



Neutral Citation Number: [2021] EWHC 526 (Ch)

Case No: BL-2018-000534

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 08/03/2021

Before :

DEPUTY MASTER LINWOOD

Between :

RAJESH KUMAR SINGH PATHANIA

Claimant

- and -

(1) COLLINS DOMINIC TASHIE-LEWIS

Defendants

(2) MOHAMMED ZIA UDDIN RASEL

Mr Alexander Hill-Smith (instructed by direct access) for the **Claimant**
Mr Robert Parkin (instructed by **Addison & Khan Solicitors**) for the **Second Defendant**
The First Defendant neither appeared nor was represented.

Hearing dates: 24th & 25th February 2021

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.

.....

Deputy Master Linwood:

1. This is a claim for relief under s.423 of the Insolvency Act 1986 (“the Act”). The Claimant, C, says the Second Defendant, D2, has been a party to sale of a property at an undervalue, which was previously owned by the First Defendant, D1, against

Approved Judgment

whom no pleaded relief is sought. D1 has played no part in these proceedings save that he did make a witness statement in May 2018, a few months after these proceedings were commenced.

2. Below I set out the essence of the claim, the factual background, the issues, my view of the witnesses, the law, my findings of fact and my determination of the issues. References as [] are paragraphs in this judgment save where the context appears otherwise.

The Claim in Essence

3. C says D1 so arranged matters in relation to a property sale by D1 to D2 so it resulted in a sale at an undervalue, and that D1 took those steps so as to prejudice his creditors, of whom C is one. C therefore claims against D2 pursuant to s.423 to the extent of the undervalue which he originally said was £48,750 plus interest of about £40,000. In essence, C says the £48,750 was only superficially paid by or on behalf of D2 and that sum was repaid to D1. D2 denies this, and says the sale to him was entirely legitimate and above board.

The Factual Background

4. The majority of the facts I set out below are agreed. I indicate where the parties diverge. In 2007/8 D1 owned a property at 36 South Street, Rainham, Essex. He was then a mortgage broker/introducer working from the same premises as C, from whom he rented office space, at 25 New Road, London, E1 where C with his wife ran a solicitor's practice known as Newland. D1 referred conveyancing transactions to C, and they were friends. D1 decided to demolish number 36 and build two new properties, known as 36 and 36A. D1 needed funds and C agreed to provide them. The properties had separate registered titles.
5. C made a substantial financial contribution to the building works and had a charge in the name of his firm for a relatively minor amount registered against each property. In October 2008 C returned to India as he had visa difficulties, leaving his wife to run their practice. Whilst he was in India, D1 was served with proceedings by his mortgagee, who eventually obtained a bailiff's appointment for eviction due for execution on 9th September 2009. D1 also applied successfully to have the charges registered by Newland removed from the properties.
6. On 1st June 2009 the Law Society intervened in Newland. C was struck off the Roll in September 2010 and his wife suspended for two years. On 29th June 2010 C was adjudged bankrupt. C returned to the UK in early 2010. He was aware whilst he was in India that the properties had been sold, but little more.
7. As to the properties, number 36A was sold to a Ms Okonye. C claimed in the like manner as here that that sale was at an undervalue and should be set aside under s.423, against D1 and Ms Okonye. The facts as to that sale are set out in the judgment of Deputy Master Lloyd in *Rajesh Kumar Singh Pathania v (1) Colin Tashie Lewis and (2) Patricia Okonye* dated 16th June 2017. His conclusion that the sale was at an undervalue but that it resulted in no loss was appealed successfully by C as appears in

Approved Judgment

the judgment of Ms Alison Foster QC (as she then was) at [2018] EWHC 362 (Ch). The facts as found by the Deputy Master were unchallenged.

8. D1 sold number 36 to D2 for £195,000. That sale price is agreed as representing the then market value. D2 purchased it with a mortgage from the Halifax, who made their offer on 1st September 2009, and provided funds of £146,250. C initially said the difference being the deposit of £48,750 represented the undervaluation as the payment of the deposit was only superficially paid by or on behalf of D2.
9. I now turn to the detail of that transaction as appears in the documents that have been obtained. Haque & Hausmann (“H&H”) acted for D2, and also Ms Okonye. D1 was represented by J Bon solicitors. H&H’s completion statement dated 12th October 2009 addressed to D2 sets out the purchase price of £195,000 and their costs of £3,836.09, a total of £198,836.09. That was financed by the above advance of £146,250 and “Off your on Account” (sic) of £10,000, leaving a balance due of £42,586.09.
10. H&H’s ledger for the purchase of number 36 (obtained by C by order of this court) shows receipt by them on 16.09.09 of £150, on 09.10.09 of £9,750 and on 10.11.09 of £100, all described as “Money On Account Cheque”. Then on 14.10.09, described as “Rec From Mahmood Property” the sum of £38,000 appears followed on 15.10.09 described as “Rec from M Z U Rasel” the sum of £4,587.
11. Mr Hill-Smith submitted in his trial skeleton that the origin of these payments form the central issue in the case. That submission changed when D2 gave some extremely late disclosure just two days before trial, which I admitted on D2’s application which I heard on the first morning of trial, for the reasons in my *extempore* judgment then. I will describe these documents and their production in more detail later.
12. In essence, Mr Hill-Smith then accepted that D2 did personally make the two payments totalling £9,900. The payment of £100 in November was never referred to at trial but I mention it as it adds up to the £10,000 on account albeit that the ledger dates do not match exactly the date of the £9,750 cheque clearing and the completion statement I refer to in [9] above predates receipt of the balancing amount of £100. However, these are ledger entries and no submissions were made as to whether anything turned on them and the apparent discrepancies I have outlined. I do not think them material in the light of the bank statements.
13. D2 says he personally made the payments which total £14,587, and that a wealthy friend, whom he describes as Mr Mahmood Qaisar, but appears in the documents as Mr Qaisar Mahmood, gave the £38,000 to him, as, as he put it in his first witness statement:

“...without any condition of return. This is because I have some other financial dealing with him for which he owed me some money. I reimbursed him from our common profit over the years. I do not have any written agreement with him...even after selling the same property in May 2010 I did not return any money to him.”
14. The ledger and bank statements show that J Bon received the full purchase price of £195,000 on 16th October 2009, the same day the sale of number 36A to Ms Okonye

Approved Judgment

completed for £210,000. D2 did not move into number 36. He said he had to carry out certain works. He then decided to sell it to raise funds for his marriage. A Ms Patience Akiri contacted him and a sale price was agreed at £206,000. She purchased jointly with Mr Bernard Tashie-Lewis who is the son of D1. The sale completed on 21st May 2010 and the net equity of £57,008.09 was transferred to D2's account with Barclays by H&H.

15. In November 2010 C issued proceedings against D1 in the County Court at Clerkenwell & Shoreditch. Then C was discharged from bankruptcy in June 2011. He obtained judgment against D1 for £213,303.80 on 2nd April 2012. The same day his trustee in bankruptcy assigned the benefit of that day's judgment to him. Disclosure orders were obtained by C in that court against J Bon and H&H which resulted in disclosure of files and bank statements through to June 2013. On 15th January 2018 Mr Qaisar Mahmood died. These proceedings were then commenced on 2nd March 2018.

The Issues

16. These are:
- i) Did D1 enter into the sale of No 36 South Street to D2 with the purpose of putting the asset beyond the reach of someone who might make a claim against him, and/or for the purpose of prejudicing the position of such a person?
 - ii) Is C a victim as defined in section 423(5) as being someone potentially prejudiced by the transaction?
 - iii) Was the sale in fact at an undervalue as to the extent of the monies paid towards the sale by Mahmoud Properties?
 - iv) If so, should the court exercise its discretion to make an order against D2 in the amount of the undervalue?
 - v) Can C rely on section 32 Limitation Act 1980 to extend the 6 year limitation period so as to enable the claim to be brought in time?

The witnesses

17. Before summarising my view of the evidence given by the witnesses I set out what the evidence is directed to. It was C's original case that the undervalue was at least £48,750, and that "...this amount was paid towards the purchase price by or on the First Defendant's behalf and returned to him". (Amended Particulars of Claim at [11]).

18. As Mr Hill-Smith states in his skeleton at [37]:

"The critical issues arise in relation to the origin of the payments of £9750 received by [H&H] on 9th October 2009 and the sum of £38,000 received by [H&H] from Mahmood Properties on 14th October 2009."

Approved Judgment

19. As to D2's explanation that he made the payment of £9750 and that the £38,000 was a gift, Mr Hill-Smith says that is a matter for cross examination and that the Court can draw adverse inferences from the absence of documents if they should exist but are not produced citing *Re Mumtaz Properties* [2011]EWCA Civ 610 where Arden LJ at [14] said:

“In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.”

20. I now turn to the witnesses themselves.

Mr Pathania

21. As Deputy Master Lloyd put it in *Okonye* at [18], although he had to keep in mind that C was struck off by the SRA for dishonesty and in later proceedings concerning an intervention into Thames Chambers Solicitors was found to have been improperly involved, he had no reason to disbelieve C, and he found his approach to the claim to be realistic and temperate. He found Ms Okonye's evidence to be neither frank nor compelling.
22. Here, C at times made assertions that did not bear examination. For example, after he confirmed that D1 was a mortgage introducer he was asked why did he believe he did not have a bank account. His response was “I don't know, ask him.” That approach to evidence assists neither the court nor C himself. C accepted, as he had to, that he had no evidence of any payment by D1 to Mr Mahmood and it was just presumption on his part.
23. C complained numerous times that he had been prevented from obtaining evidence as to the underpayment but had been stopped by D2/his lawyers. He did accept that all he was therefore left with was suspicion but “...you would not allow me to get to the bottom of it”. C gave his evidence in a direct and clear manner so far as it went as to matters of fact. But he regarded himself as having been cheated and was frustrated with what had happened. He did accept that some of his beliefs were speculative and that he had no evidence to support them but would throw the inquiry back on D2 who he took the view should prove the transaction was innocent.
24. In summary, as to C's evidence, Mr Hill-Smith said that C's credibility was of marginal significance as he could not go beyond the documents. I wholly agree. I could take little from his evidence as I will refer to further below.

Mr Rasel

Approved Judgment

25. Mr Parkin in his closing note said that D2 was at times confused, forgetful or contradictory. Again I agree with counsel's summary of their own witness. His evidence was poor in the sense he had difficulty remembering matters. Certain of his denials – in particular that he had no idea about the simultaneous sale of 36A by D1, who he knew in business, to a person who happened to ask if there were properties for sale, who also obtained a mortgage from the Halifax, and additionally also instructed H&H (but D2 said he selected them), with not just same day exchange and completion (somewhat rare in any event) but for both properties simultaneously, did concern me.
26. Also I found D2's account of the late emergence of the banking documents to be uncertain and at points somewhat evasive. His explanation of why he wished to purchase number 36 in that he wanted a bungalow not a flat but that he did not discuss it with his future wife was surprising. More concerning was his decision to sell number 36 after just 6 or 7 months as he said he required the funds for his wedding – but at the time he had over £48,000 in one of his bank accounts.
27. Likewise he said he had “forgotten” about the seven or so bank accounts he had at the material time as he only disclosed one, with Barclays, in his List of Documents. I cannot accept that even with the substantial passage of time he could have forgotten about all those accounts, especially as it appears he used bank accounts in the course of his business.
28. In summary as to the oral evidence, C could not give any substantive evidence of matters beyond the documents and D2's evidence was a mixture of a poor memory, evasiveness and contradiction. I therefore place little weight on much they said when it was not supported by contemporaneous documentary evidence.

The Law

29. The starting point of s.423(1) so far as this claim is concerned is whether there was a transaction at an undervalue, which in s.423(1)(c) is stated as being:
- “...for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.”

Issue 3: was the sale at an undervalue as to the extent of the monies paid towards the sale by Mahmoud Properties?

30. I take Issue 3 first as it does short circuit matters as appears below. C's position has also changed compared to that at the start of trial as appears at [17-19] in that Mr Hill-Smith accepts that there is now sufficient evidence that £14,587 was provided by D2 personally towards the sale, leaving the undervalue limited to the £38,000 advanced by Mahmoud Properties. There are various sub-issues I need to consider or determine which I set out below.

Late disclosure by D2

31. This is in two sections, the first being 8 pages of financial documentation and then 63 pages of a complaint to the SRA by D2's solicitors from August 2020. I am only

Approved Judgment

- concerned with the former, which consists of copies of the front of each of two cheques dated January and February 2012 made payable to Mahmood Property for £2,310.65 and £1,330.20 in the name of Rasel & Co (D2's trading style) and bank statements for his personal accounts with Barclays and Abbey.
32. The Barclays statement for 15th – 18th January 2011 shows “Payment to Mahmood Property Ref: Loan Return” for £6,500 and £8,500 on the 17th and 18th January 2011 respectively. The Abbey statements show transactions over the period 3rd September – 2nd November 2009 which include cheque payments for £150, £100 and £9,750 in September/October 2009 (matching the H&H ledger in figures), and three receipts on 16th October for £1,500, 29th October for £430 and 2nd November 2009 for £400 all from Mahmood Property. The Abbey statement is especially “busy” in that it lists some 35 transactions in the month of October 2009 alone.
 33. The cheques I discount of no real evidential value in that there is no evidence they have been paid as the reverse of each is not copied. What I do take from the statements is there can be little doubt that:
 - i) D2 paid a total of £10,000 to H&H towards his purchase of number 36 and
 - ii) He was actively involved with Mahmood Properties over these snapshots of time, both receiving monies and paying back a loan in whole or in part.
 34. The production of this documentation and the nature of the application concerned me. When I heard the application I criticised that it was made by D2's solicitor, Mr Mian, when in my view any application such as this should always be made by the party who has located the documents. Mr Parkin submitted that it may have been necessary for Mr Mian to give this evidence as D2 could not attend at his office due to the Covid-19 pandemic. I do not accept that. All engaged in the practice of law have been working wholly or in part remotely for at least 10 months.
 35. My concern was made out in that Mr Mian said D2 “...discovered [the documents] within [his] papers of historic documents over the weekend...”. But he did not. In his oral evidence D2 blamed his former wife in that he obtained them from her whom he recalled had certain documents as he had given a file to her in July 2010 to support her visa application. He believed they could be relevant. After some persuasion, she handed them over to him, the weekend before trial.
 36. What is clear is that D2 failed 1) to account for these documents he did once have but (at that time) no longer had or his multiple bank accounts in his List of Documents and 2) to give a proper and full explanation at the time the application was made to me. D2 did say he had 7 accounts at the time and had “forgotten” about the Abbey one. But again, there is no evidence of these accounts. Again, D2's memory has failed him in a way I find difficult in the surrounding circumstances to accept.
 37. The cheques of course post date the 2010 visa explanation. Mr Parkin submitted that this was evidence of a later, 2012, visa application. That may be the case but the fact remains the application and explanation were unconvincing in all the circumstances, and especially that it was made on the morning of the first day of trial.

Was this a collusive sale?

Approved Judgment

38. Mr Hill-Smith submits that this is the first of the major issues I am to determine, but it is not one of the agreed Issues. At [37] Deputy Master Lloyd said:
- “I have no doubt that the sales of 36 and 36a were collusive sales. The properties were not advertised on the open market; both Mr Rasel and Ms Okonye were known to Mr Tashie Lewis; both used the same solicitors...Ms Okonye said they were not her choice but she was told she had to use them because the sales of 36 and 36a had to be completed on the same day...The fact that, only a few months later, ownership of no 36 found its way back to close members of Mr Tashie Lewis’ family does nothing to inspire confidence about the bona fides of the sale of 36...”
39. I add that both were financed in part by mortgages from the Halifax. But the finding I quote above does not operate as a *res judicata* in respect of my judgment, as D2 did not appear in that claim. The remarks are therefore *obiter*. Mr Parkin submits that there are major differences between the sales in that first D2 provided the entirety of the purchase price, whereas Ms Okonye set off monies she alleged D1 owed her.
40. Deputy Master Lloyd found that there were no such amounts outstanding from D1 to Ms Okonye and so by that reduction the sale was at an undervalue. Secondly, Mr Parkin submits that for number 36 the full price was paid over and so there was no sale at an undervalue. I turn to that below.
41. D2 says that a) whilst he did know D1 who had told him of his money difficulties with C, b) he did not know Ms Okonye, c) he obtained the Halifax loan by himself, d) he selected H&H as they were on Halifax’s panel and e) he did not know why exchange of contracts and completion both occurred on the same day.
42. As to a), which was not in his witness statements, D2 said in his oral evidence that D1 had said that C was in a partnership with him and owed him (D1) a substantial sum of money. What was in his first witness statement at [5] was that D1 had told him that number 36 was going to be repossessed in September 2009, and he exhibited a Notice of Eviction of the Romford County Court dated 29th July 2009, due to be executed on 9th September 2009.
43. However, somewhat oddly, in his oral evidence D2 said that he did not know why D1 was selling save that the development was complete. Whilst that aspect of his evidence is contradictory and unsatisfactory, it could be due to the fact his memory is poor; as why otherwise would he try to advance a different case to that set out in his statement made some 15 months earlier?
44. Overall, I find on the balance of probabilities that D2 must have known of the linked sales of 36 and 36A for these reasons:
- i) the similarities found by Deputy Master Lloyd and me at [38-39] above just cannot be pure coincidences;
 - ii) the unsatisfactory nature of the evidence of D2 means I cannot accept his denials and

Approved Judgment

- iii) the later events namely D2 never living in the property, but selling after 6 months, to parties who included a son of D1, and his statement which I have found to be factually inconsistent namely that he needed funds for his wedding, all point away from this being a genuine arms-length property purchase.
45. They were therefore collusive sales, but that does not by itself establish or prove that the sales were at an undervalue for the purposes of s.423. I must consider who provided the purchase monies and on what basis.

The Burden of Proof

46. This lies, at first, upon C. As Mr Hill-Smith submitted to Deputy Master Lloyd and as appears at [19] of his judgement, "...the legal burden of establishing the elements of [s.423] lay on [C] but to the extent Ms Okonye advanced a contrary case the evidential burden of proving that case lay on her." So if D2 advances a positive alternative case, the burden shifts to him. Here, it is rightly accepted that D2 paid a total from his own accounts of £14,587 to H&H.
47. The balance of the cash to complete was the £38,000 provided by Mahmood Properties. C has to establish that £38,000 was paid first "...by or on [D1's] behalf" and secondly that it was "...returned to him". Such a series of transfers must therefore include one from D1 to Mahmood Properties, directly or indirectly, and then to H&H and from them to J Bon for D1 to pay to Mahmood Properties or else to Mahmood Properties directly, at the instruction of D1.
48. That was the position as originally pleaded by C at [11] of his Amended Particulars of Claim. However there was a substantial shift in the manner in which C says the undervalue was created so as to defraud him; in his first witness statement dated 26th November 2019 at [26] he says he "currently" believes the £38,000 was paid out and then paid back to Mahmood Property or Mr Mahmood himself, so "...the transfer of 36 South Street to [D2] was at an undervalue as no actual deposit was paid towards the purchase by [D2]."
49. Those are two wholly different positions and I struggle to see how if Mahmood Properties were paid back the £38,000 as it was just as C put it a "quick loan" that an underpayment had occurred. One transfer agreed and properly evidenced by the documents trail was that from H&H to J Bon being the completion monies. It is the others for either position as I set out above that C must prove.

The documentary evidence and C's efforts to obtain more

50. J Bon's HSBC bank statements show that following receipt of the purchase monies of £195,000 for number 36 and £129,000 for number 36A on 16th October 2009 payments were made to 1) GE Money (D1's mortgagee) of £227,861.07 and 2) £39,500 was transferred to an unnamed account with NatWest Bank, both on 19th October 2009. The next transfer of note was the payment of £36,541.93 on 21st October 2009 to "CD Tashie Lewis". This is a composite statement and not a ledger per property so it is not possible to ascertain which payment relates to which property and there are clearly other property transactions involving other clients and solicitors progressing at this time.

Approved Judgment

51. C says that the transfer of £39,500 was paid to Mr Mahmood/his company, relying only on the fact that it was to the same bank, NatWest. I cannot accept that assertion as sufficient evidence of same in the absence of documentary evidence.
52. C also says that the payment of £36,541.93 could not genuinely have been to D1, contrary to his pleaded case at [11] of the Amended Particulars of Claim. Again no documentary evidence of this is adduced by him, and I cannot accept this allegation.
53. Although it was not mentioned to me, a cursory arithmetic check on the sums concerned shows that £324,000 was received by J Bon on the joint sale, of which £227,000 was paid to GE Money. Then the sums of £39,500 and £36,541 were transferred. But that leaves roughly £97,000 unaccounted for on that statement. That does not assist C in proving his case.

C's efforts to obtain documentary evidence

54. The first area that could possibly assist C is D1's bank account statements. However, C says D1 does not have a bank account. He also made that allegation in his claim against Ms Okonye. I find it highly unlikely as a) a lender such as GE Money would expect payment by direct debit as opposed to cash deposits, b) D1 was engaged according to C in providing mortgages and so a bank account would be necessary for payment of his fees and c) whilst it is possible D1 was named on the transfer as a reference as opposed to being the recipient I think that unlikely in the context of the other entries on the J Bon client account statement for October 2009.
55. C has therefore apparently decided that what would appear to be the quickest and easiest route to obtaining the documentary evidence he needs to prove his claim is one that he does not wish to pursue, as especially shown by his throw away retort when asked how he knew D1 had no bank account namely "I don't know, ask him."
56. Secondly, C made an application for disclosure by J Bon's bankers, HSBC, to identify the beneficiaries of the sums of £39,500 and £36,541. HSBC said the recipients were "Gidea Park 40226". C required further detail from HSBC to include the identity of the individuals behind this apparently unregistered entity and made a further application which was heard by Deputy Master Collaco Moraes on 19th February 2020. C did not attend so his application was dismissed.
57. It was renewed, adjourned and then on the papers before me there is no trace of it being disposed of. In any event, no order was made against HSBC, albeit that (and I am not determining it, but observing) unless those payments were made to another HSBC account I think it unlikely that HSBC would have been aware of the identity of the person or persons behind Gidea Park 40226.
58. C said that D2 had at every stage opposed his applications to uncover who received those payments; that is simply wrong as a) D2 was unaware of the applications as b) D2 had no *locus* in them in any event. In summary, whilst C identified the recipient he did not proceed to uncover who was behind that unregistered entity, as he did not appear nor was he represented at the hearing on 19th February, and he did not ensure it was heard afresh. The responsibility for that lies with him. His attempts to blame D2 were wholly misplaced.

Approved Judgment

59. Thirdly, C wrote to Mr Mahmood's wife requesting bank statements from her on 12th January 2021, just 6 weeks before trial. He wrote again on 28th January, in greater detail, emphasising the need for the statements and in effect threatening her with having to give evidence. Her son replied on the 3rd February 2021 stating the family did not wish to be involved and that C should apply to the courts if he wished to pursue the matter. C did not, but in any event this approach was very late in the context of this claim which had been ongoing since March 2018.
60. In summary, no documentary evidence that supported C's alternative positions was obtained by him.

Findings, Discussion and Decision: Issue 3

61. D2's purchase is very different to that of Ms Okonye as it is agreed he personally provided £14,587 towards the sum needed to complete, including H&H's fees and disbursements. The balance (excluding the mortgage advance in D2's name) was £38,000 from Mahmood Properties. D2 says this was a gift, and that he had worked regularly with Mr Mahmood in their property business. In a somewhat opaque manner, in his first witness statement at [10] he described their dealings which went on "...over the years."
62. I find, as I have set out above, and as appears in the bank statements and solicitor's ledger that were in evidence and unchallenged as documents, the full purchase price was paid over to D1's solicitors.
63. C has to establish on his first case that the £38,000 was paid by or on behalf of D1 towards that purchase price, and later returned to D1. The burden of proof is on C. No evidence at all was before me of D1's involvement in that payment. Whilst C made various allegations against all involved, has had a very difficult time personally since he was struck off, and there are questionable matters, including the findings in the associated claim against D1 and Ms Okonye, they do not in themselves amount to more than circumstance.
64. As to D2, his evidence was confused, forgetful and at times contradictory. But as I have set out above he did contradict his written statement to his detriment. That does not accord with someone endeavouring to mislead the court. The late production of the banking documents was in my judgment of considerable assistance to him as it showed a) he had an ongoing financial relationship with Mr Mahmood/Mahmood Properties, b) they appeared to do business together c) he had borrowed money from him/it and was repaying it (not being the £38,000) and d) he had paid the total of £10,000 by 3 cheques to H&H for his purchase.
65. It does appear unusual that a sum as large as £38,000 could be transferred with no written agreement, and there is no other evidence of their business dealings or communications. Mr Hill-Smith submits that standing back it all lacks commercial reality that such a large gift should be made for no reason, and further that on the subsequent sale it did not appear that sum was paid back, and so I should find it was not a gift. Then it follows, he continues, Mr Mahmood must have been repaid, and as it was not by D2 it must have been D1.

Approved Judgment

66. I do not accept that chain of unevidenced assertions. Nor do I accept that the payment of the £39,500 went to Mahmood Properties as the mere fact that company banked at NatWest is far from, as Mr Hill-Smith submits, sufficient on the balance of probabilities to that being the proper conclusion.
67. Likewise there is no evidence before me as to whom the payment of £36,541.93 was ultimately made. It is not for D2 to evidence or provide explanations as to these payments, as C demanded. It follows that I do not accept C's alternative position that payment back to Mahmood Properties occurred and I expressly cannot see how, even if that had happened, it also amounted to a sale at an undervalue.
68. In summary, as to Issue 3, C has failed to meet the burden of proof upon him in that there is no documentary evidence to show this was a sale at an undervalue in respect of the amount advanced by Mahmood Properties. The circumstances, the collusive sale and the other facts I have set out combined with the unreliable witness testimony cannot tip the evidential burden in C's favour. The answer, one way or the other, may well be available, but the documents were not before me.
69. In view of my finding as to Issue 3 there is no reason for me to determine the other Issues. If counsel can agree a minute or order, there will be no need for an attended hearing. Finally, I would like to thank Mr Hill-Smith and Mr Parkin for their oral and written submissions. In particular, and somewhat unusually, they were both commendably frank as to the shortcomings of their respective witnesses' oral evidence, which was helpful.

Deputy Master Linwood

8th March 2021