Neutral Citation Number: [2019] EWHC 20 (Ch)

Case No: HC-2016-000214

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London EC4A 1NL

Date: 11 January 2019

Before :

John Kimbell QC
(sitting as a Deputy Judge of the High Court)

- -

Between :

JOHN ROSS — **Claimant**

- and -

(1) MITU MISRA
(2) ROSE LIMITED — **Defendants**

- -
- -

MICHAEL BOOTH QC (instructed by **Pannone Corporate LLP**) for the **Claimant**
MICHAEL LAZARUS (instructed by **Stewarts Law LLP**) for the **Defendant**

Hearing dates: 26,27,28,29,30 November, 3 and 5 December 2018

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JUDGMENT

John Kimbell QC (sitting as a Deputy Judge of the High Court):

Introduction

1. The sale and installation of uPVC windows is a highly competitive and lucrative business. The current market leader in this country is Safestyle UK plc. Safestyle started its life in December 1992 as the trading name of a company founded in Bradford by the Claimant ('**Mr Ross'**) and the Defendant ('**Mr Misra**'). This litigation arises from a bitter dispute between these two men. Mr Ross claims £26.9 million from Mr Misra. Mr Ross says that this is the value of the shares Mr Misra held on trust for him when Safestyle was floated on the stock market in 2013. Mr Misra denies that he held any shares on trust for Mr Ross.

2. On 6 December 2013, a week before shares in Safestyle were due to be offered on the London Stock Exchange's Alternative Investment Market, the then managing director of Safestyle, Steve Birmingham, received an e-mail from Mr Ross in the following terms:

> "Dear Steve,
> As you are aware and for the record:
>
> 1. I have a beneficial entitlement to 37.5% of the share capital of Style Group Holdings Limited ("Company"); and/or in the alternative
>
> 2. pursuant to the letter from Company delivered by you to me, I am entitled to shares (legally and beneficially) representing 10% of the issued share capital of the Company. […]
>
> Yours sincerely
> John"

3. Mr Birmingham responded the next day by e-mail as follows:

> "Afternoon John
>
> For the record:-
> 1. You seem to have forgotten that you transferred your entire shareholding at DLA's offices in Leeds in front of me, HSBC & witnesses. Nothing has changed since then & you do not have any shares in any Group company.
>
> 2. I have never delivered a letter from the company to you.
>
> You also seem to have forgotten that you have been through an IVA and did not disclose any shareholding in any Group company. Your claims are rejected in full. I do however understand your disappointment.
> Regards
> Steve B"

4. The scheduled floatation went ahead. The Second Defendant (a trust created by Mr Misra for the benefit of his family) received around £70 million for the shares registered in Mr Misra's name. Mr Ross received nothing.

5. The second claim referred to in Mr Ross's e-mail of 6 December 2013 has already been dealt with in the judgment of Michael Brindle QC sitting as a deputy High Court judge [2017] EWHC 362 (Ch). On an application by Mr Misra for summary judgment, the letter Mr Ross based his claim on was held not to have given rise to any legally binding obligation. However, the judge did not consider that it was appropriate to dispose in a summary manner of the other claim referred to in the e-mail to Mr Birmingham based on an alleged beneficial ownership of shares. The judge considered that this claim though "deeply unattractive" had a "horrible plausibility" [29]. This claim has therefore proceeded to a full trial before me.

6. Notwithstanding sixty pages of pleadings, twenty-two lever arch files of disclosure, twenty-six witness statements and two hundred pages of opening and closing submissions, the main issue between Mr Ross and Mr Misra remained as simple and stark as set out in the two e-mails from 2013 which I have quoted above. The rival contentions are these:

    a. Mr Ross alleges that Mr Misra orally agreed in late 2009 to hold 37.5% of his holding of 92.5% of the shares in Safestyle Group Holdings Ltd on his behalf. This promise is said in the Particulars of Claim to have been "absolute, irrevocable and unconditional". To the extent that a share and purchase agreement signed at DLA's offices on 2 February 2010 ('**the SPA**') suggests that legal and beneficial ownership of his shares was transferred to Mr Misra, Mr Ross says it was a sham. Mr Ross's case is that only days after the SPA was signed, Mr Misra reneged on their deal. According to Mr Ross this betrayal pushed into him insolvency.

    b. Mr Misra, on the other hand, says that the SPA was a genuine agreement between him and Mr Ross pursuant to which he acquired full legal and beneficial ownership of Mr Ross's shares in Style Group Holdings Limited. Mr Misra denies there was any betrayal and alleges that the reason Mr Ross sold

his shares was that he had become insolvent due to the failure of a number of his other business ventures.

The claim made against the Second Defendant was stayed by order of Master Teverson dated 9 December 2016. Rose Limited did not take part in the trial and was not represented.

Burden and standard of proof

7. In his opening submissions, Mr Booth QC, representing Mr Ross, accepted that it was for Mr Ross to prove that the SPA was a sham and that there had been a private deal between Mr Misra and Mr Ross under which Mr Misra agreed to hold 37.5% of his shares on trust for Mr Ross. Mr Booth cautioned me against applying anything other than the normal civil balance of probabilities standard of proof to the main issue. He referred me to Re-B [2009] 1 A.C. 11; Otkritie International Investment Management v Urumov [2014] EWHC 191 (Comm) at [85] – [89] and the decision of Cockerill J in FM Capital Partners Ltd v Mario [2018] EWHC 1768 (Comm) at [68] in support of the following submissions:

   a. The test is a pure balance of probabilities test. Whilst the court of course considers what is alleged when deciding on inherent probability, this is purely an aspect of common sense, not the standard of proof. In Re B [2009] 1 A.C. 11 Lord Hoffmann para 15.

   b. There is no necessary logical connection between seriousness of the allegation and the likelihood of its having occurred, Lady Hale In Re B at para 72.

   c. One should not talk about more serious allegations requiring more cogent evidence, Lady Hale In Re B at para 64.

   d. This approach is quite clear and was reaffirmed in Re S-B [2010] 1 A.C. 678 especially per Lady Hale at paras 12-13.

8. Mr Lazarus, appearing for Mr Misra, did not seek to challenge these propositions and I accept them.

9. Both counsel urged me to assess the veracity of the witness evidence by reference to the objective facts proved independently of their oral testimony, in particular by reference to the documents, and to pay particular regard to their motives and to the overall probabilities in line with the well-known dicta of Robert Goff LJ in The 'Ocean Frost' [1985] 1 Lloyd's Rep 1, at [57].

10. Both counsel also referred me to comments of Leggatt J (as he then was) in Gestmin v Credit Suisse [2013] EWHC 3560 (Comm) at [15] – [22] on the inherently imprecise nature of human memory, and the way the civil litigation process and the drafting of statements can make memory even more unreliable. Leggatt J's conclusion was that "the best approach is 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 is of course fully in accordance with the approach recommended in The Ocean Frost cited above and it is the approach I intend to adopt in this case.

11. The background evidence in relation Mr Misra and Mr Ross created credibility problems for both men. They both readily admitted in their course of their evidence to seeking to deceive HSBC bank into writing off a substantial proportion of the £10 million owed to it by Safestyle under a loan facility. The very promise that Mr Ross relies on to found his claim was said to be part of this conspiracy to deceive the bank.

12. In addition, in 1990, Mr Misra had received a custodial sentence of three and a half years for his part in a mortgage fraud and was an undischarged bankrupt. Mr Misra alleged that not only was Mr Ross an active participant in this mortgage fraud but they had both also been participants in an earlier car insurance scam. The car insurance fraud was said to involve the issue of backdated temporary cover certificates. For each certificate, Mr Misra said Mr Ross received £20 and he received a cut of either £5 or a meal from KFC.

13. There was no chain of private contemporaneous e-mails or texts directly between the two men during the crucial period of the debt write off plan against which their oral testimony could be tested. Mr Misra's explanation for this was that he was not a

'documents man'. He relied on his personal assistant, Rosie Fox, to communicate with people on his behalf.

The legal test of a sham agreement

14. It was common ground that the test I should apply when deciding whether documents signed by Mr Ross and Mr Misra were a sham or not is that set out in Snook v London and West Riding Investments Ltd. [1967] 2 QB 786 at p.802:

> "it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities … that for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

15. In Hitch v Stone [2001] EWCA Civ 63, Arden LJ identified the following points as having emerged from the authorities which have considered and applied the Snook test:

> "[65] First, in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties.
>
> [66] Second, as the passage from Snook makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.
>
> [67] Third, the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind

> them. In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship. [68] Fourth, the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding…. [69] Fifth, the intention must be a common intention (see Snook)…."

My overall conclusion

16. Having listened to six days of evidence, including seven hours of cross examination of Mr Ross and twelve hours cross-examination of Mr Misra, I was left in no real doubt on the central issue in the case. I am satisfied that on the balance of probabilities the SPA was not a sham but a genuine document, the terms of which were intended by both men to be binding. I am also more than satisfied on the balance of probabilities that Mr Misra did not promise Mr Ross that he would hold any Safestyle shares on trust for him. Before explaining my reasons for arriving at these two conclusions by reference to the evidence, it is necessary to say something about Mr Ross and Mr Misra and how they conducted their own affairs and the business of Safestyle in the run up to the central events of 2009 and 2010.

Mr Ross

17. Mr Ross is an astute and driven business-man. This is how he is described in his own current Linked-In profile. All of the witnesses called by Mr Ross who were asked about this description of him confirmed that it accorded with their own view of him. He is now 53. He grew up in Leeds as the youngest of four children in financially strained circumstances. In a magazine interview given in 2005, he described how by the age of 14 he was spending more time bunking off school to work on a farm than attending lessons. He described how he has always had an interest in making money. He left school at 16. After working for a time as an insurance salesman for two years, in 1985, still only in his early 20's, he became a self-employed insurance broker in Leeds advising clients on mortgages and life insurance. It was during this time that he met Mr Misra.

18. At the height of his involvement with Safestyle, Mr Ross would work 18 hour days running the management side of things while Mr Misra ran the sales and canvassing side. It was Mr Ross who principally dealt with Safestyle's professional advisors. By 2005, Safestyle had sales of £100 million a year and 2,300 staff. At this time, Mr Ross

led the lifestyle of a millionaire with expensive sports cars, a large house (Becca Hall), a chauffeur, a farm of his own and a wine bar. Having recovered from a serious illness in 2008 and insolvency in 2010, he is now back in the window installation business at director level.

Mr Misra

19. Mr Misra is slightly older than Mr Ross. He was born in India but moved to Bradford as an infant. He is a man with obvious energy and an imposing presence. He clearly commanded the respect of his sales work force. He was generally referred to by everyone in the company, including Mr Ross, simply as Mitu. When HSBC sent someone to investigate Safestyle, Mr Misra was reported as having a "Messiah-like status" amongst Safestyle's workforce.

20. Safestyle's former company accountant, Mr Lilburn (a witness called by Mr Ross) said the following about Mr Misra in his witness statement: "I built up an impression of him as an extremely clever man. He was always assessing angles and had an excellent memory". Having observed Mr Misra giving evidence over two days, I formed the same impression.

21. Mr Lilburn also said in his evidence that "Mitu's style was to deal with people face to face or by telephone […] It was unusual of Mitu to put anything in writing." This too was amply borne out in the course of the trial. Mr Misra expressed a consistent lack of interest in the details of agreements he had signed. When asked about such documents, he preferred instead to discuss the 'spirit' of the document. I initially suspected that this was something of a defensive affectation but I concluded in the end that it was genuine.

22. This is not to say that I concluded that it was safe for me to accept Mr Misra's evidence without caution. He had a conviction for fraud and did not even pretend to have been chastened or reformed by his conviction or imprisonment. He seemed to regard being caught as just one of those things that happen.

The start of the relationship

23. It was common ground that it was in the late 1980's, while Mr Ross was working in insurance, that he met Mr Misra. The precise circumstances are disputed but the two men clearly formed a close association. Mr Misra seems to have admired the chutzpah

of the younger Ross. In evidence, Mr Misra said that Mr Ross struck him as having "a beard in his stomach". Mr Misra explained that what he meant by this was that Mr Ross was wise for his age. Mr Ross said that Mr Misra often treated him as if he were his younger brother.

24. Mr Misra's evidence was that he and Mr Ross were involved in two separate scams: one concerning car insurance and the other involving mortgages. In relation to the mortgage fraud, Mr Misra said that he had protected Mr Ross and his then wife by not revealing their involvement to the police. Mr Booth submitted that I should reject Mr Misra's evidence of these two scams as a wholesale fabrication designed to damage Mr Ross's credibility.

25. It seemed to me that both of the alleged scams described by Mr Misra had more than a ring of truth about them. It is not necessary for me to make firm findings as to the precise nature and respective degree of involvement of the two men in either of the alleged scams.

26. I accept the thrust of Mr Misra's account of the two scams as plausible and reject the submission that they are a wholesale fabrication for the following reasons:

    a. In the course of their evidence both men had no hesitation or qualms about explaining their joint plan to deceive HSBC bank in relation to a multi-million pound facility. It seemed to me highly unlikely that Mr Ross would only have developed the capacity to act in this dishonest way for the first time in middle age.

    b. Being jointly involved in the scams of the type described by Mr Misra seemed to me to at least part of explanation for the high degree of trust and co-dependence which were the hallmarks of their relationship over many years.

    c. Mr Ross's assistance to Mr Misra when he was released from prison, in particular his agreement to "front" a company for Mr Misra and apply for a credit licence so that Mr Misra could trade notwithstanding his conviction for fraud and his bankruptcy, was consistent with Mr Ross being indebted to Mr Misra in some way.

27. However, I wish to make clear that I am not making any findings of fact in relation the allegations of what is said to have occurred in the late 1980s. They are far removed from the central issue in this case. I have dealt with them only because Mr Booth submitted that I should hold that the allegations made by Mr Misra were a recent fabrication designed to tarnish Mr Ross in retaliation for Mr Ross pleading Mr Misra's conviction for fraud.

28. My rejection of Mr Booth's submission did not in any event damage Mr Ross's case on the central issues in dispute in these proceedings. If anything, Mr Misra's evidence as to their early relationship tended to support Mr Ross's allegation that he placed an unusual degree of trust in Mr Misra.

The birth of Safestyle

29. When Mr Misra was released from prison in May 1992, it is not in dispute that Mr Ross provided crucial support and assistance to Mr Misra to get back on his feet. There were not many people I suspect who would have so readily fronted a company or applied for a credit licence for a convicted fraudster and bankrupt, still less go into business with one, but this is what Mr Ross did. It was Mr Ross who incorporated HPAS Ltd. ('**HPAS**') on 22 December 1992. He also applied for HPAS's credit licence because Mr Misra would not have been able to apply for this given his conviction and his undischarged bankruptcy.

30. I accept Mr Misra's account of the early years of Safestyle's trading. It was corroborated by the evidence of both Mr Anderson and Mr Nelson. Mr Anderson's oral evidence was measured. He did not pretend to recall details which he had no reason to remember. Mr Anderson was not close to either Mr Ross or Mr Misra but was closest to Mr Nelson. In his witness statement he said that Mr Ross was not involved in Safestyle at the very beginning. He said: "I knew that the Safestyle shareholding was split between Mr Misra, Mr Ross and Mr Nelson. I can't remember the exact split but I knew that was the pecking order."

31. Although Mr Nelson did not give live evidence because he was unexpectedly hospitalized shortly before he was due to appear, his witness statement is admissible under section 1 of the Civil Evidence Act 1995. It is consistent with both Mr Misra's and Mr Anderson's evidence about the early years of Safestyle's operation.

32. I also accept Mr Misra's evidence that it was he who invented the Safestyle name and how it came about that he, Mr Nelson and Mr Ross ended up having the following beneficial share of ownership by August 1993: Mr Misra 62.5%, Mr Ross, 20% and Mr Nelson 17.5%.

33. Mr Ross was brought in to assist with the management of the company. The former marketing director of Safestyle from 1994 – 2007, Andrew McDermott, said this of the two men in his witness statement:

> "Mr Ross ran what we called the "sane" departments, dealing with financial and legal matters and Mr Misra ran the "insane" departments, which dealt with sales and canvassing. Mr Ross thrived on meetings with lawyers and business professionals. They very rarely socialised or exchanged pleasantries but there was mutual respect and a functional understanding that they needed each other at that time to run an efficient business".

34. Mrs Ross put it more simply. She said the two men were like chalk and cheese but that they needed each other.

The 1993 Note

35. I accept the evidence of Mr Anderson that in 1997 he saw a signed handwritten note dating from 1993 which (amongst other things) set out the respective ownership shares of Mr Nelson, Mr Misra and Mr Ross. I also accept his evidence that it was Mr Ross who was seeking to rely on this note as part of the negotiation of the terms under which he was to acquire Mr Nelson's shares. Mr Anderson was brought in to mediate between the three men and so he had every reason to pay attention to what the note contained. Although in cross-examination Mr Ross was originally reluctant to accept that any such note existed, when pressed, he admitted that that there may have been a note of the type described by Mr Nelson.

Mr Ross as a 37.5% owner

36. There is no dispute that Mr Ross paid £200,000 for Mr Nelson's 17.5% interest in Safestyle in 1997. He thereby became the owner of 37.5% of the business. The resulting ownership split with Mr Misra was not documented in the usual way. To the outside world, it appeared that Mr Ross was the 100% owner. Mr Misra's 62.5% interest was, however, protected by an option agreement dated 12 November 1997. Under this option agreement, Mrs Misra's wife could acquire 62.5% of the company for £1 in the event of the death or mental incapacity of Mr Ross. It is obvious that the purpose was to hide Mr Misra's interest in the business from outsiders. It is a consistent pattern of behaviour in this case that agreements signed by Mr Misra and Mr Ross were kept not only from the outside world but even from senior managers at Safestyle.

Windowstyle

37. Safestyle's business grew quickly. Safestyle bought out its partner in the Windowstyle business which manufactured the windows which Safestyle sold. The true ownership of Windowstyle was also hidden. It appeared to be owned 100% by Mr Misra's father in law but in fact he had no financial or practical involvement in the business. He held 62.5% of the shares on trust for Mr Misra and 37.5% for Mr Ross i.e. the same shares as their interest in HPAS.

Mr Misra's Dominance

38. The division of beneficial ownership between Mr Misra and Mr Ross appears to have been reflected in the day to day division of power. Whilst Mr Ross had a great deal of autonomy to deal with administration and management, it was Mr Misra who remained the dominant influence. In a letter drafted by Mr Ross in March 2010, which I refer to in more detail later in this judgment, Mr Ross described graphically the balance of power with Mr Misra within Safestyle in these terms:

> "Even then, whilst Paula was in hospital expecting Nick you had me running round like an idiot sorting out the company incorporation, consumer credit licence, FNB agency…."

Mr Ross at some level felt both needed and to some extent mistreated by Mr Misra. When being asked about an online conservatory sideline for Safestyle which was Mr Misra's idea, Mr Ross said this:

> "It was one his ventures that he was happy to keep me out until such time as it needed proper managing to resolve the issues that it had created and then it was down to me to deal with that…. That was the way our relationship had run for 20 odd years"

Style Group UK PLC

39. In 2000, the various companies associated with Safestyle were reorganised under the umbrella of a PLC. The division of ownership remained unchanged at 37.5% for Mr Ross and 62.5% for Mr Misra. However, the public documents lodged at Companies House showed Mr Ross as the 79.26% shareholder and Mr Misra as the 20.74%.

40. In 2003 there was an amended shareholders' agreement entered into by Mr Ross and Mr Misra but nothing turns on its terms. At this point, business was booming. Mr Ross's 37.5% share of ownership was valued by Baker Tilly at £8.4 million.

The 2005 agreements

41. In 2005, a formal valuation of the Safestyle Group was obtained. This seems to have been prompted by the idea that Mr Misra and Mr Ross might sell the business. The company was valued at £30 million.

42. However, rather than sell, the decision was taken by Mr Misra and Mr Ross to refinance the company. HSBC agreed to lend £15 million to a new holding company, originally PIMCO 2285 Ltd but later renamed Style Group Holdings Ltd. As far as the bank was concerned, the purpose of the transaction was for Mr Ross to buy out Mr Misra. Mr Misra sold his shares to Style Group Holdings Ltd. for £12 million and loan notes to a value of £6.75 million. Mr Ross swapped his shares in Style Group UK ltd for shares in the new holding company and executed a guarantee in favour of the bank limited to £500,000.

43. Separate solicitors acted for Mr Ross and Mr Misra. At around this time a Mr Clive Gawthorpe became involved as an adviser to Mr Misra.

44. Mr Misra and Mr Ross signed a loan agreement dated 13 July 2005 under which Mr Misra lent Mr Ross £4 million. Mr Gawthorpe witnessed both signatures. The loan was interest free and was only repayable in certain very limited conditions.

45. The two men also signed an option agreement, drawn up by solicitors, under which Mr Misra could buy 62.5% of Mr Ross's share in the new holding company for a nominal amount. This mirrored the previous option agreement but was more direct in that Mr Misra no longer hid behind his wife.

46. Finally, both Mr Misra and Mr Ross entered into consultancy agreements with Style Group UK through corporate vehicles of their own. Mr Misra was entitled to receive £221,000 a year through his nominated consultancy company. Although he did not mention this in his witness statement, Mr Ross admitted in cross examination that a company in the Red Kite group owned by him received the same amount as Mr Misra. Neither Mr Misra nor Mr Ross or their nominated companies were obliged to provide any consultancy services in return for their respective consultancy fee income.

47. In cash terms, the upshot of the 2005 arrangements was that Mr Misra received a net cash benefit of £10.8 million out of which he lent Mr Ross £4 million. Because of the way the agreements were structured, the tax paid by Mr Misra was only at the 10% capital gains tax rate.

48. According to Mr Misra, the background and rationale for this suite of linked agreements was that he wanted to be free to do other things. He put it like this in cross-examination:

> "In my mind I was free to go and make and learn how to make movies without having the fear of having to look back over my shoulder thinking that if Safestyle went, everything went, so I was free. I had more room in my head to do what I wanted to do".

49. As to the option agreement, under which Mr Misra could acquire 62.5% of the shares, Mr Misra's evidence was that this was better than being an actual shareholder. He put it like this:

> "If the company got into trouble it would not drag me down with it. If the company did well I could always come back in, so for me it was a nice position to be in. […] It was better to have that potential than actually to be a 62.5% shareholder."

50. Mr Ross's case was that the 2005 share purchase agreement, the loan agreement and the option agreement were all shams. In his witness statement Mr Ross described the position in this way:

> "In reality the 2005 share arrangements were a sham. Whilst on the face of the documents Mitu sold his shares to me, there were no documents created to reflect our true shareholdings. …Our joint intention and understanding was that I continued to hold shares in Style as to 37.5% beneficially for myself and 62.5% beneficially for Mitu. Mitu was the beneficial owner of those shares without him having to exercise the purported option to acquire shares granted in his favour under the transaction documents. Basically, the transaction was a mechanism by which cash was extracted from the business (or rather the strength of the business) while allowing it to trade successfully."

The evidence in relation to the genuineness of the 2005 agreements

51. In addition to the evidence from Mr Misra and Mr Ross, I heard evidence on the nature of the 2005 agreements from Mr Gawthorpe and Mr Lilburn.

52. Mr Gawthorpe became involved from 1 June 2005. He had previously advised Mr Misra in relation to film ventures. He was involved in all the documents executed after the initial share sale and bank facility documents.

53. In relation to the option agreement, Mr Gawthorpe's understanding was that although the agreement was to be kept from the HSBC it was genuine as between the two men: "It was made very clear if Mitu wanted to take the option he had to make some arrangement and sort the bank out".

54. Mr Gawthorpe's evidence in chief was that his understanding was that Mr Misra was genuinely intending to leave Safestyle to concentrate on his other interests. When pressed about Mr Misra's intentions in cross-examination, Mr Gawthorpe's evidence was that his understanding at the time was that Mr Misra had sold his shares and was leaving.

55. It was put to him by Mr Booth that he was being unrealistic. His response was:

> ”No. As far as I was concerned this was very much, he had sold and this is the way of getting some monies back to John”
>
> “As far as I was concerned I was making sure that Mr Misra knew that he was no longer part and parcel of Safestyle and that therefore he would not be entitled to dividends … he would have to live off whatever consultancy fees he got”

56. It was not put to Mr Gawthorpe in cross-examination that he knew or ought to have suspected that the option and loan documents were actually shams.

57. Mr Lilburn said in his witness statement that his clear understanding of the purpose of the re-organisation was to release cash from the business for the benefit of Mr Ross and Mr Misra and that while they were on the face of it changing their share ownership it was “only on the face of it”. However, Mr Lilburn did not go so far as to say that his understanding at the time was that the agreements were shams. The main thrust of his evidence was that the way the business was operated in practice did not appear to onlookers to change very much.

58. For example, Mr Lilburn pointed out (and was not challenged on this) that throughout 2005 – 2008, Mr Misra retained his Safestyle driver and that Safestyle paid the insurance. However, Mr Lilburn did accept that between 2005 and 2008 both Mr Ross and Mr Misra initially backed away from the business following the 2005 re-organisation.

59. In cross-examination, Mr Ross not only maintained that the 2005 agreements were shams but he added that Mr Gawthorpe knew this. No such allegation of knowledge had ever been pleaded and no mention had been made of this in his witness statement. Quite properly Mr Booth did not adopt this allegation as part of Mr Ross’s case, which is why, as I have already noted, it was not put to Mr Gawthorpe. I have no hesitation in rejecting it.

60. Mr Ross accepted that after the 2005 transaction and the sharing of the £12 million neither he nor Mr Misra was working full time. He accepted that Mr Misra went to film

school after the refinancing was completed. When it was put to him that Mr Misra had spent a lot of time in India, Mr Ross declined to comment on the basis that he was not "Mr Misra's keeper". This struck me as a rather defensive response but is probably explained by the fact that after the 2005 documents had been signed, there was no particular reason for Mr Ross to keep tabs on where Mr Misra was, given that both men had to some extent stepped away from the business. The business could simply run itself with the assistance of the senior management. This is consistent with an interview he gave in late 2005 in which he said that the management team at Safestyle meant that he could choose when to get involved.

61. Mr Booth pointed to two documents in Mr Misra's name sent in late 2005 which raised concerns about management structure. One was a letter sent to Mr Lilburn in October 2005 and the other a memo addressed to Mr Ross, Mr Birmingham and Mr Lilburn. Both on their face were inconsistent with Mr Misra stepping back from the business to make films. They appeared to show a detailed involvement with and concern for management of the business. Mr Misra's response when these documents were put to him in cross-examination was to vehemently deny that he was the author of them or would ever have drafted anything like them. He said that his name appeared on them because Mr Ross wanted this for internal reasons.

62. Mr Booth was also able to point to an informal shareholders agreement in 2007 which Mr Misra was clearly referred to as being a "shareholder" of the new holding company. Mr Misra's response to this document was to say he could not account for what someone else had written. His more general response was that the documents signed in 2005 were not available within Safestyle. He accepted that members of staff were not told about the transfer of shares and the option agreements. He accepted that the staff probably perceived him still to be the 62.5% shareholder. Staff continued to receive monthly messages from both Mr Misra and Mr Ross, albeit that they were actually written by other members of staff.

Conclusion on the 2005 agreements

63. Standing back and considering the evidence in the round, in particular that of Mr Lilburn and Mr Gawthorpe, I was wholly unconvinced that the agreements signed in 2005 were shams. It seems to me to be quite clear that whatever Mr Ross's attitude was to these

agreements, Mr Misra went to some length including involving two sets of professional advisers to construct a suite of agreements which put him in a position which was even better than being an actual shareholder. He had the benefit of a large sum in cash, a generous consultancy income and an option agreement to reclaim his previous share ownership at any time. As between himself and Mr Ross, Mr Misra had no incentive or interest in the agreements being shams. I accept Mr Gawthorpe's evidence that what looked like a sale was intended to be a sale to Mr Ross albeit with Mr Misra having the right to come back in if he wanted to (and that it was clear that in these circumstances the bank loan would have to be paid off).

64. I find that both men had reached a point in which they wanted to pursue other interests and both thought they had the right to extract money from Safestyle to do so and to continue to do so by means of 'consultancy fees' and other benefits such as chauffeurs. Mr Misra clearly wanted to go to film school and did so. Mr Ross had his own Red Kite group of companies. I accept Mr Lilburn's evidence that both men initially at least stepped back from the business. The 2005 agreements reflect that. Mr Ross himself said in the magazine interview in 2005 which I have already referred to that the management systems he had put in place allowed him the luxury of choosing when he wanted to be involved in the Safestyle business (and when not).

65. Consistent with Mr Misra and Mr Ross stepping back from the day to day running of the business, Mr Birmingham and Mr Lilburn were given options to purchase 25 shares each in Style in October 2005.

66. All of the above evidence pointed to the 2005 agreements being genuine in their entirety. As to the two internal management documents in Mr Misra's name produced after the 2005 agreements were entered into, in my judgment, these were likely to have been requested by Mr Ross. It seems to me that this was part and parcel of both men keeping up the appearance of being involved when it suited them to do so. Even if I am wrong about this and they originated from Mr Misra, these two documents come nowhere near persuading me to consider the 2005 agreements were shams. Mr Misra maintained a significant albeit contingent interest in the business and was being paid a large sum of money to act as a consultant. It would therefore not be a surprise if on occasion he expressed a view on how the business was being run either at the request of Mr Ross or possibly without any such request being made at all.

67. As to the 2007 note in which Mr Misra is referred to as a shareholder, this inaccurate use of language is explicable because the option agreement was kept a secret from the senior management. It is consistent though with Mr Misra retaining a large contingent interest in the business which he could exercise at any time and with remaining a powerful figurehead for the business.

The 2007 refinancing

68. By the summer of 2007, around £9 million of the original 2005 loan had been repaid. The outstanding financing was rolled up and the loan and option agreements were amended in such a way that Mr Ross received a further £4 million and Mr Misra a further £6.75 million.

69. The fact that Mr Ross agreed to and signed these amendments to the 2005 package of agreements in order to receive what amounts to a dividend of £4 million from the company makes it in my judgment all the more difficult for him to say that the 2005 agreements were a sham.

70. The only other document signed in 2007 which is worthy of note is a guarantee signed by Mr Ross as security for the HSBC facility limited to £1.2 million. The following month, Mr Misra signed a contribution deed in the event that the guarantee was called up. Mr Misra's contribution to any liability was 62.5%. This was consistent with his option to re-acquire an interest in the company.

71. I now turn to the events leading up to the SPA itself. Mr Booth submitted that it was necessary to have full regard to the long build up to the 2010 SPA and to view it through the prism of those events.

The events of 2008

72. In 2008, two events occurred which drew Mr Misra and Mr Ross back into close contact with each other and Safestyle. First the main supplier of uPVC windows to Safestyle, Plastmo, got into severe difficulties. Secondly, Mr Ross became seriously ill and spent a number of months in hospital.

73. The significance of the Plastmo crisis is that it required Mr Misra to re-inject some working capital back into the company. Mr Misra contributed £500,000 in February 2008 and a further £550,000 for a short period in March 2008. Mr Misra' engagement was not merely financial. He gave a graphic account in cross examination of how he acted as a traffic marshal at Plastmo's premises at the heart of the crisis. The impression I gained was that Mr Misra rather relished getting involved again and averting a crisis by leading from the front. He also referred to Safestyle as his "baby". This emotional attachment appears to have been another motivation for getting back into the thick of it.

74. The second significant event of 2008 was that Mr Ross was admitted to hospital on 25 April 2008 for an operation. On 23 April 2008, Mr Ross executed a trust deed drafted by his solicitor in which he declared that he held shares in five companies (not including Safestyle) on trust for his wife and children. In fact, the operation did not go well and he experienced very serious blood loss and other complications. This led to him remaining in hospital until around the end of August 2008. His illness coincided with the severe economic and banking crisis of that year.

75. It is common ground that Mr Misra visited Mr Ross often while he was in hospital. Mr Misra was not challenged on his evidence that he promised Mr Ross as a symbolic gesture of support that he would not set foot in Safestyle's offices until the two men could walk in together. This they did in October / November 2008. By this time, the economic situation has worsened with Lehman Brothers' collapse only a few weeks before.

The financial situation at Safestyle in late 2008

76. By the time Mr Misra and Mr Ross returned to the Safestyle office, they found the company was in financial difficulty. The overdraft facility had been exhausted and a further £400,000 was needed to see the company through to the new year. Mr Lilburn referred to this as a "pinch point".

77. I find that Mr Lilburn was underplaying the situation in which the company found itself. I accept Mr Birmingham's evidence that the company was in fact in serious financial trouble.

78. Mr Birmingham was not challenged on the following evidence of financial difficulty:

    a. The company had missed the capital repayment to HSBC in March 2008
    b. The company had missed an interest payment in September 2008
    c. Payments to suppliers were being held back
    d. HSBC had put the company on monthly monitoring.

The dismissal of Mr Lilburn

79. Mr Lilburn was dismissed in November 2008. Mr Ross says that he was dismissed at the request of Mr Misra. Mr Misra says he discovered that Mr Lilburn had been keeping things from him. Curiously Mr Lilburn said that he did not know why he was dismissed. I do not need to decide precisely why he went. Mr Lilburn left to work for Mr Ross's group of companies and after his departure Mr Misra initiated an investigation into Mr Ross's use of company funds. This investigation was carried out by Mr Benson.

80. On 29 December 2008, Mr Misra injected £400,000 into the company by transfer. This took the total amount owed by the company to him at the end of the year to £786,000. By contrast, Mr Ross had taken money out of the company in 2008. By 31 December 2008 his debt to the company was £310,000. Mr Ross had also received £179,641 in consultancy fees paid to Mr Ross' company, Red Kite Holdings in the year to 31 December 2008.

Early 2009

81. Mr Ross's witness statement is strangely silent about the first eight months of 2009. The narrative section of his witness statement jumps from the end of 2008 (paragraph 29) to late summer / early Autumn of 2009 (paragraph 30). Mr Misra's defence is that the relationship between the two men broke down in in early 2009 as a result of (1) Mr Misra's belief that Mr Ross had misused company funds for his own benefit (2) the discovery of the poor state of Mr Ross's own personal finances. Mr Misra's case in this respect is clearly pleaded at paragraphs 20 – 26 of the Defence and denied in paragraphs 16 – 22 of the Reply.

82. I accept the evidence of Mr Birmingham that in early 2009 there was a "very, very emotional" meeting between Mr Ross and Mr Misra which was "intense" and at which it was clear that Mr Misra was very angry with Mr Ross. I also find that the reason for Mr Misra's anger was that he felt that while he had been putting money back into the business to keep it going in difficult financial situation, Mr Ross had been extracting money for personal use. It is not necessary for me to decide to what extent (if at all) Mr Ross had in fact misused company funds. My overall impression is that both men ran questionable personal expenses through the company. They relied on reconciliations from time to time on what expenses could and could not be recharged.

83. The point which matters for the purposes of these proceedings is the allegation that Mr Misra confronted Mr Ross in early 2009 because he *believed* that Mr Ross had put inappropriate personal expenditure through the company. This I accept. It is quite clear from the evidence I heard from Mr Birmingham and Mr Benson that they both believed that Mr Ross had misused company funds to a significant degree over a considerable period. Clearly this will have been the impression conveyed to Mr Misra at the time. This is further underlined and supported by the terse minutes of a board meeting on 1 April 2009 which record that it was resolved that "any payment or cost incurred which does not benefit the business must be reported to MM".

Mr Ross's financial position

84. At the same time that Mr Benson was conducting on Mr Misra's behalf an investigation into the use of company money by Mr Ross, there are a number of documents in early 2009 which strongly suggest that Mr Ross was struggling financially to keep his head above water. This period is important because it predates the period in which Mr Ross says there was an agreement to falsely depict him as having severe financial difficulties (in order to persuade HSBC to write off part of Safestyle's debt).

85. In February 2009, Mr Ross was overdrawn on both his home mortgage and his personal loan account. The following month, Mr Ross was £4,205 overdrawn with Barclays on his home mortgage. Another mortgage repayment was missed in May.

86. In April 2009 there is an unusual transaction in which Mr Misra transferred £125,000 to Mr Ross for one day and received it back again the next. Mr Misra's evidence was that

the purpose of this transfer was in order that Mr Ross could deceive someone into thinking that he had this sum to his name in order to be able to engineer further finance. In cross-examination Mr Ross said he could not remember what the purpose of this transaction was. I do not believe him. It is a very unusual transaction involving a large sum of money. The reason why Mr Ross does not want to admit to recalling the purpose of this transaction is no doubt because (a) it is likely to have been part of a deception of a third party which he is (rightly) embarrassed about (b) it provides evidence of serious financial difficulty in early 2009 well before the plan to deceive HSBC was hatched.

87. There was also objective evidence that Mr Ross was drawing on the company at the same time as Mr Misra was putting money back in. At the end of June 2009, the position is Mr Misra was owed £782,347 by the company and Mr Ross owed it £498,002. Mr Ross's position had worsened by some £200,000 since the last reckoning.

88. Finally, on 3 August 2009, Baker Tilly sent Mr Ross a report on the financial standing of his companies. The report considered the financial situation of a number of companies owned by Mr Ross. Baker Tilley's view was that the Red Kite Group was insolvent, the Nicky LLPs were profitable but were generating no cash (as they were repaying loans) and his Thorpe Park business was loss making. As to Safestyle, Baker Tilley noted that it provided only limited income to Mr Ross direct. The main flow of money was of course the consultancy agreement but that money was paid to Red Kite Group which Baker Tilley had found was insolvent.

89. The receipt by Mr Ross of this report and its content provides reliable independent evidential support for Mr Misra's allegation that in August 2009, he and Mr Ross had a meeting in which Mr Ross revealed that he was in a serious financial difficulty and was not going to be able to repay any of the money he owed the company. I accept this is what happened.

90. I find it entirely credible that having spent the first half of 2009 seeing what, if anything, could be done to rescue the situation, upon receipt of the Baker Tilly report on 3 August, Mr Ross realised that his other companies were beyond rescue against the backdrop of the severe financial downturn in the economy. I find that it was receipt of this report which prompted Mr Ross to tell Mr Misra that his financial position was dire.

91. There was some evidence of what Mr Ross had done to explore how his own companies might be rescued in the evidence of Mr McDermott. He was the marketing director of Safestyle from 1994 – 2007. The businesses which Mr Ross had invested in covered a wide range. They included financial services, a marketing agency, an IT company specialising in pet food ingredient tracking, a wine bar, a block of flats and land for property development. Mr McDermott looked at these businesses in early 2009 and made some suggestions as to how they might be improved. His clear impression in Spring 2009 was that they were "failing". I accept this was in fact his impression at the time. I also accept his evidence that when he asked Mr Ross why he had become involved in all these various businesses, Mr Ross' reply was "I thought I had the Midas touch". As Mr McDermott observed "It was fairly obvious the only business that he was involved in that had been successful was Safestyle".

92. I conclude that by 3 August 2009 at the latest, Mr Ross realised that his Red Kite companies were in grave financial difficulty, he could not put any funds into Safestyle or repay his debts to the company and communicated that to Mr Misra.

The debt write-off plan

93. The immediate background to the disputed assurance at the heart of this litigation is what both parties have called the 'debt write off plan'.

94. It is common ground that a plan was hatched in the later Summer / early Autumn of 2009. It involved an approach to HSBC bank to see if they would be willing to write off a significant part of Safestyle's debt. It is also common ground that the plan ultimately failed because the bank refused to write any debt off.

95. Mr Ross says that it was Mr Misra who came up with the idea of approaching HSBC to see if they would write off some debt "following a regular management meeting". Mr Ross described the plan in this way in his witness statement:

> "Effectively Mitu's plan involved presenting HSBC with a scenario which depicted me as being in very poor health (which was of course true), having a precarious financial position (which was not true as Mitu knew full well at the time) … and

> being unwilling and unable to drive the business forward during those difficult financial times but instead planning to dispose of the business to Mitu."

96. As to Mr Ross's own attitude to the plan, he says this: "I was not happy going along with this plan but given Mitu's control and his demanding nature I had little choice".

97. Finally and crucially, Mr Ross' case is that it was agreed between him and Mr Misra that no matter what the outcome of the approach to the bank to write off debt, Mr Ross was to remain beneficially entitled to 37.5% of the shares then in his name and to always receive all the benefits which flow from that. Mr Ross said in his witness statement:

> "The understanding we had on this point was not dependant on any outcome: this <u>was</u> the agreement. I would not have agreed to the HSBC plan otherwise; as I would be giving up a very significant financial interest"

98. Mr Misra in response says it was Mr Ross who first came up with the debt reduction plan following meetings Mr Ross had had with Mr Gawthorpe and Mr Pearson, that what Mr Ross wanted was 50% of whatever the bank agreed to write off. He says he reluctantly went along with it even though he personally thought it would not succeed.

The meeting with Mr Gawthorpe in September 2009

99. I accept Mr Gawthorpe's account of the background to and content of his meeting with Mr Ross in early September 2009. I find that it was Mr Ross who initiated the contact with Mr Gawthorpe by telephone. It seems to me entirely plausible that following receipt of the Baker Tilly report, Mr Ross would have thought it worthwhile to discuss his own position and that of Safestyle with Mr Gawthorpe, whom he knew to be a trusted advisor of Mr Misra. I accept that Mr Ross presented himself at this meeting as being "virtually bankrupt".

100. Mr Gawthorpe clearly felt that what he was being told by Mr Ross was accurate and not a pretence. It is likely that Mr Ross showed Mr Gawthorpe the list of assets and liabilities that Mr Pearson had prepared. I find it entirely plausible that Mr Ross would have discussed the potential impact of his insolvency on the company's loan covenants and

that the way forward was for Mr Misra to purchase the company (at the lowest possible price).

101. I also accept Mr Gawthorpe's evidence that he had not spoken to Mr Misra before seeing Mr Ross and that at the end of the meeting Mr Gawthorpe told Mr Ross that he had better go and speak to Mr Misra and explain his full position.

102. Mr Gawthorpe's account of the meeting is consistent with Mr Misra's account of Mr Ross coming to see him and presenting the plan as something which he had already discussed with Mr Gawthorpe. Mr Misra's evidence seems to me to be entirely reliable when he said of Mr Ross at this point: "What was clear was that Mr Ross was facing an IVA unless he got something out of the HSBC Plan". I accept Mr Misra's evidence that what Mr Ross wanted was a 50% cut of whatever debt write off could be achieved.

103. I accept Mr Gawthorpe's assessment of the situation as accurate: "It was very clear to me that Mr Ross would have to leave the Company and Safestyle. He was manifestly insolvent and his personal situation was threatening to bring down the Company".

Was there an assurance of a continuing 37.5% shareholding?

104. Mr Ross's allegation that Mr Misra assured him that whatever the outcome of the debt write off plan he would continue to be the beneficial owner of 37.5% shareholding first needs to be tested against the inherent probabilities. Firstly, I find it almost impossible to envisage why Mr Misra would make such a promise or even why would Mr Ross would even ask for it. As I have found, Mr Misra was angry with Mr Ross for misusing company funds and had been told he was insolvent. What Mr Ross wanted was money to stave off insolvency. His one remote chance to avoid bankruptcy was to persuade Mr Misra to release money to him as part of a buy-out by Mr Misra.

105. Secondly, in the circumstances leading up to the write off plan, as I have described them above, if a promise of an unconditional continuing beneficial ownership had been made as the price for obtaining Mr Ross's co-operation with the plan, I would expect this to be recorded by Mr Ross in some form. He had recorded his beneficial ownership rights on previous occasions directly and indirectly, notably in the 1993 Letter. He had himself signed a declaration of trust for his other corporate interests only a few months earlier. Even the tried and tested method used by Mr Misra and Mr Ross to protect their

interests against each other (an option agreement) or a blank transfer document (another method used by the two men inter se) would have been an obvious way of recording such a promise.

106. Mr Ross' explanation for why no written evidence of the alleged promise of continuing beneficial ownership exists is that he trusted Mr Misra. However, as I have found, the men's relationship though originally one of close trust and confidence, since at least December 2008 had become strained, tense and volatile. In these circumstances, the omission to record the alleged promise of a continuing unconditional beneficial ownership is inexplicable especially when it had been done in one way or other on previous occasions at times when there were far fewer strains on the relationship.

107. I accept that Mr Misra told Mr Ross that if the plan worked he would look after him. Mr Misra's account is supported by one of the few emails in evidence which he clearly drafted himself. In the draft sent to Rosie Fox on 7 March 2010, Mr Misra discussed a number of ways in which Mr Ross might be supported. This included a legacy payment, a salary and other supplementary payments. Importantly, the note contains the question "What would have happened, had the bank written off part of the loan?". In my judgement, the reason why this question appears in this draft is because it was a point of discussion between the two men. It sounds like it is the echo of a question that Mr Ross must have asked Mr Misra. Mr Misra's answer to the question is that Mr Ross would receive 37.5% of the amount the bank writes off minus any sum owed by Mr Ross to the company.

108. Whilst it is true that this note dates from March 2010 and is in that sense not exactly contemporaneous with when the men were first discussing the terms of the debt write-off plan, it provides support for Mr Misra's oral evidence that what was discussed as being a possible reward for the success of the bank write-off plan was a cut of the write off sum and not a continuing beneficial share ownership.

109. Not referred to in this note was a suggestion that Mr Misra might purchase a house for Mr and Mrs Ross. In cross examination, Mrs Ross recalled going to see a house with Mr Misra in late 2009 or early 2010. This too is consistent with Mr Misra promising Mr Ross that he would take care of him.

110. I accept Mr Misra's evidence that if he told Mr Ross that the plan failed and he did not re-aquire full ownership of Safestyle, he would start up again elsewhere. Mr Misra's evidence in this regard is supported by the evidence of Mr Anderson. Mr Anderson struck me as an entirely straightforward witness. I accept that by October/ November 2009, he and Mr Misra were a long way down the path to making the arrangements such that Mr Misra could in effect migrate the Safestyle business to Virgo if necessary.

111. Mr Misra had also set up Kerport in which his brother and Mr Birmingham were to have an interest as another potential vehicle to carry on the Safestyle business. Significantly, Mr Misra did not offer Mr Ross any shareholding or beneficial ownership in either Virgo or Kerport. The fact that Mr Ross was not promised any beneficial interest in any potential successor to the Safestyle business undermines his case that Mr Misra offered him a continuing beneficial ownership of Safestyle.

The renewal of the HSBC facility in September 2009

112. Running entirely independently of Mr Ross's discussions with Mr Misra and Mr Gawthorpe, HSBC intended to review the banking facility. The review date of September 2009 had been regularly noted in internal bank memoranda. In order to assist the bank, Deloittes were instructed to produce a further report on the company by way of an update of their original Solar I report. The Solar II report was received in draft by Safestyle on 28 August 2009. This report and the Group accounts were forwarded to the bank as a result of which HSBC decided to renew its facility on 29 September 2009 (despite some concerns about Mr Ross's personal financial situation).

113. As a result of this renewal, Mr Misa received back the £900,000 he had lent to the company in order that it could see out the challenges of late 2008 / early 2009 within days of the refinancing being obtained.

The attempt to implement the debt write off plan

114. Unsurprisingly HSBC did not react positively when the debt write off plan was presented to them on 12 October 2008. The bank's internal memoranda provide a contemporaneous accurate account of what they were told. In summary, the bank was informed that:

a. Mr Ross was resigned to his own personal insolvency because he needed £5 – 6 million to settle his personal creditors.
b. Mr Ross was due to go back to hospital soon for an appointment and did not wish to carry on with Safestyle.
c. His restaurant business has now closed but he has signed a rent guarantee for £80k per year
d. Mr Ross's Red Kite businesses had got into very bad trouble.
e. Mr Ross's prime asset is his shareholding in Safestyle but "he knows that the bulk of any sale proceeds will go to repay the bank and that any benefit to him may be limited".
f. Mr Misra has the ability to take the Safestyle salesforce away to a newco if he decides to set up in competition and that without that salesforce the trading performance will quickly deteriorate.

115. It is clear from the bank's own comments that they were highly suspicious about the story they were being told. The notes record the difficulty they had in determining how much of what they had been told was scripted and how much was genuine. The bank memo records this comment: "Given the recent supportive Deloitte review, acceptable trading and brand name, we are concerned that we are being targeted to enable Misra to acquire the business at a significant discount and at the bank's expense." The bank also suspected that Mr Ross was motivated by the possibility of a payment in the future from Mr Misra. The bank in other words had apprehended what Mr Misra said in his evidence was in fact thecase i.e. that Mr Ross would receive a cut of any debt write-off.

116. There is no need in this judgment to examine in detail all the details of the various machinations between the bank, on the one hand, and Mr Ross, Mr Misra, Mr Birmingham and their advisers, on the other, following the initial presentation of the debt write off plan. The intention of Mr Ross and Mr Misra was to persuade the bank that their only viable option was to write off Safestyle's debt. Mr Birmingham and Mr Robinson certainly at one point both came very close to deploying resignation letters in such a way that it was intended to deceive the bank into believing that they had already resigned when this was not the case. Mr Birmingham's attempt to explain his resignation letter in cross-examination was not at all convincing.

The failure of the plan

117. The reason that it is not necessary to go into the details of all the machinations of the write off plan is that it failed. The bank refused to consider a write-off of any of the debt. By mid-December the debt write-off deal had morphed into a transaction which involved Mr Ross selling his shares to Mr Misra for £1, agreeing to transfer his intellectual property and Mr Misra taking over the HSBC borrowing. I accept Mr Gawthorpe's evidence (on which he was not challenged in cross-examination):

> "It was clear after that meeting [i.e. the meeting on 23 December 2009 attended by Mr Ross, the bank's solicitors and Mr Ross's solicitors] that Mr Misra would be buying the company with all (or at least the vast majority) of the HSBC 2009 loan in place"

118. The reason why Mr Booth did not seek to challenge Mr Gawthorpe's account of the progress of the negotiations with the bank from 12 October to the end of January 2010 (as set out in paragraphs 49 – 104 of his witness statement), was that Mr Ross's case is that the only reason he went along with the new plan as it developed was because Mr Misra had promised that he would hold shares on trust for him. Mr Ross put it like this in paragraph 47 of his witness statement:

> "There was absolutely no point in me selling my shares to Mitu for only £1 had I not trusted Mitu to honour our agreement"

119. The way Mr Booth put it was that it made no sense for Mr Ross to jump out of Safestyle without the parachute of this deal as his protection. He invited to me to find that at a meeting in early February, Mr Misra removed the parachute by reneging on the deal and it was this that plunged Mr Ross into insolvency.

120. Mr Lazarus' submission was that Mr Ross' own financial state was so parlous by the last quarter of 2009 that insolvency was inevitable and that Mr Ross was willing to co-operate in return for a much more modest assurance that Mr Misra would take care of him. Finally, it was Mr Lazarus' submission that there was no betrayal of that promise (or any promise) in early February 2010.

Mr Ross' insolvency

121. In my judgment the available objective evidence points unequivocally to Mr Ross being insolvent by the end of 2009. Throughout the period in which he and Mr Misra are seeking to persuade HSBC to write off part of the Safestyle debt, Mr Ross was facing a string of demands from creditors:

    a. On 13 October 2009 he was served with a statutory demand from Mathew Clarke Wholesale for £10,350.63 and was £70,244.85 overdrawn on his Barclays current account
    b. On 23 October 2009 Brewery Wharf demanded payment of £21,501.68 in cleared funds.
    c. On 5 November 2009 Barclays made a demand for £87,897.89 under a guarantee for the failed Waterfront wine bar business.
    d. On 11 November 2009, he received a letter demanding immediate payment of £21,501.68.
    e. On 16 November 2009 Mr Gawthorpe asked Rosie Fox for £10,000 to cover a tax liability of one of the Nicky LLPs. Because Mr Ross cannot pay, he asked Mr Misra to cover the whole liability.
    f. On 23 November 2009 Mr Ross's mortgage direct debit payment of £2,974.68 was returned unpaid.
    g. On 18 December 2009 a mortgage payment of £2,974.68 on Woodhouse Farm was missed
    h. On 31 December 2009 Mr Ross still owed £503,977 under his directors' loan account

122. In addition to the documentary evidence, Mr Misra was not challenged on his evidence that between Christmas and New Year 2009 Mr Ross asked him for a loan of £15,000 "knowing he would not get it back".

123. On 13 November 2009, a three-page Excel spreadsheet was prepared by Mr Ross and sent to Mr Misra. This set out his overall debt / asset position. The net deficit figure was shown as £5,024,999. Only the first page was subsequently sent to the bank along with various bank statements and demand letters.

124. Mr Ross's case is that this spreadsheet was created as part of the debt write-off plan and was designed to exaggerate the seriousness of his financial position. However, save for one exception, I was not persuaded that it significantly distorted Mr Ross's actual

financial situation. The one respect in which it overstated Mr Ross liabilities was in relation to the £1.2 million personal guarantee. There should have been a corresponding entry in the asset column to take account of the fact that if he were sued on the guarantee, Mr Ross could seek a 62.5% contribution from Mr Misra. That could not be included in the document because the bank did not know anything about the contribution deed.

125. However, subject to the adjustment required for the personal guarantee entry, Mr Ross was not able to point to any of the other liability entries as being overstated. This was not surprising because they were all backed by documents sent to the bank.

126. As to the assets described in the document, their value was necessarily estimated. In cross-examination, Mr Ross accepted that the value of Becca Hall may have been closer to £1.4 million than the £2 million stated in the document and Woodhouse Farm may have been worth only about £400,000 rather than the £800,000 stated. The final asset referred to on page 1 of the three-page spreadsheet (Thorpe Park) may have been slightly undervalued at £700,000 when its actual value was more like £900,000. The figures accepted in cross-examination were what the properties in question were in fact sold for.

127. Mr Ross also accepted that the second page of assets may have been overstated because no apportionment had been applied to take account of co-ownership. The third page of corporate assets: Redkite Holdings, Redkite Properties, St Albans Harehills, Waterfront Winebars Ltd was not sent to the bank. It was not suggested that there was any sinister reason for this. The overall position was broadly speaking neutral. The assets were near 100% mortgaged and the assets generated only a small net income of £20k a year.

128. The picture presented in the spreadsheet is broadly consistent with the spreadsheet produced by Baker Tilley in August 2009 which I have already referred to.

129. Whilst the two spreadsheets I have just referred to are consistent with each other, they both differ from the spreadsheet of assets and liabilities produced in September 2009 which showed Mr Ross's net worth as being in the order of £3.8 million. Unlike the two other spreadsheets, the September spreadsheet recorded Mr Ross 100% interest in Safestyle as £3.75 million. It is not at all clear how this figure was arrived at.

130. In the course of giving his evidence, Mr Ross said that he had never prepared a spreadsheet which accurately set out his own personal view of his financial situation. His case was that in the documents he produced he was always either overstating his overall position e.g. to HSBC to get approval for a facility in September 2009 or understating it e.g. to HSBC in November in order to persuade the bank to write off a significant part of the Company debt.

131. Mr Ross said that he believed his interest in Safestyle was worth about £7 million in late 2009. Mr Booth sought to persuade me that although Safestyle had gone through a difficult period in 2008, the company had turned the corner by late 2009. He invited me to find that in the circumstances, Mr Ross's share in the company had a real and significant value.

132. I accept that the performance at Safestyle had improved in the course of 2009 but the conclusion Mr Booth sought to draw from this in my view ignored the practical reality of the situation Mr Ross found himself in. Putting aside his interest in Safestyle for one moment, he was clearly otherwise hopelessly insolvent. By December 2009, his other companies had failed. His net deficit was indeed around £5 million and he had even had to borrow money from Mr Misra to keep his head above water between Christmas and the New Year.

133. Turning now to his interest in Safestyle, by the time the write-off deal appeared to be doomed to failure (in December 2009) Mr Ross was totally dependent on Mr Misra. If Mr Misra walked away from Safestyle and took the bulk of the sales force to a new company, Mr Ross's interest would be virtually worthless. The same would be true if the company went into administration.

134. Mr Ross might theoretically have realised a small sum had the company been sold as a going concern to a third party. When Sun Capital expressed an interest, their indicative offer was £16.1 million including £10.2 to the bank and £1 million in cash to Mr Ross and £4 million in loan notes. If Mr Misra had been prepared to support this deal, the most Mr Ross would have realised would have been just over a million pounds in immediate cash. This was nowhere near sufficient to rescue him from insolvency. However, even this was theoretical because, by this time Mr Misra wanted to force

through a purchase by him. Mr Ross was therefore trapped. If he revealed all to the bank, they would have put the company into administration and he would become bankrupt without any prospect of any support from Mr Misra. The only option open to Mr Ross was to co-operate with Mr Misra.

135. I therefore accept Mr Lazarus's submission that Mr Ross was indeed insolvent by December 2009 and that when it was clear that the bank write-off plan was not going to succeed, he agreed to co-operate in the transfer of his interest in Safestyle to Mr Misra for a nominal sum in the expectation of being looked after. He did so because he had no better option.

The SPA

136. A draft SPA had been sent to Mr Misra by Mr Ross' solicitor, George Davies, on 24 December 2009. During January 2010 Grant Thornton worked to finalise their report on Safestyle for submission to HSBC.

137. On 5 January 2010, there was a meeting attended by Mr Ross, Mr Ross' solicitor, Mr Misra, Ian Marwood of Grant Thornton and Mr Gawthorpe. The notes of that meeting refer to HSBC not being willing to countenance a debt write off.

138. The notes refer to Mr Marwood of Grant Thornton saying that Mr Ross is "losing out as selling shares for £1". Mr Misra is recorded as saying that he wants Mr Birmingham to be managing director, his brother as sales director and Mr Ross as an employee. It refers to Mr Ross assigning trademarks to the company in return for the company writing off his debt. The meeting is recorded as having ended with discussion about a term sheet being issued by HSBC to state its proposed facility terms, subject to credit committee approval.

139. There is nothing in these notes to indicate anything other than a genuine transaction being genuinely negotiated between all the parties. Mr Ross's solicitors act entirely as they would be expected to act in relation to a situation where a refinancing is proceeding and Mr Ross is facing the real risk of bankruptcy.

140. Clause 8 of the SPA is an entire agreement clause in a conventional form and clause 2 states that the shares transferred are free from any encumbrance. Both clauses are

inconsistent with Mr Ross's claim in these proceedings. There is no evidence that HSBC insisted on either clause.

141. The contract of employment signed for Mr Ross's benefit on the same day as the SPA gave him an entitlement to £40,000 a year. Its existence is consistent with Mr Misra's evidence that he promised to help Mr Ross.

142. The evidence I heard of the day the SPA was signed did not contain the slightest hint that Mr Misra and Mr Ross had successfully pulled the wool over the eyes not only of HSBC but also of all their respective professional advisers. On the contrary, all the objective evidence in the lead up to the signing of the SPA in February supports Mr Misra's case that it was a genuine transaction.

143. Although Mr Ross's case received some support from the evidence of Mrs Ross that she recalled there being some agreement that shares be held on trust, I find this evidence wholly unconvincing. Mrs Ross had no involvement in Mr Ross's business affairs. Her evidence was vague and, in my judgment, represents her doing her best to remember events now over nine years ago, albeit inaccurately. I find her evidence to be unreliable.

The aftermath: was there a betrayal?

144. On Mr Ross's case, almost immediately after the SPA was signed Mr Misra reneged on their deal in an angry confrontation in his home in early February. Mrs Ross said that she remembered this meeting and Mr Misra shouting and storming out slamming the door. She says the meeting was in Mr Ross's study and says she recalls it was in early February because this was just after their wedding anniversary.

145. Mr Misra says he agreed to support Mr Ross in his IVA and went away to India after the SPA was signed. He says that when he returned in early March he had a difficult meeting with Mr Ross about the details of the help he expected. Following that meeting he sent a letter to Mr Ross explaining what support he was willing to provide going forward.

146. Mr Ross accepted in cross examination that on his case what Mr Misra did was "the worst act of criminality or immorality" he had suffered and not very different from Mr Misra "coming into his house and helping himself to millions of pounds of cash and forcing him into bankruptcy".

147. Mr Ross's case is not supported by any contemporaneous correspondence or other documentation. Two days after the SPA is signed, Mr Ross wrote in entirely neutral terms to Mr Maud at Rushbond (the freeholder of his Waterfront Wine Bar business) about his impending IVA. The e-mail is completely at odds with his allegation that he was unexpectedly pushed into insolvency by Mr Mira's betrayal. It is entirely consistent with Mr Ross believing that an IVA has been inevitable for some time. He says "I have done everything I can to fend it off but the time has come. I have seen some Insolvency people and I am seeing them again tomorrow so I expect they will contact you next week. I am sorry it has come to this".

148. Moreover in the following weeks, there are a series of entirely normal and friendly interactions with associates of Mr Misra, including Rosie Fox and Mr Gawthorpe, about the Nicky LLPs and his IVA. There is nothing whatsoever in the tone and content of this correspondence to suggest that Mr Ross has been betrayed by Mr Misra and plunged into bankruptcy as a result. In this correspondence, Mr Ross starts most of his e-mails to Rosie Fox with "Hi Rosie" and signs off with "cheers John". I will give three examples from this correspondence.

    a. On 12 February, Mr Ross forwarded his draft IVA proposal to Mr Gawthorpe with the following comment:

        "Hi Clive, this is Marks first stab, I would be happy to receive any comments you may have"

    b. On 19 February 2010, Mr Ross was asked to sign some documents concerning the Nicky LLPs and responds as follows:

        "Hi I don't mind. Good luck when you speak to him! Cheers John"

    c. On 9 March 2010, he wrote to Rosie Fox in these terms:

        "Hi Rosie, I am fine thank you, hope you are too. Sorry for creating all this additional work. I am sure you have enough to do. … cheers John"

149. In my judgment, it is inconceivable that Mr Ross would have been writing in this way to Rosie Fox or Clive Gawthorpe if he had been cheated and betrayed in the way he says

he was within a day or two of signing the SPA. The tone and content of the correspondence is also inconsistent with his attempt in cross-examination to paint himself as being in a state of shock so profound that he was unable to eat, drink or sleep. The correspondence in February and early March strongly suggests that: (a) nothing unsurprising happened in early February at all (b) Mr Ross had no direct communication with Mr Misra still less was the victim of a face to face betrayal (c) Mr Ross simply got on with arranging his IVA and dealing with other business matters, including in particular the administration of the Nicky LLPs in the same way that he had before the SPA.

150. I therefore do not accept Mr or Mrs Ross's account of the dramatic confrontation in early February. Mrs Ross description of Mr Misra being angry and storming out made no sense even on Mr Ross's case. It ought to have been Mr Ross being angry and bitter at the unexpected betrayal by a cold and calculating Mr Misra.

The meeting in early March

151. I accept Mr Misra's account of his meeting in early March 2010. I find it entirely plausible that Mr Misra would have taken some time off after the SPA was signed returning to work in early March. I find it entirely reasonable that Mr Ross would want to discuss the details of future assistance he might expect to receive. Whatever was discussed at the meeting, the upshot of what was then on offer is set out in Mr Misra's draft of a letter sent to Rosie Fox on 7 March 2010. The draft sets out what future assistance Mr Ross might expect. It is common ground that the final version of this letter is hand delivered to Mr Ross sometime thereafter.

The unsent letter of 24/25 March 2010

152. The strongest evidence in support of Mr Misra's case that there was no betrayal at all (whether in February or March) comes curiously enough from Mr Ross in the form of a letter he drafted to Mr Misra.

153. On 24 March 2010, Mr Ross spent nearly four hours composing a letter to Mr Misra in response to his offer of future assistance. Although he did not in the end send it, it is clear from the meta data how long he spent drafting it. It is also clear that he printed it off the following day (25 March 2010) and signed it. When he printed it off, he signed at the end of page 2 rather than page 3 (it seems by mistake). He kept the printed copy

which he signed. Mrs Ross also said that she remembered Mr Ross working on an important letter to Mr Misra at around this time.

154. The letter begins: "Hi Mitu, I have to put this in writing because you would jump down my throat before I got to the end of the first line"

155. There are three points that I take from this introduction. First, the use of 'Hi Mitu' is in my judgment inconsistent with the allegation that Mr Ross had been grievously betrayed by Mr Misra only a few weeks beforehand. Secondly, the opening line suggests that the purpose of the letter is to set out Mr Ross's own personal account of their past together which if he had attempted it face to face, Mr Misra would interrupt or contradict him on. In other words, the purpose of the letter is to say some things which Mr Misra might not welcome being reminded about. Thirdly, the letter is clearly intended to be a private communication so there was no need for Mr Ross to be anything other than completely candid about what had been agreed between the men.

156. The substance of the letter continues as follows (with paragraphs numbered inserted in [ ] for ease of reference only):

> "[1] You may recall in 1992 when you asked me what to do to make money I arranged for you to have a job working for Gary and Paul at Daimler windows.
> [2] A short while later you asked me to set up a window company with you because there was loads of money in it!
> [3] Because I was still doing mortgages I couldn't (nor did I want to) do windows full time but I agreed to front the company and help you as much as I could and in return you gave me 20% (even though it was 100% in my name)
> [4] Even then, Whilst Paula was in hospital expecting Nick you had me running round like an idiot sorting out the company incorporation, consumer credit licence, FNB agency etc.
> [5] It didn't take long till you had battered me to come to work for you full time, giving up my failing business, my Law degree, and subjecting my family to having a part time husband and father. It used to be a standing joke that the way to see more of your family was to get divorced but it was true. You allowed more time off to divorcee's than you did to married men. I believe the greatest strain on my marriage was the fact I constantly missed family engagements, parents evenings etc, etc. For the record, I did not leave Paula for another woman (I did not see Deb till much Later) I Left because I could not find a balance between working with you and living with her!
> [6] When you bought the Aston I was pleased for you, people still talk about the "Most expensive car" but that doesn't justify sending people half way around the world or having Mezzo make promotional videos. At the time you were building the house and whilst I don't think there is anything wrong with it you cannot deny you used every contact, supplier or member of staff you could that was of any use.

[7] I remember having a conversation with you in Leeds when I was buying Jamie's shares were you agreed to allow me to increase my share to 40% only to renege later saying that you needed the extra 12.5% to incentivise people in the future. When you finally did give away shares you did it pro- rata.
[8] When you and Mark established Virgo (entirely on the back of Safestyle) you told me that you and I had the same proportions as we had in safestyle but it would be between you and me because Mark would not have me as a co shareholder.
[9] Conservatories on line was another company (set up entirely on the back of Safestyle) which you insisted I had nothing to do with, registering everything in Manchester in other people's names and promising shareholdings. Telling me to keep my nose out, that is until it was totally f**ked
[10] As I recall you tried to buy a stake in Mezzo, put Andy in, and then pulled out, whilst they were a supplier of safestyle I am sure your interest was purely from a selfish point as you pursued your movie ambitions.
[11] Then their was the LA debt business you engaged me in the initial start up, including having me put money in. At a meeting at Last Cawthra, some time later we were discussing Style finance which was becoming entangled with LA debt I don't remember exactly what was said but I might have said that I fancied doing something were I would be the major shareholder. I had set up Thorpe park finance and so it was agreed that you would take over Style with Mark and I would have nothing to do with it. Then over the course of the next few days you turned it around completely so that I had to give you £600,000 Mark £ 60,000 and take Style to Leeds.
[12] I understand Safestyle currently buy the ten year service watches from your neighbour at Shadwell, the same place you got Joseph's christening present!
[13] There has been numerous examples where you have changed the rules, I have always stood by you blindly whilst you have broken whatever legal or moral rule suited you at the time, to the benefit of safestyle or not. On numerous occasions I have picked up the pieces, cleaned up the mess and kept the business going.
[14] We were sat outside Chapel Allerton hospital in late July 2008 when Steve Birmingham called and told you we needed £3 million pounds for the end of August, you passed me the phone and it never crossed your mind again……You might think you turned it around in 2009 but there were a lot of things done in the last quarter of 2008 things that reflected in the results as early as Jan 2009. And then there is the latest farce with the Bank, we used all your cronies from Manchester, followed their advice all the way, didn't get what we wanted and so as usual you need someone to blame, anyone, because it couldn't possibly be you. As usual that person was me!
[15] Then after all that, you used the same idiots to deal with the Nicky llps
[16] I know what I have done, through my own misguided ego I have lost everything I had, I risked far more than my own financial security I risked that of others for which I had no right and I am truly sorry but I never tried to scank you, I just didn't think.
[17] On balance I don't believe I deserve to be penalised to the tune of 27.5% and £181000 a year."

157. Mr Lazarus highlighted the fact that in paragraphs [7] – [11], Mr Ross sets out a number of grievances based on Mr Misra breaking legal or moral rules when it suited him.

Paragraph [7] explicitly alleges that Mr Misra reneged on a share ownership promise to Mr Ross. Mr Lazarus makes the powerful submission that if Mr Misra had really promised Mr Ross a beneficial ownership of 37.5% interest in Safestyle however the debt write-off plan turned out and had reneged on it only a few weeks earlier, it is inconceivable that he would fail to mention it in this section of the letter. On Mr Ross' case, in terms of its gravity and moral repugnancy it dwarfs the other grievances which he does refer to.

158. Mr Ross cannot say that the bank write-off plan was too recent to be worth mentioning at all. When he says in paragraph [14], "And then there is the latest farce with the Bank", he is clearly referring to the debt write-off plan. He describes the failure of the plan prosaically as "we didn't get what we wanted".

159. He does not say anything at all about any unconditional assurance of a continuing shareholding held on trust, or any sham agreements (either in 2005 or 2010), nor does he refer to any secret deal between the two men or anything about a betrayal of such an agreement. If Mr Ross's evidence of a private agreement and sudden and unexpected betrayal by Mr Misra were true, there would be no reason not to mention it here. The obvious culmination to this letter, if Mr Ross's evidence were true, would be an account of how Mr Misra had lured him into signing an agreement to give away his shareholding for £1, had then turned on him and pushed him into insolvency.

160. Far from saying anything along these lines, the final part of the narrative of the draft letter (para 15) refers to the post SPA communications of February as consisting of nothing more than "dealing with the Nicky llps".

161. Furthermore, after concluding the narrative section, Mr Ross sums up the situation as that he has "lost everything". But far from saying that his loss has been caused by fraudulent deceit or a betrayal by Mr Misra, Mr Ross says the reason he has lost everything is his own "misguided ego" and the risks he took with his own financial security. This is plainly a reference to his own failed Red Kite business ventures.

162. The last paragraph of the letter is plainly a reference back to what he has been offered by Mr Misra in his March letter. Instead of a 37.5% interest and a consultancy fee of £221,000 a year, all Mr Ross has been offered by Mr Misra in the March letter is 10% of

sale proceeds and a £40,000 legacy salary. What Mr Ross is saying is that "on balance" i.e. taking account of the whole of the narrative he has just set out, he does not deserve to be penalised in this way. However, what Mr Ross is not saying is: 'You promised me in late 2009 that you would hold my shares on trust whatever the outcome of the debt write-off plan. You lured me into signing away my shares and then you reneged on that deal immediately afterwards. You cheated me out of my only remaining asset".

163. Mr Ross's only explanation for failing to say anything like this was that it was not necessary to do so. I disagree. The letter is his own personal reckoning with Mr Misra. It set out detailed grievances and apportioned blame for Mr Ross' own financial situation. If Mr Ross's account of events given in his witness evidence in these proceedings were true, this letter is the one place in all the documentation generated in this case in which it would be expected to appear. Although I have already found that Mr Ross has failed to persuade me on the balance of probabilities that any promise was made by Mr Misra to hold shares on trust for Mr Ross, I accept Mr Lazarus' submission that the tone and content of this unsent letter fatally undermines Mr Ross's case.

Disposal

164. For all the reasons set out above, Mr Ross's claim is dismissed in its entirety.