Neutral Citation Number: [2024] EWCA Civ 26

APPEAL NUMBER M23Q085
APPEAL REFERENCE: K00BT377
CLAIM NUMBER H04YJ339

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

MANCHESTER DISTRICT REGISTRY

Date: 23 January 2024

Before :

MR JUSTICE CONSTABLE

- -

Between :

911 SBD LTD	**Claimant/ Appellant**
- and -	
BURY VAN HIRE LTD	**First Defendant/ First Respondent**
- and -	
MARCUS WALKER	**Second Defendant/ Second Respondent**

- -

- -

Raghav Trivedi (instructed by St John Legal) for the Claimant

Mike Wilkinson of Counsel (direct access) for the First Defendant/ First Respondent

Second Defendant/Second Respondent was not represented.

Hearing date: 16 January 2024

- - - - - - - - - - - - - - - - - - - -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Tuesday 23rd January 2024.

MR JUSTICE CONSTABLE:

Introduction

1. This is an appeal from the Order of His Honour Judge Khan dated 21 June 2023 dismissing the Claimant's claim following a contested trial hearing. Permission to appeal was granted by Order of Mr Justice Ritchie on 19 October 2023 in relation to Grounds 1-2, 7-14 and 15. The remaining grounds of appeal were renumbered in the perfected Grounds of Appeal, and of these, Counsel for the Appellant on this appeal, Mr Trivedi, helpfully indicated that Grounds 3, 9(a), 11 and 12 were either not pursued, or not separately pursued insofar as they were duplicative of other Grounds. I am grateful to Mr Trivedi (who did not appear for the Appellant in the trial below) and Dr Wilkinson (who did represent the First Respondent at trial) for their efficient written and oral submissions.

Background to the Claim

2. The Particulars of Claim (which were amended further to an application on the first day of trial but, in light of those amendments which were not granted permission, not

in any material way) assert that Mr Bose, the director of the Appellant ('911'), made two payments, each in the sum of £25,000 to the First Defendant ('BVH') on 30 January 2015 and 2 February 2015. It claimed that the purpose of the monies was as a deposit for the purchase of a Ferrari, an F12. The pleading continued that, despite numerous requests from 911 to BVH, there was no delivery of the vehicle. 911 sought the return of the £50,000 from BVH plus interest, originally on the basis of deceit. The Particulars of Claim acknowledge that it '*left the matter in abeyance*', until December 2019, nearly 5 years later, without Mr Bose having contacted BVH for delivery of the Ferrari, or return of the deposit (although Mr Bose's evidence was that the payment was referred to by Mr Bose to a Mr Ian Cole when, in July 2017, an Audi A8 leased to Mr Walker but located at Mr Bose's address was being repossessed; Mr Cole's evidence was that this took place in December 2019). 911 also sought payment from the Second Defendant, Mr Walker, on the basis of '*Unlawful Means Conspiracy*', although Mr Walker in fact played no part in the proceedings as they progressed, nor at trial. Although the claim against Mr Walker was the subject of permission granted of its own motion by Mr Justice Ritchie (Ground 12), that was granted in circumstances where the judge was not aware of the full circumstances and, as stated above, no appeal is made in relation to the claim against the Second Respondent.

3. The Defence alleges that BVH hires family cars, light commercial vehicles and heavy commercial vehicles and tractors, but not expensive prestige motor vehicles, which instead is undertaken by what might be described as BVH's sister company, Bury Vehicle Leasing Limited ('BVL'). BVH claimed that in December 2014, Mr Walker enquired whether BVL would be able to lease purchase a Ferrari F12 to him, trading under the style of Kensington Prestige. A contract was entered into between Mr Walker and BVL on 1 March 2015 ('the 1 March Lease'). The agreed terms make reference to a £50,000 deposit. BVH allege that, having refused to accept £50,000 in cash, Mr Walker told Mr Cole of BVH that the deposit would be provided by his colleague, Mr Bose; that (as related by Mr Walker) Mr Walker gave Mr Bose £50,000 plus a nominal fee. BVH did not dispute payment from Mr Bose of the two tranches of £25,000, nor that the Ferrari was not delivered to Mr Bose. Instead, the Ferrari was subject to the Walker Agreement. The Defence states in terms that Mr Bose said that he was paying for Mr Walker, and that at no time did Mr Bose suggest or imply that the Ferrari was for him, nor request delivery to him. Liability was therefore denied.

4. The issues for determination were summarised at paragraph 10 of the Judgment, HHJ Khan using the framing of those issues as advanced by the Appellant's counsel, Ms Husain, in the trial below. Counsel on the appeal agree that the judge had set out the issues correctly. These were :

> '*(1) Was there an agreement between 911 and BVH and, if so, what were its terms? If so, was there a breach of the terms entitling 911 to repayment of the deposit?*

(2) If there was an agreement between 911 and BVH, was there a failure of consideration entitling 911 to return [of] the deposit? The claim for failure of consideration is put on a slightly different basis, namely a failure of basis: the deposit having been paid in anticipation of parties entering into an agreement.

(3) Are elements of deceit proven i.e. that there was a representation made by BVH, by words or conduct, with the knowledge that it was false, with the intention that 911 should act upon it and upon which 911 did act, suffering loss?'

5. Evidence was heard, for the Claimants, from Mr Bose and Mr Ullah (an employee of 911 who dealt principally with an inspection undertaken of the Ferrari), and, for the Defendants, Mr Roy Cole (CEO of BVH and BVL), and Ms Danielle Cole. A statement was also submitted from a Mr Ian Cole, although he was not tendered for cross-examination. His evidence was limited to the collection by Mr Cole of an Audi A8, leased to Mr Walker, from Mr Bose' address. The critical evidence in the case centred upon the conversation or conversations between Mr Bose and Ms Cole, in which the former says he made it clear that the deposit was being made by 911 to secure purchase of the Ferrari by 911, and the latter who denied that this was the case, and who asserted instead that she was told that the deposit payments were made on behalf of Mr Walker.

The Applicable Principles

6. I will consider each of the remaining Grounds in due course. However, for the purposes of identifying the relevant principles applicable to this appeal it is sufficient to note that each of the grounds for which permission was granted is a challenge to the trial judge's findings of fact. It is trite law that any challenges to findings of fact in the court below have to pass a high threshold test. The trial judge has the benefit of hearing and seeing the witnesses which the appellate Court does not. The Appellant needs to show that the Judge was plainly wrong in the sense that there was no sufficient evidence upon which the decision could have been reached or that no reasonable Judge could have reached that decision.

7. As set out by Ritchie J when granting permission to appeal in respect of a number of the grounds, the law and relevant key cases were recently summarised in Deutsche Bank AG v Sebastian Holdings [2023] EWCA Civ 191:

'48. The appeal here is against the judge's findings of fact. Many cases of the highest authority have emphasised the limited circumstances in which such an appeal can succeed. It is enough to refer to only a few of them.

49. For example, in Henderson v Foxworth Investments Ltd [2014] UKSC 41, [2014] 1 WLR 2600 Lord Reed said that:

"67. ... in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

50. We were also referred to two more recent summaries in this court explaining the hurdles faced by an appellant seeking to challenge a judge's findings of fact. Thus in Walter Lilly & Co Ltd v Clin [2021] EWCA Civ 136, [2021] 1 WLR 2753 Lady Justice Carr said (citations omitted):

"83. Appellate courts have been warned repeatedly, including by recent statements at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The reasons for this approach are many. They include:

(i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed;

(ii) The trial is not a dress rehearsal. It is the first and last night of the show;

(iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case;

(iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping;

(v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence);

(vi) Thus, even if it were possible to duplicate the role of the trial judge, it cannot in practice be done. ...

...

85. In essence the finding of fact must be plainly wrong if it is to be overturned. A simple distillation of the circumstances in which appellate interference may be justified, so far as material for present purposes, can be set out uncontroversially as follows:

(i) Where the trial judge fundamentally misunderstood the issue or the evidence, plainly failed to take evidence in account, or arrived at a conclusion which the evidence could not on any view support;

(ii) Where the finding is infected by some identifiable error, such as a material error of law;

(iii) Where the finding lies outside the bounds within which reasonable disagreement is possible.

86. An evaluation of the facts is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and appellate courts should approach them in a similar way. The appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the trial judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion.

87. The degree to which appellate restraint should be exercised in an individual case may be influenced by the nature of the conclusion and the extent to which it depended upon an advantage possessed by the trial judge, whether from a thorough immersion in all angles of the case, or from first-hand experience of the testing of the evidence, or because of particular relevant specialist expertise."

.

8. Another recent summary was given by Lord Justice Lewison in Volpi v Volpi [2022] EWCA Civ 464, [2022] 4 WLR 48:

"2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

(ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

(iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

(vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

9. Dr Wilkinson also draws to the Court's attention the observations of Patten LJ in Weymont v Place [2015] EWCA Civ 289. The first three paragraphs summarize, in effect, the matters referred to in the authority I have cited above. Paragraphs 4 to 6 give further helpful guidance as to the bounds of what the judge described in that case as the 'relative immunity' of the trial judge:

'4. *But the relative immunity of the trial judge's findings of fact to interference on appeal depends upon the trial process having been conducted in a way which confirms that the trial judge has properly considered and understood the evidence; has taken into account the criticisms of the evidence advanced by the parties' legal representatives; and has reached a balanced and objective conclusion about points on which differing or inconsistent evidence has been given in making the factual findings which form the basis of his decision.*

5. An important aspect of this process is the production of a properly reasoned judgment which explains to the parties and to any wider readership why the judge has reached the decision he has made. This includes making a reference to the issues in the case; the legal principles or test which have to be applied; and to why, in cases of conflicting factual evidence, the judge came to accept the evidence of particular witnesses in preference to that of others.

6. The judge is not, of course, required to deal with every point raised in argument, however peripheral, or with every part of the evidence. The process of adjudication involves the identification and determination of relevant issues. But within those bounds the parties are entitled to have explained to them how the judge has determined their substantive rights and, for that purpose, the judge is required to produce a fully reasoned judgment which does so: see English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605. The production of such a judgment not only satisfies the court's duty to the parties but also imposes upon the judge the discipline of considering the detail of the evidence and the legal argument.'

10. Dr Wilkinson also referred to the efficient summary of the burden which falls upon the Appellant's shoulders at paragraph 64 of the Court of Appeal's decision in Hewes v West Hertfordshire Acute Hospitals NHS Trust [2020] EWCA 1523:

> '*The Claimant therefore has significant obstacles to surmount in this case. It is not enough to persuade the court that a different view of the evidence was possible. The Claimant has to persuade the court that the only possible view was that advocated by the Claimant at first instance.*'

11. A number of the grounds of appeal allege a failure on the part of the Judge below to give any or any adequate reasons, or failing to deal with a particular aspect of evidence or submission. In this context, it is relevant to note that following the conclusion of Closing Submissions, and with the benefit of written Closing Submissions from both Counsel, the Judge commenced by informing the parties, in outline, what he had decided and why. The Judge then stood the case down '*so that the party that has not been successful can see whether or not they want more reasons*'. The Judge then informed the parties that he was going to dismiss the claims and gave reasons which ran to the equivalent of about two pages of text. At the heart of the reasoning was the conclusion that he preferred the evidence of Ms Cole to that of Mr Bose, whom he described as '*particularly unimpressive as a witness*', and in relation to whose evidence he gave a number of illustrative rather than exhaustive reasons. After a short break, the Claimant indicated that it did seek further reasons, which were given *ex tempore* but with the benefit of more preparation and organisation at 3pm the same day. At the conclusion of these reasons, which echoed but amplified the previous reasoning, the parties were asked again whether there were any matters which either side considered had not been dealt with or which either side requested further clarification in respect of. Ms Husain indicated, on behalf of the Appellant, that there was not.

12. A number of the principles included within the summary of relevant cases cited above deal with the required approach of a Judge in terms of giving reasons. The Judge is not required to deal with every point raised in argument, or with every part of the evidence. Moreover, the findings of fact made by a trial judge are not tested on appeal by considering whether the judgment presents a '*balanced account*' of the evidence, providing that the trial judge has considered all the material evidence (and although it need not all be discussed in the judgment). Further guidance was usefully given by Arden LJ (as she then was) in T (A Child) [2002] EWCA Civ 1736, having referred to English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605 relating to the duty to give reasons:

> '*It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one*

manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.'

13. The case also considered the appropriate approach of both the Court below and the appellate Court when the basis of appeal was the absence or inadequacy of reasons:

> '*If an application for permission to appeal on the ground of lack of reasons is made to the trial Judge, the Judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course. If he concludes that he has given adequate reasons, he will no doubt refuse permission to appeal. If an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial Judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings. Where the appellate court is in doubt as to whether the reasons are adequate, it may be appropriate to direct that the application be adjourned to an oral hearing, on notice to the respondent.*
>
> *The approach of the appellate court*
>
> *Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the Judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed. This was the approach adopted by this Court, in the light of Flannery in Ludlow v National Power plc 17 November 2000 (unreported). If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing, or to direct a new trial.*'

14. In the present case, the Judge gave the parties the opportunity to identify any areas where the reasoning lacked clarity or further reasons were required on two occasions. The offer to provide further reasons was taken up in the first instance, and after the fuller account of the decision was given, the further opportunity was not. It will not necessarily be fatal to an appeal based on inadequate reasoning that, immediately after an *ex tempore* judgment, Counsel is given the opportunity to seek clarification or further reason and no clarification is sought. It may be that a period of reflection and consideration of the transcript of the judgment is necessary in order properly to conclude that the judgment suffers from a fundamental illogicality or omission. However, at an impressionist level, the failure to seek further reasons immediately after the handing down may properly be a reflection of the fact that, in reality, the

identification of the matters critical to the decision given by the judge were plainly both sufficient to understand the basis of the decision and comprehensible.

The Judgment Below

15. Having broadly set out the issues between the parties, the judge commenced his discussion of the evidence by noting that the events giving rise to the claim took place in 2014 and 2015, a considerable time ago. He referred to the guidance given by Leggatt J, as he then was, in Gestmin SGPS SA v Credit Suisse (UK) Limited [2013], and in particular the need to test what the parties have said against the contemporaneous documents to determine the probability of what they say.

16. The judge identified that the burden of proof fell upon the Claimant to establish the alleged agreement which lay at the heart of the case. Having done this, he pointed out that much of the evidence Mr Bose gave was adduced during the course of cross-examination, and observed that the particulars of claim and his written evidence had lacked the type of detail the court might expect in relation to matters which were essential to advance 911's claim. This is not a criticism which is the subject of appeal. Having looked at the pleadings, and the witness statement, and read the transcript of Mr Bose' evidence, the criticism was justified. This is an important aspect of the judge's overall reasoning in concluding that the Claimant had not discharged the burden of proof upon it.

17. Paragraphs 15 to 24 of the judgment set out the evidence of Mr Bose. As part of his recital of this evidence, the judge identified various aspects which had troubled him and which had led to clarificatory questions and, indeed, thereafter further cross-examination. Some of these aspects fed into the overall impression the judge reached in relation to the reliability of Mr Bose as a witness. Paragraphs 25 to 33 recited the evidence of Ms Cole, and paragraphs 34 to 37 the evidence of Mr Cole. At paragraph 37 he noted that Mr Cole was not challenged on the evidence that he gave regarding the circumstances in which he received an invoice from Automotive (the company selling the Ferrari to BVL) or the circumstances in which Mr Walker signed a lease purchase agreement with BVL at Mr Cole's home in March 2015 (which, as set out above, referred expressly to the existence of a £50,000 deposit). At paragraph 38, the judge referred to the evidence of Mr Ullah, pointing out that the fact of inspection was unsurprising given an impending sale, but noting that Mr Ullah could not assist in relation to arrangements or discussions which took place between Mr Walker and Mr Bose, or Mr Bose and BVH, or between Mr Bose and Ms Cole and Mr Cole.

18. At paragraph 39, the judge concluded that his '*impression of Mr Bose, Mr Cole and [Ms] Cole has assisted me in resolving the issues for determination*'.

19. Paragraph 40 stated: '*Mr Bose was a particularly unimpressive witness. I have reached that conclusion for the following reasons, set out in no particular importance and by way of illustration…*'. There then followed sub-paragraphs (a) to (h). Mr Trivedi accepted that none of the grounds of appeal sought to impugn this section of

the judgment, focussing as they do instead on the way in which the Judge is said to have failed to weigh evidence undermining the Respondent's witnesses (save for Ground 6, original Ground 9, relating to a failure to identify an aspect of supporting evidence for Mr Bose's account). The matters of concern about the lack of detail, issues of consistency and inherent improbability raised by the Judge were plainly matters the judge was entitled to take into account in assessing the evidence. In circumstances where the existence of an agreement relied upon one or potentially two oral exchanges more than 8 years' previously, a reasoned conclusion, legitimately open to the trial judge who is in the best position to judge oral testimony of key witnesses as part of all the evidence, that the key witness for the Appellant was particularly unimpressive was unsurprisingly a critical, if not the critical, reason for dismissing the claim. Indeed, in light of his concerns, the Judge expressly concluded (at paragraph 13 of the judgment) that the Appellant had failed to discharge the burden, '*even taking account of the shortcomings identified by Ms Husain in aspects of the evidence of BVH*'. Those shortcomings are effectively those matters repeated on appeal. Whilst I will consider each ground in turn, and in the aggregate, ultimately the judge was entitled to conclude that Mr Bose's evidence was contradictory and unsatisfactory, and given that 911 bore the burden of proof, this is largely dispositive of the appeal. Even if there were justifiable grounds for the Judge to have articulated greater concerns about the evidence of the First Respondent's witnesses, it was not for the First Respondent to prove anything. Indeed, even if the Judge had concluded that *all* the testimony from both sides was unsatisfactory (explained, for example, by the passage of time), the same ultimate conclusion as to the Appellant's failure to have discharged the burden of proof would have pertained.

The Grounds of Appeal

Ground 1

20. This is an overarching ground. I deal with the remaining Grounds individually below, but even when taken together, it is plain that none of the matters are such as may justify the conclusion that the ultimate finding, that the Claimant had failed to discharge the burden upon it in relation to the identified issues, was outside the range of determinations a reasonable judge could make.

Ground 2

21. Ground 2 as advanced by Mr Trivedi in his written and oral submissions focussed on a failure to weigh the oral evidence of Mr Roy Cole and Ms Cole against the documentary evidence, and in particular the 1 March Lease. It is said that the oral evidence advanced by the First Defendant did not demonstrate the details behind how the lease was signed, and the authenticity of the document. The fact that two versions of the Lease were found in the evidence was also prayed in aid.

22. However, the signing of the Lease was explicitly dealt with by Mr Cole at paragraph 21 of his statement dated 4 July 2022:

> '*After the deposit was paid, Mr Walker came to my Surrey home again on 1 March 2015, to sign the lease purchase agreement with BVL, in standard format numbered 3136, showing Mr Walker's signature in the 'Customer' box, trading as Kensington Prestige …The agreement was merely confirming what had been verbally agreed in December 2014, between [me] acting for BVL and Mr Walker*.'

23. As the Judge pointed out at paragraph 37 (referred to above), this evidence was not challenged, as it should have been expressly had the allegation about the authenticity of the document been an issue. The Judge was entitled to take the lease at face value. In any event, the fact that there are two identical versions (i.e. exact copies including in respect of all manuscript insertions), save that one has a manually corrected agreement number, is no basis whatsoever to doubt the authenticity of the document (which is probably why the allegation was not made at trial). The existence of the 1 March Lease is strong supporting evidence of the fact that (a) it was (as Mr Cole said) BVL, and not BVH, which dealt with high end cars, and that as such BVH would not therefore have entered into an agreement relating to a Ferrari at all; and (b) that it considered that the £50,000 was allocable as a deposit against the 1 March Lease for the Ferrari. Having emphasised the unchallenged evidence in relation to the 1 March Lease, it is no doubt this that the judge had in mind when later concluding, in relation to Mr Cole's credibility, that '*I have no reason to doubt what he says as regards the corporate structure and different roles of BVH and BVL and why it is improbable that BVH would have entered into the agreement which Mr Bose contends it did*'. An examination of this element of documentary clearly supports the First Respondent's defence, not the Appellant's claim.

<u>Ground 4</u>

24. The substance of Ground 4 is that the Judge accepted Ms Cole's evidence in relation to the manuscript entries on the receipts and failed in this context to give proper weight to the discrepancy between Ms Cole's account given in oral evidence as against the account she gave in her written evidence.

25. In her written evidence at paragraph 6, Ms Cole said '*Both payment receipts are attached to my statement and are in my own handwriting and record the comments I made at the time'*. Even a brief examination of the receipts demonstrates that there are almost certainly two different hands writing matters. There is text in different places ('*New Acc*; Deposit; Ferrari; Lambo Huracan' on one and 'Mr Bowes Kensington Prestige *New Acc" on another') and codes which appear to be in a different hand writing (B838 and K3136). In cross examination, Ms Cole accepted

that she had written the text, but the accounts department had written the codes. It could be said that the reference 'comments' in Ms Cole's witness statement was a reference just to the text, rather than the numbers, but even if not, it was properly for the trial judge to determine whether or to what extent the somewhat minor correction to her witness statement affected either her credibility or, equally importantly, the thrust of her evidence that both the text and codes (with which she was familiar, even if they had not physically been written on by her) supported her contemporaneous understanding that the £50,000 deposit was to be allocated to Mr Walker's purchase of the Ferrari (once Mr Walker had determined that it was a Ferrari, rather than the 'Lambo', that he wished to purchase). The judge properly identified the fact of the discrepancy, and Ms Cole's explanation of the text and codes. Having properly put his mind to this potential issue (and the Authorisation Letter – Ground 8), it was open to the judge to conclude, as he did, at paragraph 43, '*Ms Cole….was the most impressive of the witnesses who gave evidence before me. She was independent, albeit that she was at some stage married to Mr Cole's son. She is independent, no longer working for BVH and/or BVL. Everything she said made sense and was inherently probable. What she said was coherent, logical and consistent with the contemporaneous documents. Her evidence, of course, was not perfect and she corrected her oral evidence as to who had written on the transaction advices, but that did not undermine her evidence.'*

26. Failing to have properly explained in her witness statement that the codes on the document had been put there by the accounts department rather than by her was at most a minor issue and in essence, in the context of this case, a forensic rather than a substantive point. Her clear explanation as to the movement of money and the allocation of codes was, having reviewed the transcript, cogent as identified by the Judge who was more than entitled to conclude that the line of attack in relation to the owner of the handwritten codes did not shake his conclusion that she was giving a reliable account.

Ground 5

27. This relates to the Judge's assessment of the credibility of Mr Cole. It is said that the judge failed to take account of two letters, issued pre-action, in which (in the first), Mr Cole denied any knowledge of the payments being made and (in the second) averred that Mr Bose had made previous payments as agent for Mr Walker. The first point does not assist in any way: in fact the letter of 9 December 2019 states that BVH had no record of the transactions which is entirely understandable in circumstances where the dates given for when the payments had been made, to which the letter was responding, were partially incorrect. The letter principally sought further information, and might be thought measured in light of allegations of theft which had come largely if not wholly out of the blue relating to payments said to have been made nearly 5 years' previously. The second letter expressed a belief about the pre-existing relationship between Mr Walker and Mr Bose, which may or may not have been justified, but were clearly discounted by the Judge who remarked somewhat

critically about such opinions in his judgment. It cannot be said that the judge did not weigh this as he saw fit in his overall conclusions on the evidence.

Ground 6

28. It is correct that there was evidence that Mr Bose purchased a customised numberplate 'F12 SBD' at the same time as making the deposit. It is a piece of evidence which tends to support a subjective understanding on the part of Mr Bose that his company (SBD) may have an F12 on which to place the number plate (and Dr Wilkinson's submission to the contrary was unconvincing). It is also correct that the judge should have dealt explicitly with this evidence in his judgment. However, it plainly falls short of evidence that any such subjective understanding crossed the line between Mr Bose and Ms Cole (or anyone else at BVH or BVL). In circumstances where there was strong documentary evidence, which the judge did, and was entitled to, accept, that Ms Cole had understood that the funds were to be a deposit for a lease agreement between Mr Walker and BVL, evidence of Mr Bose' subjective understanding is not sufficient to displace the Judge's conclusion that Mr Bose had not established the existence of the alleged agreement.

Ground 7

29. This relates to the lack of evidence produced by the First Respondent in relation to the alleged agreement between Mr Bose and Mr Walker. This is a bad point. The First Respondent's pleaded case, and the evidence of Mr Cole, raise a case that Mr Walker informed Mr Cole of the arrangements. Mr Walker played no part in the proceedings and there was no disclosure. There is no reason to suppose that the First Defendant would have any such evidence. The failure to provide any evidence is no proper criticism and it is entirely unsurprising that the Judge did not take any account of this when assessing Ms Cole or Mr Cole's credibility and evidence.

Ground 8

30. This appeared to be the high point of Mr Trivedi's oral submissions. Ground 8 relates to the inability on the part of the First Respondent to have produced a payment authorisation document which Ms Cole gave evidence had been put in place prior to the payment of the two £25,000 tranches. The letter had not been referred to pre-action or in the pleadings, nor referred to as a document which had existed but no longer did in the context of disclosure. The Judge considered the matter expressly and concluded that her evidence was not undermined by its absence. In a fair reflection of the evidence (having read the transcript), the Judge summarised that Ms Cole was adamant that at some stage the letter had existed, and maintained that it had been lost at some stage over a period of time. The Judge then concluded, '*She told me that it was lost, and I accept the reasons that she gave as to the circumstances why it was not available to be produced*'. It is far from inherently improbable that a document created 8 years previously and which, until late 2019 at the earliest, bore no

particular significance to BVH, had been lost. Had it existed, it was plainly in the First Respondent's interests to have produced it, and it is clear that they went to some lengths to attempt to locate it (including the involvement of IT experts). This is far from the case of a party improbably and conveniently losing documents which would be likely to be *unhelpful* to that party's case, which may well properly affect that party's credibility in the eyes of the Court. Its absence is, therefore, far from the smoking gun as portrayed by Mr Trivedi, and, having considered all the evidence and having heard the witnesses, accepting Ms Cole's explanation for why the document no longer existed was well within the bounds of reasonable judgment.

Ground 9

31. Ground 9(a) related to the authorisation letter and has been dealt with above. Ground 9(b) related to the 'lip-service' Mr Cole paid to anti-money laundering regulations. It is said that there was a conflict in Mr Cole's evidence that (a) he was not prepared to take £50,000 in cash from Mr Walker but (b) was prepared to take £50,000 by way of bank transfer from a third party, in the knowledge that the bank transfer in reality reflected the same £50,000. It was in this context that the judge concluded, with some justification, that '*it may be said that Mr Cole paid lip service to money laundering regulations regarding the circumstances surrounding the payment of the deposit*'. However, it is plain from the transcript that Mr Cole's view was, as a matter of fact, that if he took £50,000 in cash (which he would then have to use or bank), there could be enquiries of him in the context of money laundering but that if a third party was the recipient of the cash, and he was then the recipient of a subsequent bank transfer, the third party would be the person to whom any enquiries about the steps taken in the context of anti-money laundering would be directed. Mr Cole's understanding displays an overly narrow, and incorrect, view of (at least) section 328 of the Proceeds of Crime Act 2002. However, any apparent breach of money laundering regulations was relied upon by Ms Husain at the trial below, and by Mr Trivedi on appeal, not as some relevant transgression in its own right, but solely because it was said to go to the *'inherent unlikeliness of the 'cash reimbursement story as a defence'* (page 50 of the transcript). However, it is plainly not inherently improbable that a business would refuse a payment of £50,000 cash and ask, instead, for payment by bank transfer. The extent to which the distinction (in particular circumstances) may or may not in fact dilute that business's obligations in respect of anti-money laundering regulations does not make Mr Cole's evidence inherently unlikely, particularly when taken with other documentation (such as the 1 March Lease and the payment receipts) which demonstrate the contract in fact entered into with Mr Walker relating to the Ferrari shortly after receipt of the deposit, and the allocation internally within BVL of the deposit monies received to Mr Walker's account.

Ground 10

32. This related to a minor inconsistency in the accounts of Ms Cole (who gave evidence about an initial conversation relating to both the 'Lambo' and the Ferrari) and Mr Cole, who only mentioned that Mr Walker discussed the purchase of the Ferrari. Both may in fact be valid recollections, but even if the discrepancy displays a difference of recollection, the Judge was more than entitled to conclude that, as part of the evidence viewed as a whole, the issue was insufficiently material to detract from the central reliability of the First Respondent's witnesses' evidence and, in particular, that of Ms Cole whose evidence he clearly found persuasive and consistent with the contemporaneous documentary evidence such that it existed.

Conclusion

33. In the circumstances, none of the grounds whether taken individually or assessed in the aggregate, lead me to the conclusion that the judge's determination of the facts was rationally unsupportable or that the nature and extent of the reasons given, whilst he did not deal with every point in issue, was inadequate. It is clear that the Judge determined that the unsatisfactory nature of Mr Bose's evidence, which conclusion was not challenged in this appeal, was such that 911 failed to discharge the burden of proof. He also concluded, for identifiable reasons which were open to him to find, that he preferred the evidence of (in particular) Ms Cole, which was central to the existence of the disputed agreement. This being the case, his dismissal of the Claimant's claim and his consequential order is upheld, and the appeal is dismissed.