Neutral Citation Number: [2025] EWHC 141 (Ch)

Case No: BL-2022-000138

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

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

Date: 27/1/2025

Before:

CHARLES MORRISON
(Sitting as a Deputy Judge of the High Court

- -

Between:

(1) SUKHWINDER SINGH **Claimant**

- and –

(1) MR MAKHAN SINGH BAINS

(2) G B RETAIL LIMITED

Defendants

- -
- -

Richard Ascroft (instructed by **Shuttari Paul & Co.**) for the C**laimant**

Tom Beasley (instructed by **MD Law (Yorkshire) LLP**) for the **Defendants**

Hearing dates: 5,6,7,8,11,12,13,14 &15 November 2024

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Approved Judgment

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.

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10.30 am on 27 2025.

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Charles Morrison (Sitting as a Deputy Judge of the High Court)

Charles Morrison (Sitting as a Deputy Judge of the High Court):

Introduction

1. The matters that came before me upon the trial of this action were the consequence of the unhappy breakdown in the relationship between the Claimant (**C**) and the first Defendant (**D1**). Having met socially and thereafter developed a close bond of mutual respect, the two protagonists decided to go into business together. In due course, their commercial relationship prospered in line with their growing friendship. Regrettably it did not last. In time, the once deep bond of trust and goodwill lost its way in a newfound atmosphere of bitterness and rancour.

2. C had a simple case. When he agreed to go into business with D1, it was on what he described as a "50/50" basis; everything was to be equal; the assets they owned and the profits they earned, would be shared equally. This principle extended to the holding of the shares in the companies that were incorporated as platforms for their various cash and carry, convenience stores, off-licence and fish and chip shop businesses. So far as C was concerned, there had been an express agreement, that his endeavours would be rewarded with a shareholding in the company established for their joint venture, G B Retail Limited (**GBR**). That agreement was the foundation of his claim in these proceedings, which he brought upon the demise of the business partnership and the friendship upon which it was built.

3. D1 had an equally simple case in response. Yes, he did agree to go into business with C, but only on the basis that C would share the net profits; it was never agreed that C would be allotted or would ever become entitled to, any shares or ownership interest in the businesses or the companies through which they were run. It was certainly the case that C was not to be given an equity interest in GBR.

The Pleaded Case

4. As will become clear in this judgment, the way in which C put his case took on a particular importance. It was not said in the Particulars of Claim (**PoC**) that C and D1 had a partnership, and that C wanted his share of the partnership assets. What is said is that there was an agreement (the **Oral Agreement**) for C to have a share in GBR allotted to him. The agreement in regard to GBR, followed on from a course of dealing between C and D1 in respect of another company, Goldbeach Trading Limited (**Goldbeach**): this was another company operated by D1.

5. At paragraphs 11 and 12 of the PoC, the matter is put like this:

> "11. In or about mid 2014:
>
> 11.1. the First Defendant suggested to the Claimant that the two of them run Goldbeach as an equal partnership;
>
> 11.2. the Claimant suggested that he and the First Defendant should start a new company focusing on retail sales.

12. In the course of discussions between the Claimant and the First Defendant which took place over the next few months it was agreed between them ("the Oral Agreement") that:

12.1. the Claimant would become an equal shareholder in Goldbeach;

12.2 the proposed new business would be carried on through the vehicle of a limited liability company to be incorporated for that purpose under the name GB Retail Ltd ("GB" being derived from Goldbeach) in which the Claimant and the First Defendant would ultimately have equal shareholdings in the same way that he was going to become an equal shareholder in GoldBeach (*sic*);

12.3 the day to day running of both Goldbeach and GB Retail Ltd would become the responsibility of Claimant as the Defendant wanted to devote more of his time to pursuing leisure activities;

12.4. in consideration for the Claimant's shareholding in GB Retail Ltd, the Claimant would:

12.4.1. prior to the incorporation of GB Retail Ltd, undertake all necessary preparatory work including the preparation of the retail business plan; conducting market research; investigating the target market; devising branding concepts and design; finding shop premises and sourcing the necessary equipment to fit out such premises;

12.4.2. upon the incorporation of GB Retail Ltd, operate its business on a day-to-day basis as aforesaid.

12.5. pending the obtaining by the Claimant of leave to remain in the United Kingdom the First Defendant would be the sole shareholder in GB Retail Ltd once incorporated and its sole director,

12.6. upon obtaining leave to remain in the United Kingdom, The Claimant would be engaged by GB Retail Ltd as an employee and he and the First Defendant would become equal shareholders in GB Retail Ltd."

6. In his Defence, D1 admitted that there was a conversation in 2014 regarding the future, but denied that he had suggested that he would run Goldbeach as a partnership with C. His case was that C would, as an employee, be paid 50% of the net profit, it being denied that he had ever suggested or discussed C becoming a shareholder in Goldbeach. Moreover, it was D1 that had informed C that he was forming a new company, that is to say GBR.

The Issues for Decision

7. It was in respect of this essential difference that the trial took place before me, over the course of nine days. Including C and D1, I heard from nine witnesses. The C was represented by Mr Ascroft and D1 by Mr Beasley. I am indebted to them both for their helpful oral submissions as well as their written skeletons and closing argument, from which I derived much benefit.

8. Although the essence of the case might be reduced to the question as to whether there was or was not the Oral Agreement alleged by C, it was put to me that I also have to decide:

   a. whether I can take account of the conduct of the parties during periods many months or years subsequent to the date of the alleged contract when deciding whether there was a contract, what its terms were and how those terms should be understood;

   b. the extent to which certain evidence can be taken into the reckoning because of the operation of the without prejudice privilege rule which might have the effect of excluding it;

   c. if there was the Oral Agreement alleged, whether I should make an order for damages in lieu of specific performance of it, and if so what the level of those damages should be.

9. In regard to the last issue I have set out, I should mention that in April 2021, a Petition was presented to this court by C, alleging unfair prejudice to him arising from D1's stewardship of GBR. The relief sought was an order for monies wrongfully taken and also a purchase of the share held by C for a fair value. In due course the Petition was stayed pending the determination of the question whether C was indeed a member of GBR and therefore had the requisite standing to maintain the Petition.

10. Rather than incur the cost of two sets of proceedings, at the outset of the trial before me, the parties with commendable good sense, agreed that the totality of the dispute between them could be resolved within the trial. The net effect of this decision was that the parties agreed that if I should find in favour of C, such that he was entitled to exercise rights as a shareholder in GBR, then in going on to decide whether damages in lieu was an appropriate remedy, I could assess any damages that I found to be payable by reference to the evidence led in trial going to the value of GBR. Subject to submissions on the appropriate date of valuation, and to argument on deductions and additions, which again demonstrating pragmatic good sense the parties agreed I could deal with by way of a form of Scott Schedule at a consequentials hearing, that evidence was heard by me. In particular, I heard from two experts in accounting and the valuation of companies, both of whom gave their evidence in what seemed to me to be an impartial, clear and direct fashion, borne out of deep experience of the subject matter.

The Law: Behaviour Subsequent to the Formation of an Oral Agreement

11. Since the decisions in *Miller and Partners Ltd v Whitworth Street (Manchester) Estates Ltd* [1970] AC 583 and *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, there has been a wealth of judicial discussion touching upon the relevance of subsequent conduct of the parties to a contract when the court is looking for assistance in the construction of a contract. It is important to have in mind however that here the court is concerned not with a deed or contract in writing but rather with an alleged oral agreement. The task for me is to decide whether an agreement was reached and if so, what were its terms. If I find that there was an agreement that a share in GBR was to be allotted to C, it is unlikely that questions of interpretation of the meaning of the terms of the contract will arise, or that they will prove difficult to resolve if they do. As I have said, I must provide an answer to the enquiry, was there a contract and was the agreement to allot a share to C one of its principal terms.

12. The extent to which reliance might be placed upon the subsequent conduct of the parties in seeking to establish what the contract was, was the question before the Recorder in the Bristol County Court in the case of *Maggs v Marsh* [2006] EWCA Civ 1058. The crux of the dispute in this case was whether certain building works comprised part of the original contract agreed orally, or whether the value of the works could be claimed as additional payment falling outside the contract. A question arose as to what evidence the Recorder should admit as to the subsequent conduct of the parties in regard to the question of what the oral agreement was. The learned Recorder approached the matter in this way at [**13**]:

> "It is common ground that my task is objectively to construe the intention of the parties. What was the contract that they made? As Lord Reid put it in *Whitworth Street Estates Ltd v Miller* [1970] AC 583 at 603: 'The question is not what the parties thought or intended but what they agreed'. What they agreed was fixed in March/April 2003. That meaning was discernible immediately after Mr Marsh's acceptance. Subject to variation, that meaning did not change. The original contract is to be found in the terms of the documents generated on/prior to 28 March 2003 and in the words that I find were spoken up to that date. There are conflicts between the accounts of the pre-contract discussions given by Messrs Maggs and/or Cook on the one hand and Mr Marsh on the other"."

13. Holding that the effect of *Whitworth* was to prevent him from paying heed to evidence of subsequent conduct of the parties, the Recorder explained his reasoning in this way:

> "The logic of that applies equally, in my view, to any oral or part oral contract. Once the words used to form the contract/variation have been established they fall to be construed in the light of the circumstances at that point in time".

14. On this basis certain potentially relevant evidence going to whether a list of "extras" was within or outside the agreement, was disregarded.

15. When the matter reached the Court of Appeal, Smith LJ, posed this question, at [**24**]:

> "Was the recorder wrong to exclude this evidence? In my view, he plainly was. The recorder properly directed himself that his task was to decide what the parties agreed at the time of the original contract in March 2003. He very properly said that that was ascertainable at the time. Of course it was ascertainable at that time, but unfortunately no one ascertained it. The parties did not write down what they had agreed. No complete record was made. Accordingly, the only way to decide

what had been agreed then was to hear evidence about it at the trial, two or three years later. The accuracy of the parties' recollections was mutually disputed. In those circumstances, it is plain to me, as a matter of general principle, that, for the purpose of testing the accuracy of those recollections, it is highly relevant to hear evidence about what the parties had said and done about the disputed matters in the meantime.

The rationale of the well-established rule in Miller's case is this. The parties have made a complete record of their agreement at the time, in writing. The written words must be objectively construed or interpreted. Such construction is a matter of law. As Lord Hoffmann said in Investors Compensation Scheme Ltd v West Bromwich Building Society [1198] 1WLR 896 at page 912, the question is what meaning the document would convey to a reasonable person having all the background knowledge which would reasonably been available to the parties in the situation in which they were at the time of the contract. It is therefore irrelevant to call evidence of how one party behaved after the event. That only sheds light on what that party subjectively thought he had agreed.

In my judgment it is clear that the principle set out in Miller's case, does not apply to an oral contract. Determining the terms of an oral contract is a question of fact. Establishing the facts will usually, as here, depend upon the recollections of the parties and other witnesses. The accuracy of those recollections may be tested and elucidated by things said and done by the parties or witnesses after the agreement has been concluded. Receiving evidence of such words or actions does not mean that the judge is losing sight of his task of deciding what the parties agreed at the time of the contract. It is simply helping him to decide whose recollection is right. It is not surprising to me that the editor of Lewison should observe that there is nothing in the authorities to prevent the court from looking at post contract actions of the parties. As a matter of principle, I can see every reason why such evidence should be received."

16. Consistent with this clear approach adopted by Smith LJ, in the later case of *BVM Management Ltd v Yeomans* [2011] EWCA Civ 1254, Aikens LJ said this at [**23**]:

"When the terms of a contract have to be ascertained from oral exchanges and conduct that is a question of fact: see *Carmichael v National Power plc* [1999] 1 WLR 2042 at 2049C per Lord Hoffmann; *Thorner v Majors* [2009] 1 WLR 776 at [**82**] per Lord Neuberger of Abbotsbury. Moreover, in the case of a contract which is entirely oral or partly oral, **evidence of things said and done after the contract was concluded are admissible to help decide what the parties had actually agreed**: *Maggs v March* [2006] BLR 395 at 400 per Smith LJ; *Crema v Cenkos Services plc* [2011] 1 WLR 2066 at [**34**] per Aikens LJ. Many cases have emphasised that an appellate court should not readily hold, particularly in a case where the finding is dependent upon oral evidence, unless the judge's finding is obviously wrong, is an unreasonable finding on the evidence or the finding produces a result unsustainable in law. All this means that we must be very slow to reverse the judge's evaluation of the facts" [*emphasis added*].

17. The conclusion must follow that the approach taken in *Miller* has no application in the present case. It is an oral agreement between C and D1 that is at the heart of the case put forward by C. It therefore falls to me to consider what C and D1 did not only at the time of contracting, but also subsequent to the supposed conclusion of a contract, the latter by way of evidence of what the parties objectively agreed at the relevant time.

The Law: Without Prejudice & Waiver

18. As Mr Passmore makes clear in the 5th Edition of his work on *Privilege*, at 10-001, communications made on a without prejudice basis are inadmissible in evidence. This so-called without prejudice privilege, arises when parties are in dispute, and usually requires the consent of those parties for it to be set aside. The effect of the privilege is to exclude any evidence of negotiations between the parties which have as their purpose the settlement of the dispute. Communications characterised as an "opening shot" in negotiations, may fall within the cloak of protection but not where such communications contain merely an assertion of a claim without any offer of settlement.

19. The court is also astute to ascertain whether the relevant discussions have taken place in the absence of a real and existing dispute between the parties. It is in each case a question of fact as to when a dispute can be said to have come into existence and which discussions can be treated as being attempts to settle. An important question for the court to pose is whether in the course of the negotiations the parties contemplated or might reasonably have contemplated resorting to litigation if no agreement was reached between them (see *Barnetson v Framlington Group Ltd* [2007] EWCA Civ 502, per Auld LJ).

20. Prior to reaching his conclusion on the relevant principles in *Avonwick Holdings Ltd v Webinvest Ltd* [2014] EWCA Civ 1436, Lewison LJ, having already reviewed a number of the cases on the subject, at [**16**], cited the views of the Court of Appeal in *Standrin v Yenton Minster Homes Limited* [1991] The Times, 22 July:

> "Nonetheless, Lloyd LJ said at page 9 of the transcript:
>
> > "The principle to be derived from these authorities, if it can be called principle, is that the opening shot of negotiations may well be the subject of privilege where, for example, a person puts forward a claim and in the same breath offers to take something less in settlement. Or to take Parker LJ's example in *South Shropshire District Council v Amos* where a person offers to accept a sum in settlement of a[n] unquantified claim. Where the opening shot is an assertion of a person's claim and nothing more than that, then *prima facie* it is not protected.""

21. As to the need for a dispute to be in existence, Lewison LJ said this [**17**]:

> "My conclusions are these. There are two bases for the operation of the without prejudice rule. The first rests on public policy and that policy is to encourage people to settle their differences. However, in order for that head of public policy to be engaged there must be a dispute. The concept of dispute is given a wide scope so that an opening shot of negotiations may fall within the policy even though the other party has not rejected the offer. That is the explanation for *Standrin*. In order to decide whether this head of public policy is engaged, the court must determine on an objective basis whether there was in fact a dispute or

issue to be resolved. If there was not then this head of public policy is not engaged."

22. It is also the case that once communications have been properly characterised as being connected to the attempt to settle the dispute, the court will not undertake a careful forensic audit of the communications, seeking to identify which communications or statements should be treated as being within the privilege and which perhaps are unrelated (see *Wilkinson v West Coast Capital*, [2005] EWHC1606 Ch, per Mann J.).

23. The without prejudice privilege will extend to cover all of the communications that can reasonably be said to be within the chain of communications aimed at reaching a settlement of the dispute, save where the right to the privilege has been lost, most obviously by the application of the principles of waiver. In this case, C says that if there was a privilege, he does not want to assert it. As will be seen, he led evidence at trial going to the detail of discussions about the possible settlement of his claims against D1. That evidence proceeded before me in the context of an express reservation, or should I say, assertion of the privilege by D1. Whilst he was, for the sake of convenience only, prepared to allow the impugned evidence to be heard, he did not accept that his privilege had by the commencement of the trial been waived, and he did not want the fact of the court hearing the evidence to be taken as evidencing his waiver. Upon the agreement of Mr Ascroft, I also agreed with this approach; I therefore heard the evidence expressly on this basis.

24. So when is the privilege lost? In seeking to answer this question, I have had the benefit of further submissions from counsel. The waiver issue was raised, *en passant*, in closing argument. I asked if authority was to be put before me. In due course it was, together with succinct, helpful submissions. One of the cases to which I have had my attention drawn is the judgment of Fancourt J in *Briggs v Clay* [2019] EWHC 102 (Ch). Although the facts of that case and the way in which the privilege was relevant to the substance of the proceedings are rather more complex than the factual position with which I have to grapple, it is in my judgment instructive to understand the manner in which the learned judge approached the principle of deployment: had the privileged material been deployed in such a way as to disentitle the party seeking to rely upon the privilege from so doing?

25. At [**83**] - [**84**], Fancourt J said this:

> "In the current claim, Aon have not deployed any of the content of the without prejudice negotiations between them and The Claimants. Aon have put in issue the reasonableness of the Approved Settlement, the negligence of the Lawyer Defendants in failing to raise the Participating Employer Argument, the question of whether that negligence should be treated as the only effective cause of the Claimants' loss and, if not, the extent to which the Lawyer Defendants rather than Aon should be held responsible for the Claimants' loss. All of those issues are independent of the fact or content of the parallel negotiations being conducted between Aon and the Claimants. The most that can be said, in my judgment, is that the content of the negotiations may be relevant to an assessment of whether the Lawyer Defendants were grossly negligent, the true effective cause of the Claimants' loss and the fair apportionment of responsibility between Aon and the Lawyer Defendants.
>
> Given that Aon have not referred to or deployed any of the content (or the fact of, or any facts about) their without prejudice negotiations with Claimants, I cannot accept that Aon have waived their right as against Claimants and others such as

> the Lawyer Defendants to the protection of the without prejudice rule. Aon's conduct in pleading the basis of its defence, including allegations about Claimants and the Lawyer Defendants, is not such as to repudiate the implied agreement with Claimants that their negotiations are to be treated as without prejudice, nor can it be understood as an implied offer to Claimants to treat the without prejudice negotiations as open. Nor does it put the negotiations or any of their content in issue. The pleaded case of Aon says nothing about the negotiations or their content."

26. It seems to me that I must embark upon a similar enquiry in this case. To what extent, judging the matter objectively, can I say that the D1 has deployed the privileged material? Here I have in mind the liberal approach of Lewison LJ in *Avonwick*, arising no doubt from the principle that the courts are intent on encouraging parties to make every reasonable effort to settle their disputes and should not feel anxious about the later production of the communications flowing from genuine efforts to achieve a resolution (see *Cutts v. Head [1984] Ch. 290,* 306, per Oliver L.J.), where at [**21**] he held that:

> "The judge held that Mr Shlosberg had waived any privilege relating to those negotiations. I disagree. All he said in his evidence was that he told Mr Gayduk that an offer had been made and that his lawyers thought it was a good one."

27. I also have in mind the way in which Fancourt J, at [**85**], applied the reasoning of Vos LJ (as he then was) in *Soon Kook Suh v Mace (UK) Ltd [2016] EWCA Civ 4*, asking himself the question, to the extent that [D1] has in any way deployed the impugned evidence, would it be unjust to deprive him of the privilege he asserts? In *Mace*, it was the tenants that persisted in an attempt to assert a without prejudice privilege in the face of a waiver argument raised by the landlord; had "the tenants' conduct, taken in the context of the purpose of the without prejudice privilege itself, constituted a waiver of it." Vos LJ, went on to say this:

> "In my judgment, the issue of waiver in the circumstances of this case requires an objective evaluation of the tenants' conduct, in the context of the purpose of the without prejudice privilege. That evaluation should be aimed at determining whether it would be unjust, in the light of the tenants' conduct, for them to argue that the admissions made in the interviews were privileged from production to the court at the trial. This, I think, requires detailed attention to the precise course of relevant events."

28. It is also necessary to look at the matter from a different perspective: if C can be said to have deployed the impugned material, is D1 now, at this stage of the proceedings, precluded from objecting? It seems to me that I must ask myself, can it be said that C did deploy material that would otherwise attract the jointly-held, without prejudice privilege? If he did, did the D1 assent to the use of that material? To the extent that D1 did nothing, can it be said that it is now too late to seek to assert the privilege when it might reasonably be expected that he would have taken the alternative course posited by Fancourt J in *Briggs* (see [**80**]), of seeking to restrain the unauthorised deployment? To these questions, I must return later in this judgment.

The Witnesses

29. I heard evidence from a number of witnesses. The C gave evidence at the end of his case; he was preceded by his wife, Ms Pawanjeet Kaur, Mr Baljit Singh, Mr Jagjeet Singh Kaur and Dr Sachdev, the accountant who had assisted the parties with the administration and tax matters for certain of the businesses around which these proceedings turn.

30. D1 gave evidence, with the assistance of a translator. As part of his case, I also heard from Ms Parveen Paul and Mr Parminder Singh. All of the witnesses from whom I heard, had provided witnesses statements. Those statements stood as their evidence in chief. Each of the witnesses was cross-examined. The first was Dr Sachdev, to whom I shall now turn.

31. Dr Sachdev provided a number of witness statements for use in the litigation between C and D1. He had been involved with the GBR business from its inception, acting as the advising accountant. He had also been involved in an earlier business venture with which the parties were concerned, that is to say, Goldbeach. As the cross-examination of Dr Sachdev unfolded, it became clear that he found himself in the unhappy situation of having to reconcile a number of differing versions of events offered up by him to different parties at different times. It was not an enviable or easy task to discharge. It seemed to me that not alone amongst the witnesses in this trial, Dr Sachdev was perfectly capable of relating the factual position as he decided he wanted to explain it at the time of asking, as distinct from any accurate representation of what actually had happened. As to what reliance I feel able to place on the evidence given by Dr Sachdev, I will return later in this judgment.

32. The first account provided by Dr Sachdev was in a witness statement prepared by him in May 2021, for use in the Companies Court Petition proceedings. His recollection was set out from paragraphs 1 - 4:

> "I have known Mr Makhan Singh Bains from over 25 years as we have a personal family relationship. He introduced Mr Sukhwinder Singh to me as his business partner in 2015.
>
> Since this introduction, both Mr Makhan Singh Bains and Mr Sukhwinder Singh have been dealing with my practice as clients with joint shareholdings in Goldbeach Trading Limited and G B Retail Ltd.
>
> In G B Retail Ltd, Mr Sukhwinder Singh was introduced as a 50% shareholder from 26th November 2015 by Mr Makhan Singh Bains and he is still a partner in this company. Whereas, in Goldbeach Trading Limited, Mr Sukhwinder Singh was introduced as a 50% shareholder from l2th August 2016 by Mr Makhan Singh Bains.
>
> I am aware that as both the partners started devoting their time and effort in G B Retail Ltd, it was decided that Mr Sukhwinder Singh be introduced as a shareholder and start concentrating solely on the trade of G B Retail Ltd. The transfer of his shareholding was duly recorded at Companies House."

33. In light of this evidence, it might have been thought that the position was clear-cut with little room for doubt in the mind of Dr Sachdev, at least as to the nature of the business relationship involving C and D1. Dr Sachdev was cross-examined as to his recollection. Before me a different account emerged. Dr Sachdev explained that he had remembered a meeting between C and D1 in his office and the use of the word "sanja", which meant 50/50 in Punjabi, to describe how D1's business would be run by them both. He recalled that "profit or capital was never discussed. It was not discussed that way; it could have been the profit or equity share, it was just clear that everything was to be 50/50; we were to take instructions from Bobby [C]."

34. Another witness statement was then put by Mr Beasley to Dr Sachdev. This was described as a draft witness statement, and it appears to have been prepared by D1's solicitors for use in these proceedings. It was signed by Dr Sachdev on 17 February 2022; he explained that he had not been asked or encouraged by anyone to include in his statement anything that was not his own account, to the best of his ability and recollection, of events he had witnessed or matters of which he had personal knowledge.

35. At paragraph 15, Dr Sachdev described a meeting that had taken place in or around 2011.

> "Makhan explained to me in Punjabi in the presence of Bobby that he wanted Bobby to deal with me in his business affairs and to do whatever he asks me to do. This was because Balbiro [D1's wife] was now dealing with her own businesses. I took this to mean that he had total authority to instruct me and my firm and my job was to take any instruction from Bobby as if it was coming from Mr Bains himself. The phrase used to describe their business relationship was - "sanjaay" - together and equal. I accept that has a number of meanings including everything equal or equality in profit share. It was made clear that there was an arrangement between them that did not concern me but I have understood this to be a profit share."

36. So what was it that Dr Sachdev recalled? Was a profit share discussed before him or was nothing mentioned? Was he told about the agreement as to an allotment of a share or was that never mentioned? When cross examined, Dr Sachdev recalled that the instruction to change the shareholding in GBR was given when C secured his right to remain in the United Kingdom; however, "even if C's name was not on Goldbeach before, they had always traded as 50/50. I understood from them that they were running the business jointly and what was recorded at Companies House did not matter."

37. Dr Sachdev went on to say that the effect when the change was implemented was to split the one share ownership so as to achieve the 50/50 ownership. "We did not want to issue more shares", he said. No attendance note of the meeting had been taken. "They [C and D1] came all the time and not always that notes were taken."

38. In the witness statement submitted by Dr Sachdev in these proceedings he explained that [**6**]:

> "It was Makhan who introduced me to Bobby. I believe that was round about 2010. I clearly remember that when he introduced Bobby he said that "they were going to work together and that everything would be joint". At that time Makhan had one company Goldbeach Trading Limited. We spoke in Punjabi and as we are both fluent in that language there was no ambiguity in the instructions I

received as he used words which made it clear that they were going to be joint partners in the business - that everything was going to be shared equally between them 50/50. That is what I was told by Makhan and I have a clear recollection of it as at the time Makhan was my client and he was introducing me to his business partner and telling me that they were going to be working together and that everything would be joint. Those instructions were extremely important and I recall his words very clearly as from that day on I acted on those instructions.

When I asked him to explain "moving forward who we should deal with and who was going to give us instructions?" Makhan made it clear that Bobby would do so and that we had to act on them as he said "you can take it that any instructions given by Bobby have come from me". When my assistant Lindsay asked "if it was okay to share information with Bobby" he said it was. He gave us that authority in relation to Goldbeach Trading limited and later it was the same for G B Retail Limited and this verbal authority was not withdrawn until January 2021 when their relationship broke down."

39. Noting the inconsistency in his statement evidence, Dr Sachdev commented as follows, at paragraph 21:

> "In my first statement. I cannot recall who had instructed me to show Bobby as a shareholder in that company [Goldbeach Trading Limited] and I had filed all the relevant forms. With G B Retail Limited Makhan had instructed me as stated previously that everything they do was to be joint. In my first statement I said Makhan had instructed to add Sukhwinder as a shareholder but with the passage of time since I don't recall who asked for the share to be split but again dealt with the administrative formalities and submitted the forms to Companies House to show that the one share which Makhan held at the time in G B Retail Limited was now jointly owned by both of them. It did not matter at that time when things were amicable as we would have done what either of them instructed us to do. I also dealt with the accounts of Brand Connection Limited when this Company started trading. Sukhwinder was now shown as the Director in this Company but the terms of their partnership and profit sharing ratio remained."

40. On 21 June 2021, it appears that D1 wrote by email to Dr Sachdev. Dr Sachdev replied on the same day at 3pm. The email from D1 set out his position on a number of factual propositions with which Dr Sachdev was invited to agree. Those propositions numbered 1 - 4, were as follows:

> "Clause 1: Instructions for formation of GB Retail Limited were given over the phone and no such instruction about Sukhwinder Singh being a shareholder was provided. My understanding was that everything they were doing is 50:50.
>
> Clause 2: There is no record of any meeting in the month of August 2015 in my office by either of them (Sukhwinder Singh and Makhan Singh) in person or jointly. There is no record of any such meeting on 26th of November 2015.
>
> Clause 5: As much as I know Makhan Singh from my 25 years of relationship, he does not have any good communication skills in Written of Spoken English. His skills in English is very very low.
>
> Clause 6: I did not receive any instructions from Makhan Singh towards changing share holding of G B Retail Limited to include Sukhwinder Singh as a

shareholder. Instructions to put him as a shareholder came from Sukhwinder Singh but I can't comment on what happened in their personal understanding."

41. To these points, Dr Sachdev replied, "I have read your email and agree to points listed."

42. Dr Sachdev did remember his draft witness statement, to which I have already made reference: he remembered signing it. In his view he did not need to confirm to D1 that he had split the share as he already had the authority from D1 that any instruction that came from one of them came from both. In his view C had authority to speak for D1.

43. As to the earnings of GBR, withdrawals by C or D1 "would be shown in the books of GBR as withdrawals of director loans or dividends payments made to them, on which tax would be paid. Money would be taken out during the year and then at the end the accounting treatment would be given for it." This applied to expenses, dividends, salary or loan repayments. Dr Sachdev could not confirm whether D1 was on the payroll. There did not appear to have been any practice, Dr Sachdev accepted, of holding Board Meetings to sanction the paying of dividends. It was simply the case that "money would be taken out during the year and then at the end it would be treated as dividend or otherwise".

44. Turning to the demise of the relationship between C and D1, Dr Sachdev explained in his statement that he had been concerned to help the parties to reach an agreement and part ways amicably. A meeting had taken place at his office in January 2021 and a division of assets was discussed. He had taken notes from which he prepared "documents which he sent to C and D1 to agree and take to solicitors, but they never agreed. D1 disagreed with everything that had been proposed. I wrote down the proposal and had my office staff write it down. At the meeting, D1 did not agree and stormed out." This was Dr Sachdev's evidence before me.

45. Dr Sachdev was also asked about another company Brand Connection Limited (**BCL**), for which he agreed he had been responsible for the preparation of accounts. This had been C's company, he confirmed. As to its affairs, his staff had dealt with C. When asked about the draft settlement agreement which he had prepared and sent to the parties in 2021, Dr Sachdev explained that there had been no mention of BCL in its terms, which purported to split the joint assets of C and D1, because that had been C's company.

46. When re-examined, Dr Sachdev was asked again about the alleged meeting in January 2021 to which I have already referred, which featured in paragraph 25 of his latest witness statement, that is to say his substantive statement filed by C in these proceedings:

> "With the passage of time I cannot now recall who actually rang me to arrange the meeting but in my witness statement in relation to the earlier proceedings I stated that it was Makhan who had contacted me. The fact is a meeting took place and they both came to see me together on or around the 8th January 2021 and we all spoke in Punjabi. We invariably spoke in Punjabi when we were all together as it was just natural for us to slip into our mother tongue. They both confirmed that they had decided to end the partnership and I decided the best way to deal with the division of their assets was to make a list of all their assets and agree on the value of the assets and then divide it equally between them. There were

lengthy discussions on the division of the assets and eventually agreement was reached at that meeting and I had made notes."

47. This evidence must however be contrasted with what Dr Sachdev said in his statement of February 2021, where at paragraph 25, he said:

> "There was a meeting in January 2021 held at my office. Bobby and Makhan [*D1*] were present with me. There was a discussion that the parties should resolve matters. Bobby then spoke to me in English with terms of what he wanted and I wrote down what he said. Makhan did not participate nor did he respond in relation to what Bobby was saying. I then explained what I had written to Makhan in Punjabi and he stormed out of the meeting. I typed up my notes and then circulated what Bobby had said to the parties. Makhan was only there for part of the meeting and Bobby remained with me at my office for a while thereafter."

48. It will be self-evident that this provides a very different account of what supposedly happened in January 2021. Before me, Dr Sachdev recalled that it was "more than likely our conversation was in Punjabi. The meeting lasted to conclusion of division of assets, but the division never came to a conclusion."

49. As to the shareholding in GBR, Dr Sachdev explained that D1 would not have known that the existing share was split into a joint holding, rather than a second share being issued by the company; nor would D1 have known that he had been notified to Companies House as being the person with significant control of GBR.

50. A further letter was put to Dr Sachdev. This was written by his assistant Lindsay Mott, to D1. Dr Sachdev explained that every letter sent from his office is discussed with him. This letter contained the following:

> "INSTRUCTION TO SPLIT SHARE-GB RETAIL LTD
>
> As per our meeting yesterday regarding the above. You had given us authority to take instructions on behalf of your companies from Sukhwinder Singh.
>
> Sukhwinder instructed us to make the share holding joint therefore our office split the share 50:50 at Companies House.
>
> As you are director of GB Retail Ltd in 2016 when requirement came into effect via confirmation statement of person of significant control (PSC) you were the PSC.
>
> Accounts were filed also on Sukhwinder's instructions. We do not hold a share register as the shares are informed to Companies House on filing of the confirmation statements."

51. In his trial witness statement, Dr Sachdev made reference to a list of questions and answers. He was asked before me whether he agreed with the answers that it appeared he was providing. His evidence, certainly in regard to answer four, was that it was "not my wording." In his statement he said:

> "I have been shown a document listing Questions and Replies which I understand has been disclosed by the Defendants. I cannot now recall if I did see this letter . I do not know who prepared that letter or the reason it was prepared or whether I even considered this document at the time."

52. The list of questions and answers appears to have been prepared by Mr Parminder Singh who it seems was assisting D1. It was sent to Dr Sachdev on 1 April 2021, following a meeting with him held on 31 March 2021. It reads as follows:

> "I know Mr. Makhan Singh and Mr. Sukhwinder Singh for a few years now. I am an accountant to businesses of both Mr. M Singh and Mr. S. Singh. I have been asked to verify contents of some letters received by Mr. M Singh through his solicitors Awan Legal Associates Limited from S. Singh's solicitor Shuttari Paul & Co Solicitors.
>
> I am not making a witness statement based on knowledge and interface of me and my team but responding to the questions asked from within this solicitor's communication. My communication is as below:
>
> Ql: Was S. Singh involved in any capacity when GB Retail Limited was formed?
>
> Al: No, S. Singh was not involved in any capacity at start of the company. We were not given any instructions of any informal understanding outside the constitution of the company.
>
> Q2: Did any meeting take place in your office on 26th of November 2015. And if so, do the minutes of meeting indicate any share holding split of 50:50 between Mr. M Singh and Mr. S Singh.
>
> A2: To the best of my knowledge no such meeting was held. I have checked and do not have any records of any such meeting in my 2015 diary. There are no minutes of meeting in our files as well. So, the question of discussing split or anything for that matter do not exist.
>
> Q3: If the meeting did not happen, how was the shareholding changed. Split of one share between Mr. M Singh and Mr. S Singh is split recorded in Companies House.
>
> A4[sic]: We were instructed by Mr. M Singh that Mr. S Singh would be the interface for GB Retail Limited and accountant can proceed with all matters pertaining to G B Retail Limited based on instructions from Mr. S Singh. Most of the work was done on verbal instructions of Mr. S Singh and this is one of those jobs.
>
> Q4: So was the reversal of shares in subsequent confirmation statement done on instructions of S Singh as well?
>
> A4: Yes, all instructions used to come from S Singh.

53. At all events, it was just not clear to me just what Dr Sachdev's explanation was for the numerous versions of events appearing from the contemporaneous documents, his various statements and his evidence before me.

54. Mr Baljit Singh (**BS**) was next to give evidence before me. His evidence was heard in two parts and required the preparation of a further, more accurate, translation of his witness statement written in Punjabi. During the first stage of his cross-examination, it became obvious that the words appearing in the English version of the hand-written statement prepared by BS in the Punjabi language, were different from the original. It was possible for me to identify that numbers written as numerals which were plain to read, were different in the two documents. As a result, the cross-examination was halted and I asked for a revised translation to be prepared and agreed between the parties. I am pleased to say that this outcome was achieved with a minimum of disruption thanks in no small measure to the good sense and co-operative spirit of the parties. The cross-examination was able to resume on the afternoon of Monday 11 November, with no serious inconvenience to the parties or disruption to the trial, save that BS was called upon to return to court, which with good grace, he agreed to do.

55. As to his evidence, BS denied that his witness statement had been written from the perspective as a friend of C but rather had been given in accordance with the facts and what was true. His evidence touched on how he had first come upon C and D1, and how as a "threesome" they would spend time looking at shops and prospective businesses that they might together acquire. His denial notwithstanding, I did nevertheless gain the impression that BS had the objective, consistent with his apparent friendship with C, of being as helpful to C as he could.

56. BS recounted how he had gone "to the Warehouse in 2010 when C and D1 started working together. They said they had a business together - D1 said that too. The C was in management doing the office work and D1 was working in the warehouse. D1 would speak to me and told me that he had the business together with C."

57. In 2014 BS had told C that he wanted to start a business and so they together started looking at shops. BS identified a shop in Kidderminster which in 2015 he took over. There were two shops: a convenience shop and an empty shop next door. The Lease was taken in his name and also D1. The C was not added at that time as "he was not legal in UK. Had he been legal, we would have included his name in lease." Nevertheless, after C became "legal in UK we did not change the lease as we were all like brothers there was no need. We were trading as BM Consortium Ltd." BS went on to describe how it was "the accountant" who had "set up the company – not the solicitor." It was he said not difficult to remember. He remembered "the three of us went there. I went with D1 to sign the lease with the solicitor. It was later with the accountant that we started BM Consortium. The C put money in."

58. There had been an understanding, BS claimed, that a third person was joining the company. The third person "put a share in." Although he did now know how much money had been contributed, BS knew that C had contributed the third share. He went on to describe how the company had been named "BM" to denote "Bobby, Baljit and D1". This was challenged by Mr Beasley who drew attention to the perhaps obvious fact that the name was not BBM.

59. So far as BS was concerned, "any company C and D1 opened, they opened together. They were business partners."

60. In his witness statement, BS explained the formation of BM Consortium in this way:

"Makhan Singh and Bobby they both told me that my share in that business would be 33%. I asked them that how come I get 33% share, and they explained to me that they will have two shares, 33% for Makhan and 33% for Bobby while I will have one share in this business. Both of them added their share in that business through their company called GB Retail and so at the end ultimately, it was decided that 67% of the share would belong to G.B Retail and 33% of the share would be mine. Both of them told me that just like in Gold Beach Trading, even in G.B retail they have equal 50/50 share even in G.B Retail."

61. As to the company BCL, BS was often at its warehouse. "We all ate together and D1 was working there." BS claimed to know that C and D1 were opening companies for soft drinks and the like, that they had a 50/50 share and that D1 would be working at BCL.

62. Reflecting what he had set out in paragraph 18 of his statement as to events in 2020, when cross-examined, BS described a conversation with D1 who had said that he was getting older and did not want to carry on with shops. Thus, the shop would stay with C. "The three of us divided up the shares – this is his, this is mine. This is suppliers' money and whatever is left is split yours and mine."

63. When the money had been divided, C said that if any bills came in after that, D1 would be responsible "and that is when D1 got angry. The Sheldon shop split was agreed by Makhan. However many there were, they divided it 50/50. I was there, sitting there." So this was the account of BS of an agreement to split assets, reached between C and D1, in his presence.

64. BS recounted how C asked for stock money and goodwill for the Sheldon business:

"They were so close, like brothers and I was shocked, God knows, to see them fight like this. Bobby was quiet and did not say much but D1 pushed a chair and the door, and said "tell your Solicitor to prepare paperwork for the Kidderminster shop and whatever there is, I will sign it." D1 had said that for Kidderminster the value for both shops was £210,000. The C and D1 "sat down and agreed it for both shops: £70,000 was my share."

65. BS confirmed in cross-examination what he had explained in his statement at paragraph 20:

"Because I had a one-third share in the Kidderminster business, I felt stuck between both of them. After few days, Makhan Singh called me and told me that he did not sign on any agreement and Bobby has no involvement in nothing to do with any business. Their relationship had completely ended. And he also said that all the property of G.B retail business belonged to him. At this, I told him that what he's saying is not the truth and he should give Bobby his Bobby's share. I got upset with to him. And Makhan Singh over this got annoyed with me too."

66. I then heard from Mr Jagjeet Kaur. He had worked at BCL. His evidence was that he had formed the impression that C and D1 were partners and working together. Much of his evidence focussed on what D1 had asked him to do whilst both were working at BCL. This included diverting stock deliveries to the company of the D1's son, rather than fulfilling orders needed by BCL. Mr Kaur had had numerous arguments with D1 over this practice which he felt broke the rules that he had been asked to follow, but nevertheless, D1 was in charge of the warehouse.

67. C's wife, Mrs Pawanjeet Kaur, also gave evidence. Repeating what she had set out in her statement, Mrs Kaur related her understanding of the growing friendship between C and D1, which led to discussions in 2009 and 2010, about them starting a business together; however, she did not herself hear any of the discussions between C and D1 regarding the business. She seemed to recall, although when cross-examined her recollection was uncertain, that in 2010 C and D1 had started Goldbeach. Mrs Kaur went on to explain how D1 had bought a family home for C and her and had agreed to "hold it on trust" for them until D's immigration status in the UK had been regularised. There had been no written record of this agreement. "We were like a family" Mrs Kaur explained. D1 "kept saying we are more than partners we are brothers."

68. Mrs Kaur had however been anxious; she wanted her husband to be a director of the companies running the businesses. In due course she had been shown the company papers so that she would stop worrying. She also recalled seeing C registered as a shareholder for both Goldbeach and GBR, but that she noted might have been when she had tried to find the documents needed for the litigation.

69. Mrs Kaur was asked about Goldbeach and BCL but her recollection was poor. She could though recall a decision in 2018 to close down Goldbeach, and C and D1 starting BCL in which they were also equal partners.

70. I then heard from C. I regret to say that I found C's evidence by turns difficult to follow and contradictory. I was also more than a little troubled by the extent to which, by his own admission, his account of events had repeatedly changed. In one critical aspect, C accepted that he had previously provided a self-serving account of what had happened but that his evidence was now different because of the change in prevailing circumstances. I was left with the very clear impression that C would offer evidence that in his mind at least supported the objective he was at that juncture pursuing. The consequence of my assessment of C and his evidence is that I am able to put very little store indeed by much of what he told the court.

71. Before turning to the evidence given by C to the court in regard to the alleged oral agreement, given the observations that I have just recorded, it is helpful first to consider the explanation given by C of the perhaps surprising contents of the "letter before action" served by his solicitors on 12 February 2021. In that letter, the solicitors set out what was described as the "Factual Background", which included the following paragraphs:

> "The Company GB Retail Ltd (hereinafter referred to as "Company") was incorporated on the 26th November 2014 at which date your client was the sole Director. At that stage our client was assisting and advising Mr Makhan Singh in his business and introduced new business leads to him. As our client had been working diligently and with a degree of commitment which your client valued he decided to make him a partner and offered our client a 50% interest in the shareholding of the company. On or around the 26th November 2015 our client

Mr Sukhwinder Singh acquired the 50% shareholding at the offices of Company's Accountant - Dr. Rakesh Sachdev Chartered Accountant of Company (incidentally the address of the accountant is also the registered address of Company). Our client's 50% shareholding was duly recorded at Companies House and we would refer you to page 1 of the said bundle.

As a result of the business skills our client had acquired and his dedication and commitment to the business the company prospered. Our client worked extremely long hours to ensure the success of the business and it was precisely for that reason that Mr Makhan Singh had offered him the 50% share in the business.

As regards the payments made to and from Brand Connection Limited we understand that both partners reached a mutual understanding that our client Mr Sukhwinder Singh would set up the company as his own personal business but that it would provide stock to GB Retail Limited.

Although our respective clients remained in partnership throughout relations became strained when your client's son Shane Tamana set up his own business virtually in competition with Brand Connection as he intended to deal with the same products, However this company Shane Consortium Limited lay dormant for a few years which was shown on the Company House website as a dormant company but towards the latter end of 2019 your client intimated that he wished to separate from our client and focus more in developing his son's Company the said Shane Consortium Limited."

72. As will shortly become evident, the position stated by the solicitors is in sharp contrast to the case made before me by C. When asked about the obvious difference in the case being advanced before the court and that set out in the solicitors' letter, C confessed that:

> "he had been obliged to write it in such a way that nothing would come back to me for working, but later I was able to write what happened. Understand my frame of mind. I had been given residency but it was not formalised and so I had to be careful as I only had leave to remain then. After years we get indefinite leave to remain so at this point, when I was claiming this, I was scared that if I write down all the facts it might harm me in a different way. But when I was asked what my rights were, and not my immigration, then I had to right down each and every fact."

73. Unfortunately for C, this explanation in itself caused further difficulties for him, by reason of the manifest inherent contradiction. "It was because I was concerned if I had been involved in a business, that might affect my immigration status", C said in answer to a question put by Mr Beasley. As is plain however from a simple reading of the solicitors' letter, there is an unambiguous admission of C's dedicated and committed efforts in working for D1 in the businesses, prior to the grant of the necessary immigration status. It cannot have been because of a desire to avoid any mention of that work, that a different version of his claim was set out. Indeed, the letter is constructed on the basis that it was entirely on account of the work done and the extent of it, that D1 offered C a 50% shareholding in GBR. When this irreconcilable position was put to C, he answered claiming that "but you are talking about period before 2015 - I was doing odd jobs. I was working as an unofficial partner of D1." As will be seen, this observation, in itself, also gives rise to an inconsistency: had he been working as a committed partner justifying commensurate economic treatment by D1, or merely carrying our "odd jobs", from time to time?

74. The C's view of it all was that his trial witness statement was to be taken as his final and definitive statement. As the case proceeded, he had understood the witness statement had to be elaborate and it was his last chance to say everything in a very detailed manner. I am driven to say that this passage of testimony, taken with my assessment of C's demeanour throughout, left me feeling distinctly uncomfortable with the quality of his evidence.

75. It is important to look at what C's case was before me, and how he now wished to corroborate it by his evidence. In his PoC at [**10**], it is averred that in 2010, D1 acquired the issued share capital in Goldbeach and became its sole director. "At that time C and D1 were on very good terms and the latter would regularly consult the former for advice as he respected the business acumen of C. The C assisted the D1 to develop Goldbeach as a viable business."

76. What is of central importance is how the pleading developed. It is then alleged that after some four years, in 2014, D1 suggested to C that the two of them operate Goldbeach as an equal partnership, whereas C countered with the idea that the two friends should start a new company focusing on retail sales. Over the course of the following months it was then agreed, orally, that not only would C become an equal shareholder in Goldbeach, but that the new business would be carried on "through the vehicle of a limited liability company to be incorporated for that purpose under the name GBR, in which C and D1 would ultimately have equal shareholdings in the same way that C was going to become an equal shareholder in Goldbeach". It is that Oral Agreement, and the alleged breach of its terms, that is the foundation of C's claim before me.

77. In his witness statement in the now stayed Companies Petition proceedings, a not dissimilar position is developed in regard to the supposed agreement with D1, at [**15**], C said this:

> "In or about mid 2014 Mr Bains suggested that he and I should run Goldbeach as an equal partnership. At or about the same time I proposed that we should set up a new business to focus on retail sales.
>
> **16**. We continued to discuss the ideas and over a period of a few months reached agreement on the way forward. The agreement was not recorded in writing - I did not see the need for a written record as I trusted Mr Bains completely. The terms of the agreement were as follows:

a. I would become an equal shareholder in Goldbeach;

b. the proposed new business would be carried on through a limited liability company to be incorporated for that purpose under the name GB Retail Ltd. I suggested this name, the first two letters being taken from Goldbeach;

c. Mr Bains and I would ultimately have equal shareholdings in the same way that I was going to become an equal shareholder in Goldbeach;

d. the day to day running of both Goldbeach and GB Retail Ltd would become my responsibility as the Defendant wanted to devote less time to them, preferring instead to focus on leisure activities such as spending time taking his two dogs for walks; spending an increased amount of time with his family taking them on holidays abroad (Mr Bains would go on holiday 4 - 5 times a year for a minimum of 7 - 10 days); organising and taking part in Kabaddi tournaments Mr Bains also spent an increasing amount of time drinking and not just at social events he would start drinking even in Cash and Carry (Goldbeach);

e. although Mr Bains was content for day to day management of both companies to be left with me, it was understood and agreed between him and me that he would be consulted on major decisions;

f. in return for my shareholding in GB Retail Ltd, I agreed to perform the following activities:

    a. prior to incorporation of GB Retail Ltd and afterwards dealing with all necessary preparatory work including a retail business plan; conducting market research; investigating the target market; devising branding concepts and design; finding shop premises and sourcing the necessary equipment to fit out such premises including conducting negotiations with Baljit Singh to acquire a majority shareholding in BM Consortium Lid and BM Perfect Foods Ltd;

    b. following incorporation of GB Retail Ltd, operate its business on a day to day basis.

g. until I obtained leave to remain in the United Kingdom, Mr Bains would be the sole shareholder in GB Retail Ltd once incorporated and its sole director;

h. upon obtaining leave to remain in the United Kingdom, I would be engaged by GB Retail Ltd as an employee and Mr Bains and I would become equal shareholders in GB Retail Ltd. It was also agreed between us that l would not become a shareholder in Goldbeach until I secured leave to remain in the United Kingdom."

78. A further account of what had taken place was set out in C's trial witness statement at [**10**]:

> "As Makhan wanted to set up his own business I told him about Goldbeach Trading Limited (hereinafter referred to as "Goldbeach") which was a Company supplying alcoholic drinks and I knew the Director of Goldbeach as he had in the

past worked with me and I knew he was struggling to run the business and wanted to dispose of it. I suggested to Makhan that he should take over the business. Makhan considered this and then said that we should go into the business together on a 50/50 basis as he had realized that I was naturally gifted in business and knew I had plans to run my own business one day. I agreed to go into partnership with him on that basis. My wife Pawanjeet Kaur warned me not to rush into things as she had doubts about Makhan but I didn't pay much attention to what she was saying as she was always suspicious about people until she got to know them. I had no doubts about Makhan. I trusted him and I thought he was completely genuine and that he wanted to go into partnership with me because he valued my friendship and my business acumen.

11) He knew I did not have residency status in the U.K so he proposed that we would open the company in his name but that we would be joint partners on a 50/50 basis. I spoke to the owner and we got Company without paying much for it. It was never suggested at any stage during our discussions that I would be just an employee and would be given a 50% bonus of the profits. I would never have agreed to that as Makhan knew all along that I would only ever consider a 50/50 partnership and he was the one who proposed it when I first told him about Goldbeach. We would both discuss our plans for the future in front of our families and friends and I never told anyone that my plans for the future was to remain an employee. By that dale I had already left full-lime employment and was selling food items and sweets to local shops by going door to door.

12) We got a good deal on Company as the owner just did not want it. On 12th June 2010 Makhan took over the business and was appointed Director. Makhan then took me to see his accountant at his office and he introduced me to Dr Rakesh Sachdev and his assistant Lindsay and told them that I was now his business partner and that everything would be joint. Dr Rakesh did ask if he could take instructions from me and Makhan confirmed that they could. He made it very clear that we were now partners in the business. I cannot remember the precise date of our meeting but it was sometime in 2010 shortly after we took over Goldbeach. I did however make it clear to Makhan that until I obtained my visa I could not be shown on the books and it was agreed between us that once I did obtain my visa then I would be shown as a shareholder and I would be put on the payroll. It was with that clear understanding and agreement in mind that we started our partnership.

79. From these passages it is plain that so far as C was concerned, he had been part of the Goldbeach business from inception. It was from the point of acquisition of Goldbeach that the joint business terms took effect. From that point C had been "50/50" with D1 in the undertaking. This was not an arrangement for C to receive a fifty per cent share of the profits; this was from the beginning, in 2010, an arrangement where C and D1 were in business together as equal partners. As will be seen, C took up this point when giving evidence at the trial and responding to questions from Mr Beasley.

80. The C carried on in his statement at [**15**] and [**16**], to explain how the formation of GBR came about:

"Goldbeach was performing so well that in or around 2012 we needed to move to much larger premises so we rented premises at Unit H Austen Way Hampstead Industrial Estate in Birmingham. We still wanted to expand our business and Makhan supported me fully in the plans I had. I believe it was round about

October 2014 that I told him that we had to set up another company to handle the retail side of the business as I had seen a gap in the market and suggested that we expand into the retail sector and we could use Goldbeach to support the new venture as combining wholesale and retail together would increase our strength as a business and in tum increase profitability as Goldbeach would be supplying the goods directly to the new company.

16) I named the company G B Retail Limited as I wanted there still to be a link to our existing company Goldbeach and so I took the two main letters G and B and came up with the name GB Retail Limited (hereinafter referred to as "GBRL"). Makhan was again shown as the sole Director and shareholder in the company but the partnership agreement that we had in Goldbeach remained the same in GBRL. Our understanding was simply carried forward and this 50/50 shareholding arrangement continued into all the other business ventures we became involved in whether the companies were registered in my name or in Makhan's name. We were joint partners 50/50 whether it was in Goldbeach or in GBRL or in any other company and over the years we opened a number of companies - G B Consortium Wholesale Limited; A Connection Limited, GLDN Import and Export Limited, Brand Connection Limited to name but a few. I paid £39,000 from my personal account into the account of GBRL in November 2015 as my share of the capital investment in the company. GBRL was duly incorporated on 26 November 2014."

81. It might be recalled that this version of events appears in clear contrast to the version set out by C's solicitors in the letter before action. On that account, it was because C had been working so diligently, "assisting and advising D1 in his business", that D1 had decided then to make C a partner and offer a 50% shareholding in GBR.

82. In his evidence at trial, C described his 10 years business experience in India. He went on to detail his experience in running retail/wholesale businesses and shops. It had been his idea to buy Goldbeach. Although he had no permission to work in the UK at that time, he had agreed to go into partnership with D1 on a 50/50 basis. His residence status meant that he had no right to payslips, but nevertheless he had been working as a partner. The C was not paid a wage "we just withdrew our profits on a weekly basis", he told me. The C then went on to explain that "if I had been told that I would just be an employee and not a shareholder, I would not have started working there."

83. C continued in his account with this evidence:

"We come from an Asian background unorthodox way of deal and level of trust so high it can be very dangerous when someone does not follow their word. It was very simple. Our understanding was to join two people and two families in Goldbeach or GBR or Consortium or Brand Connection – the arrangement was the same. Nothing was formal. Nothing was regular - no board minutes – money could be rotated in any of the accounts but expenditure common to both families. I was unofficially always a shareholder and when I gained my residence I was given official shareholder."

84. Pausing here, it must be accepted that this evidence was at once completely at odds with the pleaded case, which left no doubt that the case advanced was that the Goldbeach undertaking commenced in 2010, with C merely assisting D1; it was not until the Oral Agreement in 2014 that there was the suggestion of a partnership or equal shareholding in Goldbeach.

85. Pressed in cross-examination, C held to his view that Goldbeach had been a joint partnership of a 50/50 shareholding from the outset, though he did concede that unlike D1, C had not contributed any capital to the business.

86. The C then attempted to provide an explanation that accounted for what appeared to be a marked difference between the case pleaded, his evidence before the court and also the account given by his witness statement. The discussions in 2014, had he said been a "re-discussion" of what had been agreed from the beginning; that was to say, from the outset, the two friends were to be partners in everything and have an equal holding in all business assets. The 2014 discussion did not change anything; it was merely a confirmation; C had been a shareholder since 2010. In 2014, when C and D1 met to agree upon the new company, GBR, the confirmation of C's residence status was imminent. D1 had reassured C that "the Oral Agreement will happen and that I would become an official shareholder in Goldbeach and would become an official shareholder in GBR."

87. When it was pointed out to C that the evidence he had given appeared to be inconsistent with his previous accounts and also his pleaded case, his explanation was that "it [the PoC] should say that D1 and I already had the agreement, the agreement was that as we are already running Goldbeach as an equal partnership, we should also run GBR that way." In response to Mr Beasley, C added, "I agree with you the evidence is different". It was important to have in mind, he explained,

> "the seriousness of this case and as the case progressed, I understood that each and every word has to be stated and read very carefully. Now in my trial statement, I know that I have to concentrate and give my evidence carefully and that's why I mentioned the earlier agreement."

Discussion

88. It will by now have become clear that there is an essential inconsistency in the evidence of C; the conflicting nature of C's evidence is all the more stark when it is taken together with the accounts of the relevant events provided by those acting on his instructions. The difficulty amounts to this: did he become an equal partner with D1 in 2010 when they together embarked upon the Goldbeach venture, or was it that Goldbeach happened first, and that only because C proved himself a worthy colleague, did D1 decide in 2014 to bring him into Goldbeach as an equal partner, as well as the new business they were to start together, GBR?

89. It is hard to ignore the witness statement evidence which points clearly to the arrangement having been agreed upon in 2010. C would only ever have agreed to a 50/50 joint partnership; it was on this basis that Goldbeach was acquired, and then developed together. It was C who had negotiated the terms of business with suppliers whilst D1 worked in areas of the business that did not require negotiating or agreeing terms with contractors or suppliers. It was because Goldbeach was performing so well that in 2012, D1 supported C's plans not only to move to much larger premises in Birmingham, but also to start a new company to combine the retail and wholesale operations – GBR.

90. How is this evidence to be reconciled with the evidence given to the Companies Court? In those proceedings it was said by C that it was in 2014 that D1 had said that Goldbeach should be run as a partnership with C as an equal shareholder, the company having been established at the outset by D1 alone. Then there is the position taken by the letter before action, which asserts that only because of C's industry and diligence did D1 agree to offer to C a 50% shareholding in GBR. This is what was said:

> "As a result of the business skills our client had acquired and his dedication and commitment to the business the company prospered . Our client worked extremely long hours to ensure the success of the business and it was precisely for that reason that Mr Makhan Singh had offered him the 50% share in the business."

91. This contention is at once incongruous with C's clear evidence before me, that prior to 2015 he was only "doing odd jobs for D1 as an unofficial partner".

92. As has been seen, the PoC proceed on the basis that Goldbeach was acquired by D1 in 2010. Goldbeach was operated by D1 who from time to time consulted C for advice. The C in some capacity assisted D1 to develop Goldbeach as a viable business. It was not until 2014, that D1 suggested that Goldbeach be run as an equal partnership; it was not until the conclusion of the discussions that ensued during the following months, that it was agreed that C would become an equal shareholder in Goldbeach, and also in time, GBR.

93. When I asked C about the apparent conflict that the evidence in his statement gave rise to, he said to me that it was "a statement that reflects the paperwork but not the true understanding between D1 and me." This did not strike me as a particularly convincing answer and I am not sure that C thought it was either.

Brand Connection Limited

94. It was not only in respect of GBR and the alleged Oral Agreement, that the evidence of C was observed to be inconsistent and confused. It was C's evidence before me that from the outset there had been a partnership. The business relationship was a 50/50 venture. Anything that was done by the two partners fell to be considered within the four corners of this central principle. What then was to be made of the arrangement surrounding another company, BCL this time set up by C?

95. In the letter before action of February 2021, C's solicitors took this stance in regard to the ownership of BCL:

> "As regards the payments made to Brand Connection your client has always known that this company was owned by our client and that the company was providing liquid assets to GB Retail Limited to enable it to function properly and also provided stock."

96. But at paragraph 16 of his witness statement, C said this:

> "We were joint partners 50/50 whether it was in Goldbeach or in GBRL or in any other company and over the years we opened a number of companies - G B Consortium Wholesale Limited; A Connection Limited, GLDN Import and Export Limited, Brand Connection Limited to name but a few."

97. And later at paragraph 55,

> "Even though I was named as the sole Director Makhan was nevertheless my partner in Brand Connection Limited as well. I decided I would start trading in the wholesale supply of a variety of goods: soft beverages, packaging and catering products. It was always our intention that the profits would he shared equally. We have always had the same profit sharing arrangement no matter which company or business we were involved in."

98. C's pleaded position, set out at paragraph 26.1 of the PoC, says this about the ownership of BCL:

> "at the end of November 2020 at the offices of Brand Connection Ltd, a company owned and/or controlled by the Claimant;"

99. At paragraph 42 of his statement in the Companies Court proceedings, C's evidence supported the line adopted in the PoC:

> "Various discussions between Mr Bains and me then took place with a view to agreeing how such a separation might be achieved, including at meetings between us held on the following dates: a. at the end of November 2020 at the offices of Brand Connection Ltd, a company owned and controlled by me.";

100. Before me however, in cross examination, corporate documents were put to C confirming that C was the sole director and sole shareholder: C was asked, why were you and D1 not joint shareholders? C answered that:

> "this company was formed and we wanted to show that it was separate from Goldbeach and GBRL. We wanted to do this to show the allocation of stock – we wanted a different identity from Goldbeach but we would work together as a team. It was supposed to be assisting Goldbeach. If we had shown D1 as member here too, then the idea would fail as we wanted to show suppliers that it

was a different company so we could get more stock. There was the same accounts manager on same log in details."

101. In a further gloss on events surrounding BCL, in cross examination, C added an explanation as to how BCL came about, and who had an interest in it. The decision to incorporate BCL followed a decision to return the share he held in Goldbeach to D1:

> "After share given back to D1, I opened a new company and we agreed that I would come out of this company [Goldbeach] and we would open a new company in my name and that was BCL, so that if Goldbeach had to be liquidated then we would have a company as a back-up called BCL and that I would be a director of it and because I had given [up] shares in Goldbeach it would show no link to Goldbeach with me. Goldbeach was not doing well anyway and no need of two shareholders in that company so I agreed to plan".

102. This surprising account had not featured in any account of the facts previously put forward. It certainly appeared barely credible that suppliers would consider BCL to be a company entirely distinct from those operated by the D1/C partnership when the very same individuals were involved with it. It is also surprising, ln light of what is set out in his PoC and Companies Court statement, that before me, C should feel compelled to say:

> "I don't have an explanation for what is written here. It was always jointly owned."

103. When pressed by me on why it was that paragraph 42 of his witness statement clearly asserts that BCL was a company owned and controlled by C, C replied to me:

> "it is a statement that reflects the paperwork but not the true understanding between D1 and me".

104. All of these various versions of events, littered with obvious inconsistency, did nothing other than serve to enhance the doubts already harboured by me regarding the reliability of the evidence proffered by C.

105. During his time giving evidence, the various inconsistencies to which I have referred began to be appreciated by C. He could see that the differing accounts that he had offered up required a clear position to be taken. Thus it was that despite the various statements suggesting that BCL was a company belonging to C, in order to support the theory that everything done by the partners had been done together and for their joint benefit, C explained that:

> "My case is that D1 owns half of my business now all the other businesses I started – our businesses run by me but our businesses. I have not taken any money without everyone's consent.

106. All of this material must be contrasted with the evidence given before me in cross-examination by D1. His understanding was typically straightforward and in my judgment, likely to be the true account of what happened:

> "Bobby [C] would know about whether he was a shareholder [in BCL]. This was not a company as part of a partnership with C. I had nothing to do with BCL in any way. When C created BCL he said, brother I want to do something for myself. I said go ahead. I said I would help if he asked me. All just done

verbally and no documents. This was Bobby's company I had nothing to do with it".

107. The accounts given by C in respect of BCL, at once cast doubt on the reliability of the whole of his evidence in these proceedings. When was a statement to be treated as merely indicative of a state of affairs represented only by documentation, and therefore not to be taken into the reckoning, and when was it necessary to consider what was said to be the true underlying factual position that was now being put forward by C?

D1's response

108. A court is faced with a difficult task where the quality of evidence led before it in a trial is not such as will admit of a satisfactory finding of which version of events is more probable than another. In this case D1 says there was no Oral Agreement. In his evidence before me, his position was uncomplicated: D1 agreed that C would share equally in the profits but at no point did he turn his mind to granting to C an equal shareholding in his companies. Not only was it not discussed by D1, but it was also not a subject raised by anyone else. D1 submitted a witness statement as his evidence and he was cross examined upon it. The essence of his position was set out at [**35**]:

> "Given that I had invested so much time and money into Goldbeach and GBRL (more than £120,000), and that the Claimant had invested nothing, I had no intention of giving away half these assets by making the Claimant a shareholder in these companies. To be clear, the word 'shareholder' was never mentioned between us, and was never something that I would have considered. Despite what the Claimant now says, I never told the Claimant that he would become a shareholder in either Goldbeach or GBRL, and he is either lying or mistaken to suggest otherwise".

109. As to the incorporation of GBR, D1 added this at [**39**]:

> "On the incorporation of GBRL, I invested about £95,000, which was used to purchase a convenience store in Kidderminster. As with Goldbeach, the Claimant made no investment into GBRL. Consequently, the Claimant and I proceeded on the basis that the Claimant would receive a profit share but would not be a shareholder, which was the arrangement that I had made with the Claimant in his work for Goldbeach."

110. When cross-examined, D1 maintained a similar line. He explained the genesis of the Goldbeach business in this way:

> "Goldbeach was a Company owned by Parvinder Singh. At the time I knew I was made a director of the company.

111. When asked if Parvinder had transferred a share to him, D1 carried on:

> "No words such as shareholding were used at that time. I was made a sole director of the company. C had a white van. He picked up wine and delivered. We became friends and gradually our families became close. I moved the warehouse to Aston – we started the business when we moved to Aston, and then we moved to Unit H. 23,000 sq. ft. It was not C that suggested we take over Goldbeach. I had known Parvinder from India. I know he was paid for the stock. It was agreed that I would pay for the supplier and stock. I gave suppliers a

guarantee. It did not cost that much. The stock was £10 - 15,000. I paid the Suppliers; the company as bought for a penny. I am sure of that."

112. When cross-examined, as to the role of C, D1 explained that:

> "Yes I did agree C would have role in GBR from beginning the same as Goldbeach. Yes, C would work in GBR on same basis as he had worked in Goldbeach. Same saanja for GB as for Goldbeach. The idea started when we had too much damaged stock from the cash and carry and we did not get money for it. I have been running shops from the start and ideas come to your mind I did have the idea. C was going to get a share of the profit."

113. Much had been made by C of a meeting that it seems did take place in 2021 at the offices of Dr Sachdev. C claimed that the meeting had been arranged for the purpose of discussing how the assets of the various jointly-held businesses would be split between the two erstwhile business partners whose relationship had by that point broken down irretrievably. This was gainsaid by D1 whose evidence before me was that, yes, there had been a meeting with Dr Sachdev, however rather than a pre-arranged attempt to schedule a discussion to resolve a dispute:

> "what happened was me and my son went to drop some papers off for my wife. Sachdev said C was coming and would I wait – I said yes. So yes, I met C at the accountants. Very little happened. The meeting lasted five to ten minutes. No, it had not lasted several hours. Yes there were proposals to divide GBR and Coventry Road. Sachdev was making notes. There was no agreement. I do not recall Sachdev saying that lawyers would need to formalise. I did not utter a word – just looking at their faces – I was just watching C giving instructions and Sachdev was writing it down – I kept watching".

The Privileged Email Exchanges

114. I must now record my finding on the without prejudice privilege issue to which I made reference earlier in this judgment. It was C's case that I should have regard to a series of four email messages all dated 16 January 2021, passing between Dr Sachdev and the wife of D1. The first message from Mrs Bains says this:

> "Further to our conversation I've had the conversation with Makhan. Makhan is happy with the following: Kidderminster chip shop Kidderminster off license Lake District shop Spar Birmingham. We're happy with Bobby to have the unit. I'm not sure if your aware but this is the opposite of what was originally agreed with Bobby from the beginning."

115. The following messages were in a similar vein. On their face, there can be little doubt that the messages suggest that D1's wife was engaged in a discussion about the splitting of the assets of the businesses operated by C and D1.

116. There was however nothing in any message put before me from Dr Sachdev or anyone else, that suggested that by that point, a dispute had arisen or litigation was in prospect. To the contrary, a reply message from C to Mrs Bains and Dr Sachdev, makes it clear that an amicable solution was the objective. Yes there was a discussion about the division of assets but no reference to a dispute or to the prospect of any proceedings. It would not have been reasonably contemplated by either party, certainly not D1, that there would be a resort to litigation if no agreement was to be reached. In this context, it is my view that the messages fall on the wrong side of the "opening shot" line, that is to say they do not attract without prejudice privilege. In any event, the purpose of the negotiations, as contained in the email exchange, was not the settlement of a dispute. Accordingly, I have had full regard to the exchange of messages passing between Mrs Bains and Dr Sachdev.

117. What then do I make of those email exchanges? It is not clear to me that they add anything much at all. D1 said in cross examination that he had no knowledge of the exchange. His wife, he said, had not been acting on his instructions despite the plain reference, as can be seen from the message I have already recited, to Mrs Bains discussing aspects of the proposals with her husband and then relaying his views. I find D1's evidence on this matter quite extraordinary and indeed lacking in any credibility. I confess to some difficulty in respect of this evidence for this reason; I otherwise found D1 to be a truthful and credible witness. His answers, through an interpreter were straightforward and to the point; he appeared to give an honest answer to questions which on their face may have been detrimental to his case. By way of example, when asked if he had indeed told Dr Sachdev that he could act on any instruction given to him in respect of Goldbeach by C, the answer was a simple, yes. Wherever a conflict arose with the account provided by C, I was naturally drawn to favour the account provided by D1. Despite the position taken by D1 on his involvement with the email exchanges of his wife with Dr Sachdev which I find impossible to accept, I do not find the remainder of his evidence to have been irredeemably tainted.

118. In my judgment D1 was giving a truthful account when he explained how matters came to a head over the disagreement on valuations ascribed by BS and C to parts of the jointly-run businesses. This important passage of evidence from D1 was given before me:

> "In the first week of January, C and BS had given a valuation for the chip shop. The grocery shop 90k and chip shop was 120k. Bobby and Baljit had taken £20,000 from the chip shop without my knowledge. At that time we had an argument as to why have they had taken the money out without my permission? I got angry as well. I said whatever is happening is very wrong. I became very angry and said to C where you are in life today is because of me. I also said who are you to divide GBR, as GBR belongs to me. In anger I slammed the door and left"

119. Returning to the emails from Mrs Bains, I do not find that they point conclusively to a recognition on the part of D1 that he was obliged to split his assets with C. Not only did he convincingly deny this before me, the language used is in my judgment equally consistent with D1 agreeing to provide some benefit to C following his profitable engagement with the businesses over a lengthy period. It is D1's case that he intended to work very closely with C and to split the profits of their business ventures equally.

120. So far as D1 was concerned he knew nothing of C being registered as a shareholder of Goldbeach, and nor did he know that Companies House had been informed of the joint ownership of the one share in GBR. I saw no evidence that would suggest D1 was aware of these facts. This is consistent with the statement of Dr Sachdev, which while at odds with his email of 21 June 2021, explains that:

> "I did not receive any instructions from Makhan Singh towards changing shareholding of G B Retail Limited to include Sukhwinder Singh as a shareholder. Instructions to put him as a shareholder came from Sukhwinder Singh but I can't comment on what happened in their personal understanding."

121. Dr Sachdev also agreed with the statement that:

> "Instructions for formation of GB Retail Limited were given over the phone and no such instruction about Sukhwinder Singh being a shareholder was provided. My understanding was that everything they were doing is 50:50."

122. It seems to me that taking Dr Sachdev's evidence as a whole, the more likely explanation is that it was C alone who gave the instructions regarding shares to the office of Dr Sachdev. Because he had been told that they could act upon C's instructions, Dr Sachdev and his team took the steps that they did in respect of registering a share in Goldbeach as being held by C, and then subsequently informing Companies House that the one share in GBR was held jointly by C and D1. It is probable that D1 was just not involved.

123. It also suited C and Dr Sachdev to be able to present an equity ownership position because this was consistent with the tax planning that was Dr Sachdev's principal concern in acting for D1 and C. The evidence given by Dr Sachdev, was that drawings from the business were allocated to salary or dividends depending upon the optimum outcome from a tax mitigation standpoint.

124. I remind myself here that D1 is illiterate. Whatever his proficiency in the Punjabi language, he cannot read or write in English, nor can he speak it. I gained the impression during the trial that he has a rudimentary understanding of spoken English. As to the letters and documentation necessarily generated by business activity, D1 explained that:

> "I have never opened any Goldbeach or GBR letters myself or been to the bank to ask for a statement or letter. Any letter at the warehouse or the cash and carry I never opened either; they were only opened by C. We had both agreed this. [Pressed on whether he had been curious about the financial position, he replied:] I was the sole owner. I had given him [C] responsibility and I trusted him too much."

125. A finding that D1 simply was not aware of dealings in shares conducted by the office of Dr Sachdev, appears to me consistent with the evidence given before me by C, who said that:

> "I went to the accountants many times dealing with other matters of the company. Being in the alcohol industry we were always asked questions by tax office and we had joint meetings with HMRC many times. I left dealing with annual return to accountant but I rang his office several times and I was told several times I was a shareholder. It was just that I was phoning and just casually I asked and then was told. I am sure about it 100%. My wife was asking me to check. She asked me to check. She did not trust people as I do. Not pressurising but asked me normally in conversations at home. I showed her the document given to me by Rakesh".

Establishing the Oral Agreement

126. At all events it is for C to establish the existence of the Oral Agreement on the balance of probabilities. He must lay a satisfactory evidential foundation for that assertion. In my judgement he has failed to do so. For the reasons that I have given, I am unwilling to rely upon C's evidence as establishing the likelihood of the Oral Agreement.

127. I have reminded myself of the principles in relation to burden and standard of proof as they are explained at Chapter 6, by the learned authors of *Phipson on Evidence 20th Ed*.

> "While a judge or tribunal of fact should make findings of fact if it can, in exceptional cases it may be forced to the conclusion that it cannot say that either version of events satisfies the balance of probabilities. In such a case the burden of proof may determine which party succeeds. The judge or tribunal of fact may only dispose of a case on this basis if it cannot reasonably make a finding one way or the other on a disputed issue. A judge should only do this where the state of the evidence is so unsatisfactory that no other course was open to them.

128. The reference in *Phipson* to "exceptional cases" is drawn from what is I understand to be the leading authority in this area, namely *Stephens v Cannon* [2005] EWCA Civ 222. The principles to be applied by the court when faced with a burden of proof problem, impeding the process of determining an issue on the balance of probabilities were, with the agreement of the court, set out by Wilson J. Auld LJ referred to them at [**18**] in *Veerlander v Devon Waste Management* [2007] EWCA Civ 835:

> "(a) The situation in which the court finds itself before it can despatch a disputed issue by resort to the burden of proof had to be exceptional.
>
> (b) Nevertheless the issue does not have to be of any particular type. A legitimate state of agnosticism can logically arise following inquiry into any type of disputed issue. It may be more likely to arise following an enquiry into, for example, the identity of the aggressor in an unwitnessed fight; but it can arise even after an enquiry, aided by good experts, into, for example, the cause of the sinking of a ship.
>
> (c) The exceptional situation which entitles the court to resort to the burden of proof is that, notwithstanding that it has striven to do so, it cannot reasonably make a finding in relation to a disputed issue.

(d) A court which resorts to the burden of proof must ensure that others can discern that it had striven to make a finding in relation to a disputed issue and can understand the reasons why it has concluded that it cannot do so. The parties must be able to discern the court's endeavour and to understand its reasons in order to be able to perceive why they have won and lost. An appellate court must also be able to do so because otherwise it will not be able to accept that the court below was in the exceptional situation of being entitled to resort to the burden of proof.

(e) In a few cases the fact of the endeavour and the reasons for the conclusion will readily be inferred from the circumstances and so there will be no need for the court to demonstrate the endeavour and to explain the reasons in any detail in its judgment. In most cases, however, a more detailed demonstration and explanation in judgment will be necessary."

129. In *Veerlander*, the Recorder's difficulty was that he could not rely upon the claimant's own evidence in regard to a crucial ingredient of his case. It was necessary for the claimant to prove the point in order to succeed. Auld LJ, in dismissing the appeal against the judgement of the Recorder explained his reasoning thus [**22**] – [**24**]:

"Mr Levene's contrary submission was that, on their own terms, the Stephens v Cannon propositions did not outlaw a resort by the Recorder to the burden of proof in the circumstances of this case. He advanced two main reasons for that submission. First, it was common ground that this was a single, simple and narrowly-defined issue of primary fact on which the whole case turned, namely whether Mr Verlander in one alleged significant lifting movement, one of some feet, injured his back. Secondly, he submitted that the Recorder made all too plain in paragraph 5 of his judgment why he resorted to the burden of proof, in truth, that he did not believe Mr Verlander's evidence, no doubt stopping short of branding him as a liar out of a natural sensitivity to the feelings of litigants by judges in such a state of mind.

In my view, the Recorder's resort to the burden of proof in the circumstances of this case -- one, I have just said, of a single, simple issue of primary fact in which the only direct evidence supporting Mr Verlander's account was his own, the Recorder, for the reasons which in my view he adequately gave, had clearly no faith in what Mr Verlander told him. He was unimpressive as a witness, evasive, inconsistent and contradictory. It is plain, as the Recorder said in paragraph 10 of his judgment, that, even without the misgivings he had about some of the defence evidence, he would not have been able to find in his favour.

When this court in Stephens v Cannon used the word "exceptional" as a seeming qualification for resort by a tribunal to the burden of proof, it meant no more than that such resort is only necessary where on the available evidence, conflicting and/or uncertain and/or falling short of proof, there is nothing left but to conclude that the claimant has not proved his case. The burden of proof remains part of our law and practice -- and a respectable and useful part at that -- where a tribunal cannot on the state of the evidence before it rationally decide one way or the other. In this case the Recorder has shown, in my view, in his general observations on the unsatisfactory nature of the important parts of the evidence on each side going to the central issue, particularly that of Mr Verlander, that he had considered carefully whether there was evidence on which he could rationally decide one way or the other. It is more than plain from what he has said and why, that he concluded he could not. Further, more detailed analysis by him of the evidence and rehearsal of his views on it would, in my view, have been otiose."

130. I regret to say that the quality of C's evidence taken as a whole, and my assessment of him as a witness, leads me to the firm conclusion that I cannot with any confidence arrive at a view that there was, on the balance of probabilities, the Oral Agreement that he contends for. I am unwilling to accept C's evidence in support of that case; it is by turns unreliable, uncertain and contradictory. C has failed to satisfy me on his own evidence that the Oral Agreement was entered into.

131. It cannot be seriously argued that the evidence of Dr Sachdev which itself suffers from similar or serious inconsistencies, is such as could corroborate a finding of the Oral Agreement having the terms alleged by C. The evidence of Dr Sachdev simply does not go that far.

132. Were I not of the firm view that C has failed to prove his case by virtue of the singular unreliability of his evidence, I would in the alternative find that on a balance of probabilities, the version of events put forward by D1 is to be preferred. I accept the account provided by D1 that he never intended to offer C a shareholding in GBR. What he agreed to was C coming into the business that he D1 had started, on the basis of an equal share of the profits. It had never occurred to him to offer an equity stake in the company and I agree with D1 that he would not at the time have understood what that entailed. Without intending any discourtesy to him, but taking account of the evidence he gave, I doubt that D1 has today a proper understanding of the meaning and effect of a shareholding in a company beyond the implications for the entitlement to the assets held by the company.

133. In these circumstances, this is not a case where I am called upon to expend a great deal of effort in assessing what it was that the parties did well after the agreement in issue was supposedly entered into, so as to determine whether there was an agreement or what its terms were. It will have become clear that in my judgment the C's case just did not travel that far. I am not persuaded that I can ignore or discount the myriad problems faced by C in establishing his case as I have set them out in this judgment, and then alight upon evidence of something that happened some years later as pointing in one direction or the other so as to tip the scales on a balance of probability. That would in my judgment be a wholly artificial process. In any case, however, I did not see anything in the evidence put before me by the C and the various witnesses called in his case as suggested that I should find that after all, because of some aspect of the parties' later behaviour, there must have been the Oral Agreement contended for. In this context, I again make particular reference to my views on the emails sent by Mrs Bains and the conflicting evidence of the parties as to the alleged settlement meeting. In short, and taking full account of what Aikens LJ in *BVM Management* made clear I am perfectly entitled to place reliance upon, I saw nothing in the way the parties subsequently conducted themselves as providing the evidence I would need in order to make a finding in favour of the Oral Agreement.

134. In arriving at the views I have just expressed, I must add that I did not place any reliance upon the evidence given by C in regard to the assistance provided by D1 in the acquisition of his family home. As I understood the evidence, the home was purchased by D1, but later transferred into the ownership of C. As D1 explained in cross examination, he was simply helping his friend. It did not in my judgment in any sense corroborate C's case for the existence of the Oral Agreement. That C and D1 were at one stage very close friends, is not doubted. Nor did I see any particular relevance in the evidence surrounding the participation or otherwise of D1 in BCL. Whatever role he performed and howsoever minor or extensive it was, did not in my judgment point to the existence of the Oral Agreement contended for by C.

135. For completeness I must add that in my judgment nothing turned on the evidence of BS whether in regard to the holding of the lease for the Kidderminster shops or in regard to the supposed assertion by D1 of the 50/50 partnership. None of this evidence was inconsistent with D1's stance that he was in a business partnership with C and he had agreed to share profits equally. Nothing in what was said to me by BS gave me grounds for finding the existence of the Oral Agreement. I similarly saw nothing to assist me in reaching the essential finding in this case, in the evidence given by Mrs Pawanjeet Kaur or Mr Jagjeet Kaur. Whether or not Mrs Kaur did see shareholder documents takes the enquiry no further as to whether there had indeed been the Oral Agreement. The steps taken by the office of Dr Sachdev in respect of the shareholding, are not and cannot be the subject of challenge: what must be decided is whether D1 entered into the Oral Agreement alleged for C to have the entitlement to the shareholding. It is to that question that I do not accept that the evidence of either Mrs Kaur or Mr Jagjeet Kaur provides any assistance. In the circumstances of this case, I do not find that the mere existence of the shareholding as created by Dr Sachdev is probative of the central controversy. To the extent that there could be any doubt in this respect, I make it clear, as I have already set out, that I accept the account given by D1 that he was at all material times unaware of the existence of the shareholding in Goldbeach and GBR created by the office of Dr Sachdev.

136. In the circumstances it is unnecessary for me to address the evidence given by the other witnesses called to give evidence by D1. It is also unnecessary for me to consider the evidence given by the two expert witnesses.

Conclusion

137. For the reasons that I have given, the C's claims for specific performance or damages in the alternative, must fail and accordingly are dismissed. The claims for damages for breach of the oral agreement and for rectification must also fail and be dismissed.

138. I shall be obliged to receive a draft order for approval from counsel. If there is the need for further directions from me, I shall see to it that a consequentials hearing is listed so soon as is convenient for the parties.