



Neutral Citation Number: [2019] EWHC 535 (Ch)

Case No: HC-2014-000734

IN THE HIGH COURT OF JUSTICE
Business and Property Courts of England and Wales
Business List (Ch D)

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

Date: 26/03/2019

Before :

DEPUTY MASTER BOWLES

Between :

Nirav Shah

Claimant

- and -

Ashok Shah

Defendant/Part

-and-

20 Claimant

(1) Jaivant Shah

(2) Bharat Shah

(3) Narendra Shah

Part 20
Defendants

Thomas Roe QC and Chloe Shuffrey (instructed by Kappor & Co) for the **Part 20 Claimant**

Gideon Roseman (instructed by SNV Law Ltd) for the **1st Part 20 Defendant**

Hearing dates: 27th, 28th and 29th November 2018

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Deputy Master Bowles:

1. This judgment constitutes a further stage in the working out of the rights and liabilities of the Part 20 Claimant (Ashok) and two of his brothers, the first and second Part 20 Defendants (Jaivant and Bharat) arising out of the business dealings of the three brothers over many years.
2. The background to this matter and the circumstances leading to this prolonged litigation are set out in some detail in my previous judgment ([2017] EWHC 2693(Ch)). That judgment arose out of a seven day trial of what has been termed the ‘Second Issues’, being, in essence, a determination, or, as it has transpired, a step towards the determination, of the accounting obligations of the three brothers, principally Ashok and Jaivant, in respect of the various business activities and investments carried on by the brothers, over time, and in respect of the assets derived from those investments and activities.
3. Judgment in the ‘Second Issues’ trial was handed down on 1st November 2017. The judgment determined a large number of issues but left some issues still outstanding. This judgment deals with two of those issues.
4. The first of those issues (issue 1, as defined in my order of 15 June 2018) is the issue as to how Jaivant should account in respect of an investment made by Jaivant, upon behalf of the three brothers, in a barge and tug boat business carried on by a friend of Jaivant’s, a Mr Vervaria, in Jamnagar. In an agreement made between the three brothers, at, or around, the end of 2000 and the beginning of 2001 (referred to in my judgment in respect of the Second Issues and in this judgment as the 2001 agreement), a value of 5M rupees was placed upon the investment. As indicated in my judgment on the Second Issues, that figure will have emanated from Jaivant.
5. It was Jaivant’s obligation to account to his brothers for this investment and, in my judgment on the Second Issues, I determined, at paragraphs 204 and 205, that he had wholly failed in that obligation, having provided neither documentation, nor coherent explanation as to what had occurred and that, given that failure, the court had to draw its own conclusions as to the value of the investment for which Jaivant should account.
6. In that regard, I accepted evidence from Ashok that, in 2013, he had had a discussion with Jaivant about the venture and that Jaivant had, at that date, placed a value of £100,000 upon the brothers’ share in the business. It seemed unlikely to me, in the absence of proper evidence from Jaivant and notwithstanding that Jaivant had, apparently, been told in 2015 that there was ‘nothing doing’ in respect of the venture that an investment worth £100,000 in 2013 now had no value.
7. Accordingly, while giving Jaivant a last chance to put in credible evidence as to the current value of the investment, I indicated that, absent such evidence, I would direct

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that Jaivant account, in respect of the brothers' investment in this venture, in the sum of £100,000 (paragraph 210 of judgment).

8. That indication was reflected in the order made by me on 1st November 2017.
9. The relevant part of that order provided that there be stood over for further consideration 'how Jaivant Shah should account in respect of ... the Jamnagar marine venture'. The order further provided, by paragraphs 6(a) and 6(b) that, in respect, inter alia, of the marine venture there should be further disclosure by list, that, in respect of the marine venture, Jaivant was to serve 'full evidence' as to all his dealings and that 'subject to the materials arising under paragraphs 6(a) and 6(b)' of the order', Jaivant Shah was 'to account: as to the marine venture in accordance with paragraph 210 of the judgment'.
10. In light of the foregoing, the issue for determination, in respect of Jaivant's obligation to account, is a narrow one; namely as to whether, in light of such new materials as he may have provided, by way of disclosure, or evidence as to his dealings in respect of the marine venture, grounds exist such as to warrant, or call for, a different basis of account than that provisionally determined in my judgment upon the Second Issues.
11. The second issue for determination at this trial is defined, in my order 15 June 2018, as the 'interaction between the overall liabilities arising from the Second Issues trial and Ashok Shah's liabilities arising out of the First Issues, in particular interest arising on the Gudka debt'. That definition and the issue arising from that definition calls for explanation.
12. This body of litigation commenced with a Claim brought by Nirav Shah, Jaivant's son, as assignee from the executors of a gentleman called Harakhchand Gudka (Mr Gudka), of a debt, originally, of £910,000, which Mr Gudka had advanced, over a period of time, to the brothers, including at that time, the third Part 20 Defendant, Narendra Shah (Narendra), to assist them in their business activities. Mr Gudka was Jaivant's father in law. He died in December 2000, at which date the principal sum outstanding on the loan and for which, by that date, the three brothers, other than Narendra, who had been released from the debt, were jointly and severally liable, was £510,000.
13. No action was taken by Mr Gudka's estate in respect of the debt, between the death of Mr Gudka and the assignment of the debt in to Nirav in July 2014. The debt did not appear as an asset of the estate in the estate's declaration of assets, which was attached to the grant of probate over Mr Gudka's estate and obtained in January 2002.
14. My clear conclusion, in the Second Issues trial, was that this debt had, by 2014 and although referred to as a liability of the brothers in the 2001 agreement, become dormant and was only resurrected by Jaivant and his family and assigned to Nirav in order to place pressure upon Ashok, who was the only one of the brothers sued in respect of the debt, at the time when he was pursuing Jaivant for an explanation of the sale, behind his back, of a flat in Mumbai, referred to in the Second Issues trial as the Bombay Flat, and for payment of his share of the proceeds of that flat.
15. The Bombay Flat was a major asset of the brothers' collective business. My conclusions, in the Second Issues trial, were that the flat had been sold behind Ashok's back (that was not, in fact, disputed) that, contrary to Jaivant's case, the flat sold and in respect of which he and Bharat were accountable had constituted two titles, making up

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a single unit and that the price obtained for the flat, on sale, was 120M rupees and not the sum of 35M rupees shown on the sale documents and which, according to Jaivant, had been obtained, as an aggregate figure, upon the sale of the two titles. The destination of those proceeds of sale has never been established, save that some part of the proceeds went to repay monies which Jaivant had borrowed to repay other creditors of the brothers and save that 3M rupees were paid over to Ashok. What is clear and, as will transpire, material to the current issue is that no part of the proceeds went in repayment of the Gudka debt, notwithstanding Jaivant's assertion in evidence at the Second Issues trial that he regarded that debt as a personal liability to a good friend.

16. Nirav's claim for repayment of the resurrected debt was contested by Ashok. As between himself and Nirav he put Nirav to proof of the debt and of the assignment of the debt. As between himself Jaivant and in addition to a claim for contribution, upon the footing of the brothers' joint and several liability, Ashok alleged that there had been an agreement between himself, Jaivant and Bharat, whereby, in consideration of Jaivant acquiring full control and ownership of a number of plots and properties in Bangalore and Surat, previously held upon behalf of the three brothers, as assets arising from their business activities, Jaivant would accept sole responsibility for the Gudka debt. Other collateral issues arose as to the right to and rate of interest on the debt and as to whether any interest should be simple or compounded. The trial of these matters, which came on before and were determined by Alison Foster QC, sitting as a judge of the Chancery Division, constituted the trial of what was termed, in my order of 3 February 2016, 'the First Issues'.
17. Regrettably, the principal issue in the trial of the First Issues, namely whether the entire liability for the Gudka debt and any interest fell on Jaivant, proved to be founded upon lies told by Ashok and documents forged by Ashok. In the course of the trial, but only relatively late on and after expert evidence had been heard, to the effect that the key alleged document, a purported agreement of 23 May 2001, had been prepared at a very much later date than Ashok had alleged, Ashok withdrew his claim that liability for the Gudka debt rested upon Jaivant and, in consequence, judgment, on that issue, as between Ashok and Jaivant, was given in favour of Jaivant.
18. In due course and by order, dated 12 January 2017, it was declared that Ashok, Jaivant and Bharat were jointly and severally liable to pay Nirav the principal sum of £510,00, together with accrued interest of £1,230,603.04 and that interest would continue to accrue at the rate of £109.41 per day. As regards interest, Miss Foster QC held that simple, not compound, interest had been agreed to be payable upon the principal debt. She accepted, however, evidence that that interest was to accrue at the bank deposit rate applicable at the date of each draw down of the loan and, on that footing, she accepted and incorporated in her order an interest calculation set out voluntary particulars provided by Nirav in May 2016. Draw down of the overall sum of £910,000 had taken place, on the evidence before her, over some ten years with £400,000 repaid in, or about, 1999. The recoverable interest, as I understand it, therefore related back, in part, to the interest accrued before 1999 and before the repayment of the £400,000 and, in part, to the interest accrued, or accruing, on the outstanding £510,000 since 1999.
19. Despite her finding of several liability, the order made on 12 January 2017 was made subject to an undertaking by Nirav that he would not seek to recover from Ashok any more than one third of the judgment debt, or of interest accruing, or accrued, on the judgment debt.

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20. The effect of the foregoing, since neither principal debt, nor interest, has been paid by Ashok, or, as I understand it, Bharat, or Jaivant, is that the overall indebtedness of the brothers to Nirav stood, at the date of trial, at some £1,815,442.37 and, therefore, that Ashok's enforceable liability, at that date, was some £655,037, with interest accruing on that sum, as against him, at one third of £109.41 each day.
21. The issue now for determination relates to the interaction between that liability and the liabilities of Jaivant and, to an extent, Bharat, arising from the Second issues trial and my findings at that trial.
22. The material findings at that trial relate to the Bombay Flat, as already mentioned, and to another property, referred to in the Second Issues trial as the Surat Plot.
23. The Bombay Flat was sold in 2012 for 120 million rupees. Subject to various allowances, I determined that, in that instance, Jaivant and Bharat were jointly accountable to Ashok as his agent, for one third of that figure. At rates of exchange obtaining in 2012, the price obtained for the flat was £1,406,715 and gave rise to an obligation to account for £468,905. Giving credit for certain allowances, arising out of payments legitimately made by Jaivant and Bharat out of the proceeds, the core sum for which those two brothers were accountable to Ashok was some £386,571.
24. The Surat Plot was, as I found, sold by Jaivant in 2003 for some 33 million rupees. He failed to account at all to Ashok for that sum and, in consequence, by my order of 1st November 2017 I directed that he account for one third of that figure, less a share of sale costs. Expressed in sterling at the applicable rate of exchange in 2003, the sale price for the plot was £455,802 and the core amount for which he was accountable was £151,934. As with the Bombay Flat the nature of his accountability was as agent for Ashok and, in this instance, Bharat.
25. What is said on behalf of Ashok, is that the correct interaction between these finding, and the findings in the First Issues trial is that Ashok's share of the Gudka debt and the interest upon that debt should be borne by Jaivant and, to the extent, I think, that the proceeds of the Bombay Flat come into play, Bharat.
26. The core of the argument is twofold; firstly, that, on the basis of the findings in the Second Issues trial, Jaivant and, as relevant, Bharat were under an obligation to use the proceeds of the Surat plot and, as necessary, the Bombay Flat to pay off/pay down the Gudka debt; secondly, that, even if there was no such positive duty, nonetheless, had the proceeds of the two properties been properly accounted for, they would have been used to pay down/pay off the debt. In either instance it is said, albeit that the monies for which Jaivant and Bharat have been held to be accountable to Ashok would be reduced, Ashok's liability in respect of the Gudka debt would have been nil and that, in consequence, I should direct, or declare, that, as between Ashok and Jaivant/ Bharat and by way of indemnity, the full extent of Ashok's liability in respect of the Gudka debt should fall upon Jaivant/Bharat.
27. Before considering the merits of the foregoing, I will, first, deal, relatively shortly, with the narrow issue that arises in respect of the Jamnagar marine venture. The question here is whether, as set out in paragraph 10 of this judgment, any new materials provided to the court by Jaivant, in accordance with the opportunity afforded to Jaivant by my judgment upon the Second Issues and my order of 1st November 2017, warrant, or

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require me to modify the basis upon which, subject to that opportunity I have directed and determined that Jaivant should account.

28. The short answer to that question is ‘no’ and, in consequence, I shall now direct that Jaivant should account in respect of the marine venture upon the footing that the three brothers’ share in that venture has a value of £100,000 and, therefore, that Jaivant is accountable to Ashok for one third of that amount.
29. The only new evidence, or disclosure, provided by Jaivant in respect of this issue is to be found in paragraphs 13 to 16 of a witness statement dated 23rd November 2017. The witness statement adds nothing to the information that was available to me at the Second Issues trial and continues to leave the court with no coherent explanation, or documentary evidence, in respect of the relevant investment. If anything, the new evidence serves to emphasise, only, Jaivant’s ignorance of the venture in which he invested and, correspondingly, his inability to properly account in respect of that venture. Jaivant, for example, now tells me that he cannot say whether his investment was by way of loan, or otherwise, or the name, or structure, of the business, or entity, into which he put the brothers’ money.
30. The court, in consequence, is left, as it was following the trial, with no proper account of an investment in a business, which, on the evidence, ran for a number of years, but with only the bare assertion, by Jaivant, that he had been told, by his friend Mr Vervaria, whose business it was, that there was ‘nothing doing’ in respect of the business and that it had been abandoned.
31. That assertion, itself inconsistent with Ashok’s evidence, which I accepted, that, in 2013, the brothers’ interest in the venture was to be sold for £100,000, does not and cannot constitute the giving of a proper account. When, as here, an agent makes an investment upon behalf of others, that agent has an obligation to those others to understand the investment and to follow the investment, such as to be able to explain fully and properly what went on. On his own evidence, Jaivant wholly failed in this regard.
32. In the result, I can see no good reason to direct that Jaivant account upon any other basis than that contemplated at paragraph 210 of my judgment in the Second Issues trial and in my order of 1st November 2017.
33. In the absence of a proper account, I am left only with evidence from Ashok, put to Jaivant in cross examination, but not, as shown in the transcript, ever fully answered by him, that in December 2013 the brothers’ share in the business was being sold for £100,000 and with a complete absence of any evidence, such as to explain how, or why, an investment of that apparent value in 2013 had, in 2017, or now, no value at all.
34. Jaivant must, accordingly, account for the Jamnagar marine venture as set out in paragraph 28 of this judgment.
35. Turning, then, to the second issue for my determination at this trial, I will deal, firstly, with an application made by Jaivant that he should be entitled to put in expert evidence pertaining to the issue, which application was heard and determined against Jaivant at the commencement of the current trial.

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36. The application in question was issued on 22nd November 2018 some five days, including a weekend, prior to the date fixed for this trial. The trial, itself, had been fixed, pursuant to my order of 15 June 2018, to be heard on the first open date after 19th November 2018, with provision made for evidence to be filed by 26th October. No application had been made, at the directions hearings on 7th and 15th June 2018 that gave rise to my directions, for any expert evidence to be called at this trial. The date for evidence had, by agreement between the parties, been put back to 5th November 2018. Evidence had been filed and served by Ashok, on 5th November, pursuant to my order and the agreed extension. Jaivant had not served or filed any further evidence.
37. The evidence in support of that application to put in expert evidence acknowledged that the application was made very late, but asserted that it had not been until such time that Ashok's evidence, served on 5th November, had been received that it had been understood by Jaivant, or on his behalf, that Ashok's contention was that the proceeds of the Surat plot and the Bombay Flat should have been used to pay down/pay off the Gudka debt, such that Ashok should be indemnified against his liability in respect of that debt in the manner earlier explained.
38. In regard to the expert evidence, Jaivant served, with his application, a forty six page report, obtained from Indian lawyers, the core effect of which was said to show that the Surat transaction was intrinsically unlawful, in Indian law, that the proceeds could not have been remitted out of India for ten years following receipt and only after the acquisition and sale of the plot had been reported to and dealt with by the relevant Indian authorities and that any remittance, or repatriation, of the proceeds would have had to be conducted via authorised bodies and subject to procedural compliance. In regard to the Bombay Flat the earliest that the proceeds, it is said, could have been remitted was 2016 and, then, subject to the same process and procedures as in the case of the Surat plot.
39. The purpose underlying the report and the application for its admission into evidence was to demonstrate that Jaivant and, to the extent relevant, Bharat had not, by reason of Indian law, been in a position to utilise the proceeds of either the Surat plot or the Bombay Flat to pay off/pay down the Gudka debt in the way that Ashok contended should, or would have occurred had Jaivant/ Bharat acted properly in respect of the sale of those two properties.
40. I refused to admit this very late expert evidence.
41. I took the view that it would only have been appropriate to allow the evidence in and, correspondingly, allow Ashok an adjournment to deal with the proposed evidence if it had, indeed, been the case that Jaivant had been taken by surprise by the way in which Ashok formulated his claim in respect of liability for the Gudka debt and the interest on that debt and, in particular, if that claim, as now formulated, had only emerged when Ashok served and filed his evidence on 5th November 2018. Other than in that circumstance, it seemed to me that there was no justification at all for the late application and that it would be wrong to allow in the evidence, or to allow the consequential adjournment which would have been necessitated, in order to allow Ashok to meet the evidence, had the evidence been allowed in.
42. This trial has been listed since June and, given the lengthy history of this litigation, the importance of moving it towards a final conclusion and the court resources that have

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already been deployed in the adjudication of matters to date, the only proper basis for allowing in the evidence would have been if its admission was necessary to meet a situation where Jaivant had been taken by surprise.

43. I am quite satisfied that that has not been the case.
44. As already, indicated, there were, prior to this trial, two directions hearings, on 7th and 15th June, at which considerable time was expended in the determination of the residual issues for adjudication. It was out of those hearings that the issue with which I am now concerned; namely the interaction between the liabilities arising from the Second Issues trial and Ashok's liabilities arising from the First Issues evolved.
45. The skeleton argument put in by Mr Roe QC and Ms Shuffrey, at those hearings, on behalf of Ashok, made plain that their basic contention, in respect of the interaction between the liabilities arising out of the First and Second Issues trials and, in particular, Ashok's liabilities arising out of the First Issues trial, was that those liabilities would have been largely, if not completely, eliminated had Jaivant not, as it was put, helped himself to the proceeds of the Surat plot and, instead, utilised those monies to pay down the Gudka debt and that, on that footing, the liability for the substantial interest now accrued upon the Gudka debt should be thrown upon Jaivant and, where appropriate, Bharat, to the extent that that liability would not have arisen but for Jaivant/Bharat's disposals of and failures to account for jointly owned assets.
46. While the skeleton argument did not refine the legal argument which is now said, on behalf of Ashok, to entitle Ashok to that result, an explanatory footnote to the skeleton argument plainly foreshadowed the broad jurisprudential basis upon which, it is now said, that liability in respect of the Gudka debt, or the interest on that debt, should be thrown on Jaivant/ Bharat.
47. That foot note referenced paragraphs 8 and 9 of Ashok's Amended Particulars of his Additional Claim against Jaivant and the contention, in those paragraphs, that, in respect of what was there referred to as the Overseas Property Partnership, but which, plainly, related to the arrangements between the brothers arising from the 2001 agreement, the brothers and each of them were under a duty not to dispose of jointly owned assets, other than by consent and then only for the purpose of the repayment of their joint debts, that Jaivant, in particular, had acted in breach of that duty by disposing of assets other than in compliance with that duty and by failing to account to Ashok (and, it was then said, Bharat) in respect of his use of and disposal of assets and that Ashok, accordingly, sought damages, or an account of profits, in respect of Jaivant's use of those assets.
48. That the language used in the final iteration of the current issue was not intended to reflect a drawing back by Ashok from the position advanced in his skeleton argument is abundantly clear from the annotated draft order lodged, on behalf of Ashok, prior to the second directions hearing. That draft order set out the current issue in the form adopted in my order of 15th June and explained that that form was proposed as a means of encapsulating the issue which had been raised in the skeleton argument and ventilated at the earlier hearing, namely the allocation of Ashok's liabilities in respect of the Gudka debt, in circumstances where Jaivant and, in respect of the Bombay Flat, Bharat had liquidated joint assets but had not used the proceeds to pay down the Gudka debt.

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49. In light of the foregoing, I have no doubt at all that Jaivant has, since June 2018, been well aware of the general thrust of Ashok's contention that he and, where relevant, Bharat should bear the liability for the Gudka debt, or the interest liability on that debt, and, further, that the legal, or equitable, basis underlying that contention was that Jaivant/Bharat were each under a duty, in respect of joint assets, including, therefore, the Surat Plot and the Bombay Flat, to utilise any proceeds from their sale to pay down the Gudka debt and other joint debt and/or to account to Ashok in respect of those proceeds, that it was their breaches of that duty which has resulted in the Gudka debt remaining unpaid and in very substantial interest accruing thereon and that it is in those circumstances that liability for the Gudka indebtedness should fall upon them, rather than upon Ashok.
50. In these circumstances and as already stated, I am quite satisfied that Jaivant was not, in any material way, taken by surprise by the way that Ashok's case was formulated either in his 5th November 2018 evidence, or in Mr Roe's and Miss Shuffrey's skeleton argument submitted for this trial.
51. I am equally satisfied that Jaivant had every opportunity to put in evidence directed to meet that case, within the time scale allowed by my directions, and every opportunity, had he been so minded, to make a timeous application for permission to adduce expert evidence. His failure to take either of those steps until virtually the last available moment cannot be justified and does not, therefore, warrant the admission at this late stage of the proposed expert evidence, or the adjournment necessarily consequential upon the admission of that evidence.
52. Mr Roseman made much of the alleged lack of pleading out of Ashok's claim in respect of this issue. His submission was that the lack of a formal pleading in respect of the claim now advanced had prejudiced his client and caused, or contributed, to his being surprised by the way in which Ashok's claim in respect of this issue has been articulated.
53. I am not and was not persuaded. Not merely was the issue for determination discussed at length at the two directions hearing, but the shape of Ashok's claim within the issue was also fully canvassed. While it is fair to say that the precise legal and equitable arguments which have been deployed upon behalf of Ashok were not foreshadowed in any detail, that would have been as much the case even if I had chosen to order pleadings within the issue. I did not order pleadings precisely because the issue was clear.
54. In the result and for the reasons now given, I refused Jaivant's application to put in expert evidence, with the consequence that the factual issues of Indian law raised in that evidence do not arise for any determination.
55. I turn, therefore, to the substance of Ashok's claim.
56. The starting point in a consideration of the interaction between the findings in the trials of the First and Second Issues are the findings, themselves, and, in particular, the limits of the findings that I made, in the trial of the Second Issues.
57. Mr Roe based the first limb of his argument, namely that, pursuant to my findings in the trial of the Second Issues, Jaivant/ Bharat were under a positive duty to put the

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proceeds of successively the Surat Plot and the Bombay Flat towards the payment down of the Gudka debt, upon principles of partnership and, in particular, the operation of sections 39 and 44 of the Partnership Act 1890.

58. That argument, however, presupposes a finding of partnership. No such finding has ever been made.
59. Ashok's Third Party claim was pleaded in partnership. That contention has never been admitted, nor determined. The consensus in the pleadings and, in effect, at the Second Issues trial was that the precise legal characterisation of the brothers' relationship did not matter. Accordingly, the question was neither addressed, nor resolved at that trial. While, as contemplated in my judgment on the Second Issues, at paragraph 189, the 2001 agreement is capable of being regarded as a dissolution agreement, in respect of a prior partnership, it would be incorrect to treat that paragraph as constituting, or giving rise to, a finding to that effect, in circumstances where the question was never argued and where the 'label' to be attached to the brothers' business arrangements was not regarded as significant.
60. Additionally and, in respect of this issue, importantly, the particular findings as to Jaivant/Bharat's obligations arising out of the sale of the Surat Plot and the Bombay Flat were, as set out in paragraph 23 and 24 of this judgment (paragraphs 102 and 138 of my judgment on the Second Issues), that, in respect of Surat, Jaivant should account as 'agent and fiduciary' and that, in respect of the Bombay Flat, both Jaivant and Bharat were accountable 'as agents and, therefore, fiduciaries for Ashok'. Neither of those findings, or the liabilities arising from those findings, were based upon partnership, or were, in any way, contingent upon a finding of partnership.
61. In those circumstances, I am unpersuaded that there are to be found within my findings on the Second Issues any findings of partnership, or, in consequence, any findings which give rise to the positive duty to pay down the Gudka debt from the proceeds of Surat, or the Bombay Flat, which, it is argued, on behalf of Ashok, arise, by the application, or operation, of the law of partnership, to my findings on the Second Issues.
62. I add that, even were I to be wrong as to the above and even if, therefore, my findings could be treated as including a finding that the brothers' business activities were carried on in partnership and that the liabilities arising from those findings were liabilities arising from that partnership, I am neither satisfied, nor persuaded, that such findings would have the effect of producing the positive obligation contended for upon behalf of Ashok.
63. As is plain from their language, both sections 39 and 44 apply and operate in the context of a dissolved partnership and to the circumstances obtaining following a dissolution.
64. Even if the brothers' business activities are to be regarded as the activities of a partnership and even if the 2001 agreement is to be regarded as an agreement designed to facilitate the dissolution of that partnership, it is less than clear that the agreement gave rise, there and then, to a dissolution. The agreement itself does not so provide. Nor has that ever been Ashok's case. His case (paragraph 7(c) of his amended Particulars of Additional Claim) has been that from 2000 to 2015 there remained in being the so-called Overseas Property Partnership and that that partnership continued until dissolved in July 2015, or by the issue of the Third Party proceedings, or, in the further alternative,

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was to be dissolved by an order in these proceedings. That case has never been adjudicated upon, either, as already stated, as to the existence of the alleged partnership or as to its dissolution.

65. In those circumstances and, in particular, in the absence of any finding that there has been a dissolution, I cannot see that my findings, in the Second Issues trial, bring either section 39 or section 44 into play.
66. Additionally, it is not my understanding of those sections that they operate in the 'granular' way suggested upon behalf of Ashok.
67. In my understanding, the purpose of section 39 is to set out in statutory form what has conventionally been called the partner's lien, namely the right of any partner, in this instance upon dissolution, to call for the payment out of the assets of the partnership of the debts and liabilities of the partnership and, thereafter, to have any surplus divided appropriately between the partners, after the deduction from each partner's gross share of any sum that that partner owes to the partnership. The section is designed to define and establish the share which each partner will have in the surplus assets of the partnership, following dissolution. It does not contemplate that a partner, who, following a dissolution, receives partnership monies into his hands, must there and then apply those monies in payment of partnership debt. The provision is, rather, a provision setting out, in statutory form, the entitlement of any given partner upon a dissolution and, consequentially, the broad process to be carried through in the identification and calculation of each partner's partnership share.
68. Section 44 is, likewise, not intended, as I understand it, to give rise to the 'granular' approach suggested by Mr Roe, for Ashok. This section applies in the final working out of accounts upon a dissolution and sets out, subject to agreement, the order in respect of which the various liabilities of the partnership should be paid out, in establishing the existence, if at all, of any surplus for distribution and, in consequence, the value in money of each partner's partnership share. Section 39 defines the principle pursuant to which a partnership share is established. Section 44 deals in more detail with the process whereby that share is translated into money for distribution. Most materially, by setting out the order in which partnership liabilities are met, the section determines, where there is a deficiency of assets, the priorities as between the various liabilities to third parties and to the partners inter se. It is not intended to impose upon an individual partner, as opposed to the partners as a whole, particular obligations in respect of monies coming into his, or her, hands.
69. In the result and for the aggregate of the reasons that I have set out, I do not consider that my findings in the Second Issues trial established any positive duty upon Jaivant, or Bharat, to apply the proceeds of the Surat plot, or the Bombay Flat towards the repayment of the Gudka debt.
70. There remains, however, for consideration, the alternative way that Ashok /puts his case, namely that in the event that Jaivant/Bharat had properly accounted to him in respect of his share in the proceeds of sale of those properties then he would have procured that those proceeds went in repayment of the Gudka debt and in his liability in respect of that debt, including the interest on that debt, being extinguished.

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71. The mechanics of this and the process whereby the debt would have been extinguished is explained, upon behalf of Ashok, as follows.
72. What is said is that had the proceeds of sale of Surat been properly accounted to Ashok then they would have been applied towards and in respect of the Gudka debt. Those proceeds, at the point of sale in 2003, amounted, in sterling, to £455,802, set against the Gudka debt, as shown in the 2001 agreement, at £510,000. Accordingly, the application of the Surat funds, in that way, would have reduced, it is said, the Gudka debt to some £54,198. That calculation, of course, ignores the interest which, on the findings, in the First Issues trial, would already have accrued in respect of the debt, both before and after the 1999 part-repayment. What is said about that, however, is that Mr Gudka's estate, notwithstanding its technical entitlement to interest, would have accepted this further part-repayment and would, thereafter, have looked only for the balance.
73. What is further said is that, even allowing for the accumulation of interest, either before or after the sale of the Surat plot, the monies which were released upon the sale of the Bombay Flat, if properly accounted for, would have (and would have been used for) the repayment of any balance of the Gudka debt and interest, with the consequence that Ashok's liability in respect of that debt and interest on that debt would have been discharged.
74. The consequence, it is said, of the foregoing is to demonstrate that, as a matter of causation, it was Jaivant and Bharat's failure to properly account to Ashok in respect of both Surat and the Bombay Flat that has given rise to his continuing and increasing liability in respect of the Gudka debt and which should, therefore, as a matter of equitable compensation entitle him to an indemnity from Jaivant/Bharat, by way of remedy for their breach of trust in failing to account.
75. There was no dispute at trial as to the applicability of principles of equitable compensation to the facts of this case. In particular, it was not suggested that Jaivant/Bharat were not trustees, for themselves and Ashok, in respect of monies coming into their hands in consequence of the relevant sales. That concession, if that is what it is, was rightly made. There is no doubt but that the monies arising on the sales were beneficially monies of each of the brothers, in equal shares, and, therefore, that Jaivant/Bharat, when they acquired the proceeds of the sales and legal title to those monies, became constructive trustees in respect of the monies in their hands. On that footing, there can, equally, be no doubt but that, in failing to account for Ashok, as beneficiary, for his share of those monies, Jaivant/Bharat acted in breach of trust. In those circumstances, principles of equitable compensation as recently explained by the Supreme Court, in **AIB Group (UK) Plc v Mark Redler & Co Solicitors [2015] AC 1503**, undoubtedly apply and Ashok is entitled, as explained, by Lord Toulson, in **AIB**, to be placed in the same position as if Jaivant/Bharat's breach of trust had not taken place.
76. The question, then, arising is the counter-factual question as to what would have taken place had Jaivant/Ashok's breach of trust not taken place and had, therefore, they properly accounted to Ashok. In particular, the question, to be determined upon the balance of probabilities and with the burden, as I see it, upon Ashok, as the one making the case, is whether, as is now contended by Ashok, the consequence of a proper accounting would have been that the Gudka loan and interest would have been repaid and the brothers released, or discharged, from that liability.

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77. In this regard, it needs to be noted that the breach of trust, for which equitable compensation is sought, is the breach of the obligations owed by Jaivant/Bharat, as trustees, to Ashok, arising from their failure to account to Ashok. The breach is not a failure to account for the totality of the proceeds of sale, as would be the case, if the brothers had been found, as they have not, to be partners. Rather, the question for resolution, on the balance of probabilities, is what would have happened in the counterfactual situation which would have arisen, on my findings, if Jaivant/Bharat had, at the point of sale of the Surat plot and the Bombay Flat, properly accounted to Ashok for his share of the proceeds.
78. Ashok's written evidence, in his 5th November witness statement, made some acknowledgement of these two different accountabilities. His evidence was to the effect that had he been told, on the sale of the Surat plot, in 2003, or the Bombay Flat, in 2012, that those sales had taken place, then he would have insisted that the proceeds be used to pay down/pay off the Gudka debt, or that, at the least, his share in the proceeds would have been put to that purpose.
79. That evidence, however, was posited upon the assumption that he had known, at those dates, that the Gudka debt remained due and was accruing interest. The question answered by that evidence, is not, however, the question that the court has to answer. The question is not what would have happened, in 2003, or 2012, if Ashok had, at those dates, been blessed with twenty/twenty hindsight. The question is a different question; namely what, on the facts, as known, or understood, in 2003, or 2012, would have occurred, at those dates, in the event that Jaivant/Bharat had properly accounted to Ashok for and in respect of the proceeds of sale of, respectively, the Surat plot and the Bombay Flat. In particular, the question is whether, in the circumstances then known, or understood, to be obtaining, Ashok would either have insisted (if capable of so doing) that the entire, or the necessary part of, the proceeds of Surat, or of the Bombay Flat, be put towards paying off the Gudka debt, or, in the alternative, would have put his part of those proceeds to that purpose.
80. The strong probability is that he would not.
81. The circumstances surrounding the 'resurrection' of the Gudka debt are set out, in some detail, in my judgment upon the Second Issues. The debt had not been included in the declaration of the assets of Mr Gudka's estate attached to the 2002 grant of probate in respect of his estate. No steps at all were ever taken in respect of its recovery by the Gudka estate, between the death of Mr Gudka and the assignment, for no consideration, of the debt to Jaivant's son, Nirav, in July 2014. That assignment was made at a time when, as explained in my judgment on the Second Issues, Ashok had learnt of the sale of the Bombay Flat and was seeking explanations and an account. It was a dormant debt which, but for Jaivant and his family's desire to put pressure upon Ashok and to deflect him from following up his concerns in respect of the sale of the Bombay Flat, would never have been pursued.
82. In that context, it seems highly unlikely that, on a proper accounting, in either 2003, or 2012, Ashok would have called for the repayment of this dormant debt, or put his own share of the relevant proceeds towards that debt.
83. The clear fact is that Jaivant, who had every opportunity to pay down the Gudka debt from the proceeds of Surat and, latterly, the Bombay Flat, never took any step to do so;

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this despite Mr Gudka having been, as Jaivant told me, his good friend and this despite Mr Gudka being his father in law. The reason is not hard to find. The debt was a family matter which was not expected to be repaid. That position would not have changed even had Jaivant properly accounted. There was no expectation, until the debt was resurrected to put pressure on Ashok, that the debt would be repaid and, correspondingly, no likelihood, had that proper accounting taken place, that Ashok would have insisted upon repayment, or funded, from his own share, the repayment of a debt the recovery of which was not, then, sought, or intended.

84. In so saying, I do not overlook, witness statements, in the First Issues trial, for example that of Avrani Devraj, dated 17th March 2016, which, on their face, speak to requests for repayment being made to Ashok during the period 2000 to 2014. I attach negligible weight to that evidence, which was, as I see it, an unfortunate part of the process whereby Jaivant and his family sought to use the Gudka debt to pressurise and to deflect Ashok from pursuing Jaivant's conduct in respect of the Surat plot and the Bombay Flat.
85. By the same token, but on the other side of the balance, I attach very little weight to certain passages in Ashok's evidence in the First Issues trial, to which my attention was drawn, as indicating his unwillingness to acknowledge responsibility for the Gudka debt and, as it was submitted, the consequent unlikelihood that he would have repaid that debt had the proper accounting taken place. I am not persuaded that Ashok's conduct, or evidence, at the trial of the First issues, gives any sensible guidance as to how he would have behaved in respect of the Gudka debt had there been proper accounting.
86. I give very much more weight to Ashok's own and, as I see it, considered evidence, as set out in his 5th November 2018 witness statement.
87. In that statement, Ashok stated, in terms, that at all times, up until the 'resurrection' of the Gudka debt, it was not his expectation that the Gudka debt needed, in practice, to be repaid. If that evidence be right, then it necessarily follows that, on any proper accounting, Ashok would not have either insisted upon, or put his own monies towards, the repayment of a debt, which, in his expectation, was not to be repaid.
88. I accept this aspect of Ashok's evidence. It seems to me to be all of a piece with Jaivant's conduct, or the lack of it, in respect of the repayment of the Gudka debt and all of a piece, also, with the complete inactivity, as I find, of the Gudka family in respect of the Gudka debt, until it was tactically resurrected in 2014.
89. I prefer this evidence to the evidence that he gave, under cross examination, at trial. In that evidence he sought, as it seemed to me, not merely to modify his written evidence but to reverse it and to assert, for the first time and contrary to his written evidence, that the Gudka debt was to be repaid. Ashok asserted that, at a meeting with Jaivant in 2012, it was agreed that all the debts in the 2001 agreement, including, therefore, the Gudka debt, were to be repaid and that his expectation, after that meeting, was that the debt would be repaid. When, in consequence, demand for repayment was made, by Nirav, in 2014, following the assignment, his response had been to question why repayment had not taken place.

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90. Given that none of this material had appeared in his witness statement and given that this material completely contradicted his written evidence, it is not surprising that Mr Roseman put to Ashok that he was making this up. Ashok denied this. Unfortunately, I cannot accept his denial. I am satisfied that Ashok was making this up and was doing so in the late realisation that this new evidence would better assist his case.
91. Ashok gave no explanation for this complete volte face. Nor is there anywhere to be found, in the now copious papers and materials relating to this matter, any prior reference to any meeting, or discussion, with Jaivant along the lines now alleged. It is inconceivable, if what Jaivant told me was true, that these matters could have been overlooked when Ashok made his November 2018 witness statement and that he could have made a witness statement to the opposite effect. I am satisfied that what he told me was untrue and that, as put to him, this evidence was invented, in the realisation that the true position, namely that there had been no expectation, prior to the resurrection of the debt, that it would have to be repaid, ran wholly contrary to any contention that, on a proper accounting in 2003, or 2012, the Gudka debt would have been repaid.
92. In the result, I am entirely unpersuaded that the result of a proper accounting would have been the repayment of the Gudka loan, whether in 2003, or 2012, or at all.
93. Consequentially, there is no basis for the conclusion that the effect of a proper accounting would have been to discharge Ashok from his liabilities in respect of the Gudka loan, such that Jaivant, or Bharat, should indemnify him in respect of that continuing liability and such that the interaction between the liabilities arising from the trial of the First Issues and the liabilities arising from the trial of the Second Issues should lead to that result.