Neutral Citation Number: [2023] EWHC 2322 (Ch)

Claim No: PT-2021-BHM-000070

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

Priory Courts
33 Bull Street
Birmingham, B4 6DS

Date:19 September 2023

HIS HONOUR JUDGE RICHARD WILLIAMS
(Sitting as a High Court Judge)

- -

Between:

MR ASLAM ABBAS

Claimant

- and –

MR SHABIR HUSSAIN (1)
TILT HAMMER LTD (2)
HENSHAW ESTATES LTD (3)

Defendants

- -

Simon Bradshaw (instructed by Tower Bridge Legal) for the **Claimant**
Tony Watkin (instructed by Mezzle Law Limited) for the **Defendants**

Hearing dates: 5th, 6th, 7th, 8th, 9th, 12th, 13th June and 19 September 2023

(draft judgment sent to the parties' legal advisers by email dated 12 September 2023)

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JUDGMENT

Introduction

1. This is my judgment following the trial of a claim relating to the beneficial ownership of a development property being the western half ("***the Disputed Property***") of the former Tilt Hammer Inn, Alum Rock Road, Birmingham, B8 1Ll and 4-6 Adderley Road, Saltley, Birmingham, B8 1ED (together "***Tilt Hammer***").

2. The Disputed Property has recently been valued by the single joint expert at £100,000. The costs budgets of the parties were approved in the combined sum of some £250,000, which would appear to be wholly disproportionate to the amount in dispute.

3. However, this is not so much a commercial dispute, but rather a most unfortunate, toxic and long running family feud. It is not unusual for cases involving family members to generate strong feelings on both sides of the argument. However, a striking feature of this dispute is the extreme and deep-seated feelings of anger, resentment, betrayal and bitterness that have been generated throughout the wider family.

4. I can only express the hope that this judgment draws a line under this dispute. Whilst reconciliation may not now be realistically possible, at least this fractured family can seek to move on, albeit separately, with their lives.

Background

5. The Claimant ("***C***") is Mr Aslam Abbas. The First Defendant ("***D1***") is Mr Shabir Hussain.

6. C and D1 are brothers. Their mother, Mrs Mubarik Begum, and late father established family businesses operating in both Pakistan and the UK. The UK business operated through, Piper Clothing Company Limited ("***Piper***"), and occupied premises that the parents personally owned at 130 Highgate Road ("***No. 130***").

7. In or around 1996, 126 Highgate Road, Birmingham, B12 0AU ("***Highgate***") (a then disused petrol station) was purchased in the name of C. The purchase price was some £45,000. It is not disputed that, prior to the purchase of Highgate, C, D1 and their siblings each received money from their parents from the sales of No 130 and the business of Piper, although it is not agreed how much C and D1 each received or what they did with their respective shares:

    a. C says that he received some £50,000 to £60,000, which in large part he used to purchase, for his own benefit and mortgage free, Highgate; and

    b. D1 says that he and C each received the sum of £30,000 with C using his share to purchase a home for him and his family at 22 Pickwick Grove, whilst D1 used the majority of his share, together with a loan (£15,000) secured by way of a mortgage against the property, to purchase Highgate[1]; and

    c. D1 further says that at this time he was struggling to cope due to his wife's then serious ill-health. Therefore, D1 directed C to purchase Highgate for

[1] C said that 22 Pickwick Grove was purchased by his wife using her own funds and the property remains registered in her name.

D1's benefit such that C, although the legal owner, was effectively holding the property on trust for D1.

8. It is not disputed that, between 1996 and 1998, Highgate was developed through the construction of a commercial building and the establishment/fitting out of a restaurant business ("***the Business***") to be operated out of that building. The accounts record the Business trading as "Karachi Fried Chicken" with D1 as sole proprietor, although Mr Gulamabbas Mohammed Bharwani made a contribution towards the development costs such that he acquired an interest in the Business. Whilst it is agreed that C also acquired an interest in the Business, the nature, extent and reason for that interest is disputed:

    a. C claims that he contributed towards the development costs such that he acquired a 1/3rd share in the Business. Mr Bharwani gave evidence in support of C and said that the Business was a partnership between him, C and D1 with each having a 1/3rd equal share; and

    b. D1 denies that C made any financial contribution towards the development costs. He says that the total cost of the development was £122,000 with Mr Bharwani contributing the sum of £55,000 and D1 contributing the sum of £67,000, which was raised from the sale of machinery he had received from the disposal of the business of Piper. It was agreed that that the profits and losses be split 49% to D1, 40% to Mr Bharwani and 11% to C. Whilst C made no financial contribution towards the development costs, D1 nevertheless decided to gift C a small interest in the Business to help him out.

9. It is not disputed that, in 1998, the legal title of Highgate was transferred from C to D1, although the reason for the transfer is disputed:

    a. C says that at that time he was financially exposed as a result of personal guarantees that he had given in his capacity as a director of Piper to creditors of the company. D1 advised C to transfer Highgate into his name and he would then hold the property on trust for C;

    b. D1 accepts that C had financial problems, but they were personal and unrelated to Piper. In any event, by this time, D1's wife was thankfully on the road to recovery, and so he wanted to regularise his financial affairs by taking the property into his name.

10. On 26 January 2001, D1 and Mr Bharwani signed a written agreement ("***the Buy Out Agreement***") whereby they agreed:

    "……

    1. That [D1] would purchase [Mr Bharwani's] one third share in the [Business] and [Highgate] for the price of 95,000 pounds.

    2. That this payment is to be in full and final settlement of any claim that you may have on the said business but also on the basis that I accept full responsibility for the payment of any liabilities outstanding both prior to the 24th January this year and that have accrued and continue to accrue since that date.

3. That the 95,000 pounds shall be paid as follows:

   (a) 35,000 pounds to be paid within 14 days of the 24th January 2001.

   (b) The balance of 60,000 pounds to be paid within 3 months from 24th January 2001.

…….”

11. C and D1 dispute the effect of the Buy Out Agreement:

    a. D1 says that following the Buy Out Agreement he effectively remained the sole owner of the Business. C only had a job working for D1 in the restaurant of the Business and for which C was paid the national minimum wage; and

    b. C says that the £95,000 paid to Mr Bharwani was paid out of the profits of the Business such that following the Buy Out Agreement, C and D1 became equal partners in the Business and were working alternative shifts in the restaurant.

12. In 2001, Tilt Hammer, which comprised a disused and derelict public house, was purchased jointly by C and D1 for some £100,000 as a development property and subject to obtaining the necessary planning permission.

13. On 15 October 2009, D1 and C executed a TR1 (“***the 2009 TR1***”) whereby:

    a. D1 transferred Highgate to D1 and C; and

    b. D1 and C declared that they held Highgate on trust for themselves as tenants in common in equal shares.

14. It is not disputed that the 2009 TR1 was executed to give effect to an oral agreement made by C and D1 (“***the 2009 Oral Agreement***”). However, C and D1 dispute the reason for and the terms of the 2009 Oral Agreement:

    a. C says that, in 2005, he had asked D1 to transfer Highgate back to him. He had by then settled with Piper’s creditors such that he was no longer financially exposed under the personal guarantees that he had given. However, D1 refused to do so, which led to a dispute. That dispute was eventually settled by way of informal mediation through friends and family. C agreed that, because D1 was his partner in the Business and had spent money developing Highgate, it was only fair that D1 own 50% of Highgate; and

    b. D1 says that his parents, and in particular Mrs Begum, put him under considerable pressure to support C financially by gifting him some of Highgate and the Business. However, it made no commercial sense to gift a property and business to C, who had previous poor business sense. Therefore, D1 offered C a 50% interest in both Highgate and the Business in exchange for a payment of £250,000 with a deposit payable of £25,000 and the balance to be paid in the “not-too-distant-future”. D1 agreed to put Highgate immediately into joint names, but on the understanding that the property would be held on trust for D1 as the sole beneficial owner until

such time as the £250,000 was paid in full. Also, in the meantime, D1 allowed C to run the Business day to day in order to give C the opportunity to earn some more money.

15. In 2010, C gave D1 a cheque for 25 Lakh, which was passed to their brother, Mr Riaz Ul Hassan, to bank in Pakistan. However, when Mr Ul Hassan presented the cheque in Pakistan the bank there refused to honour it. C and D1 dispute the reason for the cheque:

    a. C says that D1 had asked to borrow the money from him to fund a divorce settlement in Pakistan; and

    b. D1 says that it was towards the deposit payable by C pursuant to the 2009 Oral Agreement. Mr Ul Hassan, who gave evidence in support of D1, said that, when he returned to the UK, D1 had told Mr Ul Hassan that the cheque was supposed to be a 10% instalment towards the sum of £250,000 that C owed to D1 in respect of a 50% interest in Highgate.

16. On 13 February 2012, C and D1 jointly purchased an investment property at 86 Main Street, Sparkbrook, Birmingham, B11 1SH ("***Main Street***") for £315,000. Main Street comprised a 22-bed hostel. D1 stated that the intended, but unexecuted, plan was for residential development of the site.

17. On 1 May 2014, Zaika Limited ("***Zaika***") was incorporated and was the entity through which the Business was then operated. C was the sole registered director and shareholder of Zaika.

18. On 25 May 2014, C and D1 executed a deed ("***the Shareholders' Agreement***"), which was drafted by a solicitor, Mr Jatinder Singh Bahra, who at the time was employed by Mann & Co solicitors, on the instructions of D1. The Shareholders' Agreement recorded that C "agree[s] and declare[s] that 50% of the entire issued share capital of [Zaika] is held …on trust for [D1]…"

19. It is not disputed that the Shareholders' Agreement was executed at a meeting held at the offices of Mann & Co solicitors, but there is a dispute as to what was discussed at that meeting:

    a. It was D1's evidence that by this time C and D1's relationship was starting to deteriorate and he had lost trust in C. Therefore, he instructed Mr Bahra to prepare a loan agreement for the outstanding sum of £250,000 in addition to the Shareholders' Agreement. However, C refused to sign the loan agreement because he said that their relationship continued to be one of trust;

    b. Mr Bahra, who gave evidence in support of the defendants, said that D1 had previously told him that D1 distrusted C, who still owed D1 £250,000 from 2010 in respect of a 50% interest in the land, buildings and business at Highgate. Mr Bahra advised D1 that it was therefore important to document the fact that 50% of the shares in Zaika were held on trust by C for D1. As a consequence, Mr Bahra prepared the Shareholders' Agreement. During the course of the meeting, D1 commented that he would like something in writing to record the fact that C still owed the sum of £250,000, but C remarked that nothing was required due to the trust that existed between them; and

c. C denies that any such discussion took place over the alleged £250,00 debt.

20. In 2014, D1 instructed Mr Peter Saville, an accountant and financial advisor, to advise primarily in connection with a complex issue arising over business rates. Mr Saville, who was called as a witness by D1, stated in his written evidence that during the initial meeting, D1 set out the various business/financial arrangements he then had with C. As a result, Mr Saville:

> "was made aware that [C] promised to pay the outstanding sum of £250,000 to [D1] for the 50% transfer of 126 Highgate Road over an extended period."

21. It is not disputed that by 2015 the business relationship between C and D1 had broken down irretrievably and they agreed to go their separate ways by dividing between them the properties at Highgate, Tilt Hammer and Main Street. However, there then followed several months of negotiations over how in practical terms the division was to be achieved.

22. Eventually an oral agreement was reached ("***the 2015 Oral Agreement***"), although C1 and D1 dispute precisely what was agreed, when and where:

    a. C says –

        i. The agreement was made in late September/early October 2015,

        ii. It was made at a pre-arranged meeting in the cafeteria area of the Queen Elizabeth Hospital, Birmingham, in the presence of and at the insistence of Mrs Begum, who was waiting there to attend her regular appointment for dialysis,

        iii. It was agreed that,

            - C would become the sole owner of Highgate
            - D1 would become the sole owner of Main Street
            - Tilt Hammer would be divided so that C would become the owner of the western half being the Disputed Land and D1 would become the owner of the eastern half
            - C would pay £40,000 to D1, who believed that C was receiving a greater share of the value of the property portfolio. C did not consider that this was fair, but he reluctantly agreed to make the payment following Mrs Begum's intervention and in order to achieve final resolution;

    b. Mrs Begum, who gave evidence in support of C, confirmed C's version of events as to where, why and what was agreed, although she said that the meeting took place in June 2015; and

    c. D1 says –

        i. The agreement was made in October 2015,

ii. The agreement was made in the restaurant at Highgate. Only C and D1 were present at the meeting, although Mrs Begum was sat outside in C's car,

iii. It was agreed that,

- C would become the sole owner of Highgate
- D1 would become the sole owner of Main Street
- D1 would become the sole owner of Tilt Hammer to reflect the fact that C had not paid D1 any of the £250,000 due under the 2009 Oral Agreement in respect of Highgate/the Business
- C would, however, have the option still to pay D1 the sum of £250,000 in which case Tilt Hammer would be divided and D1 would transfer the Disputed Land to C.

23. It was C's evidence that, following the 2015 Oral Agreement, D1 telephoned C to say that he was coming to C's home as he needed money for the building work being done to D1's home. C borrowed £5,000 from Mrs Begum, who lived and continues to live with C, from the cash that she routinely kept at home. C then handed the cash to D1 when he came round later that day.

24. It was the evidence of D1's son, Mr Ali Abbas, that "some days later" his father gave him a further £5,000 in an envelope, which he was told to give to D1. Mr Ali Abbas then handed the envelope to D1 when D1 was sat in his car parked up outside C's home.

25. D1 disputes that he received any such cash payments from or on behalf of C.

26. Mr Ian McLachlan of GQS Solicitors ("***GQS***") was instructed to deal with the relevant transfers. On 8th or 9th of November 2015[2], a meeting took place at the offices of GQS ("***the GQS Meeting***"). So far as the GQS Meeting, it is not disputed that:

a. In attendance were Mr McLachlan, C, D1, Mr Iqbal Javed (C's cousin there supporting C) and Mr Saqlain Hussain (D1's son there supporting D1);

b. The following 4 transfers were executed –

i. a TR1 dated 9 November 2015 whereby C and D1 transferred Highgate to C,

ii. a TR1 dated 9 November 2015 whereby C and D1 transferred Main Street to D1,

iii. a TR1 dated 9 November 2015 whereby C and D1 transferred Tilt Hammer to D1,

[2] Although an important meeting in the context of this case, nothing turns on the exact date of the meeting.

iv. a TP1 dated 10 November 2015 ("***the TP1***") whereby D1 transferred the western half of Tilt Hammer (being the Disputed Land) to C;

c. C gave D1 a cheque in the sum of £10,000 post-dated 4 March 2016; and

d. Mr Iqbal Javed provided D1 with a handwritten letter guaranteeing C's cheque in the event that it "bounces or is dishonoured."[3]

27. There is a dispute, however, over (i) the reason for the post-dated cheque, (ii) the reason for the TP1 and (iii) what, if any, other payments were made during the course of the GQS Meeting:

a. It was the evidence of C that -

i. At the meeting, and prior to the transfers being executed, C handed D1 £30,000 in cash being the balance of the £40,000 due under the 2015 Oral Agreement,

ii. However, D1 then demanded for the first time an additional £10,000 payment. In order to see an end to the long running dispute, C reluctantly agreed to the additional payment, which was the reason for the post-dated cheque/letter of guarantee,

iii. Mr McLachlan advised that, in order to achieve the intended split of Tilt Hammer, it was necessary due to restrictions under the title deeds first to transfer the whole of the property into one party's name before then transferring part of the property to the other party;

b. C did not call Mr Iqbal Javed as a supporting witness, but there was indirect support for C's version of events from Mr Ali Abbas and Mr Bharwani –

i. It was the evidence of all 3 witnesses that, immediately prior to the GQS Meeting, they and Mr Iqbal Javed met at the restaurant at Highgate where the £30,000 in cash was collected, counted and then placed in a plastic carrier bag to be taken to the GQS Meeting,

ii. It was the evidence of C and Mr Bharwani that Mr Bharwani loaned C and brought to the pre-meeting £10,000 in cash,

iii. It was the evidence of C that the remaining cash was raised through a loan from Mr Iqbal Javed (£7,000), a payment received from a private money syndicate of which he was a member (£10,000) and his/his wife's funds (£3,000);

c. It was the evidence of D1 and Mr Saqlain Hussain that -

i. No cash payments were made by C at the GQS Meeting,

ii. After the first three transfers had been signed, Mr McLachlan left the room so that C and D1 could discuss matters privately. During this

[3] The cheque was not honoured when it was subsequently presented by D1 to the bank in March 2016, although C said in evidence that he had specifically told D1 not to present the cheque at that time as he was not then in funds.

time, C handed D1 the post-dated cheque in part payment of the option to acquire the Disputed Land, but C wanted an assurance that D1 would transfer the property once the £250,000 had been paid in full,

iii. Therefore, D1 executed the TP1. D1 stated in evidence that, upon the cheque being honoured and the balance of £240,000 being paid, "I would instruct GQS to file the TP1"; and

d. Neither side chose to call Mr McLachlan as a witness.

28. It is not disputed that, following the GQS Meeting, the 3 TR1s were registered, the TP1 was not registered, and in April 2016 C gave D1 a cheque for £5,000, which cleared. However,:

a. it was C's evidence that –

i. C had full trust and an expectation that Mr McLachlan would promptly register all four transfers to give effect to the 2015 Oral Agreement,

ii. Having paid £5,000 to D1 by cheque, the outstanding balance due of the £50,000 (being £5,000) was set off against the rental income that D1 owed C from Highgate,

iii. C was in no rush to develop the Disputed Land. However, after D1 had begun to develop the eastern half of Tilt Hammer, C decided to search the Land Registry in May 2017 when he discovered that D1, in breach of the terms of the 2015 Oral Agreement, had transferred the whole of Tilt Hammer (including the Disputed Land) to Tilt Hammer Limited ("***D2***") on 27 March 2017; and

b. it was D1's evidence that –

i. Although C paid him £5,000 in April 2016 no further payments were received leaving a balance owing under the option agreement of £245,000,

ii. By March 2017, D1 had been waiting 15 months for C to exercise the option, which he had failed to do so whilst making money out of the restaurant at Highgate. D1 took the view that C was not going to action the option granted under the 2015 Oral Agreement, which had by then expired in any event. Therefore, he transferred Tilt Hammer to D2[4].

29. During the period between July 2017 and March 2021 correspondence passed between C, D1 and GQS Solicitors (or their respective solicitors) in connection with the failure to register the TP1.

[4] D2 was incorporated on 8 March 2017 with D1 being initially registered as sole director and shareholder. In October 2021, D1 gifted the shareholding in D2 to another son, Mr Saif Ali Hussain, who was then also appointed a co-director of D2.

30. On 4 November 2019, Mr Ali Abbas together with his 2 brothers (Messrs Zain Abbas and Bilal Abbas) and their cousin (Mr Mohammed Asif Javed[5]) drove to D1's business premises where an ugly and armed confrontation ("***the Confrontation***") took place. Mr Ali Abbas had a wrench, Mr Bilal Abbas had a metal bar and D1 had a chain. During the course of the Confrontation, Mr Zain Abbas drove away in D1's van and Mr Mohammed Asif Javed drove his car striking D1. I have had the opportunity to view video footage of the Confrontation and I say without exaggeration that there could easily have been very serious or indeed fatal injury inflicted that day. The following criminal charges were brought:

    a. Mr Ali Abbas – violent disorder and having an offensive weapon;

    b. Mr Zain Abbas – violent disorder and dangerous driving;

    c. Mr Mohammed Asif Javed – violent disorder and dangerous driving; and

    d. Mr Bilal Abbas – violent disorder and having an offensive weapon.

    The criminal defendants pleaded "not guilty" to the offences. They claimed that they were acting in self-defence, and a criminal trial was listed with a time estimate of 9 days.

31. It is not disputed that, on the same day and shortly following the Confrontation, C spoke to Mr Ul Hassan. However,:

    a. It was the written evidence of D1 and Mr Ul Hassan that C called Mr Ul Hassan to provide the location of D1's van. At the time, Mr Ul Hassan was with D1 and put the call on speaker phone. C then threatened D1 by saying that this was just the beginning and they would force D1 to sign over the Disputed Land;

    b. It was the evidence of C and Mr Ali Abbas that –

        i. the first C knew of the Confrontation was after the event when told what had happened. C was angry and shouted that his sons should not have gone [6],

        ii. the Confrontation was unrelated to the Disputed Land. C's sons and nephew had gone to see D1 because earlier that day Mr Bilal Abbas had been threatened on his way to college; and

    c. It was C's evidence that he spoke to Mr Ul Hassan in person when Mr Ul Hussan was either already at or subsequently came to the restaurant at Highgate. It was Mr Ul Hussan, who ultimately went to collect and return the van to D1. There was no telephone call with Mr Ul Hassan or threat made to D1. Indeed, it was D1 who threatened C by saying that he would put C's sons in jail, and who then sought to leverage the position by offering to drop the criminal charges if C dropped his claim to the Disputed Land.

[5] Mr Mohammed Asif Javed is the son of Mr Iqbal Javed, who attended the GQS Meeting in support of C.
[6] It was C's evidence that, immediately following the Confrontation, his sons came to the restaurant at Highgate to tell him what had happened and he told them to return D1's van. It was Mr Ali Abbas' evidence that he did not go to the restaurant that day, but rather went to see his father 2 nights later when he received "a bollocking".

32. On 1 December 2019, D2 transferred the Disputed Land to Henshaw Estates Limited ("***D3***")[7]. At the time of the transfer, D1 was the sole director of both D2 and D3.

33. These proceedings were issued in May 2021.

34. In September 2021, the Solicitors Regulation Authority Limited ("***the SRA***") issued proceedings against Mr McLachlan alleging misconduct albeit in the context of advising a client unconnected to the present proceedings between July 2014 and February 2015. The subject transactions included the sale of a property valued at £159,950 for consideration of £130,000, which consideration included the exchange of a ring and motor vehicle purportedly having a combined value of £94,950. The proceedings were concluded on 28 January 2022 by way of an agreed outcome whereby:

    a. Mr McLachlan admitted that the property transfer "clearly bore unusual features";

    b. Mr McLachlan admitted inter alia a failure to keep "detailed records regarding the instructions received";

    c. The Solicitors Disciplinary Tribunal ("***SDT***") found that Mr McLachlan's conduct amounted to "manifest incompetence" which "went substantially beyond mere professional negligence."; and

    d. The SDT approved the sanction agreed between the SRA and Mr McLachlan that Mr McLachlan be suspended for 12 months but also give "an undertaking to remove himself from the Roll permanently thereafter (i.e. he will never reapply)."

35. In November 2021, C issued parallel professional negligence proceedings against GQS. Those proceedings have been stayed pending the outcome of the present claim.

36. At the case management hearing on 22 April 2022, the parties were given permission to rely upon the written evidence of a single joint expert to value the relevant properties both "as of 5 November 2015 and at present". The expert, Mr Jonathan Mountford of GJS Dillon Ltd, in his reports dated 22 August 2022 provided the following valuations:

Dates of valuations	5 November 2015	22 August 2022
Highgate	£300,000	£300,000
Tilt Hammer – Western Half (Disputed Land)	£95,000	£100,000
Tilt Hammer – Eastern Half	£100,000	£975,000
Main Street	£275,000	£290,000

[7] D3 was incorporated on 22 October 2019 with D1 initially registered as sole director and shareholder. In March 2022, Mr Sibtain Hussain, another of D1's sons, was appointed co-director. In June 2022, D1 gifted the shareholding in D3 to Mr Sibtain Hussain and resigned as a director of D3.

The substantial increase in the value of the eastern half of Tilt Hammer as at 22 August 2022 reflects the fact that, in the meantime, it was redeveloped by D2 and now comprises "four ground floor retail units with four 3 bedroom flats above", whereas the western half of Tilt Hammer (being the Disputed Land) remains undeveloped and still comprises a "bare section of land extending to approximately 0.82 acres".

37. Shortly before the commencement of this trial, the criminal defendants pleaded guilty to the lesser charges of affray (Messrs Mohammed Javed and Zain Abbas also pleaded guilty to dangerous driving) and after the sentencing judge, HHJ Bond, had given an indication that he would not impose custodial sentences. At a hearing on 6 April 2023, HHJ Bond:

    a. made a 5 year restraining order against all the criminal defendants, which included the following restrictions -

        i. prohibiting them from contacting directly or indirectly D1, Mr Sibtain Hussain and Mr Saqlain Hussain,

        ii. prohibiting them from going to D1's business premises or Tilt Hammer; and

    b. sentenced the criminal defendants as follows –

        i. each criminal defendant was made the subject of a 12 months' community order with both rehabilitative and unpaid work requirements,

        ii. Messrs Zain Abbas and Mohammed Asif Javed were each disqualified from driving for a minimum period of 12 months and subject to a retest.

The parties' respective cases

Applicable legal framework

constructive trust

38. In ***Matchmove Limited v Dowding and Church*** [2016] EWCA Civ 1233, which involved a dispute between former friends as to the effect of an oral agreement to purchase development property, 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."

clean hands

39. Imposing a constructive trust is a discretionary and equitable remedy, based on the conscience of the parties, so that the remedy may be denied to a claimant in circumstances where the claimant has been guilty of such serious misconduct, and

which is sufficiently closely connected to the remedy sought, that it would be inequitable/unconscionable to grant him the remedy to which he would otherwise be entitled. In ***Royal Bank of Scotland Plc v Highland Financial Partners LP*** [2013] EWCA Civ 328, Aikens LJ said:

> "[159] ……. Ultimately in each case it is a matter of assessment by the judge who has to examine all the relevant factors in the case before him to see if the misconduct of the claimant is sufficient to warrant a refusal of the relief sought."

C's claim

40. It is C's case that the 2015 Oral Agreement included an agreement that D1 would transfer the Disputed Land to C, who relied upon that agreement to his detriment by paying D1 the sum of £50,000. In his skeleton argument, Counsel for C submitted that "the legal approach to the claim is relatively straightforward: if the evidence of himself and his witnesses is preferred, then the 2015 [Oral] Agreement gave rise to a constructive trust whereby D1 held Tilt Hammer on trust for himself and C. The relief C seeks follows accordingly."

The defendants' defence

41. It is the defendants' case that the 2015 Oral Agreement included the grant to C of only an option, to be exercised within a reasonable period of time, to acquire a 50% beneficial interest in Tilt Hammer upon payment in full of the sum of £250,000. C failed to exercise that option, whether in a reasonable time or at all, since he only ever paid the sum of £5,000 thereby leaving an outstanding balance due of £245,000.

42. It of course makes absolutely no sense, whether commercial or otherwise, that C would ever have agreed an option to acquire the Disputed Land valued at £100,000 for the sum of £250,000. It is acknowledged on behalf of the defendants that, to make sense of their case, the 2015 Oral Agreement must be considered in the context of the 2009 Oral Agreement when it was agreed that C would pay D1 the sum of £250,000 for a 50% interest in Highgate and the Business, which sum C never paid. It is claimed that, in 2015, D1 wanted a resolution of their financial affairs, and so he agreed to the division of the properties in the way that he then did to achieve a practical solution whereby:

    a. D1 secured repayment of some of the £250,000 that he was owed under the 2009 Oral Agreement by acquiring the ownership of the whole of Tilt Hammer; or

    b. D1 secured repayment of the entire sum of £250,000 that he was owed under the 2009 Oral Agreement and in the event that C exercised the option over the Disputed Land.

    It is C's case that the terms of the 2009 Oral Agreement were such that ownership of Highgate and the Business was to be shared equally between him and D1. It was never agreed that C's shared ownership was in exchange for/conditional upon any payment of £250,000 to D1.

43. Even if the terms of the 2015 Oral Agreement are found by the Court to be as claimed by C, the defendants deny that C is entitled to the relief sought for the following reasons:

    a. C has only ever paid £5,000 towards the alleged £40,000 or £50,000 bargained for; and

    b. Even if C has paid in full the amount due, C was responsible for encouraging or inciting the criminal defendants to threaten and use violence to intimidate D1 into signing over the Disputed Land such that it would be unconscionable for the Court to grant C the relief that he would otherwise be entitled.

44. It is C's case in response that:

    a. he has paid not only the £40,000 originally bargained for, but also the additional £10,000 demanded by D1 during the course of the GQS Meeting;

    b. the Confrontation was unrelated to the Disputed Land, but arose because C's younger son, Mr Bilal Abbas, had been threatened on his way to college earlier that day;

    c. C had no prior knowledge of the actions of his sons/nephew. He strongly disapproved of their conduct when subsequently told what had happened; and

    d. Even if the Confrontation was related to the Disputed Land and C had prior knowledge, –

        i. it is not conduct sufficiently closely connected to the relief C seeks in this case to deny C of that relief. The Confrontation occurred more than 2 years after D1 transferred Tilt Hammer to D2; and/or

        ii. it would be grossly disproportionate to deny C restitution of land valued at £100,000 as a consequence of conduct, which resulted in the criminal defendants, but not C, receiving community sentences.

Burden and standard of proof

45. C has the overall burden of proving his claim. The defendants do not pursue any counterclaim.

46. The parties do not dispute that oral agreements were made. However, the parties and their witnesses have radically different accounts of what was or was not agreed, for what purpose and with what effect. Ultimately, a party who alleges a disputed fact bears the burden of proving it.

47. 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."

48. Whilst the parties' respective cases are perhaps easily stated, there are very significant and extensive factual disputes arising between the parties. For the reasons I will give later, it has not been an easy task on the available evidence to piece together events and conversations going back almost 30 years.

49. Each side asserts positive but radically different versions of what was and was not agreed under the 2009 Oral Agreement and the 2015 Oral Agreement. I cannot sit on the fence, but must decide, on balance, which of the competing versions of the agreements I prefer on the available evidence as being more likely than the other.

General observations upon the evidence of witnesses of fact

Indicators of unsatisfactory witness evidence

50. 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:

    a. Evasive and argumentative answers;

    b. Tangential speeches avoiding the questions;

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

    d. Disclosure and evidence shortcomings;

    e. Self-contradiction;

    f. Internal inconsistency;

    g. Shifting case;

    h. New evidence; and

    i. Selective disclosure.

Interference with memory

51. It is a striking feature of this case that the witnesses were seeking to recall events and conversations that took place in the context of multiple property and business transactions going back very many 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.

52. 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."

<u>Importance of corroborating contemporaneous documents, if available</u>

53. 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."

54. 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."

Adverse Inferences

55. The court may draw adverse inferences from the failure of a party (i) to produce contemporaneous documents that would have otherwise existed, if that party's oral evidence is correct, 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

56. 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

57. 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."

58. 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."

Lucas Direction

59. 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.

Assessment of the witnesses of fact in this case

60. In my assessment much of the witness evidence in this case (including from the principal witnesses, C and D1, who were cross examined at length) was tainted to a significant and material extent by indicators of unsatisfactory/unreliable witness evidence. I set out below by way of illustration specific examples of such indicators.

C

61. I did not find C to be a reliable or at times a credible witness.

62. Shifting case:

a. C sent pre-action letters (via 4 different firms of solicitors) to D1 (dated 30 June 2017, 3 May, 31 May 2018 and 24 January 2019) and to GQS (dated 4 July 2017, 16 May, 25 May 2018 and 4 January 2019). None of those letters make any reference to cash payments allegedly made by C to D1 pursuant to the 2015 Oral Agreement. There was not even mention of the part payment of £30,000 allegedly made at the GQS Meeting and despite C claiming that this cash payment was made in front of Mr McLachlan. Indeed, it was C's oral evidence that Mr McLachlan specifically commented upon the cash payment by saying "do what you want."; and

b. C's solicitors sent a further pre-action letter to GQS Solicitors dated 15 February 2021, which did finally mention the cash payment of £30,000 being made at the GQS Meeting, but not pursuant to the 2015 Oral Agreement. Rather, the letter stated (with my emphasis added) "At this meeting, [D1] requested that the Claimant make payment of £30,000 to him in order that the relevant deeds could be executed. We understand that this request was performed in the presence of Mr Iqbal Javed, Mr Sibtain Hussain and your Mr McLachlan." Even then the letter makes no reference to the alleged earlier cash payments totalling £10,000.

63. New evidence - For the first time, C in his oral evidence provided significant details about how:

a. he had raised the £30,000 in cash prior to the GQS Meeting. He said that -

i. He was given £7,000 by Mr Iqbal Javed,

ii. He was given £10,000 by Mr Bharwani,

iii. He was given £10,000 from a private money syndicate, which was administered by his sister-in-law and of which he was a member (£10,000),

iv. He contributed £3,000 of his own or his wife's money; and

b. on the morning of the GQS Meeting, Mr Iqbal Javed and Mr Bharwani brought their cash contributions to C at the restaurant at Highgate where the money was counted in denominations of £10, £20 and £50 before then being placed in a plastic carrier bag to be taken to the GQS Meeting.

64. Evidential gaps – C said in his oral evidence that he could have called, but chose not to call, the following witnesses:

a. his sister-in-law and Mr Iqbal Javed to confirm the source of the funds for the £30,000 cash payment; and

b. Mr McLachlan and Mr Iqbal Javed to confirm that they witnessed the cash payment of £30,000 at the GQS Meeting.

65. C sought to explain these striking shortcomings (shifting case, new evidence and evidential gaps) on the ground that "the payment was not in dispute, which was agreed. It was the land in dispute." That explanation was frankly nonsensical:

a. In his pre-action letter dated 11 June 2017, D1 stated that

> "the reason why the [TP1] has not as yet been lodged at the Land Registry is that your client has not kept to the agreement we made together in November 2015……it is clear to me that my brother has only provided you with partial information from which you now state your position."

b. In his pre-action letter dated 14 July 2017, Mr McLachlan stated

> "The instruction I had were that both brothers had agreed that three properties they owned jointly were to be split between them. One was to get one property and one the other. The third, the one that has given rise to the problem that now exists was to be split into two equal parts. Finally, [C] was to make a small delayed payment to his brother by way of a post dated cheque……."

c. It is self-evident from this correspondence that there was no acknowledgment that substantial cash payments were due and/or paid under the terms of the 2015 Oral Agreement;

d. The Amended Particulars of Claim dated 19 October 2021 allege;

> "[11.] Between about 1st October 2015 and 8th November 2015, the Claimant paid an initial sum of £10,000 to the First Defendant made up of two payments.
>
> ……..
>
> [17.] Whilst at the office of GQS Solicitors, the Claimant made a further payment of £30,000 in cash to the First Defendant in the presence of Mr McLachlan, Mr Iqbal Javed….."

e. The Amended Defence dated 17 August 2021 responded:

> "[10.] Paragraph 11 is denied. No such payments were made.
>
> ……
>
> [16.1.] No such £30,000 cash payment was ever made."

f. Therefore, it was abundantly clear that by September 2021, prior to the time directed for exchange of witness statements (9 September 2022), not only was there no acknowledgment that the cash sums had been paid, they were expressly denied. Nevertheless, C in his oral evidence sought somewhat bizarrely to excuse the continuing evidential shortcomings on the ground that "From my side, I had paid. I did not have a dispute over it."

66. Disclosure shortcomings:

a. C said in his oral evidence that the £5,000 cash he borrowed from his mother to give to his brother in part payment of the £40,000 due under the 2015 Oral Agreement was from money, which (i) he collected each month for his mother from her Post Office account into which her income support and attendance allowance was paid and (ii) was then kept by his mother at

their home. He said that he could have obtained documentary evidence from the Post Office to verify this and such documentary evidence would have been helpful;

b. C said in his oral evidence that the further sum of £5,000 he gave to Mr Ali Abbas to give to D1 "possibly came from the bank", although C has not disclosed any relevant bank statement; and

c. C said in his oral evidence that he would need to check with the local Lloyds and Halifax branches in Solihull to see whether the £3,000 that he had contributed towards the £30,000 cash payment to D1 came from his own or his wife's bank account. C has not disclosed any relevant bank statement from either his or his wife's account.

67. Self-contradiction:

a. In his oral evidence, C claimed that the Confrontation was unrelated to this dispute with his brother, but then claimed that, when subsequently told about the Confrontation, he shouted at his sons "I can sort out my own affairs.";

b. In his oral evidence, C said that he could have contributed more money towards the alleged £30,000 cash payment to D1, but simply chose not to do so. He said that between him and his mother, they had additional funds available of some £14,000 to £15,000. However, later in his oral evidence he said that –

i. he explained to D1 at the GQS Meeting that the reason he was providing a post-dated cheque for the additional £10,000 was because he "did not have money."

ii. C told D1 3 months later not to cash the cheque because C "did not have the funds."; and

c. In his witness statement dated 16 March 2023, C relied upon and exhibited notes from McLachlan's file. However, in his oral evidence C sought to distance himself from those very same documents by claiming for the first time that Mr McLachlan and D1 had fabricated them.

68. Internal inconsistencies - C said in his oral evidence that he had not obtained receipts for the substantial cash payments he allegedly made to D1 pursuant to the 2015 Oral Agreement because they still had trust in each other. However:

a. It was C's written evidence that the 2015 Oral Agreement was made because:

> "[23.] Our disagreements gradually got worse to the point that there were physical altercations between us. As an example, D1 attacked me whilst we were at the Highgate Road restaurant in around 2015. Whilst the Police were informed of this, they did not take any action because they considered it to be an inter familia[l] dispute. In any event, it was clear at this point that we could no longer work together, and it was best to simply go our separate ways.";

b. The level of mistrust between the brothers was such that it is not disputed that they each felt the need to bring their own supporter to the GQS Meeting - Mr Iqbal Javed supporting C and Mr Saqlain Hussain supporting D1;

c. It was C's evidence that at the GQS Meeting D1, in breach of the terms of the 2015 Oral Agreement, demanded payment of £10,000 in addition to the £40,000 in cash that C had paid (£10,000) or was in process of paying (£30,000); and

d. The level of mistrust was such that Mr Iqbal Javed was even required to guarantee payment of the additional sum of £10,000.

Mrs Begum

69. Mrs Begum celebrated her 90th birthday 2 weeks before the start of the trial. She gave her evidence through an interpreter. At the outset of giving her oral evidence, Mrs Begum momentarily was unable to remember her home address. As to the date of the 2015 Oral Agreement, Mrs Begum repeatedly said that it was in June by reference to a visit to the seaside she recalled taking place in the same month as the meeting. However, C and D1 do not dispute that the agreement was made in the Autumn, not the Summer of that year.

70. In her oral evidence, Mrs Begum described how her 6 children worked in the family factory on "her orders." The children "did what I said." Thereafter, the children would seek her opinion and approval regarding various financial matters. Mrs Begum said, "I may be illiterate, but I am aware of everything." It is not disputed that Mrs Begum is generally regarded as the head of the family.

71. In light of Mrs Begum's age, ill-health and physical frailty, I had raised concerns at the Pre-Trial Review Hearing over Mrs Begum being called as a witness to a dispute between her two children. I have to say those concerns were somewhat misplaced, since Mrs Begum presented at trial as a continuing force of nature despite her advancing years. After Mrs Begum had given her evidence, D1 was asked during his evidence how Mrs Begum could ever have pressurised him to support C financially, and to which D1 replied "You saw mother in action, she commanded, demanded, used her experience in the factory."

72. In my assessment, Mrs Begum's oral evidence was overwhelmingly clear and consistent. I did not find that Mrs Begum's evidence was tainted to any meaningful extent by indicators of unreliable witness evidence.

Mr Ali Abbas

73. It is right to acknowledge that Mr Ali Abbas made some concessions that did not necessarily support his father's case. He said that both C's and D1's "behaviour was not good for business, arguing over little things….. I have a different personality to them, more logic than emotion."

74. That said, the evidence of Mr Ali Abbas was to a much greater extent undermined by indicators of unreliable evidence.

75. When questioned about the Confrontation, he was highly argumentative, verging on being aggressive, and evasive.

76. Self-contradiction:

a. In his oral evidence, Mr Ali Abbas acknowledged that he had pleaded guilty to a criminal offence arising from the Confrontation, but nevertheless later in his oral evidence he continued to maintain that he had done nothing wrong, but was himself a victim acting in self-defence. The transcript of the sentencing hearing at the Crown Court records the prosecution's opening of the facts as including –

> "It is Mr Shabir Hussain who was the man pulling his white van out of the car park, opening the gate and closing it again before the defendants arrived and they were clearly waiting for him to do so because of their arrival in the Golf.…… The Abbases were shouting things like, 'You bastard, mother fucker, we are here to kill you today, we are going to fuck you up.' Ali Abbas had a wrench when you look closely at the footage, that was the weapon of choice. [Bilal Abbas] had a bar, metal bar, and Mr Hussain defended himself with the chain that you see."

The transcript does not record any challenge made on behalf of the criminal defendants to the facts opened on behalf of the prosecution.

b. At the start of his witness statement, Mr Ali Abbas stated "[4.] I make this statement from matters within my own knowledge unless otherwise stated." At the end of his witness statement, Mr Ali Abbas certified that "This witness statement sets out only my personal knowledge and recollection, in my own words". In the middle of his witness statement, Mr Ali Abbas stated:

> "[11.] Due to the involvement of independent third parties and in particular my grandmother, they eventually reached an agreement. The agreement that was reached was that:
>
> (a) The Highgate Road property will be transferred to my father
>
> (b) The Main Street property will be transferred to my uncle
>
> (c) The Tilt Hammer property would be split with one half being owned solely by my father and the second solely by my uncle.
>
> [12.] Later, my uncle demanded that my father pay him £40,000 in addition to the division of the properties. Although my father was reluctant to pay this, he was convinced by my grandmother to pay my uncle the £40,000 just so that the matter is drawn to a close."

In his oral evidence, Mr Ali Abbas conceded that he was not at the meeting when the agreement was made such that what was there stated in his witness statement was not in fact within his personal knowledge.

<u>Mr Bharwani</u>

77. Mr Bharwani is the former business partner of C and D1, but also the long-time friend of C. Such is the strength of their friendship that over the years, Mr Bharwani

and C have regularly loaned each other money, "sometimes large amounts and sometimes smaller amounts."

78. I did not find Mr Bharwani to be a reliable witness.

79. New Evidence:

    a. Mr Bharwani said in his oral evidence that after C had unsuccessfully been chasing up Mr McLachlan after the GQS Meeting, he and C went unannounced to the offices of GQS where they met with Mr McLachlan in early 2016. At that meeting, Mr McLachlan confirmed that he had witnessed the £30,000 in cash being handed over to D1. If that was said by Mr McLachlan, it was of course highly relevant to this dispute. When asked why he had not mentioned this conversation with Mr McLachlan in his written evidence, Mr Bharwani, like C, sought to explain this striking omission on the basis that the £40,000 payment was not in dispute at the time he prepared his witness statement. That is not true. Mr Bharwani's witness statement is dated some 12 months after the date of the Amended Defence, which expressly denied any such cash payments, including the £30,000 cash payment allegedly made at the GQS Meeting; and

    b. In his written evidence, Mr Bharwani stated that –

        "[12.] In or around October 2015, I was invited to attend the meeting with GQS Solicitors by Aslam, but I did not attend. I felt that they had both reached an agreement and that they were simply going to the solicitors to ratify that agreement. Furthermore, as there were several other people attending, including Mr Javed Iqbal who is an experienced solicitor I did not feel the need to be present.

        [13.] On the day of the meeting however, Aslam borrowed £10,000 cash from me. I knew that this was to give to Shabbir as part of the £40,000 that was agreed."

    Whilst Mr Bharwani may not have attended the GQS Meeting, he mentioned for the first time in his oral evidence that he had in fact attended a pre-meeting at the restaurant. He further said that, whilst the cash he brought to the restaurant was not counted out there because he had done so himself beforehand, he did witness the other cash being counted. If true, this was again a striking omission from Mr Bharwani's written evidence bearing in mind that the cash payment was very much disputed by D1.

80. Self-contradiction:

    a. At the end of his witness statement, Mr Bharwani certified that "This witness statement sets out only my personal knowledge and recollection, in my own words". Earlier in his witness statement, Mr Bharwani stated –

        "[9.] At another meeting, the parties reached an agreement. The agreement that they had reached was as follows:

        (a) The Highgate Road property was going to be transferred to Aslam

        (b) The Main Street property was going to be transferred to Shabbir

(c) The Tilt Hammer property would be split in two, with Shabbir taking the part facing Alum Rock Road and Aslam to take the other part of it."

In his oral evidence, Mr Bharwani conceded that he was not at this meeting, but was told about it subsequently by Mrs Begum.

b. Again at the end of his witness statement, Mr Bharwani certified that "On points that I understand to be important in the case, I have stated honestly (a) how well I recall matters and (b) whether my memory has been refreshed by considering documents, if so how and when." At no point in his written evidence does Mr Bharwani make any reference to the need to refresh his memory whether by considering documents or otherwise. However, in his oral evidence Mr Bharwani said that he could not recall the timeline, although he could recall the sequence. Therefore, at the time he was preparing his witness statement, he spoke to C, and they read through letters and text messages together so that they could "trace back the timeline" and "put together a chronology".

81. Internal inconsistency: In his written evidence, Mr Bharwani expressed shock when told after the GQS Meeting that "£30,000 cash had exchanged hands in front of a solicitor between two parties in a property transaction." However, in his oral evidence, Mr Bharwani said that he had attended the restaurant immediately prior to the GQS Meeting where he actually witnessed cash being counted to be taken to a meeting, which, according to his written evidence, he knew was taking place at the offices of GQS, and indeed a meeting that he himself had originally been invited to attend.

D1

82. I did not find D1 to be a reliable or at times a credible witness.

83. Self-contradiction:

a. In his written evidence, D1 stated (with my emphasis added):

"[10] In 1997, ……. Using our remaining money and a small £15,000 loan from Habib Bank we purchased [Highgate] for £45,000……The property was put into my name.……

[11] I planned ….. to develop [Highgate]. My total investment came to £67,000. The costs to develop [Highgate] was £122,000. I introduced a trading partner, Mr Abbas Bharwani, who invested £55,000 into the business for the work.

[12] On 3 March 1998, we opened Karachi Fried Chicken trading from [Highgate]. It was agreed that the partners would split profits and losses commensurate with what they had invested. I received 49%, abbas Bharwani 40% and [C] 11%. I was running the business as a sole trader initially and took sole responsibility for all loans and bills for the business.

> [13] In January 2001, I paid Abbas Bharwani £95,000 for his investment in [Highgate] and took over his share of the business. The agreement for this is at SH1".

The clear impression from D1's witness statement was that Highgate was purchased jointly with C and the Business was a partnership between him, C and Mr Bharwani. However, at the beginning of his oral evidence, D1 sought to "correct" his written evidence by substituting the words "my" for "our" at paragraph 10 of his witness statement and the words "I" for "we" at paragraph 12 of his witness statement. Thereafter, during the course of cross examination, D1 further explained that he had always been the sole owner of both Highgate and the Business. This cannot in my view simply be characterised as a mere correction. It was instead a significant, fundamental and unexplained change of position.

b. Shortly before trial, Mrs Begum was admitted to hospital. D1 visited his mother in hospital on 26 April 2023 and covertly recorded their conversation. It was not argued on behalf of C that the covert recording was unlawful or inadmissible, but it was clearly distasteful. D1's explanation for covertly recording his mother in this way was variously –

    i. D1 said that he was worried about Mrs Begum, who was "being abused by her daughter-in-law" and was "not fit to give evidence" at trial,

    ii. Despite D1's apparent concerns as to Mrs Begum's vulnerability, he nevertheless felt it appropriate covertly to record their conversation. He even claimed that there was no need to make Mrs Begum aware of the recording since she "was not in any state to give consent",

    iii. Notwithstanding D1's apparent concerns over Mrs Begum's mental capacity, the transcript of the recording makes repeated references to D1 putting to Mrs Begum that she had asked D1 to give C a ½ share in the Business,

    iv. D1 denied that he had hoped to record his mother saying something to contradict her written evidence,

    v. D1 admitted that he "wanted the truth" and he "thought [Mrs Begum] would tell the truth when not being coerced by [C's] family."

84. Shifting case:

    a. Again I note that in response to the initial letter of claim, D1 stated in his letter dated 11 June 2017 that "the reason why the [TP1] has not as yet been lodged at the Land Registry is that your client has not kept to the agreement we made together in November 2015 ….. it is clear to me that my brother has only provided you with partial information from which you now state your position."[8];

[8] The letter of claim is dated 30 June 2017, and so I infer that the response letter should have been dated 11 July 2017, and not 11 June 2017.

b. In their letter dated 15 September 2017, C's solicitors, Artis Legal, asked that D1 "fully particularise the agreements allegedly made with our client in relation to the Transfer of [the Disputed Land] into the name of our client." In his letter dated 2 October 2017, D1 responded –

> "This property was one part of a series of three property transfers between my brother (your client) and myself which were not fully completed for various reasons. The situation remains open to discussion so that the matter can then be finalised. It is not a simple matter of just making one transfer – my brother has not kept to his word and I have incurred extra expense and considerable liabilities that were not agreed in our initial verbal agreement.";

c. D1 failed without good reason to respond meaningfully or at all to further letters of claim dated 31 May 2018, 24 January 2019 and 18 March 2021. By way of illustration, D1 sought to explain his failure to respond to the first of these letters on the basis that "Just thought a letter. Tried to telephone but couldn't get through. Not very professional of them."; and

d. The first mention that D1 made to an alleged outstanding sum of £250,000 was in his defence filed in these proceedings. D1 sought to explain this striking omission on the ground that until a claim is issued then it is not serious enough to warrant a detailed response. That explanation was patently ridiculous and wholly contrary to the Pre-Action Protocol, which obliges parties to exchange sufficient information so that they can understand each other's position and try to settle the case without the need for court proceedings.

85. New evidence: When asked why, if Highgate was purchased by D1, it was registered in C's name, D1 said in his oral evidence for the first time that he had instructed C to put Highgate in C's name because D1 was struggling to cope with his wife's then ill-health and look after their young children at the same time. D1 described it as the worst time of his life, which makes it even more surprising, if true, that there is absolutely no mention made in D1's written evidence of the existence of or need for a trust over the property when it was first purchased in the name of C.

86. Internal inconsistencies:

a. D1, "without wanting to blow my own trumpet", sought to portray himself as an astute business man in stark contrast to C, who he described as lacking business acumen and prone to making poor decisions with money. D1 said that he was the sole director of several companies. He had an understanding of company accounts. He routinely dealt with "contracts and leases", and with conveyancing solicitors. However -

i. After D1 said in his oral evidence that he had been the sole owner of the Business, D1 was asked why, if that was the case, he had signed the Buy Out Agreement whereby he agreed to pay Mr Bharwani £95,000 including for his stated 1/3rd share of the Business? D1 then sought to distance himself from the Buy Out Agreement, and notwithstanding that he had exhibited a copy to his own witness statement,

ii. He said that it was Mr Bharwani, who had drawn up the Buy Out Agreement and who could not even spell D1's name correctly,

iii. He said that Mr Bharwani "came to me and said he had a little investment in the Business, and I said ok."; and

iv. He signed the Buy Out Agreement because "sometimes in life it is better to sign unfair agreements."

This explanation for why D1 was apparently willing to sign an agreement promising to pay Mr Bharwani a substantial sum of money for a share in a business that Mr Bharwani did not even have was, not only fanciful, but also wholly inconsistent with D1's earlier evidence as to his own business savinness.

b. D1 disclosed shortly before and sought to rely at trial upon copies of letters from the conveyancing solicitors, Bradley & Cuthbertson, who were instructed to deal with the transfer of Highgate from C to D1 in 1998. The letter dated 15 January 1998 stated, "I refer to my telephone conversation with [D1] on the 13th January, when he informed me that he did not require a mortgage from Habib Bank and therefore upon completion of his purchase of the above property from [C] for the price of £45,000 the mortgage in favour of Habib Bank can be repaid and a cheque for the balance monies sent to [C]." The references to a purchase price being paid and the balance of the monies, after discharge of the existing mortgage, being sent to C are wholly inconsistent with D1's new case at trial that he was, at the time of the transfer, already the sole beneficial owner of Highgate such that the transfer was intended merely to regularise the position following his wife's recovery by merging the legal and beneficial ownership of the property. D1 was simply unable to explain this inconsistency.

c. In his written evidence, D1 stated that in August 2015 he and D1 met at another restaurant (Al Faisal) to agree a way forward with Mr Sohail Abbas acting as mediator. "We came out of the meeting wanting to split the properties equally." However, in his oral evidence, D1 said that –

i. Mr Sohail Abbas had not been called as a witness at trial because his evidence was not that important,

ii. The purpose of this particular meeting was in fact to discuss a sale of Highgate/the Business to the owners of Al Faisal restaurant. D1 said initially that the proposed sale price was £600,000, but later said it was £675,000. In any event, they had met at Al Faisal because the owners there had expressed an interest in buying,

iii. The alleged £250,000 was not mentioned at this meeting because "If some advantage was to be gained then why benefit Al Faisal rather than my brother",

iv. Whilst the £250,000 was not mentioned at this meeting, Mr Sohail Abbas knew all about it, and notwithstanding D1's earlier claim that Mr Sohail Abbas was unable to provide any evidence that might be important/relevant at this trial.

87. Disclosure shortcomings:

a. In his written evidence D1 stated that;

> [27.] At the same time as entering into the Share Agreement, Mann and Co solicitors had also prepared a draft loan agreement to confirm the £250,000 owed for the Claimant's share of the property 126 Highgate. The Claimant said he didn't need to sign this as we had trust."

b. There is no dispute that Mr Bahra, on D1's instructions, drafted the Shareholders' Agreement. In his oral evidence, Mr Bahra said that, although he recalled discussions about a loan agreement, he never drafted any loan agreement because of C's insistence that there was no need to record anything in writing;

c. Mr Bahra also said in his oral evidence that there would have been a client file, but he had not had sight of the file before preparing his written evidence, since he had left the firm some years ago (2015/2016) and did not know if the file was ever asked for;

d. As conceded by his counsel, D1's primary case only makes sense if considered in the context of the sum of £250,000 allegedly payable pursuant to the terms of the 2009 Oral Agreement. Therefore, Mr Bahra's client file was potentially highly relevant. Indeed, if it contained a draft loan agreement as claimed by D1, it was likely to be highly persuasive evidence in support of D1's case; and

e. When asked why he had not disclosed the client file into these proceedings, D1 said that it was no longer available because firms of solicitors do not retain client files longer than 6 years and he only ever received the letter before action in 2021. When it was then pointed out to D1 that Artis Legal, on behalf of C, sent a letter of claim to D1 as long ago as 30 June 2017, D1 then sought to excuse the failure to disclose the client file on the basis that it would not have served any useful purpose as the draft loan agreement was never signed. However, if D1 considered it to be of no relevance, why did he ever feel the need to refer to its existence in his written evidence?

<u>Mr Sibtain Hussain</u>

88. Mr Sibtain Hussain is the son of D1 and the twin brother of Mr Saqlain Hussain. However, his involvement with the Disputed Land arose only after he was appointed a director and gifted ownership of D3 in 2020. Therefore, Mr Sibtain Hussain's evidence was of little, if any, relevance to the factual matters in dispute.

<u>Mr Saqlain Hussain</u>

89. In his written evidence, Mr Saqlain Hussain stated:

> [5.] I was present at a meeting that took place at GQS' office on 9 November 2015 where the First Defendant and the Claimant were meeting to sign transfer documents for the split of the property partnership between them……

…….

[7.] During this meeting there was a period of time when Mr McLachlan left the room to allow us all to discuss matters privately. During this time the Claimant gave Dad a post dated cheque for March 2016 for the sum of £10,000. ……..

[8.] The fact that the cheque was post-dated made me believe that the Option would [be] paid at the time the cheque could be presented.

[9.] …… The Claimant wanted some assurance from Dad that he would transfer the land once the monies were paid. My Dad offered to sign a transfer so that it was ready to be filed as soon as the money was paid……

……

[10.] We said that [the] Second Transfer would stay with the solicitors until the Claimant paid and that as soon as he paid, the solicitors would file it….."

90. The clear impression from this written evidence is that Mr McLachlan had no knowledge of any option agreement. However, in his oral evidence, Mr Saqlain Hussain said for the first time that:

    a. D1 instructed Mr McLachlan to prepare the TP1 during the course of the GQS Meeting.[9]

    b. D1 told Mr McLachlan that the signed TP1 was to be "held on file until the amount was paid in full"; and

    c. D1 told Mr McLachlan "to hold [the TP1] until he was given instructions to file it and until he heard from my father."

91. No explanation was given as to why this potentially important new evidence had not been included in the written evidence. However, even then, the new evidence was:

    a. Internally inconsistent - Was Mr McLachlan told to hold the TP1 until such time as the money was paid or until he heard further from D1? If it was the former, then what amount of money – £10,000 being the amount of the post-dated cheque or the whole of the alleged £250,000; and

    b. Inconsistent with D1's own oral evidence. D1 said that –

        > "[At the time of the GQS Meeting, Mr McLachlan] was never aware of the £250,000. He was not acting in the dispute. He was just doing the conveyancing. Just paying him to do a job……. He did not know anything about any payment whether a cheque. We never mentioned anything but the conveyancing…. We never discussed anything apart from the conveyancing.

92. I did not find Mr Saqlain Hussain to be a reliable witness.

[9] It follows that must have been when Mr McLachlan had re-joined the meeting having previously "left the room to allow us all to discuss matters privately" and during which time C handed D1 the post-dated cheque.

Mr Bahra

93. As a solicitor and officer of the court with no personal stake in the dispute, I found Mr Bahra to be an honest witness doing his best to assist the court. In his oral evidence, Mr Bahra said that he was clear in his mind and not mistaken as to his recollection of the discussion between D1 and C over the £250,000 debt. I did not find that Mr Bahra's evidence was tainted by indicators of unreliable witness evidence.

Mr Saville

94. In his witness statement, Mr Saville states that he became aware of the outstanding sum of £250,000 owed by C when D, at their initial meeting "eight years ago", set out the business/financial arrangements that he then had with his brother. In addition, Mr Saville makes no mention in his witness statement to any relevant documents before certifying at the end of the witness statement that he understood the importance of stating (i) how well he recalled matters and (ii) whether his memory had been refreshed by considering documents, and if so how and when.

95. Therefore, on the face of the witness statement, Mr Saville was being asked for the first time to record in writing his recollection of a discussion he had with D1 at their initial meeting that took place over 8 years beforehand and without being able to refresh his memory from any contemporaneous file note.

96. However, during the course of his oral evidence, Mr Saville variously said:

    a. He dealt with D1 fairly frequently, meeting him once a month to discuss business matters;

    b. He would have made contemporaneous file notes of the discussions that were had at those meetings';

    c. His written evidence "was both recollection and a compilation of various discussions of matters over time….. as matters progressed";

    d. It was "probably difficult for me to say at what specific meeting I was told about a specific fact";

    e. He was not present at any of the discussions between C and D1. His understanding was based on what he was told by D1 and developed "slice by slice over a long period"; and

    f. He "could have produced the witness statement without the [file] notes, but they reconfirmed my belief. I was not asked to produce a copy of the [file] notes during these proceedings."

97. Whilst I found Mr Saville an honest witness doing his best to assist the court, I did not find him to be a reliable witness.

Mr Ul-Hassan

98. It was Mr Ul-Hassan's written evidence that "On 4 November 2019, [D] was assaulted with a motor vehicle by [C]'s three sons and Iqbal Javed's son. They also

stole his van. [C] called me giving the location of the van. I was with [D1] at the time so I put the phone on speaker phone. [C] said this was just the beginning and they would force [D1] to sign over the land.

99. In his oral evidence, Mr Ul-Hassan said:

> "Yes I was [at the restaurant on 4 November]. I remember now. I was helping [C] when the 3 sons came down upset. Ali Abbas said they had a problem with their uncle whilst holding a bunch of keys in his hand and he asked me to take the keys to [D1]. I went over there and called [C] and said I can't find the van. Ali Abbas told his dad it was parked in Grove Road. I went there just behind the Mosque. I miscalled C who called me back. I called D1 and said come over. I phoned [C] and said son left problem. [C] and Ali Abbas swearing and I said come over and apologise to uncle. If I wasn't at the restaurant how could they have given me the keys. They said on phone going to force [D1] to sign over the land. I was on speaker phone. ….. I do not know about criminal court case. Yes I know about that….."

100. Mr Ul-Hassan's oral evidence, which departed significantly from his written evidence, was also utterly confused and confusing. I did not find him to be a reliable witness.

Overall approach to the findings of fact in this case

Witness evidence

101. Apart from Mrs Begum and Mr Bahra, whose evidence I will address later, I did not find the remaining witnesses of fact, including the primary witnesses being C and D1, to be reliable witnesses.[10] For the reasons already given, I found that their witness evidence was tainted to a significant and material extent by indicators of unsatisfactory witness evidence. Further, in the particular circumstances of this case, I consider that there is a very real and substantial risk of interference with the memories of these witnesses and bearing in mind that:

    a. They were seeking to recall events and conversations going back between 8 and 27 years ago; and

    b. With the exception of Mr Saville, none of them can be regarded as detached or objective observers being either the parties themselves or persons closely connected and loyal to the parties (either through friendship or family) in the context of a toxic, dysfunctional, complex and long running family feud. Therefore, these witnesses were subject to significant motivating forces and powerful biases.

102. So far as Mrs Begum, it was her evidence that:

    a. In 2015, C and D1 attended a meeting at the hospital at her request in an attempt to resolve the dispute;

    b. At this meeting, C and D1 agreed that Highgate be transferred to C, Main Street be transferred to D1 and Tilt hammer be divided between them; and

[10] It was not necessary to, and I did not, make any assessment as to the reliability of the evidence of Mr Sibtain Hussain

c. D1 insisted that C pay D1 the additional sum of £40,000. Initially C was reluctant to do so because he believed that D1 was getting the better half of Tilt Hammer since that half was front facing on a main road. However, C ultimately agreed to make the additional payment after Mrs Begum pleaded him to do so in order finally to resolve matters.

103. So far as Mr Bahra, it was his evidence that:

a. C and D1 attended his then offices on 25 May 2014 to sign the Shareholders' Agreement, which Mr Bahra had drafted on D1's instructions; and

b. During the course of the meeting, D1 commented that he would like something in writing to record the fact that C still owed D1 the sum of £250,000, but C remarked that nothing was required due to trust that existed between them.

104. Whilst I did not find that the evidence of Mrs Begum and Mr Bahra was tainted by indicators of unreliable witness evidence, it strikes me that they cannot both be correct in their recollections. If it is correct that there were discussions at a meeting in 2014 over an outstanding sum of £250,000, then it cannot be correct that such a significant amount of money was then simply omitted from discussions at a subsequent meeting, only some 12 months later, over how fairly to divide the properties/Business following a period of protracted and difficult negotiations.

105. It was submitted on behalf of D1 that I ought not to attach any weight to the evidence of Mrs Begum since she was not an impartial observer. Indeed, C acknowledged in his oral evidence that he has lived with Mrs Begum his whole life and she is now dependent upon him to meet her physical needs. He also went as far as to say that their money was essentially pooled and treated as family money. However, in my assessment even now Mrs Begum is reluctant to take sides between her two sons:

a. In her written evidence, Mrs Begum stated that –

> [18.] It was my view that blood is thicker than water and as they were family they shouldn't be fighting over money or property. This view was clearly lost on both of them and was to no avail…..
>
> …….
>
> [21.] It is really embarrassing for me to know that my sons are fighting over properties in Court…..
>
> ……
>
> [24.] …. It pains me that it has come to this, but I felt the need to get involved to this extent so that justice can be done."

b. The transcript of the covert recording taken by D1 whilst visiting his mother in hospital shortly before the start of the trial confirms the following exchanges –

> D1:- "He is still my brother. If he talks to me in a nice way once…. I am the same brother who kept him close to me. His offspring were raised on my money, mother."
>
> Mrs Begum:- "I will live with you and I will live with him."
>
> D1:- "Yes, come and live with me. May Allah…bless you with a long life!"
>
> Mrs Begum:- "Not like this. Not like this. If you want, don't take me with you, but things should not be like this. I will come to you and stay with you for six days, and then stay with him for six days."

It appears that Mrs Begum, despite her age and ill-health, was still willing to split her time equally between her sons in an attempt to mend the rift between them.

106. That said, I do accept that, as result of Mrs Begum having lived with C and his family throughout the course of this protracted dispute, she would undoubtedly have been exposed to powerful influences, such that there is a real risk of subconscious bias.

107. Mr Bahra's witness statement is dated 10 October 2022. Therefore, Mr Bahra was being asked for the first time to record in writing his recollection of a discussion that took place over 8 years beforehand and without being able to refresh his memory from the client file. In addition, there does not appear to have been anything particularly memorable about the meeting from Mr Bahra's perspective. In his oral evidence, Mr Bahra said that D1 was not a regular client. He had acted for D1 only once or twice over a period of 12 years. The main focus of his practice was secured lending. The meeting itself was short and to the point. In all the circumstances, I consider that there is a real risk of interference with Mr Bahra's memory as a result of the litigation process itself.

108. Further, Mr Bahra and D1 were not even agreed as to the drafting of a loan agreement – D1 said that one was drafted by Mr Bahra on his instructions, whereas Mr Bahra said one was not. Clearly the most reliable evidence would have been the client file, but which is no longer available because of the time that has now elapsed and the firm's retention policy. D1 could and should have requested the client file when still available. It strikes me as unfair to allow D1 to secure a tactical advantage from the evidential gap that he has permitted by attaching conclusive weight to the oral evidence of Mr Bahra when that evidence is uncorroborated by contemporaneous documentary evidence that would otherwise have been available.

109. In all the circumstances, I have approached the evidence of all the witnesses of fact with a substantial degree of caution.

Documentary evidence

110. This is a commercial case in the sense that it involves a dispute over the beneficial ownership of development land. However, it is also a dispute between brothers. It is not unusual for family members, as in the present case, to conduct business together informally without any written record.

111. Notwithstanding that general level of informality:

a. Mr Bahra was instructed to draft the Shareholders' Agreement, but his client file is no longer available; and

b. Mr McLachlan was instructed to deal with the relevant transfers. Whilst Mr McLachlan's client file is available, it is deficient and ultimately is of little evidential value in seeking to resolve the present dispute. The client file contains no proper attendance notes, and the Client Care Contract under the sub heading "**Work to be done"** merely states "Transferring three properties from joint names to [D1] and [C]." As recorded in the SRA proceedings, albeit in the context of another matter, Mr McLachlan admitted to a failure to keep "detailed records regarding the instructions received".

112. As a result, there are comparatively few contemporary and qualitative documents available, and against which I can assess the likelihood of the competing narratives.[11]

Conclusion

113. In making my findings of disputed facts in this case, I have had particular regard to the undisputed facts, the inferences properly to be drawn from those undisputed facts and any missing relevant evidence, the contemporary documents (albeit limited in number) and the overall probabilities including by reference to the parties' motives.

114. I am unable in the course of this judgment to refer to all the evidence and argument relied upon by the parties, but I have taken it all into account in making my findings of fact.

Likely surrounding circumstances at the time the 2009 Oral Agreement was made

115. As already explained, in determining the likely terms of the 2015 Oral Agreement, it is necessary first for me to determine the likely terms of the 2009 Oral Agreement. The likely terms of the 2009 Oral Agreement must be considered in the wider context of the factual matrix arising at the time the 2009 Oral Agreement was made. At that time:

a. C says that –

i. Although by then registered in D1's name, C remained the 100% beneficial owner of Highgate; and

ii. C was an equal partner in the Business following the buyout of Mr Bharwani's 1/3rd share and having contributed towards the development costs.

b. D1 says that –

[11] In the present case, there had been a complete breakdown in relations/trust between C and D1 by the time of the 2015 Oral Agreement, which was only made after several months of protracted and difficult negotiations. It is therefore surprising that neither party saw the need to record in writing what had been agreed orally; even if informally by way of text/email. Whilst hindsight is a wonderful thing, had the parties done so, they could potentially have avoided spending the eye watering sums they have on this litigation.

i. Although initially registered in C's name, D1 was always the 100% beneficial owner of Highgate before also becoming the legal owner following the transfer of the title into his name in 1998; and

ii. D1 was the sole owner of the Business.

Highgate

116. C says that he bought Highgate for himself using his share of the monies received from his parents and without the need for any mortgage, but was subsequently advised by D1 to transfer the property into D1's name because of C's financial exposure under the personal guarantees that he had given to Piper's creditors.

117. D1 says that he bought Highgate for himself using his share of the monies received from his parents with the assistance of a small mortgage, although the property was initially registered in C's name due to the need at the time to focus upon D1's wife's then ill-health.

118. There are some contemporaneous documents available in the form of letters dated 15 January, 29 January, 25 February, 26 February and 23 March 1998 from the solicitors, Bradley & Cuthbertson, who were instructed to deal with the transfer of Highgate from C to D1. However, the contents of those letters appear to undermine both C and D1's versions of events in that they refer to the need on completion to:

a. redeem C's existing mortgage. C sought unconvincingly to explain away the contents of these letters by claiming that either they were forgeries or D1 had somehow been able to mortgage the property in C's name but without C's knowledge in order to raise monies to purchase other properties; and

b. pay C the balance of the stated purchase price of £45,000, and after redeeming the mortgage. D1 was unable to explain why the correspondence made reference to paying the balance of the proceeds of sale to C, if D1 was in fact already the beneficial owner.

119. Both C and D1 accept the Buy Out Agreement as being a genuine document. However, the contents of that document also appear to undermine C and D1's competing narratives that they each remained the sole beneficial owner of Highgate from the time it was purchased. The Buy Out Agreement expressly records that Mr Bharwani was selling his 1/3rd share in both "the business and freehold property Karachi Fried Chicken", which is consistent with Mr Bharwani also having had a beneficial interest in Highgate.

120. D1's explanation that C was asked and agreed to take on a significant mortgage liability to assist D1 to purchase Highgate solely for D1's own benefit gave rise to more questions than answers:

a. In his written and oral evidence, D1 repeatedly sought to undermine C's financial credibility. For example, D1 stated that C "had not historically made sensible decisions with money and has instead focused on get rich schemes [including] pa[ying] £32,000 for diamonds but these turned out to be crystals";

b. If C was so financially incompetent, why would D1 have ever entrusted C with such a substantial financial commitment on behalf of D1? and

c. Even if D1 had no other option but to entrust C, rather than perhaps one of his other brothers, would it not have been more straightforward and effective for D1 simply to have granted C a limited power of attorney to deal with the property on behalf of and whilst D1 was otherwise engaged?

121. On balance, I find that it is more likely that, at the time of the 2009 Oral Agreement, Highgate was considered and treated by the brothers as a joint venture:

a. D1 stated (prior to his purported correction and again with my emphasis added) in his written evidence -

> "[10.] In 1997, ……. Using our remaining money and a small £15,000 loan from Habib Bank we purchased [Highgate] for £45,000……The property was put into my name.……";

b. C stated in his written evidence –

> "[16.] … because D1 had spent money developing Highgate…. it would only be fair for D1 to own 50% of Highgate….";

c. C and D1 both emphasised in their evidence that prior to the breakdown in their relationship, in 2014, their business dealings with each other had been founded and conducted upon mutual brotherly trust, which is, in my view, more consistent with a shared expectation and understanding that they would collaborate with one another by way of property investments; and

d. Indeed, it is not disputed that Tilt Hammer (in 2001) and Main Street (in 2012) were acquired by the brothers as joint ventures with the intention of developing those properties. It is inherently more likely, therefore, that Highgate was acquired and developed in the same way.

The Business

122. In support of his claim that he was the sole owner of the Business, D1 relies upon the:

a. The management accounts, which record the Business trading as "Karachi Fried Chicken" with D1 as sole proprietor; and

b. Various invoices and planning letters addressed to D1.

123. I am not persuaded that these documents in themselves necessarily evidence the beneficial ownership of the Business. It is C's evidence that, although D1 was the front man for the Business, he held it on trust for D1 and C as equal beneficial owners. It is not disputed that C and D1 entered into other arrangements such that the legal ownership of the Business did not reflect the beneficial ownership. Zaika was incorporated on 1 May 2014 and through which the Business was then operated. C was the registered sole director and shareholder of Zaika. Notwithstanding that C, through Zaika, then effectively became the sole legal owner of the Business, it is accepted that he was not the sole beneficial owner – albeit C says that he and D1 were equal beneficial owners, whereas D1 says that he was the sole beneficial owner pending payment of the alleged sum of £250,000.

124. On balance, I find that it is more likely that, at the time of the 2009 Oral Agreement, the Business was considered and treated by the brothers as an equal partnership:

a. In his written evidence, D1 admitted that the Business was operated as a partnership between him, C and Mr Bharwani. It was only during the course of his oral evidence that he sought to claim for the first time that he was the sole owner of the Business such that C and Mr Bharwani were never his partners in the Business. He said variously -

i. "I owned 100% of the Business",

ii. C and D1 had "secret investments. All it was",

iii. "I was giving [Mr Bharwani] 1/3rd interest as silent partner. He never had any share, I just opted to give him a share. He wanted to take out his share…. He came to me and said he had a little investment and I said ok.",

iv. "Only Mr Bharwani had a 1/3rd interest. I owned 100%. He had £55,000 investment."

b. I found D1's oral evidence in this regard to be utterly confused and confusing:

i. He said that he was the sole owner of the Business and C and Mr Bharwani were merely investors, but investors in what if not a share of the Business to ensure capital appreciation?; and

ii. He later said that he was the sole owner of the Business and Mr Bharwani only had a "share" or an "interest", but again a share or interest in what, if not a share or interest in the Business?

c. The one aspect of his written evidence that D1 did not seek to correct was that the profits and losses of the Business were to be split. An agreement to share profits and losses is of course the essence of a partnership. In addition, in the Buy Out Agreement, D1 expressly agreed to indemnify Mr Bharwani against any past and future liabilities of the Business, which is also consistent with the Business being operated by way of a partnership, since a partner is generally personally liable for all partnership debts;

d. More consistent with the evidence of C and Mr Bharwani that there was an equal partnership are the terms of the Buy Out Agreement, which expressly record that Mr Bharwani sold his 1/3rd share in the Business. In contrast, D1's competing narrative made no sense. It was D1's written evidence that Mr Bharwani was entitled to a 40% share of the profits in which case why would he have been willing for the purposes of the Buy Out Agreement to treat his share as only a 1/3rd share, and despite D1 saying in his oral evidence that Mr Bharwani effectively took the lead in drafting the Buy Out Agreement; and

e. It was D1's oral evidence that he had given C a relatively small interest in the Business simply to help C out, since he was struggling financially. It was C's evidence that he had an equal share in the Business as a result of

contributing to the redevelopment costs. There is some contemporaneous documentary evidence to support C's version of events. The Business opened in March 1998 following the earlier redevelopment of Highgate. C has produced a copy bank statement, which evidences a positive balance of £43,681.61 as at 30 September 1997 reducing to £25,001.61 as at 31 December 1997 as a result of 4 substantial transactions over the intervening 4 month period. C said that it was these monies that were used to help fund the redevelopment of Highgate. Again, D1's competing narrative made no sense. On D1's case Mr Bharwani's capital contribution to the Business was £55,000 out of a total of £122,000, which equates to 45%, but he was only entitled to 40% of the profits. Therefore, Mr Bharwani was himself apparently willing to gift a 5% interest in the Business to C without any motivation for doing so.

Inconsistencies/contradictions around the alleged outstanding payment of £250,000

125. It is not disputed that on the back of the post-dated cheque, C wrote the words "in conjunction of" and D1 wrote the words "for the purchase of 126 Highgate B12 8OA". D1 sought to argue that these words were a clear acceptance by C that D1 owed him money. However, there is no reference to the disputed sum of £250,000, and so I do not attach any weight to the writing on the back of the post-dated cheque, which in my view is inconclusive.

126. However, I found that D1's pleaded case and evidence around the alleged outstanding payment of £250,000 to be fatally undermined by extensive inconsistencies and contradictions.

127. D1's Amended Defence states that:

> "[5.1] …….. In 2009, an agreement was reached…. That the First Defendant would transfer legal title in 126 Highgate Road into the joint names of the parties. It was agreed that the Claimant would pay the sum of £250,000 for a 50% interest in the [p]roperty….. the effect of this agreement…… was one of the following:
>
> [5.1.1.] that the Claimant and the First Defendant would hold the legal title to 126 Highgate Road on trust for the First Defendant as sole beneficiary until such time as the sum of £250,000 was paid to the First Defendant by the Claimant; alternatively,
>
> [5.1.2] that the £250,000 was to be treated as a loan by the First Defendant to the Claimant for the purchase of a 50% share in 126 Highgate Road.

The Amended Defence makes no mention of it being part of the agreement that C would also acquire a 50% share in the Business in exchange for the payment of the sum of £250,000. It was only during his oral evidence that D1 claimed that he was the sole owner of the Business and the payment of £250,000 was for C to acquire a 50% interest in "Highgate Road, the building, the business, the lot." However, that contradicted D1's written evidence that C already had a share of the Business, since C was entitled to receive 11% of the profits as a result of an earlier agreement apparently made in 1998 when the Business was first opened. Earlier in his oral evidence D1 said that he had gifted C the 11% share in order to help him out.

128. D1 further stated in his written evidence that, in 2009, "I was under considerable pressure from my mother and father to support [C] who did not have a mind and attitude to make money through business. Our mother … was very insistent that I support and gift him some of the property title and business at 126 Highgate Road ….. it does not make commercial sense to just gift someone with previous poor business sense a business or property. I therefore decided that I would grant [C] 50% of 126 Highgate Road in exchange for £250,000 payment." However, this evidence gives rise to a number of inconsistencies/contradictions:

a. D1 emphasised in his oral evidence that Mrs Begum had "commanded, demanded" that he gift C some of Highfield and/or the Business, but of course on D1's own case there was no such gift. Any interest that C acquired was in exchange for the payment of the sum of £250,000;

b. D1 stated in his written evidence that "it does not make commercial sense to just gift someone with previous poor business sense a business", but according to D1's oral evidence that is precisely what he did in 1998 when he gifted to C an 11% share in the Business;

c. D1 sought to portray C as financially inept, in financial need, and deserving of the sympathy and concerns of their parents. However, -

   i. it is not disputed that C contributed a total of some £215,000 towards the joint purchases of Tilt Hammer in 2001 and Main Street in 2012;

   ii. in his written evidence D1 stated that, at the time they purchased Tilt Hammer, he "allowed [C] to run the day to day [Business]; and

   iii. it is not disputed that, from 1 May 2014, the Business was operated through Zaika of which C was the sole director.

   All of this is more consistent with C having an aptitude for business and making money; and

d. In his written evidence, D1 claimed that C was only able to contribute ½ the cost of purchasing Tilt Hammer (£100,000) in 2001 by saving the money that D1 paid C for his work in the Business. However, earlier in his written evidence, D1 claimed that C, who would have started work there in 1998, was initially paid only the national minimum wage. It is frankly ridiculous to suggest that C was able to save £50,000 over a period of some 4 years when earning the national minimum wage, which was £3.60 in 1999, £3.70 in 2000 and £4.10 in 2001. No doubt recognising this, D1 said for the first time in his oral evidence that he had gifted C some money, although D1 did not quantify the amount of that gift, which C used together with other money, again unquantified, that C "must have sourced from elsewhere." In any event, this was apparently another example of D1 being willing to gift C a share in a business/property (Tilt Hammer) contrary to D1's stated philosophy that it made no commercial sense to just gift someone with previous poor business sense a business or property.

129. C seeks to rely upon the fact that the 2009 TR1 transferring Highgate into joint names makes no mention of the alleged sum due of £250,000 and expressly records that "The transfer is not for money or anything that has a monetary value." I acknowledge that, as submitted on behalf of D1, neither does the TP1 (in relation to

the Disputed Land) make reference to any consideration and notwithstanding that it is C's case that it was agreed he pay the sum of £40,000. Nevertheless, it is striking in my judgment that:

a. the 2009 TR1 includes an express declaration of trust that "they are to hold the property on trust for themselves as tenants in common in equal shares", which is wholly contrary to D1's written evidence that "I agreed to put the property in joint names but until the monies were paid both of us would hold the property on trust for me a 100% sole beneficial interest.";

b. D1 sought in his oral evidence to explain away the express declaration of trust on the basis that "This is trust between people. Why if I've got a fantastic business do I want to give anyone an interest? I trusted him. If trust was good, it was all good. I was still 100% owner because on trust." That explanation made no sense;

c. D1 sought to portray himself as financially astute, particularly in the context of property transactions. Yet he apparently agreed even before receiving the payment of £250,000, which on his own evidence was unlikely to be paid whether in the reasonably foreseeable future or at all because C was financially inept, to place the property into shared legal and beneficial ownership and without seeking, in the meantime, to protect his position, when given the opportunity to do so, by an express declaration of trust in the 2009 TR1 that the property continued to be solely beneficially owned by D1 pending receipt of the sum of £250,000; and

d. In the absence of fraud, mistake or undue influence, the effect of executing an express declaration of trust is to exclude the operation of any constructive trust – ***Pankhania v Chandegra*** [2013] 1 P&CR 16. By executing the express declaration of trust within the 2009 TR1, D1 effectively put 50% of the property into the hands of C's creditors in the event that C was ever made bankrupt. Again on D1's evidence this was a real as opposed to a theoretical risk, since in his oral evidence he claimed that, in 1998, C had got into personal financial problems whereby C was unable to pay the mortgage on his own home and was wanting "to do a bankruptcy."

130. D1 offered no evidence upon how the sum of £250,000 had been calculated, negotiated and finally agreed. It was on any measure a very substantial figure. If true, and having regard to the problems subsequently arising when seeking to agree a split of the properties, that figure of £250,000 would undoubtedly have been the subject of similarly protracted negotiations. It is difficult to see even on D1's own case that C, and assuming he had the means to pay, would ever have agreed in 2009 to pay the sum of £250,000 to acquire a 50% interest in both Highgate and the Business:

a. Highgate was purchased for £45,000 in 1996;

b. Highgate was valued by the single joint expert at £300,000 in 2015 being some 6 years after the 2009 Oral Agreement. It is likely that the value of Highgate would have increased significantly in the period from 2009 to 2015 bearing in mind the market recovery over that period following the financial crash of 2008;

c. Whilst the single joint expert valuation took into account the redevelopment works that had been carried out at Highgate following the acquisition, it did not take into account the value of the Business operating from the premises. This may well account for D1's change of position at trial that the payment of £250,000 was not only for a 50% share of Highgate, but also a 50% share of the Business;

d. C accepted in his evidence that in 2009 the Business was doing well. The management accounts for the year ended 30 September 2000 record gross profit of £219,665 and net profit before tax of £91,379. They also record shareholder drawings of £76,222;

e. However, even professional valuations of shares in a private company are notoriously difficult and fragile. The best evidence of what such an asset is worth is what someone is prepared to pay for it;

f. According to the Buy Out Agreement, Mr Bharwani sold a 1/3rd share in both Highgate and the Business for a total of £95,000. Whilst that buy out was in 2001, the Business had by then already been in operation for several years and was well established; and

g. On D1's written evidence, C already had an 11% interest in the Business at the time of the 2009 Oral Agreement in which case he would only have been acquiring a further 39% share in the Business broadly comparable to the 33.3% share sold by Mr Bharwani.

131. In 2012, C contributed the sum of £165,000 towards the joint purchase of Main Street. It was D1's written evidence that "In 2012, ……. the Claimant had some money he wanted to invest so had been looking at other properties. There was a property in Warwick Road that [C] was looking at and he asked me if I was interested in investing with him. At the time I had my eye on …. Main Street. [C] went to see it and asked if we could buy it together rather than the one he was looking at as my idea was better." However,:

a. on D1's case the sum of £250,000 had by then been outstanding for some 3 years and despite C having initially promised that the whole of the money would be paid in the "not too distant future." Indeed, again on D1's case, C had even failed to pay the promised 10% deposit. It was D1's evidence that, in 2010, C had tried to pay the deposit by way of the cheque for 25 Lakh, which was not honoured. D1 further said that C had tried to pay the deposit in Pakistan because C had told D1 that "he had no money in the UK.";

b. by 2012 C's financial position had apparently improved dramatically in that he now had £165,000 to invest. It was D1's oral evidence that C had been able to raise the required funds from the money C was making from the Business. In his written evidence, D1 stated that from 2009 he had "allowed [C] to run the day to day [B]usiness …. [to] give [C] a platform to work and earn more money so I was still honouring my mother and father." In his oral evidence, D1 said that C "had an interest [in the Business] but just a beneficiary …. he was running [the Business] with me and I allowed him to work." It was unclear whether it was D1's evidence that C was only entitled to a wage and/or a share of the profits from the Business. If C was only a paid employee it is inherently unlikely that he would have been able to save the sum of £165,000 from even an increased level of earnings over a period

of only 3 years. If C was entitled to a share of the profits from the Business then this would be wholly contrary to D1's earlier oral evidence that he remained the sole owner of the Business until such time as C paid the outstanding sum of £250,000. Either way, it was D1's evidence that C had raised the funds from the Business; and

c. in all those circumstances, it makes no sense that D1 would have agreed to enter into a further joint venture with C in relation to Main Street, rather than insisting that C use the money he then had available to him from the Business to pay D1 the sum of £250,000 still outstanding in relation to Highgate and the Business.

132. If true that C's 50% share in the Business was conditional upon the payment of the sum of £250,000, it makes even less sense that in 2014:

a. D1 chose to transfer the Business, which he says he then solely owned, to Zaika when -

i. C was the sole registered director and shareholder of Zaika;

ii. D1 stated in his written evidence that, in 2012, C "had assured me that he would settle everything up so we could have a clean state between us. On reliance of this, I went to the auction and purchased .. Main Street but both our names went onto the property title."; and

iii. At the time of the transfer of the Business, essentially into C's sole name, the alleged sum of £250,000 was still unpaid 5 years later and despite C having apparently assured D1 –

- in 2009, that the money would be paid in the "not-to-distant-future" and "within a short space of time",

- in 2012, that he "would settle everything up".

b. Having apparently finally lost trust in C, and only some 3 weeks after having transferred the Business to Zaika, D1 insisted upon them entering into the Shareholders' Agreement to protect his position. But even then the declaration of trust was that the Business was beneficially owned 50% each, and not 100% by D1 despite the whole of the alleged sum of £250,000 still being unpaid, which was a "big problem". In his oral evidence, D1 attempted unconvincingly to square this particular circle as to why he was apparently still willing to give 50% of the Business to C, who he no longer trusted and who had repeatedly failed over many years to pay the promised monies, on the basis that:

> "I was coming and going and so I allowed [C] to run [the Business] and so probably had to give him a bit more. 50% of the profit."

TP1 delivered in escrow?

133. It is D1's pleaded case that the TP1 "was prepared on the insistence of [C] who wanted comfort that upon payment of the £250,000 he would obtain title. Mr McLachlan was instructed not to register the said transfer until further instructions were given – in effect it was held in escrow."

134. Although Mr McLachlan was not called as a witness at trial, he did write to Artis Legal (C's then solicitors) on 14 July 2017, when matters ought to have been still relatively fresh in Mr McLachlan's memory, to explain why the TP1 had not been registered:

> "……..
>
> The instruction I had were that both brothers had agreed that three properties they owned jointly were to be split between them. One was to get one property and one the other. The third, the one that has given rise .to the problem that now exits was to be split into two equal parts. Finally [C] was to make a small, delayed payment to his brother by way of a post dated cheque.
>
> There was a tenancy in common restriction in the registers of all three properties. Having had a problem with the Land Registry in the past when attempting to register transfers of part where there was no consideration I advised that there be two transfers in respect of Tilt Hammer. The first was to be of all the land into the name of one brother alone with the restriction being removed and once that had been registered a transfer of part. I made [D1] the transferee in the TR1 because I understood [C] was going abroad and thought if any queries were raised by the land Registry they could be dealt with easier if [D1] was available rather than wait for his brother to return. I have subsequently been told by [C] he wasn't going abroad so my understanding must have been incorrect.
>
> I prepared transfers based on the instructions I was given and as you say, on or about 8th November 2015 the two brothers and a Mr Javid came to my office. All the transfers were signed. You say [C] signed the 9th and 10th transfers but he only signed the first. It was just [D1] who signed the 10th November one.
>
> After the 9th November transfer had been registered I spoke to [D1] and told him the registration had been completed and I was in the process of registering the TP1. He said there was an outstanding query he had with his brother and they would come back to me when it had been resolved. He did not say then what it was but has subsequently.
>
> Instead of chasing up the matter I did nothing until [C] contacted me earlier this year…….. [C] instructed me to sort the problem out and I said I would do all I could to do so. He did tell me that he was not prepared to honour the bounced cheque he had given his brother.
>
> ……"

135. In an undated email, but enclosing a copy letter dated 15 September 2017 from Artis Legal that had been "received a few days ago", Mr McLachlan advised D1;

> "…..
>
> You have said on several occasions that you would sign the correcting transfer and the way forward is that you do that before the whole thing gets

completely out of hand. You will recall both mine and Ishfaq's concerns at you having transferred all the land to your company when you knew half of it belonged to your brother. I fear for you if the matter does finish up in court you will be severely criticised for having done that.

……."

136. Mr McLachlan wrote to Artis Legal on 21 September 2017:

"……

We had prepared a TP1 similar to the one dated 10th November 2015 with the limited company as the transferor. [D1] had said and still does that he will sign this when you client honours the cheque he bounced. We did raise this with [C]…. But he said he would not.

As there is an impasse on that we are unable to do more.

……."

137. It is evident from that correspondence that Mr McLachlan's understanding at the time was that:

a. The transfers, including the TP1, were prepared to give effect to an agreement to split the properties;

b. The TP1 was required because of the problems that he had previously encountered with the Land Registry when attempting to register transfers of part where there was no consideration;

c. Having registered the TR1s, he was subsequently told by D1 to delay registering the TP1 executed by D1 pending resolution of a problem, which he was later told was a bounced post-dated cheque in respect of a small payment by C to D1; and

d. Following his attempts to resolve the situation, D1 was willing to execute a new TP1 on behalf of his company, which was by then the registered owner of Tilt Hammer, provided that C honoured the bounced cheque, but C was not willing to do so.

138. It is striking that Mr McLachlan makes no mention in that correspondence of it ever being part of any agreement that C was granted only an option to purchase the Disputed Land and/or that there was a payment due from C of £250,000 in exercise of that option.

139. When this correspondence was put to D1, he explained that Mr McLachlan made no mention of the option agreement because he was not told about it at the time. D1 further explained that it was a deliberate decision not to tell Mr McLachlan about the option agreement because he was only dealing with the conveyancing. I have to say that explanation is counterintuitive because what is an option agreement if not the legal process of transferring land from one person to another. In re-examination, D1 miraculously remembered taking a call from Mr McLachlan asking what he was to do with the TP1 and D1 then saying that the problem was not only the bounced cheque but "to be honest there is a lot of other money outstanding."

140. It was the evidence of D1 and Mr Saqlain Hussain that, having handed D1 the post-dated cheque, C sought some assurance that D1 would honour the option agreement once C had paid the sum of £250,000 in full. It was only then that D1 decided to execute the TP1 to give C the comfort he sought. There are a number of problems with this version of events:

a. It is of course wholly contrary to what is stated by Mr McLachlan in his correspondence. In particular, Mr McLachlan stated that the TP1 had been drafted on his own initiative because of the practical problems he had previously encountered when attempting to register transfers of part where there was no consideration;

b. D1 and Mr Saqlain Hussain said in evidence that Mr McLachlan and/or Mr Ishfaq, who owned GQS, had lied in the correspondence either to cover their own backs or because they were being pressurised by C to do so. Although I was not referred to the case in submissions, in ***MRH Solicitors -v- The County Court sitting at Manchester*** [2015] EWHC 1795 (Admin) it was held that the court below was wrong to have made findings that solicitors had been dishonest when they had no opportunity to give evidence to rebut the allegation of dishonesty.[12] In giving the judgement of the court, Nicol J held:

> "[34] We well understand how the Recorder's suspicions were aroused. However, in the absence of good reason a Judge ought to be extremely cautious before making conclusive findings of fraud unless the person concerned has at least had the opportunity to give evidence to rebut the allegations. This is a matter of elementary fairness. In ***Vogon International Ltd v the Serious Fraud Office*** [2004] EWCA Civ 104 at [29] May LJ (with whom Lord Phillips MR and Jonathan Parker LJ agreed) said,
>
> > "It is, I regret to say, elementary common fairness that neither parties to the litigation, their counsel nor judges should make serious imputations or findings in any litigation when the person concerned against whom such imputations or findings are made have not been given a proper opportunity of dealing with the imputations and defending themselves."
>
> [35] This is not only required because of fairness to the party affected but also to avoid the Court falling into error – see for instance ***Co-operative Group (CWS) Ltd v International Computers*** [2003] EWCA Civ 1955 at [38]. As Megarry J memorably said in ***John v Rees*** [1970] CH 345, 402,
>
> > "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were answered; of inexplicable conduct,

[12] I accept that, in the SRA proceedings against him, Mr McLachlan made admissions of serious misconduct that amounted to manifest incompetence, albeit in connection with an unrelated matter. However, those admissions must be considered in their wider context. The Agreed Outcome Proposal recorded that "Factors mitigating the seriousness of the identified breaches include……. The absence of any allegation of dishonesty or lack of integrity." In addition, "the conduct was of relatively brief duration in an otherwise unblemished career."

> which was fully explained…Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events".”

c. In my judgment, it is simply unfair to raise very serious allegations of dishonesty against Mr McLachlan and Mr Ishfaq indirectly in the course of oral evidence without giving them the opportunity to respond. If the defendants wished to raise allegations against Mr McLachlan and Mr Ishfaq that required to be answered, D1 ought to have called them to give evidence (waiving privilege); and

d. Further, if true, that D1 only decided to execute the TP1 in direct response to the assurances sought by C during the course of the GQS Meeting, it must follow that the TP1 was drafted by Mr McLachlan during the course of the meeting itself. Indeed, in his oral evidence, Mr Saqlain Hussain said for the first time that it was during the meeting that his father first instructed Mr McLachlan to prepare the TP1. However, it was D1’s oral evidence that Mr McLachlan “was never aware of the £250,000……. He was just doing the conveyancing. Just paying him to do a job……. He did not know anything about any payment whether a cheque. We never mentioned anything but the conveyancing…. We never discussed anything apart from the conveyancing.” Therefore, according to the combined evidence of D1 and Mr Saqlain Hussain:

    i. C and D1 signed the TR1s prepared by Mr McLachlan in advance of the meeting,

    ii. Mr McLachlan then left the meeting to give C and D1 the opportunity to “discuss matters privately”,

    iii. During those private discussions, C handed D1 the post-dated cheque and sought an assurance that D1 would honour the option agreement when he paid in full. D1, therefore, decided to execute a TP1 to give C the assurance he sought,

    iv. On re-joining the meeting, D1 instructed Mr McLachlan to draft the TP1, which D1 then executed and gave to Mr McLachlan to keep hold of for some unspecified time and purpose,

    v. Mr McLachlan was not told and apparently did not even think to ask, whether out of professional duty or natural curiosity, why he was being asked to draft a TP1 and/or to keep hold of it once executed by D1,

    vi. C, who was so anxious to seek assurances that D1 would honour the option agreement, apparently did not think it worth seeking advice from or even mentioning the option agreement to Mr McLachlan, who was to keep hold of the TP1.

This version of events stretches credulity beyond breaking point.

141. Further, there is a fundamental conceptual problem with D1's claim that the TP1 was delivered on the basis that it was not to become a deed until the condition of payment in full by C of the sum of £250,000. In ***Governors and Guardians of the Foundling Hospital v Crane*** [1911] 2 KB 367, Farwell LJ [at 377] explained that "an escrow… is not a deed at all; it is a document delivered upon a condition on the performance of which it will become a deed, and will take effect as from the delivery, but until such performance it conveys no estate at all.". I struggle to see how Mr McLachlan, who was acting on behalf of C and D1, could have ever held the TP1 in escrow without even knowing what the condition was that needed to be satisfied that rendered it escrow in the first place. I repeat that it was D1's evidence that at the time of the GQS Meeting, Mr McLachlan was not aware of any option agreement, any post-dated cheque or any sum owing of £250,000.

142. I find D1's claim that the TP1 was delivered in escrow to be utterly fanciful and lacking any credibility.

What were the likely terms of the 2015 Oral Agreement?

143. In ***Bank St Petersburg PJSC & Anor v Arkhangelsky*** [2020] EWCA Civ 408 Sir Geoffrey Vos 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.

144. Standing back, and in all the circumstances of the case, I prefer C's version of the terms of the 2015 Oral Agreement for the following primary reasons:

a. It is acknowledged on behalf of the defendants that their version of the terms of the 2015 Oral Agreement only makes sense if, by way of the 2009 Oral Agreement, it had previously been agreed that C would acquire a 50% beneficial interest in Highgate and the Business in exchange for C paying D1 the sum of £250,000, which sum C never paid;

b. I have found that, at the time the 2009 Oral Agreement was made, Highgate and the Business were viewed and treated by C and D1 as a joint venture/partnership such that C had no reason to and would not have agreed to pay D1 the sum of £250,000 to acquire interests that he already had;

c. Indeed, entirely consistent with C's narrative, the 2009 TR1 and the Shareholders' Agreement, which were subsequently signed by both C and D1, record unequivocally and unconditionally that they each had a 50% interest in respectively Highgate and the Business;

d. D1's narrative around the alleged payment of £250,000 due under the 2009 Oral Agreement was riddled with inconsistencies and contradictions, which rendered C's competing narrative the more likely to be true in this regard;

e. Having determined that there was never an outstanding sum of £250,000 payable by C to D1 from 2009, it makes no sense, whether commercial or otherwise, that C would then have agreed in 2015 to an option to acquire the Disputed Land, which has been valued at £100,000, for the sum of £250,000; and

f. I have found that D1's claim that the 2015 Oral Agreement included only the grant of an option to acquire the Disputed Land, such that the TP1 was delivered in escrow at GQS Meeting, to be utterly fanciful and lacking any credibility.

What, if any, payments were made pursuant to the 2015 Oral Agreement?

145. Having decided that the terms of the 2015 Oral Agreement were more likely as claimed by C, I must now determine whether or not, and if so to what extent, C paid the money bargained for.

146. It was C's evidence that the post-dated cheque and the letter of guarantee were written out at the GQS Meeting in direct response to D1's then demand for an additional sum of £10,000. However, the letter of guarantee is dated 5 November 2015, which is days before the GQS Meeting. C's only explanation for this was that Mr Iqbal Javed must have got the wrong date. It is more likely that the post-dated cheque was intended as part payment towards the previously agreed sum of £40,000 and was presented as such at the GQS Meeting.

147. C said in evidence that it was not out of the ordinary to pay over £30,000 in cash at a meeting. That may or may not be true, but it is certainly out of the ordinary to hand over such a large amount of cash in front of a solicitor. C's oral evidence went further in that he described Mr McLachlan's role not simply as an observer but someone who actively encouraged the handover of cash by inviting C and D1 to do as they wished. Indeed, it was Mr Bharwani's oral evidence that, at a subsequent meeting they attended, Mr McLachlan readily admitted to them that he had witnessed the handover of cash. If that is true then Mr McLachlan would have knowingly entered false information into the TP1/TR1s, which all stated that the transfers were not for money. It is inherently unlikely that Mr McLachlan, a solicitor and an officer of the court, would have done so particularly when no motive for doing so has ever been suggested.

148. It is striking that:

a. C did not insist upon a written receipt for what would have been a substantial cash payment and in circumstances where it is not disputed that there had been a complete breakdown in trust between the brothers. Indeed, it is C's case that, having previously agreed the sum of £40,000, it was only at the GQS Meeting when paying the balance due of £30,000 in cash that D1 sought to go back on that agreement by suddenly demanding an additional sum of £10,000. Also, it would appear that D1 had so little trust in C that Mr Iqbal Javed was required to guarantee C's post-dated cheque;

b. C's pre-action letters (via 4 different firms of solicitors) to D1 (dated 30 June 2017, 3 May, 31 May 2018 and 24 January 2019) and to GQS (dated 4 July 2017, 16 May, 25 May 2018 and 4 January 2019) make no reference to cash payments allegedly made by C to D1 pursuant to the 2015 Oral Agreement; and

c. nowhere in his correspondence does Mr McLachlan make reference to any cash payments. The only reference to any payment is where Mr McLachlan states that he was subsequently told by D1 about a problem arising over "a small delayed payment….. by way of a post dated cheque."

149. As to the source of the cash allegedly handed over at the GQS Meeting, C appeared to be making up his evidence as he went along in an attempt to answer questions consistent with his case. For example, when asked where the balance of £3,000 came from he said:

> "I had some money from the business. Possibly from my bank. I can produce something. Can't remember which bank. It came from myself from house. Had more than £5,000 in house when gave it to [D1] but that all he asked for. My Mum had more money – her money and my money the same….Family money more than £5,000 in the house……Mum might have £7,000 to £8,000. Between us might have say £14,000 to £15,000……Yes I could have put more money in but didn't want to. £3,000 from my or my Mrs account. Would need to check which branch in Solihull. See what I can do to check."

150. In relation to the disputed cash payments, C could have:

a. Called his sister-in-law as a witness to confirm that she, on behalf of the money syndicate, gave C the sum of £10,000;

b. Called Mr McLachlan to confirm that he witnessed the cash being handed over at the GQS Meeting;

c. Called Mr Iqbal Javed to confirm that he loaned C the sum of £7,000, witnessed the cash being handed over at the GQS Meeting and drafted the letter of guarantee in response to D1's demand for the additional sum of £10,000; and/or

d. Disclosed copy bank statements to verify the source of the cash payments, whether the £10,000 allegedly paid over prior to the GQS Meeting or the balance of the cash paid over at the GQS Meeting and allegedly raised from personal funds (£3,000).

C did none of these things.

151. Initially, in his oral evidence C sought to explain away missing evidence on the basis that it was not in dispute that the cash payments were made, although that was clearly nonsense, since the defence expressly denies that any such payments were made/received. The missing evidence would clearly have been highly material to this issue. The Directions Questionnaire dated 26 January 2022 and filed on behalf of C expressly records Mr McLachlan and Mr Iqbal Javed as relevant witnesses, who C intended to call at trial. Indeed, C himself acknowledged in his oral evidence that "I think that [Iqbal] Javed is a crucial witness in this case." I agree, since Mr Iqbal Javed is a solicitor and officer of the court. However later in his oral evidence, C said that:

a. Mr McLachlan had not been called as a witness because C had issued proceedings against GQS in which he was alleging that Mr McLachlan had been negligent; and

b. Mr Iqbal Javed had not been called as a witness because his son was one of the criminal defendants. Either Mr Iqbal Javed was threatened or he was promised something by D1 not to give evidence for C.

However, none of that explains why C could not have, if necessary, (i) served witness summaries of the evidence which would otherwise be included in their witness statements pursuant to Civil Procedure Rules r.32.9, and then (ii) witness summonsed Mr McLachlan and Mr Iqbal Javed to attend trial. In addition, C offered no explanation as to why he had not called his sister-in-law as a witness or disclosed corroborating bank statements that ought readily to have been available. In all the circumstances, I consider it appropriate to draw an adverse inference that this obvious evidence was missing because it would not have supported C's version of events.

152. There is compelling evidence that C was unwilling and/or unable to pay the money bargained for:

a. In their written evidence, C and Mrs Begum stated that C was reluctant to pay any premium, which he considered unjust, but only agreed to do so under pressure from Mrs Begum;

b. Mr Ali Abbas described both C and D1 as overly emotional in their business dealings with each other and which manifested itself in petty squabbling;

c. It is not disputed that the post-dated cheque bounced. C said in evidence that he had specifically told D1 not to cash the cheque because he was not in funds; and

d. In his letter dated 21 September 2017, Mr McLachlan stated that, following his attempts to broker a settlement, C refused to honour the bounced cheque.

153. For all these reasons, save for the undisputed sum of £5,000, I find that, more likely than not, C failed to pay the £40,000 bargained for. Having found that C failed to keep to his side of the 2015 Oral Agreement, I can see nothing inequitable or unconscionable in the defendants retaining the Disputed Land for their own benefit.

Clean Hands

154. It is not strictly necessary for me to deal with this issue having already effectively dismissed C's claim. However, for the following brief reasons, I do not find that C encouraged or incited the criminal defendants to threaten and use violence to intimidate D1 into signing over the Disputed Land:

a. There were very lengthy criminal proceedings arising in connection with the Confrontation;

b. Not only was C never charged in connection with the Confrontation, he was not even interviewed by the Police;

c. It was the evidence of D1 that not only did C make threats immediately following the Confrontation but he also "made a lot of other threats";

d. Having initially avoided answering the question whether or not he had made any report to the Police of any threats, D1 admitted that he had not made any such report;

e. Having initially denied knowing anything about any criminal case, Mr Ul-Hassan, who allegedly witnessed C threatening D1, admitted that he did

know about the criminal case. Nevertheless, he did not report the matter to the police and was not interviewed by the police; and

f. In his sentencing remarks, HHJ Bond noted that in relation to C's youngest son, Mr Bilal Abbas, "what struck me about you was the fact that you were man [enough] to admit to the probation service that your parents are very disappointed and think that you are all stupid. Well, that strikes me as being truthful."

Overall Conclusion

155. The claim is dismissed.

156. D1 shall repay C the sum of £5,000.