Case No: J80NE026

IN THE COUNTY COURT AT NEWCASTLE
BUSINESS AND PROPERTY WORK

The Moot Hall, Castle Garth,
Newcastle Upon Tyne NE1 1RQ
Date: 22/11/2023

Before :

HH JUDGE DAVIS-WHITE KC

- -

Between :

(1) HARDIAL SINGH JAGPAL
(2) JOGINDER KAUR JAGPAL

Claimants

- and -

(1) GURDEEP SINGH CHAHAL
(2) MANJIT KAUR CHAHAL

Defendants

- -
- -

Mr Sean Kelly (instructed by **Brar & Co Limited**) for the **Claimants**
Mr Henry Stevens (instructed by **Tilly Bailey & Irvine LLP**) for the **Defendants**

Hearing dates: 13 and 14 November 2023

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Approved Judgment

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HH JUDGE DAVIS-WHITE KC (SITTING AS A JUDGE OF THE CHANCERY DIVISION)

HH Judge Davis-White KC :

Introduction

1. In this case the primary issue is whether the beneficial interest in shares in a limited company, owned by a partnership, was transferred to the Defendants prior to the shares being compulsorily acquired by the Co-Operative Group Holdings (2011) Limited (the "Co-Op") in 2018. On that acquisition, consideration was paid by the Co-Op. The dispute between the parties is the identity of the beneficial owners who were entitled to such consideration. Throughout, until acquired by the Co-Op, legal title to the shares was registered in the joint names of Mr Jagpal, the First Claimant, and Mr Chahal, the First Defendant.

2. The shares in question were originally beneficially owned by a partnership comprising two members each of two families, the Jagpals and the Chahals (the "Original Partnership"). The members of the Original Partnership comprised the four parties to these proceedings. Mr and Mrs Jagpal are husband and wife. So are Mr and Mrs Chahal. The Original Partnership owned and operated a store and post office. It operated under the Nisa franchise and owned shares in the relevant Nisa company in accordance with the overall trading and membership rights established between Nisa and its retail members.

3. In about 2017, the Jagpals wished to leave the Original Partnership. The business of the partnership and certain assets, but on the face of the relevant document, not the shares, were effectively sold to Mr and Mrs Chahals and their two sons under a Deed of Dissolution. They acquired the same as a new partnership of four persons (the "Successor Partnership"). The shares in question have now been transferred to the Co-Op pursuant to a court sanctioned scheme of arrangement between Nisa and its relevant members. The Successor Partnership received the entirety of the consideration payable by the Co-Op. The Claimants say that they are entitled to their share of the same, beneficial title in the shares never having left the Original Partnership. The Defendants say that beneficial ownership of the shares did transfer to the Successor Partnership, either under the Deed of Dissolution relating to the Original Partnership or pursuant to a specifically enforceable side/collateral contract to such Deed which was in place by the time of the Deed of Dissolution.

The main facts and the contemporaneous documents

4. The main facts are largely agreed between the parties.

5. In 2007, the Claimants, Mr and Mrs Jagpal, and the Defendants, Mr and Mrs Chahal, formed an unwritten partnership at will (being the Original Partnership) to acquire and run a small supermarket and post office known as West Wylam Colliery Post Office (the "Store"). The Store is situated at West Wylam, Prudhoe. It was acquired in about June 2007. The parties then ran the business through the Original Partnership. The Original Partnership operated under the name "J & C Stores trading as Nisa Local". The name "J & C" reflected the first letter of the surname of each of the two families.

6. Under the franchise trading agreement with the relevant Nisa company (more recently called Nisa Retail Limited but, in 2007, named Nisa-Today's (Holdings) Limited) ("Nisa"). As a requirement of trading with Nisa, retail franchisees were, in general,

required to acquire shares in Nisa. The relevant terms governing the relationship between Nisa and its retail members was governed both by the Articles of Association of Nisa and some terms and conditions called "Retail Membership Application, Terms and Conditions" defined as the "Retail Membership Agreement". The Retail Membership Agreement also provided for a retail member of Nisa to enter into a number of other detailed agreements with Nisa, for example relating to trading between Nisa and the member, use by the member of the Nisa name and so on.

7. The copy of the Retail Membership Agreement that was shown to me is dated 1 March 2013. It was common ground that in all material respects the terms there set out governed the relationship with Nisa in this case (save as amended by the court approved Scheme of Arrangement, which I shall come onto). I shall refer to its terms on the basis that they applied throughout the relevant time.

8. As I have said, in general, retail members of Nisa were required to acquire and hold shares in Nisa. Nisa's board of directors did however have a discretion to admit persons to trade without requiring them to purchase shares in Nisa, such persons being defined as "Deemed Members" (see Clause 4 of the Retail Membership Application). As well as acquiring shares in Nisa, a retail franchisee had to pay an annual subscription fee.

9. As regards shares, the Retail Membership Agreement envisaged that on termination of a Retail Membership Agreement between Nisa and any retail franchisee, any shares in Nisa would be transferred "at the price ruling at that time" to an incoming member or to Nisa or to such other person as the Board of Directors of Nisa might nominate (see clause 18 and especially 18.9.2). This price was also referred to before me as the "Published Price". The evidence before me was that this price was set by the Board of Nisa and that it did not change very frequently. However, the Retail Membership Agreement also envisaged a "partial termination" in circumstances where a member wished to remain a member of Nisa (and did not wish to fully terminate the agreement) but ceased to order for one or more retail outlets. In such circumstances, Nisa retained a right to terminate the agreement in full (triggering the share transfer requirement) but there was no requirement to do so. Furthermore, it appears that the right to distributions of profits or receipt of other benefits of membership of Nisa, such as being eligible for rebates, ceased to apply in respect of such shares in such circumstances.

10. Pursuant to the Retail Membership Agreement, the four partners acquired by allotment 10 Ordinary Shares in Nisa for the sum of £1,500 on or about 6 November 2007 (the "Shares"). The Shares were registered in the joint names of the First Claimant, Mr Hardial Singh Jagpal ("Mr Jagpal"), and the First Defendant, Mr Gurdeep Singh Chahal ("Mr Chahal"). It is common ground that, until dissolution of the Original Partnership in 2017, the Shares were owned beneficially by the Partnership, having been acquired with funds of the Original Partnership. It is also common ground that they were held on the trusts laid down by s20(1) of the Partnership Act 1890:

> "*20 (1) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.*"

11. When the Successor Partnership of the Chahals was formed and took over the Store and its business, Nisa (or at least a certain level of Nisa employee) did not realise that that the Shares were held in one name and the business was operated by other persons. When that came to its attention, it insisted that the Shares ought to be registered in the same names as the owners of the business which was trading as retail franchisee with Nisa (in terms, for example, of ordering stock from Nisa). It is unclear what facts Nisa was told and when. If Nisa was aware of the true shareholding and Original Partnership position, it is unclear why Nisa did not earlier insist (i.e. in 2007) that the Shares were registered in the names of and held by the four partners of the Original Partnership and not just two of them.

12. In 2017, Mr and Mrs Jaypal wished to realise their interests in the Original Partnership and its property and agreed in principle to transfer the business and sell various partnership assets to the Defendants, Mr and Mrs Chahal and their two sons, Mr Mavinder Singh Chahal and Mr Amardeep Singh Chahal (defined in the Deed as the "Acquiring Partners"). This was effected by way of a Deed of Dissolution dated 24 July 2017 and made between the parties, defined as the "Partners" of the first part and the Defendants and their two sons of the other part (the "Deed of Dissolution").

13. At the time of the Deed of Dissolution, there was a freeze on dealings in (or at least, transfers of) shares in Nisa. This was because of a general offer to acquire such shares by Sainsbury plc. In the light of such freeze, legal title to the Shares was not transferred under the Deed of Dissolution.

14. Following completion of the Deed of Dissolution, the Successor Partnership carried on the business at the Store as franchisee of Nisa.

15. In due course, a Scheme of Arrangement dated 24 October 2017 was sanctioned by the High Court by Order dated 4 May 2018 under Part 26 of the Companies Act 2006. The Scheme was between Nisa and the shareholders in Nisa defined as "Scheme Shareholders" (the "Scheme"). This Scheme gave effect to a recommended acceptance (the recommendation being that of the board of Nisa) of an offer by the Co-op to acquire the entire issued share capital of Nisa.

16. Under the Scheme, the Co-Op was to acquire all Scheme Shares. For these purposes, the Shares were included among and were Scheme Shares. As consideration for such shares, Scheme Shareholders were to receive from the Co-Op, various types of monetary consideration. These included an Initial Consideration, a Deferred Consideration and a Rebate Consideration, all as defined by the Scheme. Some of this consideration was payable in the future by way of instalments provided certain conditions were met. As regards Deferred Consideration, the relevant Nisa Scheme Shareholder had to remain a Nisa trading member at certain dates and to meet a certain level of "Rateable Turnover" (meaning purchases of products excluding tobacco and spirits from Nisa net of VAT). As regards Rebate Consideration, the Scheme Shareholder had to meet a Rebate Consideration Qualifying Condition which was calculated by reference to Rateable Turnover. As will be apparent, following dissolution of the Original Partnership, the registered shareholders of the Shares did not carry on business and therefore would have failed to meet the conditions required for payment of the Deferred Consideration and the Rebate Consideration. However, the Scheme also provided that where a Scheme Shareholder had transferred its trading business to a "Family Member" the Co-op would treat the Family Member as "*carrying*

on a continuous business as that of …the Scheme Shareholder…for the purposes of assessing i) the qualification for Deferred Consideration and Rebate Commission and (ii) the amount of Qualifying Rateable Turnover" (see Clause 2.6 of the Scheme). A "*Family Member*" is defined by the Scheme as meaning "*any person, persons or company which the Co-op (or a nominated executive or executives in the Co-op Group) considers has either a current familial or business relationship directly or indirectly with the Nisa Shareholder at the time of the business transfer in question and where the trading relationship hitherto carried on by the Nisa is to the Co-op's satisfaction to be carried on by such person, persons or company as a Nisa trading member*".

17. Following the Co-Op appreciating in 2018 that the Successor Partners had acquired no shares in Nisa before the Scheme became effective, consideration for the Shares was paid to the Successor Partnership on the basis that as between Mr Chahal and Mr Jagpal (the registered holders), the distribution of such consideration was a matter for those holders to work out. Deferred and Rebate Consideration was also paid in reliance on Clause 2.6 of the Scheme. In total, the First Defendant received some £52,619 which was then ploughed into the Successor Partnership. This was made up as to £20,000 of Initial Consideration, three payments of £5,513 in April 2019, 2020 and 2021 (totalling £16,539) by way of Deferred Consideration and 16 instalments of Rebate Consideration paid quarterly from October 2018 onwards and totalling £16,080.

18. The Defendants' case is that on completion of the Deed of Dissolution, the Shares ceased to be owned beneficially by the Partnership but became beneficially owned by the Successor Partners. In this respect, they say that Mr Jagpal and Mr Chahal were obliged to transfer legal title to the shares, at the Published Price, when it became possible to do so, and that as a result of the agreement being specifically enforceable the Shares were thereafter held beneficially on trust for the Successor Partners. This result is said to arise on the true construction of the Deed of Dissolution and/or as a result of a side/collateral agreement, outside the Deed of Dissolution. The Defendants say that the beneficial ownership of the Shares having been vested in the Chahals, they (or at least Mr and Mrs Chahal) correctly received the consideration from the Co-Op and were able to apply it how they wished (including by injecting it as funds into the Successor Partnership).

19. The Claimants' case is that (a) on its true construction, the Deed of Dissolution contained no provision to transfer the Shares to the partners of the Successor Partnership nor provided for any transfer of beneficial interest in the Shares; (b) there is an "entire agreement" clause in the Deed of Dissolution and hence no room for the operation of any collateral/ side agreement; (c) in any event, as a matter of fact, no such collateral or side agreement was ever reached. Accordingly, say the Claimants, beneficial ownership of the Shares at all material times remained with the Original Partnership. The consideration received from the Co-Op for the Shares should not have been retained by the Chahals. It was property of the Original Partnership. The Original Partnership having been wound up and its liabilities discharged, the four partners are each individually entitled to one quarter shares of the consideration and the Chahals should account to the Jagpals accordingly.

Representation and the oral evidence

20. The Jagpals were represented by Mr Sean Kelly of Counsel. The Chahals were represented by Mr Stevens of Counsel. I am grateful to both of them for their written and oral submissions.

21. I heard oral evidence from each of Mr and Mrs Jagpal, Mr Chahal and his son, Mr Mavinder Chahal.

22. As will be apparent, on the case of the Defendants matters relevant to the legal issues turned on what had occurred up and until execution of the Deed of Dissolution. It was common ground, and Mr Mavinder Chahal confirmed, that he had had no involvement with Mr Jagpal in this period. Similarly, Mrs Jagpal explained that in the "culture" of the parties (also by reference to their ages), it was common for wives to leave their husbands to carry out negotiations (in this case Mr Jagpal and Mr Chahal) and not to be directly involved themselves. Mr Jagpal did, however, says Mrs Jagpal, report back to his wife and she would make a positive decision as to whether she agreed or disagreed with a proposal or deal as negotiated. Accordingly, the evidence of Mrs Jagpal and Mr Mavinder Chahal was largely relevant as confirming what they had been told by way of hearsay. However, Mr Mavinder Chahal also said that he had been involved in instructing/communicating with the then solicitors for the Chahals and was aware of the content of the relevant inter-solicitor correspondence leading to the Deed of Dissolution. It was therefore primarily Mr Jagpal and Mr Chahal who gave the most relevant evidence regarding what they had discussed and agreed to either directly between themselves or through solicitors.

23. I have well in mind the dangers of relying on oral recollections of witnesses more than 6 years or so after the events in question, not least where the witnesses have rehearsed the facts a number of times, as is the case here. As the courts have said on many occasions, the surest guides are the contemporaneous documents and the inherent probabilities. In this connection, and as regards the difficulty of assessing the "demeanour" of a witness as a guide to truth and accuracy and the effect on memory of a continued re-consideration of a case and of documents over time, I would also refer briefly to the convenient summary set out in the judgment of Warby J (as he then was) in *R (Dutta) v General Medical Council* [2020] EWHC 1974 (Admin) at paragraphs 39 to 41 where he said (with emphasis removed, and inserting sub-paragraph numbers for bullets in the extracts from the judgment in the *Kimathi* case, referred to below):

> *"[39] There is now a considerable body of authority setting out the lessons of experience and of science in relation to the judicial determination of facts. Recent first instance authorities include Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3650 (Comm) (Leggatt J, as he then was) and two decisions of Mostyn J: Lachaux v Lachaux [2017] EWHC 385 (Fam) [2017] 4 WLR 57 and Carmarthenshire County Council v Y [2017] EWHC 36 [2017] 4 WLR 136. Key aspects of this learning were distilled by Stewart J in Kimathi v Foreign and Commonwealth Office [2018] EWHC 2066 (QB) at [96]:*
>
> *"i) Gestmin:*
>
> *(1) We believe memories to be more faithful than they are. Two common errors are to suppose (1) that the stronger and more vivid the*

recollection, the more likely it is to be accurate; (2) the more confident another person is in their recollection, the more likely it is to be accurate.

(2) Memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is even true of "flash bulb" memories (a misleading term), i.e., memories of experiencing or learning of a particularly shocking or traumatic event.

(3) Events can come to be recalled as memories which did not happen at all or which happened to somebody else.

(4) The process of civil litigation itself subjects the memories of witnesses to powerful biases.

(5) Considerable interference with memory is introduced in civil litigation by the procedure of preparing for trial. Statements are often taken a long time after relevant events and drafted by a lawyer who is conscious of the significance for the issues in the case of what the witness does or does not say.

(6) The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. "This does not mean that oral testimony serves no useful purpose… But its value lies largely… 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".

ii) Lachaux:

Mostyn J cited extensively from Gestmin and referred to two passages in earlier authorities.[45] I extract from those citations, and from Mostyn J's judgment, the following: -

[[45] The dissenting speech of Lord Pearce in Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403, 431; Robert Goff LJ in Armagas Ltd v Mundogas SA [1985] 1 Lloyd's Rep 1, 57.]

(7) "Witnesses, especially those who are emotional, who think they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the

incident occurred. Therefore, contemporary documents are always of the utmost importance…"

(8) "…I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective fact proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities…"

(9) Mostyn J said of the latter quotation, "these wise words are surely of general application and are not confined to fraud cases… it is certainly often difficult to tell whether a witness is telling the truth and I agree with the view of Bingham J that the demeanour of a witness is not a reliable pointer to his or her honesty."

iii) Carmarthenshire County Council:

(11) The general rule is that oral evidence given under cross-examination is the gold standard because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness. However, oral evidence under cross-examination is far from the be all and end all of forensic proof. Referring to paragraph 22 of Gestmin, Mostyn J said: "…this approach applies equally to all fact-finding exercises, especially where the facts in issue are in the distant past. This approach does not dilute the importance that the law places on cross-examination as a vital component of due process, but it does place it in its correct context."

[40] This is not all new thinking, as the dates of the cases cited in the footnote make clear. Armagas v Mundogas, otherwise known as The Ocean Frost, has been routinely cited over the past 35 years. Lord Bingham's paper on "The Judge as Juror" (Chapter 1 of The Business of Judging) is also familiar to many. Of the five methods of appraising a witness's evidence, he identified the primary method as analysing the consistency of the evidence with what is agreed or clearly shown by other evidence to have occurred. The witness's demeanour was listed last, and least of all.

[41] A recent illustration of these principles at work is the decision of the High Court of Australia in Pell v The Queen [2020] HCA 12. That was a criminal case in which, exceptionally, on appeal from a jury trial, the Supreme Court of Victoria viewed video recordings of the evidence given at trial, as well as reading transcripts and visiting the Cathedral where the offences were said to have been committed. Having done so, the Supreme Court assessed the complainant's credibility. As the High Court put it at [47], "their Honours' subjective assessment, that A was a compellingly truthful witness, drove their analysis of the consistency and cogency of his evidence …" The Supreme Court was however divided on the point, and the High Court observed that this "may be thought to underscore the highly subjective nature of demeanour-based judgments": [49]. The High Court allowed the appeal and quashed Cardinal Pell's convictions, on the basis that, assuming the witness's evidence to have been assessed by the jury as "thoroughly

credible and reliable", nonetheless the objective facts "required the jury, acting rationally, to have entertained a doubt as to the applicant's guilt": [119]."

24. I shall go on to deal in more detail with the evidence of each of Mr Jagpal and Mr Chahal when considering the documents. In certain respects they disagreed completely with or were unable to explain certain aspects of the relevant contemporaneous correspondence between their then respective solicitors and how it fitted with their oral evidence. Mr Chahal put at least one divergence down to "misunderstanding" by his solicitors and Mr Jagpal went so far as to suggest that a secretary of his solicitors had simply made things up in an email sent by her on behalf of the relevant solicitor. This stresses the need for caution when considering their respective oral evidence. In addition it seems fairly clear to me that neither Mr Jagpal nor Mr Chahal had a very clear idea of the fairly technical legal position regarding ownership of the Shares. Although their respective pleadings were clear that the Shares were beneficially owned by the Original Partnership (at least until the Deed of Dissolution) and even though, throughout, legal title to all 10 shares was held jointly by Mr Jagpal and Mr Chahal, each of them constantly referred to the position, prior to the Deed of Dissolution, as there being 5 shares owned by Mr Jagpal and 5 by Mr Chahal, referring to "his" shares in each case. This inaccuracy pervaded not only their evidence but the contemporaneous correspondence, as I shall explain.

25. The evening before Mr Chahal was going to give evidence his wife unfortunately fell ill and was taken to hospital. She later underwent an emergency operation. On the following morning, Mr Chahal indicated through Counsel that he wished to proceed notwithstanding his lack of sleep rather than cause an adjournment of the trial. In my assessment, Mr Chahal's evidence was not obviously affected by the lack of sleep and pressure that he was under. However, I take that into account. Obviously, I also wish Mrs Chahal a speedy recovery.

26. Mrs Jagpal's evidence was much more general and, at least as far as recollection is concerned, is not affected by the problems of remembering details. The main relevant point that she gave evidence upon, and on which she was not challenged, was that the Shares were originally to be sold as part of the overall deal, though she could not remember the price. They were removed from what became the Deed of Dissolution because of the Sainsbury offer. At that point she was told that it had been agreed between Mr Jagpal and Mr Chahal that the Shares would be dealt with after the sale had gone through. I accept her evidence on this point. It is of course only hearsay.

27. I turn to the facts in more detail.

The lead up to the Deed of Dissolution

28. By letter dated 26 May 2017, the then solicitors for the Chahal family, PG Legal Limited ("PG Legal") wrote to Mr and Mrs Jagpal, at their then address at Eastern Way, Newcastle upon Tyne, confirming that they had been instructed by the Chahal family in relation to "the proposed purchase of your share in the above-named property and business". This was a reference to the subject matter heading of the letter "Re Purchase of Nisa Store, West Wylam". The letter set out the writer's understanding that the terms which had been agreed were that the Jagpals intended to sell and the Chahal brothers Mavinder and Amardeep Chahal (the "Chahal Brothers") intended to buy the Jagpals'

50% share in both the business operating at the Store and also the freehold of that property. The letter recorded that the solicitors had been advised that the purchase price had been agreed at £225,000 and the intention was that at the time of the sale there would have been a complete stock-take which would value the stock. The letter also referred to the writer's understanding that there was a loan with the NatWest bank, likely to be in the region of £39,000, and that it was anticipated that the value of the stock, 50% of which would be purchased by the purchasers would be likely to be in the region of a similar value to 50% of the outstanding loan. There would, it was envisaged, need to be an adjustment to the purchase price once the details of the loan had been ascertained and the redemption figure confirmed. As regards employees, it was envisaged that the partnership would continue to employ employees in the shop and since the partnership was not to be dissolved there would be no need to transfer the employment contracts of those employees into the new business. As regards the Shares the letter stated:

> *"Furthermore, we are advised that it has been agreed that Mavinder and Amardeep which* [sic] *purchase your Nisa shares and we are told that the purchase price will be published share price".*

29. It is unclear whether the reference to the purchase of shares was (as seems likely in the light of later correspondence) a reference to five Shares, in the mistaken basis that Mr Jagpal (or Mr and Mrs Jagpal) held legal and beneficial title to five out of the ten Shares or a reference to the ten Shares. For what it is worth, my view is that it is a reference to the former and the idea seems to have been that the Original Partnership would continue in being (see e.g. the reference to employees) with the Jagpals retiring and the Chahal Brothers becoming partners of the Original Partnership in their place. It also seems clear to me that there was no binding agreement at this point. It was envisaged there would be adjustment to the price agreed in principle once further facts came to light. In his written evidence, Mr Jagpal referred to "heads of terms" dated 25 May 2016. I am satisfied that this was in fact a reference to the letter of 26 May 2017 with either a typo or a mistake in the date. The letter is clearly the opening communication and no separate "heads of terms" with any earlier date has been located.

30. By letter dated 14 June 2017, the then solicitors for Mr and Mrs Jagpal, Caris Robson LLP ("Caris-Robson"), replied to PG Legal's letter of 26 May 2017. The letter referred to the writer's understanding that the figures quoted in the letter of 26 May 2017 were "slightly incorrect" and stated that their client believe the deal to be as follows:

> *"- The sale price is to be £225,000 and the loan account is in the region of £110,000 and therefore a half share of this would be £56,000.*
> *- The value of 10 Nisa shares to be split 50/50 between our clients and your clients*
> *- between the parties, and the balance of the current account to be divided equally between our clients and your clients, once all outstanding invoices have been paid."*

The letter ended by asking for confirmation of the Chahals' agreement to the above and looked forward to receiving draft contract documentation in due course.

The reference to value splitting is unclear in the sense that there are a number of ways in which that could be achieved.

31. Although not marked "subject to contract" I am satisfied that the letter and subsequent correspondence were in fact conducted on that basis in the sense that any binding agreements were to be contained in formal documentation (ultimately the Deed of Dissolution). I am also satisfied that even if I am wrong about the subject to contract point, at this stage there was no agreement reached between the parties. This is confirmed by the emailed reply from PG Legal later the same morning, which I now turn to.

32. The emailed reply from PG Legal referred to the "*fairly big difference between our clients belief (about the value of the outstanding loans with Nat West) and your clients view*". The letter went on to say, "*So that I am clear could you please confirm that you are suggesting the following terms*". The reply then set out terms, including a purchase price of £225k, plus 50% of the value of the stock, plus the published price of 5 Nisa shares, plus 50% of the current account as at the date of completion. This again suggests that terms were regarded as being under negotiation rather than any final binding agreement having been reached. Further, it is clear that agreement had to be reached as to the overall package and that individual items had not been agreed in terms of a finally binding contract regarding those terms and not others.

33. A copy of the emailed reply of PG Legal dated 14 June 2017 appears to have manuscript comments made by Mr Cameron Caris of Caris Robson which shows that he discussed the same with Mr Jagpal (apparently by telephone) the same day and in which he raised a number of questions about valuation and also about goodwill. There is also a note about leaving the account (apparently with Nisa) running until sums were paid but a separate account for Nisa to be opened going ahead by the Chahals.

34. A letter of 6 July 2017 from PG Legal is missing from the bundle. It is referred to in a letter from Caris Robson to PG Legal dated 12 July 2017. At this point (and contrary to the letter of 26 May 2017), it seems to have been envisaged that, as eventually provided for by the Deed of Dissolution, the Original Partnership was to be wound up. The letter of 12 July 2017 sets out a suggestion, said to be from Mr Jagpal, that sums in the Original Partnership's current bank account be held back to pay creditors of the Original Partnership "until the winding up accounts have been completed". Again, matters were still under negotiation. As regards the Shares, the letter continued:

> *"I am also told that the NISA shares are currently suspended due to a Sainsburys takeover bid, and apparently our clients have agreed, between them, that the shares should simply remain as they are, and our clients will deal with the shares post-completion once they are in a position to deal with any transfers. Again, I would appreciate it if you could confirm that these are your instructions also and that any reference to the shares will need to be withdrawn from the documentation."*

35. The natural reading of this letter to me is that the legal documentation would not include any provisions about the Shares and that what had been agreed was that the Shares were to be dealt with under a separate agreement to be reached after completion. Leaving them "as they are" suggests simply that the status quo (or legal and beneficial title) was to be maintained as it then was with no change. Had there been any legal agreement about the Shares (even if it was, for example, conditional upon dealings in Nisa shares being permitted again) it can be expected to have been something that would have required an amendment to the documentation rather than simply being removed from the documentation. Further, and for the avoidance of doubt, the letter is, in my

judgment, inconsistent with any idea that there was then a concluded agreement that in certain defined circumstances the Shares (or any of them) would be sold at a published price, and there is the further difficulty that there is no suggestion of who was to buy which Shares of the Shares and from whom.

36. By letter of reply dated the same date, 12 July 2017, PG Legal raised a new point about the Shares:

> "*My understanding is that it has been agreed that half of the 10 (please confirm the no) NISA shares will be transferred into the name of Gurdeep Singh Chahal just as soon as share dealings are possible. I think we should amend the agreement to reflect this?"*

It is unclear whether this was on the basis that Mr Chalal was already thought to be the registered holder (and/or owner) of five shares (and so the letter is dealing with what were perceived to be the separate five shares "owned" by Mr Jagpal) or whether this was dealing with a transfer into Mr Chahal's sole name, beneficially (for the first time) of five of the Shares but leaving the remaining five still to be dealt with.

37. By email dated 14 July 2017, Caris Robson confirmed that the Jagpals were content with the "majority of the document". However, there were a few comments "about the agreement", one of which related to the Shares, suggesting that at this point references to the Shares had not been removed from the draft Deed of Dissolution. The comment was:

> "*We understand that your clients as a pair own 5 Nisa shares and my clients as a pair own 5 Nisa shares. It is suggested that the shares have nothing to do with the running of the business, and my client intends to take his shares with him post completion. We would appreciate it if you could confirm that this is agreed and that a clause could be entered within the agreement to confirm that this is the case. I understand that my client has already spoken with Nisa, who have confirmed that following the dissolution of the partnership, they are happy to regard both sets of our clients as owning 5 shares each*".

38. That there was at this point no binding agreement regarding the Shares is confirmed by the reply of PG Legal by email dated 20 July 2017 under cover of which the Deed of Dissolution was returned and it was said that:

> "*We need to agree a side letter about*
> 1. *The Nisa shares- these are (I am now advised) held in joint names and will need to be transferred to the relevant individuals (Gurdeep Singh and your client) once dealings in these shares is again allowed.*
> 2. *The Partnership bank account ….*"

39. At this point there is no suggestion that the position set out in the letter of Caris Robson dated 14 July 2017 (that the Jagpals would retain, or have transferred to them, 5 of the Shares) was anything other than agreed in principle and certainly not that there was any contrary extant binding agreement requiring the Jagpals to take steps with the result that the Chahals would hold all 10 Shares, legally and beneficially. In particular, there is no hint of any agreement that the Jagpals were bound to transfer "their" 5 Shares to the Chahals at the Published Price. The letter is, in my judgment, perfectly clear that

PG Legal were acting on the assumption that, at the end of the day, Mr Chahal would be the legal (and beneficial) owner of five of the Shares and Mr Jagpal would be the legal and beneficial owner of the remaining five Shares. On the face of it the suggestion seems to be that legal and beneficial title of 5 Shares would be transferred to Mr Chahal/the Chahals and 5 to Mr and Mrs Jagpal.

40. By email dated 24 July 2017, Cameron Caris confirmed that the agreement was ready to be signed, with relevant agreed changes to it having been made.

41. As regards the shares the email of 24 July 2017 said:

> "*With regards to the side letter, our clients are happy to agree that the NISA shares are held in joint names and transferred once dealings are allowed.*"

In the context of the immediately preceding correspondence, the transfers envisaged were of 5 Shares to the Jagpals (or Mr Jagpal) and 5 Shares to the Chahals (or Mr Chahal). The letter does not make clear on what basis these transfers would be made. Would they be a distribution in the context of the winding up of the Partnership and therefore not a transfer on sale or was it envisaged that the transferees would pay the Original Partnership for the Shares (either in any event or only of required to meet any relevant Original Partnership Liabilities)? In my judgment, matters were left on the basis that any deal regarding the Shares would be worked out later and that at most there was an agreement in principle that the Shares would end up so that the Jagpals (or Mr Jagpal) was the registered owner of five Shares and the Chahals (whether Mr and Mrs Chahal or all four Chahals who were partners in the Successor Partnership) or Mr Chahal were the registered owner of the other five Shares.

The Deed of Dissolution

42. I turn to the Deed of Dissolution. This was in fact dated and completed on 24 July 2017. The recitals, under the heading "Background" are as follows:

> "***BACKGROUND***
> ***(A)*** *The Partners have been carrying on the Business in partnership together without a written agreement with the terms of their partnership being governed by the terms implied by the Partnership Act 1890 (the Partnership).*
> ***(B)*** *The Partners have agreed to dissolve the Partnership on the Dissolution Date and to wind up the Partnership as set out in this Deed*
> ***(C)*** *The Partners have agreed that the Acquiring Partners will acquire the Allocated Assets and shall be entitled to carry on the business of the Partnership as the Acquired Business.*"

43. Clause 1 deals with matters of interpretation.

44. Clause 2 deals with the winding up and dissolution of the Original Partnership as provided for under the Deed of Dissolution. Dissolution took place on the date of the Deed, 24 July 2017. Clause 2.2 requires return by the Partners of all Partnership Assets, which are defined as: "*the Premises and all other assets (or rights in them) which belong to the Partnership or held by any Partner or Partners on trust for the Partnership as at the Dissolution Date*".

45. Clause 3 deals with issues of authority of the partners to act for the Original Partnership and to take drawings particularly as concerned the period between dissolution and winding up and thereafter.

46. Clause 4 deals with the sale of the Allocated Assets to the Acquiring Partners (i.e. the partners of the Successor Business, being Mr and Mrs Chahal and the two Chahal brothers). The Allocated Assets are identified as being the assets of the Original Partnership identified in Schedule 2. The consideration for the Allocated Assets is calculated by a formula set out in the Deed which involved deducting from the stated value of the assets, the assumption of Allocated Liabilities (among other adjustments). The Allocated liabilities were 50% of the value of the existing Nat West loan. Payment was to be made to the Jagpals. Although not spelled out it is fairly clear that the Allocated Assets were to be treated as being distributed to the Original Partners and the Chahals then bought the 50% interests of the Jagpals in the distributed Allocated Assets. As they were taking over the Bank loan as a liability, the Chahals got credit, against the purchase price, of 50% of the value of that loan. The Allocated Assets were defined as being 50% of the value of the freehold property at which the business was conducted, 50% of the value of stock and 50% of the value of goodwill. The Shares were not included.

47. Clause 5 deals with the assignment or novation of Contracts of the acquired business. These were defined as being: "all *contracts, arrangements, licences and other commitments relating to the Acquired Business entered into, on or before, and which remain to be performed by any party to them in whole or in part at Completion*." As part of this clause was relied upon by the Chahals, at least in their Defence, I set out the terms of clause 5.3:

> "***5.3*** *Insofar as any of the Contracts cannot be assigned or novated to the Acquiring Partners without Third Party Consent and such Third Party Consent is refused or otherwise not obtained or where any of the Contracts are incapable of transfer to the Acquiring Partners by assignment, novation or other means:*
>
> > ***(a)*** *the Partners at the Acquiring Partners' request shall use their best endeavours with the co-operation of the Acquiring Partners to procure such assignment or novation;*
> > ***(b)*** *unless and until any such Contract shall be assigned or novated, the Partners shall hold such Contract and any monies, goods or other benefits received thereunder as trustee for the Acquiring Partners and their successors in title absolutely;*
> > ***(c)*** *the Acquiring Partners shall (if sub-contracting is permissible and lawful under the Contract in question as the Partner's sub-contractor, perform all the obligations of the Partners under such Contract and, where sub-contracting is not permissible, the Acquiring Partners shall perform such obligations as agent for the Partners; and*
> > ***(d)*** *unless and until any such Contract is assigned or novated, the Partners shall (so far as it lawfully may) give all such assistance as the Acquiring Partners may reasonably require to enable the Acquiring Partners to enforce their rights under such Contract and (without limitation) shall provide access to all relevant books, documents and other information in relation to such Contract as the Acquiring Partners may require from time to time."*

48. Clause 6 deals with VAT and transfer as a going concern.

49. Clause 7 deals with post-dissolution restrictions on the departing partners.

50. Clause 8 provides for employees and among other things their transfer to the Successor Partnership pursuant to TUPE.

51. Clause 9 provides for confidentiality matters.

52. Clause 10 provides for the use of the Name (though the definition seems to have been left out of the Deed).

53. Clause 11 provides for the payment of debts and liabilities of the Original Partnership from the Original Partnership bank account and that in the event there were insufficient funds in that bank account then they would be borne by the Original Partners equally.

54. Clause 12 provides for the preparation of winding up accounts.

55. Clause 13 provides for the payments from the Original Partnership bank account of debts and liabilities other than the Allocated Liabilities, then the repayment of advances by Original Partners with any residue to be divided between the Original Partners in the same proportions as they had shared profits.

56. Clause 14 deals with announcements of the dissolution.

57. Clause 15 is a clause for further assurance.

58. Clause 16 deals with the retention of records by Mr Chahal.

59. Clause 17 deals with notices.

60. Clause 18 is an entire agreement clause in the following terms:

> ***"18. ENTIRE AGREEMENT ANO PROVISIONS SURVIVING DISSOLUTION***
>
> ***18.1*** *This Deed constitutes the entire agreement between the parties as to the dissolution, winding up and sale of the assets of the Partnership and supersedes all previous agreements, promises, assurances, warranties, representations and undertakings between them, whether written or oral, relating to its subject matter.*
>
> ***18.2*** *Each Partner agrees that, in entering into this Deed, he does not rely on and shall have no remedies in respect of, any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Deed. Each Partner agrees that he shall no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this Deed.*
>
> ***18.3*** *Nothing in this clause shall limit or exclude any liability for fraud."*

61. Clause 19 deals with variations (to be in writing and signed by the parties or their authorised representatives).

62. Clause 20 deals with governing law and jurisdiction.

Developments after the Deed of Dissolution

63. By letter dated 8 September 2017, Nisa wrote to Mr Jagpal and Mr Chahal saying that they had received the (Successor) partnership accounts. They could see that the name on the accounts did not match the names of the holders of the Shares (Mr Jagpal and Mr Chahal). They said that they needed to ensure the trading name and the shareholding names were the same. They enclosed a stock transfer for completion and requested its return together with the share certificate. It was said that the trading title on the file would be changed once the new share certificate was issued. The letter erroneously referred to the Successor Partnership as a company. It is unclear whether the Stock Transfer in evidence before me is the same as the one sent in September 2017. It seems to me that the one in evidence is probably a copy of the one sent separately in 2018. However, the evidence suggests that the same stock transfer form was sent (in substance at least in terms of how it was completed) in September 2017 and again in 2018. That provided for the transfer of all 10 Shares but was blank as regards the transferees. It also provided that the consideration money was "£0.00".

64. By letter dated 10 October 2017 sent to members, the Nisa board unanimously recommended acceptance of an offer by the Co-Op to buy the issued share capital of Nisa. It announced that a bid conduct agreement had been entered that day which obliged the Co-Op to submit a formal offer to members, reflecting the terms summarised in the letter, within the next 28 days. the summary of the terms of the proposed offer confirmed a proposed payment of up to £20,000 per shareholder, a payment of £1,654 per share, payable in three equal instalments in early 2019, and 2021 and an additional payment of up to 1% of rebateable sales for each shareholder during the 4 years to 31 March 2022 (payable quarterly from June 2018 onwards). Members would cease to be members of Nisa and their Nisa terms and conditions would be altered accordingly.

65. Between 6 and 7 February 2018 there were a number of internal Nisa emails. Apparently someone from the Chahals had been on the phone to check that documents returned about the end of November 2017 with regard to "*name of shares as they had bought out*" Mr Jagpal meant that there would be no issue when it came to "*receiving their £20k from the Co-op*". It seems that any documents returned did not include a properly executed Share transfer form, signed by both registered holders, Mr Jagpal and Mr Chahal. In reply, from Nisa, it was confirmed that the Shares were still registered in the joint names of Mr Jagpa and Mr Chahal and that a share transfer form would need to be completed, executed and returned.

66. In various emails between 12 and 13 February 2018 to Nisa, Mr Mavinder Chahal identified that the relevant Nisa account number was JO5500 and the Account name was M&A Stores. He asked whether it would be possible to have 5 out of the 10 shares assigned to M&A Stores as the shareholder (Mr Chahal) was still a named partner on the account. One of Nisa's emails in reply made the point that M&A did not hold any shares and the old partnership of Mr Jagpal and Mr Chahal trading as J & C stores was not a trading members and that it should therefore not hold any shares. Obviously the

writer was not aware that the Original Partnership comprised four not two partners. Mr Mavinder Chahal also told Nisa that Mr Jagpal was "*not willing to sign over his shares*" and asking how to move forward. The then Group Credit Controller then wrote to say that the shares in Nisa had to be registered in the same name as the partners in the then current business otherwise "*we are unable to trade*". He went on, among other things, to say that "*We should have been notified in advance of any changes in the partnership as per our rules of membership*". He asked for verified opening partnership accounts and the return of the completed stock transfer form. Mr Mavinder Chahal wrote back to say that Nisa had been informed of the change in partnership, referring to the change of business name to M&A Stores and the change of the direct debit details and partnership names on the account (which account is unclear: i.e. the bank account or the Nisa account). Mr Mavinder Chahal, having referred to the fact that the 10 Shares were registered in the joint names of Mr Jagpal and Mr Chahal, went onto say: "*Is it not possible for Mr Chahal to allocate his share (5) of the shares to M&A Stores, leaving Mr Jagpal to do as he pleases with his 5 shares.*"

67. On 14 February 2018 there were further emails between Mr Mavinder Chahal and Nisa. In one of them, Mr Mavinder Chahal asked "c*ould I check that is states 0.00 for consideration monies? Should there not be a value in there?*". The response was: "*If it is a name change only, then the value is 0.00 as no monies have changed hands. If legally we have to repay the 10 shares to J&C Stores then the value will be £135.00 x10. I can amend the value one we have some guidance on the matter*." Somewhat surprisingly, Nisa seemed content to act on the basis that only one of the two joint shareholders signed a transfer form for the Shares and even though they knew that the non-signing shareholder was not prepared to join in the transfer. One email from Nisa referred to the fact that account JO55 should have been closed and a new membership opened for the new legal entity. This goes some way to confirming Mr Jagpal's evidence that he remained liable on the Nisa account of the Old Partnership which had continued to be used by the Successor Partnership post dissolution of the Original Partnership.

68. An internal Nisa email dated 14 February 2018 from David Bateman (apparently then responsible for Northern England and Scotland), wrote that he had sought guidance form within Nisa as to how to deal with the situation where Mr Jagpal was retiring and Mr Chahal taking over. "*As Harry* [Jagpal] *didn't have a new business to transfer half the shares to, he left them as is with Mr Chahal to protect future value in event of Nisa sale/keep them live until he did find a new opportunity as trading was suspended at that point"*.

69. The Nisa emails peter out in the bundle in April 2018 at the point where Nisa was unable to say whether a transfer of shares signed by one of the legal holders of the Shares was going to be actioned and treated as a valid transfer of the shares. Ultimately it seems that it was decided by Nisa that the stock transfer form submitted was inadequate. This seems to follow from a letter from Nisa to PG Legal Ltd dated 3 May 2018 in which they explain that payments under the Scheme of Arrangement would only be made where Nisa/Coop were satisfied as to the continuity of trade and where a stock transfer form had been signed by the transferors but that no duly executed transfer form had yet been provided. However, Nisa was going to recommend to the Co-Op that based on the facts as Nisa understood them, the Chahals' situation was such that the "family member" exception (under the Scheme) would be suitable to be applied:

"*Please note that under the terms of the Scheme, the Initial Consideration and Deferred Consideration may be paid to the trading account held by Nisa for such shareholders as the trading member, so it will be for your clients to resolve how the consideration will be accounted for as between them and Mr Jagpal once received into the trading account.*"

70. As I have said, the Scheme of Arrangement was sanctioned by Order of the High Court made on 4 May 2018.

71. Meanwhile there had been further contact between the then solicitors for the parties before me.

72. By email dated 4 April 2018, Caris Robson wrote to PG Legal. The email set out the original intention to transfer the Shares as part of the business but the fact that they had not been transferred due to restrictions on transfer arising from a proposed offer for the share capital of Nisa.

"*As the Shares are linked to the account held by the Business in Nisa in the joint names of our respective clients (the "Nisa Account"), the restriction on the shares would have meant that the Nisa account could not be transferred into your clients' names and therefore your clients would have to open a new account, at considerable cost to them. Therefore, on the advice of a contact of your clients at Nisa and at your clients' request in order to save them the additional cost of opening a new account, my clients agreed to leave the Shares and the Account in joint names until the restrictions on the transfer of the Shares had been lifted. This was done by my clients in good faith and as a gesture of goodwill.*

My clients have since been informed by a senior representative at Nisa that the advice of your clients' contact Nisa was incorrect and in fact the Shares and the Account should have both been transferred to your clients as part of the Sale, or in the absence of that being possible, a new account with Nisa in your clients' name should have been set up. My clients have also been informed that the action that was taken in respect of the Account could give Nisa grounds to suspend or terminate the Account. This would obviously be hugely detrimental to your clients. Assuming your clients would like to avoid the closure of the Account, action should now be taken to transfer the 5 of the Shares. that are due to my client, as soon as possible, at the published share price. My clients have a copy of the share certificate in respect of the Shares and are happy to sign a ·stock transfer form transferring 5 of the shares or to sign a stock transfer form transferring all 10 shares as required provided that 50% of the consideration, reflecting half of the published share price, is transferred to my clients.

If your clients are agreeable to this then please confirm and we will contact Nisa for the relevant documents to implement the transfer. Otherwise. if this is not acceptable, please let me know and we will contact Nisa to confirm that my clients have no issue with the Account being closed. Please confirm your clients' intentions by the end of Friday 13 April. If we have not heard from you by this date, we will proceed with contacting Nisa in respect of closure of the Account."

73. The important points that I take from this letter are that (a) as far as Mr Jagpal and his advisers were concerned, Mr Jagpal was still entitled to 5 of the Shares and that the entire beneficial interest in the 10 Shares did not lie with Mr Chahal nor the partners of the Successor Partnership and (b) there was no contract in place requiring the transfer of any of the 5 Shares at the Published Price to Mr Chahal or to any other Chahal(s); (c) an offer was being made to transfer the 5 shares of Mr Jagpal at the Published Price (reflecting what had been originally agreed in principle back in May 2017) and that (d) Mr Jagpal's real concern at this point was his potential liability on the account with Nisa which had been opened as an account of the Original Partnership and which the Chahals had continued to operate (and place orders on) as the Successor Partnership. I reject what I understood Mr Stevens' submission to be, namely that this letter reflects a binding agreement having been made back in May 2017 that Mr Jagpal would transfer any interest he had in any of the Shares to Mr Chahal at the published price or any relevant variation of such agreement.

74. PG Legal, by response dated 13 April 2018, sought confirmation that the Jagpals be paid *"£825 for their 5 shares*" so that PG Legal might "*more properly deal with your query*".

75. By letter dated 30 April 2018 they chased the matter, having heard nothing in the meantime. They suggested that Caris Robson advise their client to complete the share transfer sent to him by Nisa and that "*Failure to do so will be a clear breach of the agreement antecedent to the sale*." Immediate proceedings were threatened. In particular, any loss of any consideration from the Co-op was said to be recoverable. The threat was not carried through. Indeed, as has been seen, a matter of days later Nisa confirmed that the full consideration would be paid in respect of the Shares with it being left to the parties to sort out respective entitlements (if any).

76. By email dated 12 March 2019, PG Legal wrote to say that their clients were not prepared to discuss the matter further, that they had been instructed not to respond to further correspondence and that the Jagpals should take the matter up with Nisa. In any event, if there were any shares still in existence their value would depend on the members' trading performance which in the case of the Jagpals was nil. Although I do not have the intervening correspondence between April 2018 and March 2019, this response looks to be disingenuous given the letter from Nisa of 3 May 2018 that I have referred to.

The Defendants' case

77. I did not find it easy to identify the Defendants' case from their pleaded defence. I understand that Mr Kelly for the Claimants had a similar difficulty. I should add that Mr Stevens was not responsible for the Defence. Among other things, the Defence, as I read it, appeared to assert that the Shares had been deliberately excluded from the Deed of Dissolution but, at the same time, asserted that on its proper construction it provided for a transfer of the Shares (or a beneficial interest in the Shares) from Mr Jagpal apparently to the Chahal partners in the Successor Partnership. It also asserted that the transfer was for no further consideration than that set out in the Deed of Dissolution, whereas the evidence filed on behalf of the Defendants appeared to assert that the agreement was that the Shares would be transferred for a consideration which was equal to the overall Published Price for such Shares.

78. I made clear to Mr Stevens that I would be restricting the Defendants to their pleaded case and suggested that he might wish to consider amending the Defence. Overnight, Mr Stevens produced some proposed amendments. As I understood him, whilst objecting to what he said was a lack of particularisation, Mr Kelly did not oppose the proposed amendments being allowed and, commendably, produced his own consequential amendments to the Claimants' Reply. He confirmed that the proposed amendments did not necessitate any change or addition to his evidence and that they did not cause any difficulties for him that would need to be met by an adjournment. In those circumstances, the trial proceeded on the basis of the amended Defence and the amended Reply. To the extent necessary I formally give permission for both sets of amendments on the usual costs basis that the Defendants pay the costs of the same.

Discussion and further findings

The Deed of Dissolution: transfer of beneficial title on its true construction?

79. As regards the legal principles of construction, for convenience I summarise the many recent decisions of the Court of Appeal, House of Lords and Supreme Court by adopting the helpful summary and analysis of one of the more recent Court of Appeal cases, *Network Rail Infrastructure Ltd v ABC Electrification Ltd* [2020] EWCA Civ 1645 ("Network Rail") at [18] and [19]:

> "*[18] A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:*
>
> *(1) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;*
>
> *(2) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;*

(3) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;

(4) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;

(5) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;

(6) When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.

[19] Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to

that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."

80. It follows that much of the evidence that I have recited, which sets out the history behind the document and the parties intentions at various times falls to be ignored in construing the Deed of Dissolution.

81. The main point relied upon by Mr Stevens is set out in paragraph 10 of his Skeleton argument:

"*Ds maintain that the agreement for the sale of the partnership and assets included all those assets required for the continued trading of the new partnership under the Nisa franchise*

under the terms of the "Retail Membership Application – Terms and Conditions"."

A transfer of the Shares was, he submitted, required to enable the trading to continue.

82. I have a number of problems with this submission of necessity, or need. First, given the suspension of trading in Nisa shares, even if Nisa required the member to hold shares in Nisa, legal title to the Shares could not be transferred at that point. Secondly, the requirement, from the perspective of trading with Nisa, of the retail trader holding shares in Nisa was a situation that Nisa could waive and could agree to trade with the retail member even though that member did not have any Nisa shares. Thirdly, even assuming the Chahals needed to be the registered holders of shares in Nisa there was no need for such shares to be the Shares. There is no evidence that the Chahals could not simply buy other shares in Nisa, if necessary, from Nisa itself. Fourthly, the Nisa requirement could only be that legal title to shares in Nisa be held by the retail member. There was nothing in the Nisa terms and conditions about beneficial title. Thus, it seems to me unclear that the Shares had to be transferred to the Chahal Successor Partnership to enable it to trade and even if they did, all that had to be transferred was legal title: beneficial title did not have to be transferred nor agreed to be sold. Finally, even if under the Nisa terms and condition the Jagpals were not entitled to (a) retain a beneficial interest in the Shares nor (b) to retain legal title to shares in Nisa following dissolution of the Original Partnership, the Shares could be disposed of to Nisa and did not have to be transferred to the Chahal Partnership. From the point of view of the Jagpals themselves there was, on any view, therefore no need for them to divest themselves of all and every interest in the Shares by transferring the same to the Chahals.

83. Some of the difficulty in the Defendants' case is, perhaps, revealed by the different stance taken by them as regards the terms that they say apply regarding payment for the Shares (or some of them). As I have said as originally pleaded the case was that the binding agreement was that the 10 Shares had to be transferred to the Chahals as, in effect, part of the consideration for the payment to the Jagpals under the Deed of Dissolution and that no further payments were due to the Original Partnership or the Jagpals in respect of the transfer of legal and beneficial ownership in any of the Shares. If the transfer was only of legal title (with beneficial ownership remaining in the Original Partnership or, on a winding up and distribution, the Jagpals having a 50% interest in the 10 Shares or a 100% interest in five of the Shares), a payment for no

monetary consideration would make some sense. However, under the Amended Defence the asserted case is that the Mr Jagpal and Mr Chahal would transfer their legal and beneficial interest in the Shares to the Chahal members of the Successor Partnership at the published share price (see amended paragraph 7.3). This in itself creates difficulties because the agreement would have had to encompass the beneficial interest (as partners) of Mrs Jagpal and Mrs Chahal. Further, as pleaded, the defence is not consistent with the evidence of Mr Chahal and Mr Mavinder Chahal which is that the agreement was that Mr Jagpal would receive consideration equivalent to the value of the Jagpal interest in the Shares but not that the Chahals had to pay for any interest of Mr Chahal (and Mrs Chahal) in the Shares. All these difficulties demonstrate why it is difficult to imply a relevant term into the Deed of Dissolution or to construe the agreement to achieve a transfer of beneficial interest to the Chahals (or at least away from the Jagpals). In short, there is no need to imply a term as a matter of business efficacy and it is difficult to be sure what term should be implied or what construction should be placed upon the Deed of Dissolution in terms of what precise end result is said to result from such construction.

84. As it happened, there is no pleading of any implied term in the Deed of Dissolution and Mr Stevens accepted that he could not argue for one. The difficulties in identifying what term would be implied and the problem that a transfer was not needed to give business efficacy to the Deed of Dissolution are insurmountable hurdles to any cause of implication of a term.

85. As regards construction, there is the further point that it is difficult to see what provision of the Deed of Dissolution can be construed to give rise to the conclusion that its effect is to transfer any beneficial interest of the Jagpals (even if contingent upon winding up and payment of Original Partnership liabilities) to the Chahals. As is very clear, the Shares are not part of the Allocated Assets which are transferred to the Chahals and I cannot see how any other provision of the Deed can be "construed" so as to include them as such Allocated Assets or otherwise so as to involve the agreement to transfer which is alleged.

86. In the original Defence (which was not amended on this point) it was asserted that clause 5 (and specifically clause 5.3(b)) of the Deed gave rise to an obligation to transfer (presumably) legal and beneficial interest in the Shares to the Chahals. However, shares are usually treated as property, not as "contracts" and Mr Stevens confirmed, in my view quite rightly, that he did not rely on that clause. Despite my pressing him, I was unable to identify which clause of the Deed Mr Stevens asserted should be construed so as to (as the minimum necessary for the Defendants to establish this element of the Defence) involve either a specifically enforceable promise of the Jagpals to transfer the legal and beneficial interest in the Shares or mediate transfer of such beneficial interest.

87. I therefore reject the Chahals' case that on a true construction of the Dissolution Deed, the beneficial interest in the Shares was transferred to the partners of the Successor Partnership on completion.

A separate contract entered into prior to or at the same time of the Deed of Dissolution?

88. On the face of the contemporaneous documents, it seems to me impossible to identify any binding agreement that the Jagpals would transfer their beneficial interest in the Shares to the Chahals. The last few pieces of correspondence prior to entry into the

Deed of Dissolution show clearly that, on the most favourable case to the Chahals, any binding agreement was restricted to one that the Jagpals would end up with legal and beneficial ownership of five of the Shares: in other words that they would have at the end of the day a 50% interest in the Shares represented by a 100% interest in five of the 10 Shares.

89. In my judgment, the correspondence shows no binding agreement having been reached. There was no formal side letter and the terms of any such agreement, in terms of achieving a change from 10 Shares held in the names of Mr Jagpal and Mr Chahal for the benefit of the Original Partnership to the Shares being held for the Successor Partnership or all or any of the Chahal partners of the Successor Partnership are wholly unclear to me from that correspondence.

90. The oral evidence of Mr Jagpal confirmed that in principle he was at all material times prepared to transfer any interest he had in the ten Shares to the Chahals provided he received the value of the same. He, as did Mr Chahal, tended to talk in terms of his, Mr Jagpal's shares and he did not clearly differentiate between an interest, of the partners in the Original Partnership, in the 10 Shares and any "distribution" after winding up of the same which might result in Mr and Mrs Jagpal receiving half of the Shares. It was also somewhat unclear when he became aware of the Co-Op offer and whether he was aware of the inflated value of the Shares as a result (and specifically whether he was aware of this when offering to sell "his" Shares in April 2018 at the Published Price). He also gave slightly unsatisfactory evidence about the letter of 14 July 2017 sent by Mr Caris' secretary (at Cameron Caris) on his, Mr Caris', behalf. This letter confirmed an intention of Mr Jagpal to retain "his" 5 Shares. Mr Jagpal suggested that this was totally contrary to his instructions and that this had not been his position. I am satisfied that he is mistaken in this respect but that this mistake emanates from an error of memory of the detail of what had happened rather than anything more sinister. What came out quite clearly from his evidence, and from Mrs Jagpal's evidence, is that at the time of the Deed of Dissolution there was no final binding agreement regarding the Shares and that the arrangements to be made in respect of them were left to one side to be dealt with later. Although Mr Jagpal was prepared in principle to transfer any interest he had in the Shares to the Chahals as long as he got the relevant value of the same (which was at the time believed to be by reference to the published price), there was no binding agreement in place. This is consistent with the contemporaneous correspondence and I accept it.

91. Mr Chahal's evidence, written and oral, also revealed a lack of grasp of the legal details and of the negotiations over time that are revealed by the contemporaneous correspondence. By way of example, his written evidence was to the effect that his "understanding" of the position came from his solicitor rather than from any direct conversations with Mr Jagpal, which seems inconsistent with the contemporaneous records that his solicitor had been told what Mr Chahal and Mr Jagpal had agreed at various points (rather than himself agreeing the same). Further, as well as apparently setting out the abandoned case that the share transfer would be for no further consideration Mr Chahal also apparently (but confusingly) raised a further variation as to the terms of what had been agreed, his assertion in his witness statement being that the sale price would not be at the published price for shares (from time to time or at the time of transfer) but the value they had at the date of completion of the Deed of Dissolution (see his witness statement paragraph 16):

> *"My understanding of the deal done was that they would simply be transferred over when it was possible to do so. There was also no discussion or agreement that a further*
>
> *payment would be made for the shares, although again I understood that it had been agreed that the shares would be transferred at the value they had on the date of completion once dealings in the shares were allowed*".

92. Indeed, Mr Chahal's evidence as to the terms of the alleged agreement was, in his cross-examination, confused and contradicted by the contemporaneous documents. Again, by way of example, his evidence was that the only agreement he reached was with Mr Jagpal prior to the letter of 26 May 2017 and he was unable to explain how and why his solicitors had apparently been in agreement with Mr Jagpal's solicitors, later on, that the Shares would be split as a shareholding so that Mr Jagpal (or the Jagpals) took five and the Chahals (or some or all of them) took the other five. He was also unable to explain when the "deal" had changed from being one that his sons would purchase the Shares (as recorded in the 26 May 2017 letter) to one (as he alleged the agreement to be) that he would purchase the shares.

93. In summary, I consider that Mr Chahal, like Mr Jagpal, was honestly doing his best to assist the court but that his recollection of the detail of what had happened at the time was unreliable. The surest safe guide to what happened is, in my judgment, to be found in the contemporaneous solicitors' correspondence.

94. In short my conclusions are (a) no final binding agreement was reached regarding the Shares, matters were left on the basis that a deal would be done later; (b) if I am wrong as to (a), there were no sufficiently certain terms as to create a legally binding contract there being uncertainty as to, among other things, the consideration, how legally matters would be structured so as to get from a position where the Shares were registered in the name of Mr Jagpal and Mr Chahal but held for the Original Partnership to one where the Shares (or some of them) were held by Mr Chahal and/or the members of the Chahal Successor Partnership and even the parties to the agreement; (c) if I am wrong on (a) and (b) the agreement was that Mr Jagpal would retain/acquire 5 of the Shares, legally and beneficially and finally (d) any agreement was subject to contract and the entry into formal documentation (which would also have involved a drafted carve out from clause 18 of the Dissolution Deed) but no formal documents were ever entered into.

95. However, even if I am wrong in my conclusions in the last paragraph, and there was some form of legally binding agreement entered into which was in principle specifically enforceable and involving all and any beneficial interest of the Jagpals in the Shares to be transferred to the Chahals or any of them, this agreement would have been rendered inoperative by the "Entire agreement" clause 18 of the Dissolution Deed. I did not understand Mr Stevens to be able to raise an argument to answer to this point.

96. Accordingly, I find that there was no side or collateral agreement to the Deed of Dissolution under which the Jagpals' interest in the Shares was transferred to the Chahals or any of them.

A contract entered into after the Deed of Dissolution?

97. I could not identify that the Defence contained a case that a contract was entered into regarding the Shares as between any of the Jagpals and any of the Chahals after the Deed of Dissolution. In oral evidence, Mr Chahal specifically confirmed that no such agreement came into being. Nevertheless the list of issues before me included as an issue "Was there an agreement to transfer the [S]hares after completion of the [Deed of Dissolution] from the first Claimant to the Acquiring Partners and if there was what were the terms of that agreement". Initially I detected an attempt to submit that a new contract was formed by some form of acceptance of what to me is a clear offer in the letter of 4 April 2018. However, it seems to me clear that that offer was never accepted. And that it has lapsed long ago. Mr Stevens confirmed that he did not raise any such case and, in these circumstances, I need deal with it no further.

98. For completeness, I should also add that I do not consider that I need to resolve the conflict of evidence as to whether Mr Jagpal only refused to sign a stock transfer form once (in 2018) or twice (in 2017 and 2018) and as to what he said on the occasion or occasions. On any view, he refused to sign it on one occasion when his refusal was based on there being no consideration provided for in the Stock Transfer form.

Conclusion

99. The Jagpals retaining a 50% interest in the 10 Shares (or what comes to the same thing, a 10% beneficial interest in 5 of the 10 Shares), any sums received in respect of the Shares, now acquired by the Co-op under the Scheme of Arrangement are due to the Jagpals so far as they had a beneficial interest in the Shares. It was common ground that the Original Partnership has now been wound up and all its debts paid. Accordingly, any beneficial interest in the Shares or their proceeds is now subject to a 50% interest of the Jagpals. The consideration was received by the Chahal Successor Partnership. Mr Stevens confirmed he took no point on the fact that the Chahal Brothers had not been joined to the proceedings. Accordingly, I do not need to deal with the question of whether, in the absence of their joinder, there are any difficulties in requiring Mr and Mrs Chahal to account for one half of the purchase monies received from the Co-Op in respect of the Shares. I understand the total sum to be agreed and the only remaining issue to be determined to be the date(s) from which interest runs and the rate of interest.

100. A further point was raised by Mr Stevens which was that the consideration paid in respect of the Shares was not in fact due under the Scheme. I do not see how this affects the position. Whether or not the Co-op was bound to pay the sums it did, the sums were received as consideration for the Shares and as having a beneficial interest of 50% in the Shares, the Jagpals are entitled to receive 50% of the sums received. In any event, as it happens and given the correspondence and the terms of the Scheme of Arrangement, it seems to me clear why the Co-Op paid all three types of consideration and that the consideration was properly paid under the Scheme.

101. The parties should agree as much as they can of an order to give effect to his judgment and lodge an order within 7 days of hand down of this judgment showing the extent of any agreement and disagreement. If any issues need to be resolved they can be done so at a short remote hearing. The parties should contact the court within 7 days of the hand down to arrange a date for such hearing, if needed. I will initially extend the time for appealing to the expiry of the period of 21 days from the sealing of any order to give effect to this judgment and reserve all consequential matters (including permission to appeal) until an order is sealed which deals with all relevant matters.