lie. A witness may lie because the case is a lie.

Interference with memory

39. Even honest witnesses can be genuinely mistaken in their evidence. It is a striking feature of this case that the witnesses were seeking to recall events and conversations that took place going back several years, which necessarily gives rise to particular problems. Apart from the fact that, quite understandably, it is often difficult for witnesses to remember accurately what happened or what was said so long ago, witnesses can easily persuade themselves that the accounts they now give are the correct ones.

40. In ***Gestmin SGPS SA v Credit Suisse (UK) Limited*** [2013] EWHC 3560 (Comm), Leggatt J, as he then was, made the following observations about the interference with human memory introduced by the court process itself:

> "[19.] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of

preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

[20.] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events."

41. None of the witnesses in this case can be regarded as detached or objective observers being either a party to the proceedings, or a longstanding friend of or openly hostile to a party to the proceedings. Therefore, the witnesses were subject to significant motivating forces and powerful biases.

Adverse Inferences

42. The court may draw adverse inferences from the failure of a party (i) to produce contemporaneous documents that would have otherwise existed and supported their case, and/or (ii) to call as a witness at trial a person who might be expected to give important evidence.

Absence of contemporaneous documentary evidence

43. In ***Re: Mumtaz Properties Ltd*** [2011] EWCA Civ 610, Arden LJ said:

"[14] In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be

conspicuous by its absence and the judge may be able to draw inferences from its absence."

Failure to call a witness of fact to give evidence

44. In ***Wisniewski v Central Manchester Health Authority*** [1998] PIQR P323 at P340, Brooke LJ said:

> "From this line of authority I derive the following principles……
>
> (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 a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to 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 that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such 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/her absence or silence may be reduced or nullified."

45. However, in ***Royal Mail Group Ltd (Respondent) v Efobi (Appellant)*** [2021] UKSC 33, Lord Leggatt said:

> "[41.] The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in ***Wisniewski v Central Manchester Health Authority***….is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in

> the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

Importance of corroborating contemporaneous documents, if available

46. In ***The Ocean Frost*** [1985] 1 Lloyd's Rep 1, Robert Goff LJ observed (and which observation was described as "salutary" by Lord Mance in ***Central bank of Ecuador v Conticorp SA*** [215] UKPC 11 at [164]):

> [57] "………….. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."

47. Similarly, in ***Gestmin SGPS SA v Credit Suisse (UK) Limited***, Leggatt J, having commented upon the unreliability of human memory, concluded that:

> "[22.] In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

Subsequent conduct

48. In ***Carmichael and another v National Power Plc*** 1999 1 WLR 2042, the House of Lords held that the industrial tribunal had been entitled, when determining as a question of fact whether a contract of employment had been agreed between the parties, to have regard to the parties' subsequent conduct. In so deciding, Lord Hoffman said this (at [2050H], and with my emphasis added):

> "……In the case of a contract which is based partly upon oral exchanges and conduct, a party may have a clear understanding of what was agreed without necessarily being able to remember the precise conversation or action which gave rise to that belief. As the Court of Appeal pointed out, the tribunal did not make any specific findings about what was said at the interviews or on any other occasion. But the terms of the engagement must have been discussed

and these conversations must have played a part in forming the views of the parties about what their respective obligations were.

> The evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms, in an objective sense, were agreed. Of course the tribunal may reject such evidence and conclude that the party misunderstood the effect of what was being said and done. But when both parties are agreed about what they understood their mutual obligations (or lack of them) to be, it is a strong thing to exclude their evidence from consideration. Evidence of subsequent conduct, which would be inadmissible to construe a purely written contract (see *Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd.* [1970] A.C. 583) may be relevant on similar grounds, namely that it shows what the parties thought they had agreed. It may of course also be admissible for the same purposes as it would be if the contract had been in writing, namely, to support an argument that the terms have been varied or enlarged or to found an estoppel."

Assessment of the witnesses of fact in this case

C

49. I did not find C to be a reliable or at times a credible witness. His testimony was tainted to a significant and material extent by indicators of unsatisfactory witness evidence.

50. Missing evidence:

    i) C said that he had in his possession, but had failed to disclose into these proceedings, relevant documents in connection with the sale of his shares in Sky Taxi for £25,000, which funds he allegedly applied towards the initial cost of refurbishing the Property.

    ii) C accepted in his oral evidence that his wife, who accompanied him to Court every day, could have given material evidence to assist the Court in resolving this dispute. C said that he did not call his wife as a witness because he did not think she would be allowed to give evidence because she was not impartial. However, that explanation made little sense when C chose to call as witnesses a number of his close friends.

    iii) It was C's evidence that the money that he borrowed from friends to purchase the Property was repaid in large part from the monies raised in 2019 through remortgaging the family home. In his oral evidence, C said that the remortgage monies were paid into his wife's bank account and then transfers made out of that account to repay the loans. However, C failed to disclose copies of the relevant bank statements, which, although not in his direct control, could reasonably have been obtained in light of his wife's continuing support.

51. Inconsistencies:

i) C denied in his oral evidence that he had separated from his wife such that he needed to move into the Flat. However, the transcript of the Meeting, which C relies upon as an accurate record of what was said, records C as saying –

> "I want to make something clear, nothing is left between me and [my wife], the only thing that is left is dignity and reputation, nothing more in terms of a partnership….."

C's wife is then recorded as saying in response –

> "It is good to be frank."

ii) C stated in his written evidence that Mr Mali lent him the sum of £35,000, which D partly repaid in the sum of £30,000 with C repaying the balance. However, in his oral evidence, C accepted that interest was payable on the loan such that the sum to be repaid was £49,000 in total. Further, in his oral evidence, and by reference to D's bank statements, C said that D only repaid Mr Mali the sum of £20,000 with C repaying the balance of £29,000.

52. Contradictions: It was C's evidence that, at Mr Ahmad's request, he repaid the money that he had borrowed from Mr Ahmad in 2018 by transferring the sum of £20,000 to a Mr Wahid Wali in 2019. C said in his oral evidence that he had no dealings with Mr Wali and so no other reason to make the payment. However, C was then taken to an extract of his disclosed bank statements, which had been unsuccessfully redacted and still showed that C made a payment of £2,500 to Mr Wali on 7 June 2021. C accepted that he had made that other payment and sought unconvincingly to explain away the contradiction by claiming that –

> "I have no business with him, maybe my family, maybe someone asked me. He is my friend, we help each other when we need to."

<u>Mr Homayon</u>

53. I have no reason to doubt that Mr Homayon was an honest witnesses doing his best to assist the court. Further, I did not find that his evidence was tainted by indicators of unsatisfactory witness evidence. That said, Mr Homayon is a close friend of C, and so I have treated his evidence with a degree of caution.

<u>Mr Ahmad</u>

54. In my assessment, the reliability of Mr Ahmad's evidence was undermined by a significant and material internal inconsistency:

i) It was not disputed that Mr Ahmad was appointed a co-director and co-shareholder of EPLL for the sole purpose of securing commercial lending to fund the acquisition of the Property.

ii) The filings at Companies House record that Mr Ahmad resigned as a director and transferred his shares to D on 21 March 2018 shortly after

the offer of commercial lending had been withdrawn. It was Mr Ahmad's evidence that all this was done (presumably by D) without Mr Ahmad's knowledge.

iii) However, if true that Mr Ahmad held his shares on trust for C, Mr Ahmad could and should have taken steps to transfer those shares to C once the offer of commercial lending had been withdrawn, since Mr Ahmad's continued involvement served no useful purpose.

iv) Mr Ahmad's unconvincing explanation for his failure to act was that he was not asked and did not volunteer to transfer his shares to C.

Mr Mali

55. I did not find Mr Mali to be a credible witness.

56. It was the written evidence of Mr Mali that he arranged "for a family member of mine, Bano Tasha, to send £35,000 to [D's] bank account on or around 13 March 2018."

57. In his oral evidence, Mr Mali was questioned over whether the money advanced was in fact an unregulated loan subject to an extortionate rate of interest. In response, Mr Mali said for the first time and variously that:

i) Bano Tasha was a business run by his mother-in-law.

ii) The business was cash rich and managed by Mr Mali.

iii) The mother-in-law had been living with Mr Mali for 20 years and she owed him because he had been looking after her.

iv) He had a power of attorney over the business and used the cash in the business to make the loan.

58. Notwithstanding the confused and confusing nature of Mr Mali's oral evidence, he vehemently denied that he ever made an unregulated loan by charging interest. However, even C in his oral evidence agreed with D that Mr Mali's loan was indeed subject to interest with the total amount repayable after 12 months being £49,000. By my calculation that equates to an interest rate of 40% per annum. It is therefore unsurprising that, on 15 August 2018, the conveyancing solicitor emailed the mortgage broker, Mr Holden, chasing the re-finance by way of the buy-to-let mortgage on the Flat because:

> "Having spoken to [C and D] I am aware that [EPLL] has also borrowed money at extortionate interest rate and it is in all parties interest to complete the refinance as soon as possible."

D

59. I did not find D to be a reliable or at times a credible witness. His testimony, even more than that of C, was tainted to a significant and material extent by indicators of unsatisfactory witness evidence.

60. Inconsistencies:

i) D stated in his written evidence (at [6]) that "Upon finalizing the lease and some maintenance at the property, I opened the shop officially on 1st of January 2015." However, in his oral evidence, D accepted that the Property was in a very poor state and needed lots of work. D bizarrely sought to explain away this inconsistency by claiming that "Yes, full refurbishment but only some maintenance."

ii) D emphasised in his written evidence that C played absolutely no role in the acquisition of the Property other than facilitating some introductions to third party lenders. However, in his oral evidence and when faced with the contemporary documents, D admitted that he and C were in contact with the conveyancing solicitors and that they also went to see the accountant together to discuss how best to proceed to avoid incurring VAT. D further admitted that he might have asked C if they should buy the Property together, he trusted C and always took C's advice.

iii) D stated in his written evidence that he repaid Mr Mali the sum of £35,000, but in his oral evidence he said that he repaid the sum of £49,000 albeit within 12 months. However, D was then taken to contemporary documents, which evidenced that, in March 2019 over 12 months later, Mr Mali was becoming increasingly aggressive over the outstanding loan. Further, D admitted that it was C, who then arranged for Mr Mali to be repaid albeit in part funded by a Tesco Loan for some £30,000 taken out by D. The oral evidence of D in this regard became increasingly confused and confusing.

61. New evidence:

i) In his written evidence, D stated that to fund the acquisition of the Property he borrowed £20,000 "from various friends of mine." When asked who those friends were, D said in his oral evidence that they included Jamid the owner of a mini-market. Whilst D allegedly borrowed the not insignificant sum of £7,000 from his friend Jamid, D did not know Jamid's second name. It appeared that D was making up his evidence as he went along in an attempt to answer questions consistent with his case.

ii) In his written evidence, D stated that he borrowed the further sum of £15,000 from a Mr Halim. In his oral evidence, D said:

> "I know him as Halim. He is a taxi-driver. He working in [the Business]. On the books but not working there, he was applying to bring his wife to the UK. Don't know if Halim his 1st or 2nd name."

D was given a warning against self-incrimination in connection with immigration fraud.

<u>Mr Ali Ajdari</u>

62. Mr Ajdari is the brother of C and the cousin of D. In his oral evidence, Mr Ajdari confirmed that he moved to the UK from Iran in 2006, but had not spoken to C for some 10 years following them falling out. He was here in court to support D.

63. Indeed, it became clear during cross examination that much of what Mr Ajdari stated in his written evidence as matters of fact were in reality only his recollections of what he had been told by D rather than matters directly within his personal knowledge.

64. For those reasons, I am unable to and do not attach any weight to the evidence of Mr Ajdari.

<u>Mrs Zurawska-Nowak</u>

65. In my assessment, Mrs Zurawsak-Nowak was not a credible witness. In her oral evidence:

    i) Mrs Zurawsak-Nowak confirmed that D was her best friend and, from January 2015, she began working in the Business.

    ii) Mrs Zurawsak-Nowak was taken to D's disclosed bank statements, which recorded that, on 16 February 2015, she made payments to D totalling £228. When asked why she was paying D back her weekly earnings, Mrs Zurawsak-Nowak explained that she was paid cash in hand and the payments to D were unrelated to her earnings, which is why those payments were not happening every month.

    iii) Mrs Zurawsak-Nowak was then taken to further entries in D's disclosed bank statements, which recorded that she and indeed her husband continued to make regular payments of £114 and £50 respectively to D on 16 March, 24 March, 13 April, 23 April, 8 May, 21 May, 19 June, 29 June, 28 July and 30 July 2015.

    iv) Mrs Zurawsak-Nowak was initially evasive refusing to answer questions about what those payments were for without her husband being present and because she did not feel safe in doing so. Eventually, she said that she and her husband owed D money loaned to them by D when they were still studying. Further, it was only a few years ago that D had told them that the loans were cleared and no further payments required.

    v) Mrs Zurawsak-Nowak appeared to be making up her evidence as she went along in an attempt to answer questions in a manner consistent with D's case.

    vi) Mrs Zurawsak-Nowak gave her evidence before D, who then said in his evidence that –

        a) In 2013, Mrs Zurawsak-Nowak and her husband moved to a house that required lots of work. He helped them out and they started to pay him back when Mrs Zurawsak-Nowak began

working in the Business. The money was fully paid off by 2017, or 2020, or 2021;

b) They were always giving each other money, although he was not prepared to say how much as it was nothing to do with the Business;

c) He did not know how much he lent Mrs Zurawsak-Nowak; and

d) The Business accounts were false in that they only recorded the income from customers eating in at the restaurant. D was given another warning against self-incrimination; this time in connection with false accounting.

vii) In my view, the more likely explanation for these payments is that Mrs Zurawsak-Nowak was assisting D in tax evasion.

Overall approach to the findings of fact in this case

66. The primary witness of fact in this case were C and D. I did not find them to be reliable or at times credible witnesses. Therefore, I am unable safely to accept their evidence unless it is corroborated by other reliable evidence, or is contrary to their own interests.

67. In making my findings of disputed facts in this case, I have had particular regard to the undisputed facts including what the parties subsequently said and did, the objective inferences properly to be drawn from those undisputed facts, the contemporary documents and the overall probabilities including by reference to the parties' motives.

Analysis

Initial observations

68. D relies upon the absence of any written partnership agreement in support of his version of events, but in my view it is not unusual for there to be no written terms governing business dealings between close family members. C and D were in agreement that, prior to the relatively recent breakdown in their relationship, they had been more like brothers and had trusted each other implicitly.

69. C does not particularise precisely when and what was said in connection with the alleged oral agreements. However, that is unsurprising having regard to the length of time that has now elapsed. Further, I do not consider that lack of detail to be fatal to C's claim, since it would not be untypical for informal business agreements between family members to evolve over time by way of oral exchanges.

Business

Negotiating the 2014 Lease

70. It was C's evidence that he was closely involved in the negotiations over the 2014 Lease. It was D's written evidence that:

> [7.] The Claimant claims that the lease was acquired with the intention of running the business in partnership with one another. This is categorically denied, I bought the lease entirely with my own funds and worked on it from the beginning with my close friend Isabella. We carried out the viewing of the property prior to purchasing the lease and set up the business from the beginning. The only role that the Claimant played in this was that he became the guarantor of the property….."

71. In cross examination, D was taken to an email sent to C by the landlord's agent dated 2 May 2014, which C then forwarded to the architect. The email stated:

> "…..
>
> Subject to the landlord satisfying themselves of you and your colleagues financial soundness I confirm that they would consider an assignment and variation to the term as follows:
>
> Increase the term to 20 years
>
> Reduce the rent in years one and two.
>
> …….."

72. In light of the contents of that email, D changed his evidence and accepted that C had helped D a lot by liaising with the landlord's agent, the architect, the conveyancing solicitor, the builder and the electricians. However, D claimed that, in 2015, he repaid C for his help by making payments to C from the profits generated by the Business.

73. Whilst C was not named as a tenant under the 2014 Lease, he was named as guarantor. C admitted in his oral evidence that he had previously acted as guarantor for D's flat, but I consider that the guarantee of a commercial lease, which imposed repairing obligations upon the tenant, is significantly more onerous than that of a residential lease. It strikes me as inherently unlikely that C would have been willing to expose himself to such a potential significant financial liability dependent upon the performance of the Business without being invested in the Business. In other words, and notwithstanding their close relationship, it makes no commercial sense for C to have agreed to take on any downside of the Business without enjoying any upside.

Cost of refurbishment

74. It was C's evidence that he contributed the sum of £32,000 towards the cost of refurbishing the Property prior to the Business opening, which contribution was funded by way of selling his shares in Sky Taxi for £22,500 and the balance on a credit card. As already noted, C failed to disclose any documentary evidence to corroborate that share sale. However, on balance I find that C did make a

significant financial contribution towards the cost of refurbishment for the following primary reasons:

i) It is not disputed that D borrowed £12,000 from Tesco Bank, although it was D's written evidence that this money was used to pay towards the purchase price (£13,000) of the 2014 Lease from the previous tenant.

ii) C has disclosed photographs (x 81), which he took of the condition of the Property at the time. Leaving aside the question of why C would ever have felt the need to take so many photographs if he had no interest in the Business, those photographs show that the Property was in a very poor condition throughout including the Flat above the Business. For examples, the Business required a new kitchen and the Property as a whole required new electrics.

iii) In his oral evidence, D claimed for the first time that he had also raised the sum of £15,000 by way of other loans and savings to pay for the cost of refurbishment. However, even if that was true, it is highly unlikely that the sum of £15,000 would ever have been sufficient to meet in full the cost of refurbishment thereby leaving a substantial shortfall.

iv) C's disclosed bank statements show that, on 19 November 2019, he received into his personal account the sum of £6,5000 from his Barclaycard. Thereafter, the bank statements record multiple payments being made to builders merchants.

v) C has also disclosed copies of numerous contemporary receipts for building materials. It was put to Mr Ahmad in cross examination, which he denied, that those receipts were in relation to the refurbishment of Mr Ahmad's 2 bedroom flat, which was going on at the same time. However, that proposed explanation made absolutely no sense bearing in mind that the copy receipts include the cost of a new staircase. Therefore, for the first time in his oral evidence, D was forced to accept that C paid towards the cost of refurbishment, but then asserted unsupported by any evidence that C's payments for materials were effectively further loans to D that he subsequently repaid at some unspecified time.

Subsequent conduct

75. Further, I find that the parties' subsequent conduct was consistent with it having been agreed that the Business was a partnership between C and D:

i) C claimed that D emailed him weekly profit and loss ledgers for the Business from January 2015 to December 2018. D did not dispute that he emailed C the weekly ledgers from January 2015 for some 8 weeks, copies of which were included in the trial bundle. D's explanation that he did so simply to share the information with C because D was his big brother made no sense when it was also D's evidence that at this time C was in financial difficulties, which meant that C was dependent upon D and living rent free in the Flat whilst taking free food from the Business.

ii) D admitted in his oral evidence that there were tenants in occupation of the Flat. He further claimed that it was he who collected the rents from those tenants and C played no role in the rentals. However, if that was true, D was unable to explain why he admittedly never signed any tenancy agreements and the only copy of a tenancy agreement contained in the hearing bundles was signed by and in the name of C as landlord.

iii) The sharing of profits is indicative of a partnership. D relies in support of his case upon the absence of any written record of C ever having received an income from the Business. However, I do not attach any weight to that fact and having regard to D's admissions that it was his practice to falsify the official records such that they cannot be relied upon as accurate. He admitted a failure to fully account for the income of the Business in order to defraud HMRC. He further admitted falsifying the pay roll record in order to bolster a spousal visa application made by a person he barely knew and who then apparently lent him the sum of £15,000. In contrast, I attach weight to the following:

a) It is not disputed that D worked in the Business whilst C continued to work as a taxi driver;

b) The weekly ledgers admittedly sent by D to C record, as a separate item under his name, D's salary as a deduction before calculating the gross profits. It is difficult to understand why it would have been necessary to record separately D's salary in this way, if, as a sole trader, he would have been entitled to the whole of the profits in any event;

c) D's admission in oral evidence that he made payments to C, at least in 2015, out of the profits of the Business; and

d) On 10 June 2021, D emailed C a spreadsheet that showed the total profits for each of the years 2015, 2016, 2017, 2018 and 2019 together with an equal split of those profits under the stated names of C and D.

iv) Section 44(b) of the Partnership Act 1890 provides that on dissolution the partnership assets are applied to repay each partner's capital contributions before the residue is divided amongst the partners. On 17 March 2021, C messaged D: "And I want it to be finished and everyone should go on with his own life." On 15 and 16 June 2021, C and D exchanged the following messages:

C – "Please determine my withdrawal and yours as well. And tell me, how much did we earn during this period and how much is each other's withdrawal."

D – "I already sent you the profit first. We should take withdrawal of upstairs flat into account as well, see how much is each other's withdrawal. Send the total you spent.

C – “Which expenditure do you mean? In the beginning?”

D – “Yes”

C - “Count the upstairs as well and send it.”

D – “Make an effort, send the expenditure you did in the beginning.”

C - “I must go to Kenilworth house, it’s there, I will send you as soon as possible.

D - “It’s available.”

Purchase of the Property

Negotiations

76. It was D’s written evidence that:

> [44.] I purchased the property… and there was not even a single document or deed which demonstrates the claimant’s interest in the given property. Every document or correspondence between me and the previous freeholder or my instructed solicitors in the purchase of the …property has been addressed to me as the legal proprietor of the property.”

77. Whilst D relies upon the fact that the conveyancing solicitor’s ledger records D as the sole client, I do not attach much weight to that fact, since this is a dispute over beneficial rather than legal ownership. In any event, other contemporaneous documents corroborate the fact that C was closely involved in the acquisition of the Property:

i) On 31 January 2018, the conveyancing solicitor emailed C and D –

> “Dear both
>
> Please see attached the email I have received from your landlord’s Solicitors attaching title documents with contracts to follow. I am in a position to progress submitting searches should you wish?
>
> As discussed with [C] we should act swiftly to avoid the landlord playing any games, I would advise that you submit searches and press your broker Dan Ahmed to progress your mortgage application.
>
> When we spoke you did mention that you wish to avoid paying VAT, I have informed you that this is something that only your accountant can advise on and I am happy to have a meeting with your accountants in this regard….
>
> …..”

ii) On 6 February 2018, the conveyancing solicitor emailed the accountant, copying in both C and D -

> "It was a pleasure to meet with you on Friday, I have since asked the question to the sellers solicitors about purchasing in a Limited company as discussed and you will note from the response below the seller is agreeable with this..
>
> I trust the clients may wish to purchase in a Limited company now, based on our conversation on Friday. Perhaps you could take clear instructions in this regard and keep me informed.
>
> ….."

iii) On 4 March 2018, the mortgage broker emailed the conveyancing solicitor, copying in both C and D –

> "I have spoken with [C] late Friday, regarding the deadline placed by the vendors. The date of 18th March will never be achievable via a conventional mortgage route.
>
> Therefore I have discussed the option with [C] around a Bridging Loan, as he is pressed for time.
>
> …….
>
> I have requested a quotation from them, and will run this past [C] and party once it's in.
>
> ….."

Initial borrowing

78. It was C's evidence that he and D each contributed towards the purchase price of the Property. D denied that C made any financial contribution and also claimed that D did not have the financial means to make any such contribution following the separation from his wife.

79. C called several witnesses, including in particular Mr Homayon whom I found to be a reliable witness, to confirm that they lent substantial monies to C towards the purchase of the Property and which loans were then repaid by C in 2019. It was C's evidence that the loans were largely repaid through remortgaging the family home. C's version of events is further corroborated by the following contemporary documents:

i) The copy bank statements record C making a direct payment of £20,000 to D on 13 March 2018 described as 'El Paso' and resulting in a balance of £112,373.62 in D's account. On the same day, D transferred the sum of £112,000 to the conveyancing solicitors. D sought to assert unsupported by any evidence that C's payment to D was another loan. However, that claim is wholly inconsistent with D's primary claim that C was unable to make any financial contribution towards the acquisition

of the Property because C was financially dependent upon D living rent free in the Flat and feeding himself through handouts from D.

ii) D's bank statements record that Issa Keshavarz transferred to D on 12 and 13 March 2018 the total sum of £12,000 towards the acquisition of the Property. C and D each claim that this money was lent to him personally because Mr Keshavarz was his friend not the other's friend. Sadly, Mr Keshavarz is unable to shed any light on this particular matter, since C stated in his written evidence that Mr Keshavarz passed away on 20 September 2020. However, C has disclosed text messages between him and Mr Keshavarz in March and November 2019, which refer to the amounts loaned and provides the bank details of Mr Keshavarz.

80. In stark contrast, D did not call any witnesses to confirm that they lent him money either towards the purchase of the Property in 2018 or in relation to the further loans allegedly taken out in 2019 to repay the original loans. I draw the adverse inference that D failed to call any such witnesses because there were none to support his case.

81. As already noted, D's evidence as to how he alone had been able to raise the funds required to purchase the Property was at best confused and confusing.

82. For these reasons, I find on balance that C made a substantial financial contribution towards the purchase of the Property in large part funded by personal borrowing.

Attempted refinancing

83. In his oral evidence D agreed that the original plan, which ultimately fell through, had been to repay the borrowing used to fund the Purchase of the Property through a buy-to-let mortgage secured against the leasehold title of the Flat once the freehold title of the Property had been split. I repeat that it was D's case that C's only involvement with the Property was to facilitate introductions to C's contacts to make loans personal to D. However, the available contemporary documents corroborate C's claim that he was directly involved in the attempted refinancing:

i) The conveyancing solicitors instructed architects, Frank Russell Associates Limited, to prepare structural plans in support of splitting the freehold title of the Property to facilitate the buy-to-let mortgage on the leasehold title of the Flat. On 29 May 2018, the architects emailed to D an invoice for their work, which D immediately forwarded to C. This was of course at a time when D claims that C was financially dependent upon D.

ii) On 6 July 2018, C emailed the conveyancing solicitor under the subject header "ELPASO, Leamington Spa" as follows:

> "I have not been able to speak to you on the phone to seek you advice on if I should proceed to put my flat in the market to raise fund to pay off the outstanding borrowing debt.

I wanted to ask you ask if you think the process of the separating the Leamington property longer then I will put my flat in market to raise the money to pay off my debts as I am getting disparate and had promised to all those money within 6-8 weeks of borrowing. The most important thing is my reputation and credibility which I do not want to get tarnished.

I would be REALLY GRATEFUL if you can assess the current progress, and the remaining works of the application for separating the Leamington property and give me an rough idea on how long more it is likely to take before this work is complete.

If this would will more than another 4 weeks then I have to put my flat in the market."

iii) On 9 July 2018, the conveyancing solicitor responded:

"Sorry for the delay I will have this resolved ASAP.

It has taken longer than expected due to other work-loads.

Can you please send me £400 so I can pay off land registry fees etc. thanks.

iv) On 15 August 2018, the conveyancing solicitor emailed Mr Holden requesting confirmation that the refinance by way of the buy-to-let remortgage was urgently required because of the financial hardship arising from the existing borrowing being at an "extortionate interest rate". Mr Holden responded by email on 28 August 2018 confirming (with my emphasis added) that -

"Those are my instructions from <u>the client</u>. I have no reason to doubt what <u>they</u> say as they did purchase the property relatively quickly because of the price at which it was being offered to <u>them</u> and the pressure that <u>they</u> had from the vendor to complete as soon as possible.

After all that is one of the reasons for the refinance to repay the current lenders off."

It is striking that Mr Holden's email response is copied into C, but not D.

v) On 19 June 2019, Mr Holden emailed the conveyancing solicitor to advise -

"I met with [D and C] in Leamington on Monday to organise the finance. When clarifying the situation with them they weren't entirely sure of the ownership, they said that the business owns the freehold and that [D] owns the lease there is currently no ground rent being charged. Is this correct? If we go

down the buy to let re-mortgage route it should be straight forward, less straight forward obviously if the business owns both the freehold and the lease, as we would be attempting to source finance for a business that only incorporated on February 2018 etc."

vi) On 23 June 2019, the conveyancing solicitor emailed Mr Holden in response to confirm that "the company owns the ground floor and [D] owns the long lease apartment upstairs." Again that email was copied into C, but not D. On 4 July 2019, Mr Holden emailed D, but copied into C, the mortgage illustration.

84. C has disclosed contemporary documents to corroborate the fact that in October 2019 C's family home was remortgaged in order to raise funds totalling £78,033.17. It is likely no coincidence that the family home was remortgaged shortly after the attempted refinancing of the Flat had fallen through.

85. On balance, I find that C was directly involved in and interested in the attempted refinancing because he was so anxious to repay the short term loans that he had taken from friends and associates in order to help fund the purchase of the Property after the original offer of commercial lending had been withdrawn. When the refinancing also fell through, C was forced to remortgage the family home to raise the funds to repay his personal borrowing.

Subsequent conduct

86. I find that C and D have subsequently said and done things, which are consistent with C having an agreed beneficial interest in the Property:

i) At the Meeting, C sought to persuade his wife to sell the family home to raise funds to pay off his borrowing. The transcript of the Meeting records D repeatedly acknowledging C's interest in the Property. By way of illustration:

D – "… How much do you want from [C]?"

C's wife - "… The more he gives, the better and the happier I would be. I am happiest if he gives all."

….

D - ".. as you know, half this place is mine and half is [C's]…. From the half of [C's] share, you should agree with [C] what portion you want, in fact I am as a witness here….You make a deal with yourselves, at the end I will make a deal with you."

C - "What deal do you want to make with me?"

C's wife - "Are you ready to give me your share?"

C - "All? Shall I give you all?"

C's wife - "Yes, all. That's half though, half is [D's], half yours, will you give me half your's?"

…..

C's wife - "… But as I cannot trust anyone, I want something to be in my name."

D - "…. I will go to the accountant on Monday, this place is in the company's name, I will add you name as well. You just send me a photo of your ID or passport so that I go there and add your name as 50 per cent company share…."

D sought unconvincingly to explain away what he had said during the Meeting by claiming that either he was drunk so that he did not know what he was saying or he was looking for an investor.

ii) Whilst in Iran receiving treatment, it is not disputed that D transferred 50% of the shareholding in EPLL to C. D had several months beforehand already appointed C as a director of EPLL to enable C to run the company in D's absence. Therefore, there was no practical need for D to transfer the shareholding to C at that time, which in my view is more consistent with D seeking to regularise the position by formally recording that C had an agreed interest in the Property/Business.

iii) Whilst D was still in Iran the parties exchanged the following messages –

(15 February 2020)

D - "….

I want the store and I will be working because I am in debt and have to pay bank instalments but my condition for returning is that I should have no more partner.

and work for myself.

think about and let me know. Thanks."

(28 June 2020)

C - "Okay, are you there to write that you want to transfer my share from the property, and say in the next email that I want to give my share for rent or lease?

D - "Yes"

Conclusion

87. In ***Bank St Petersburg PJSC & Anor v Arkhangelsky*** [2020] EWCA Civ 408 the then Chancellor of the High Court warned that a trial judge when determining disputed facts must be careful to avoid adopting a piecemeal and compartmentalised approach, but rather to stand back and consider the effects and implications of the facts he has found taken in the round.

88. I have found that:

    a) C was closely involved and interested in the purchase of the 2014 Lease, the purchase of the freehold title of the Property, and the attempted refinancing through the proposed buy-to-let mortgage secured against the leasehold title of the Flat, as evidenced by him liaising with relevant professionals.

    b) C agreed to act as guarantor under the 2014 Lease thereby incurring a potential significant personal liability linked to the success or otherwise of the Business.

    c) C made a significant direct contribution towards the cost of refurbishing the Property to enable the Business to operate, which contribution was in part funded by C's personal borrowing; and

    d) C made a significant direct contribution towards the purchase of the Property by applying funds raised largely through personal borrowing from friends and associates, which was repaid from remortgaging the family home after the attempted refinance through the proposed buy-to-let mortgage secured against the leasehold title of the Flat fell through.

    It makes no commercial sense, and is therefore inherently unlikely, that C would have done all this if it had not been agreed between him and D that the Business/Property, including the 2018 Lease, were a joint venture.

89. I have also found that the parties' subsequent conduct overall in terms of what was said and done is more consistent with it having been agreed between C and D that the Business/Property, including the 2018 Lease, were a joint venture. In summary:

    a) D sending to C weekly cash ledgers for the Business and which recorded deductions for D's salary before calculating gross profits.

    b) D sending to C a breakdown of the annual profits of the Business for each of the years 2015 to 2019 and recoding an equal split between them of those profits.

    c) D admittedly making payments to C in 2015 from the profits of the Business.

d) C signing a tenancy agreement in respect of the Flat in his stated capacity as landlord.

e) At the Meeting, D offering to transfer C's half share in the Property to C's wife to persuade her to sell the family home. The Meeting took place on 28 November 2018 after the freehold title had been split and the 2018 Lease was in existence.

f) D voluntarily transferring 50% of the shares in EPPL, which owned the freehold of the Property, at a time when C had already been appointed a director of EPPL.

g) C and D each messaging the other and expressing the wish to end the joint venture.

h) D messaging C and insisting that C quantify his initial capital contribution in order to effect a clean break.

90. Therefore, in my judgment, C is entitled to the relief sought.

Overall conclusion

91. I make the following declarations:

i) C and D were in a partnership, which was dissolved on 14 February 2018 upon the incorporation of EPPL.

ii) C has a 50% beneficial interest in the 2018 Lease.