Neutral Citation Number: [2020] EWHC 2852 (QB)

Case No: QB-2019-001033

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/10/2020

Before:

MR DAVID LOCK QC
(sitting as a Deputy Judge of the High Court)

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Between:

PHILIP COLEMAN	**Claimant**
- and –	
MARK MUNDELL	**Defendant**

- -
- -

Helen Swaffield (instructed by **Shah Law Chambers**) for the Claimant
James Holmes-Milner (instructed by **William Heath & Co**) for the Defendant

Hearing dates: 13, 14 and 15 October 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 30 October 2020.

Mr David Lock, sitting as a Deputy Judge of the High Court:

1. This is a claim by the Claimant, Mr Philip Coleman ("**Mr Coleman**"), against Mr Mark Mondell ("**Mr Mondell**") for specific performance of an oral agreement which Mr Coleman alleges he entered into with Mr Mondell. In substance, Mr Colman claims that he orally agreed to transfer 50% of the issued share capital in a Spanish company, Ninurta S.L. ("**Ninurta**"), to Mr Mondell as security for the repayment of an interest-free loan of £250,000 by Mr Mondell to Mr Coleman. Mr Coleman has offered to repay the sum of £250,000 to Mr Mondell. Mr Mondell has refused to transfer the shares he holds in Ninurta back to Mr Coleman because he does not accept that he entered into any form of loan transaction. Mr Mondell's case is that he agreed to purchase the Ninurta shares for £250,000 and is under no obligation to sell the shares back to Mr Coleman.

2. The Claimant was represented by Ms Helen Swaffield and the Defendant was represented by Mr James Holmes-Milner. Both counsel presented their cases in a way which was of great assistance to me, made proper and efficient use of court time and made final submissions which substantially narrowed the legal issues arising on this case. I am grateful for the assistance given by both counsel.

The background.

3. The background facts are not substantially in issue. However, it is necessary to explain something of the background in order to set the evidence of all parties concerning the factual dispute within a proper context.

4. In the autumn of 2016, Direct Entry Solutions Ltd ("**DES**"), which is a company owned by Mr Coleman and operated a courier business, was facing substantial financial difficulties. Mr Coleman was the Chief Executive Officer of DES. It had premises near Heathrow Airport and employed about 40 members of staff. DES had contracts with a range of partners and suppliers both within the UK and internationally and found itself in financial difficulties due to exchange rate fluctuations and the consequences of the Brexit referendum result which Mr Coleman considered had damaged DES's business.

5. Mr Coleman had executed a second charge over a residential property he owned jointly with his wife, Mrs Indre Coleman, to support DES's borrowings. Mr Coleman was also overdrawn on his directors' loan account in the sum of approximately £490,000. Accordingly, in the event that DES went into liquidation, substantial sums would need to be paid by him to the liquidator. It was common ground that, by the end of September 2016, Mr Coleman was in an extremely difficult financial position because any failure by DES would not only lead to the loss of his business and unemployment for all of his staff, but would also result in Mr Coleman having to make substantial payments from his own resources to both the liquidator and the bank.

6. Mr Coleman had managed to arrange an invoice discounting service to refinance his debtor book with a company called Pulse Cash flow ("**Pulse**"). He hoped an arrangement with Pulse would release approximately £300,000 worth of cash into the business. Nonetheless, he considered that this would be insufficient to pay his immediate creditors. He felt that he needed an immediate cash injection of £250,000

into DES to give the company any realistic chance of being able to trade its way out of its present difficulties or go through a managed insolvency process which would, in effect, preserve the business albeit within a new corporate form.

7. Mr Coleman had business interests other than his involvement in DES. In particular, he was the effective beneficial owner of 100% of the shares in Ninurta, which owned 5 plots of valuable land in Marbella, Spain ("**the Ninurta land**"). He had purchased the shares in Ninurta in 2014 for a sum of €800,000. Mr Colman thought that the value of the Ninurta land was considerably higher than the price he had paid for it in 2014 and that the land had continued to increase in value.

8. Mr Coleman's first attempts to raise cash for DES involved discussions with a Marbella based businessman, Mr Graham Hellier. On 20 September 2016 Mr Cedric Bredoux Bertrand, a surveyor from Nvoga Marbella Realty, emailed Mr Coleman with a schedule setting out his view concerning the amounts which he advised should be sought when marketing the 5 plots of the Ninurta land. The schedule set out a range of potential total values of between €2.55M and €3.1M for the 5 plots. The higher figure appeared to be for the sale of the plots individually, whereas the lower figure was for the sale of the Ninurta land as a package. The land had a potentially higher value if it was treated as being "constructable". I note that the values given to plots 2 and 3 were just over €600,000 each, and that the schedule ascribed a value of €949,110 for plot 5.

9. Plots 2 and 3 were each subsequently sold for €700,000 in 2018, and an option was agreed with the same purchaser to sell plot 5 for €800,000 as part of the same arrangement. All parties agreed that the value of land in the Marbella region had risen between 2016 and 2018 by about 20% or 25%. Given the values subsequently achieved for plots 2 and 3 in sales in 2018, I find that the figures on the schedule produced by Mr Bredoux Bertrand were realistic figures for the best reasonably achievable values for the land in 2016. It was suggested on behalf of the Defendant that these figures were mere "puffs" and that land values in Marbella had fallen between 2014 when Mr Coleman purchased the shares in Ninurta and 2016 when the relevant transactions took place. I do not accept that suggestion because it is inconsistent with Mr Mondell's own suggestion as to the level of increase in land values between 2016 and 2018. I thus accept that the figures on Mr Bredoux Bertrand's schedule were realistic values for the price at which the plots should be marketed, albeit that final sales prices may not achieve those sums. The figures in the Schedule are broadly consistent with a combination of the overall evidence of steadily increasing land values in Marbella over the relevant period, as evidenced by the prices subsequently paid by purchasers in 2018.

10. Armed with evidence of the value of the land that he owned in Spain, Mr Coleman sought to engage Mr Hellier in discussions about raising finance urgently to allow him to invest in DES using the Ninurta land as collateral for the transaction. His evidence was that the majority of the discussions took place over the telephone, but there is supporting evidence within a series of email exchanges. On 29 September emailed Mr Hellier offering the Ninurta land for €2.5M. The email said "*the price I am looking at for selling all would be 2.5m euros for a quick sale and perhaps we can discuss a buy back option as I know you are not keen on the idea of development?".* Mr Hellier responded by indicating that he was offering "*1.2m*". The email also does not explain precisely what Mr Hellier was seeking to get from Mr Coleman for his

1.2m or whether this was in pounds or euros. Mr Coleman explained in evidence that Mr Hellier's expertise lay in turning around failing companies and he was looking to acquire an equity share in DES as part of this arrangement as well as securing ownership of the Ninurta land. The precise level of any proposed equity share in DES was never resolved but I accept that this was of marginal relevance because, at this point, the shares in DES had little real value as the company was struggling to avoid liquidation.

11. The email from Mr Hellier does not indicate whether that offer was in pounds sterling or in euros, and there was conflicting evidence concerning this point. It is not necessary to make a finding on that point because the offer was rejected by Mr Coleman as being too low. Mr Coleman considered that this was a low opening offer from Mr Hellier and there was a sufficient possibility of reaching a deal with Mr Helier to justify him travelling to Spain for further discussions. The purpose of that trip was to allow Mr Coleman and Mr Helier to meet face to face to explore whether a deal could be reached. In evidence, Mr Coleman expressed the view in evidence that he would have hoped to have agreed a deal under which Mr Hellier paid him something like €2M for the Ninurta land. In the event, Mr Coleman never went to Spain for reasons I will set out below and so it is impossible to know whether further discussions would have produced a sale price and other terms that were acceptable to both Mr Coleman and Mr Hellier.

12. It was suggested on behalf of the Defendant that, by 30 September 2016, discussions about a cash injection from Mr Hellier had come to nothing and that this option was effectively closed off to Mr Coleman. I do not accept that that is a fair interpretation of the evidence. It seems to me that although Mr Coleman had rejected Mr Hellier's first offer, he had agreed to travel to Spain for further discussions with Mr Hellier to see whether a deal was possible. Mr Coleman had an urgent need to cash and so was in a relatively weak bargaining position. However, the Ninurta land was a valuable asset with which to trade. Mr Hellier was both a friend and a business associate and the emails suggest he was willing to discuss advancing him money as long as he could satisfy himself that the transaction was to his own commercial advantage. Whilst it is impossible to know whether further discussions with Mr Hellier would have produced a mutually acceptable arrangement, I consider that the evidence establishes that, by the afternoon of 30 September 2016, there remained a real possibility of Mr Coleman being able to conclude a deal with Mr Hellier.

13. Whilst Mr Coleman was driving from London to Gatwick on the afternoon of 30 September, he received a call from Mr Mondell. The friendship between Mr Coleman and Mr Mondell had started in about 2009 after Mr Mondell's partner, Ms Vilena Kafina, had met and become friends with Mrs Indre Coleman. Mr Mondell was previously a Canadian citizen but he has lived in the UK since the 1990s and has a UK passport. Mr Mondell had worked in the City of London in financial services but appears to have left that role in order to develop his residential property interests in the West London area. By 2016 it appears he owned at least 7 residential properties in that area. In a statement he made to a Spanish lawyer in 2017, he said he owned assets to a value of £3.5M. Mr Mondell's properties were let out to tenants and he described himself as being "semi-retired", with the rents from these properties providing either part or the whole of his income.

14. Mr Coleman and Mr Mondell had a common interest in property development and a friendship developed between them. They spent time together in both London and Spain, where Mr and Mrs Coleman had property interests and also had a holiday home. Mr Coleman estimated that Mr Mondell and his family came to stay with them about 10 times between 2012 and 2018, and they also took skiing trips together.

15. Mr Coleman accepts that he told Mr Mondell about the purchase of the Ninurta land in 2014, because he was excited about the development potential of this land which he thought he had purchased at a very competitive price. Mr Coleman also discussed the financial difficulties with DES as they mounted during 2016. He referred, in particular, to a discussion between them at the Curtains Up public house in London on 15 September 2016 when he explained the financial pressure he was under in relation to DES. Thus, it was common ground that Mr Mondell had some understanding of the financial pressures his friend was facing when he called Mr Coleman on the afternoon of 30 September 2016.

16. There is considerable dispute between Mr Coleman and Mr Mondell as to what was said during that telephone call on the afternoon of 30 September 2016. Mr Coleman says that Mr Mondell offered to lend him £250,000 to allow him to put that money into DES and thus give the company a chance of survival. Mr Coleman says that, although Mr Mondell said he was making this loan because he was primarily motivated to assist his friend, he wanted security for the loan. The obvious source of such security was the Ninurta land in Spain. In contrast, Mr Mondell says that Mr Coleman suggested to him that Mr Mondell may wish to purchase shares in Ninurta in order to generate the £250,000 in cash that Mr Coleman needed to put into DES. Mr Mondell was insistent in his evidence that he never discussed a potential loan but only ever discussed a purchase of a 50% stake in Ninurta for £250,000.

My assessment of the principal witnesses.

17. During the trial I heard both Mr Coleman and Mr Mondell give evidence. There were numerous conflicts between the evidence given by these two men on the key issue as to whether this transaction was, in substance, a share sale or a loan. In determining which account of events is more likely to be correct, it is appropriate for me to say something about the way in which these witnesses gave their evidence and their background.

18. My overall impression is that Mr Coleman was not a particularly satisfactory witness. He gave his evidence carefully but, when pressed on areas that were difficult for him, his evidence tended to be evasive and to towards generalities without answering the question that had been put to him. However, his evidence was generally consistent with the documents. He did not attempt to downplay the extremely difficult financial situation he faced in September 2016 and his account of the progress of discussions with Mr Hellier is consistent with the email trail. However, his evidence about the extent to which he understood that he was entering into a transaction which involved the transfer of ownership of the shares from him to Mr Mondell was unsatisfactory. He initially sought to say that he was not aware that the Deed transferred ownership of the shares. He later admitted that he did understand that this was the legal effect of the document he had signed. I consider that he was reluctant to accept that he had entered into a transfer of the shares to Mr Mondell because he feared that any recognition that ownership had passed to Mr Mondell may inhibit his ability to

reclaim ownership of the shares. Thus, to that extent, my impression was of a witness who was tailoring his evidence to what he thought would serve his case.

19. However, whatever difficulties there may be in accepting Mr Coleman's evidence on key points, those difficulties pale into insignificance in comparison to the difficulties faced in accepting the evidence of Mr Mondell. Counsel for Mr Coleman drew my attention to a series of matters which she suggested meant that I consider should be very cautious about accepting evidence he gave unless this was supported by other documentary evidence. In substance, I agree with those submissions and thus will list the areas which are relied upon by Mr Coleman's counsel to suggest that I should treat Mr Mondell as an unreliable witness.

20. First counsel for Mr Coleman relies on the fact that, in November 2016, shortly after the material events with which we are concerned in this case, Mr Mondell pleaded guilty to fraud and two charges of forgery at Isleworth Crown Court. The background to those convictions was that in November 2015 Mr Mondell applied for a residents parking permit in respect of an address at 71 Munster Road, Hammersmith. The case was brought against Mr Mondell on the basis that, at the time that Mr Mondell applied for the residents parking permit, the properties at 71C and 71D Munster Road were occupied by tenants and that Mr Mondell lived elsewhere. It was thus dishonest for Mr Mondell to apply for a resident's parking permit in respect of a property where he was not a resident.

21. When giving evidence about this incident in this trial, Mr Mondell tried to suggest that this was all a problem with the vehicle logbook and that he had in fact been living at 71D Munster Road at the material time. Whilst there is evidence to suggest that Mr Mondell subsequently moved to live at this address, it cannot have been correct that he was living there at the time that he made the application for the residents parking permit because the local authority led evidence that, at that time, the properties had been rented out to tenants. Mr Mondell pleaded guilty to those offences on the basis that the properties were occupied by his tenants. If the account he gave to this court of events was correct, the only correct inference is that he pleaded guilty to offences which he had not committed. It must also have been the case that the local authority's evidence that that both properties were occupied by tenants was false, despite the tenants providing their tenancy agreements to the local authority. I do not accept that Mr Mondell pleaded guilty to offences which he had not committed. Accordingly I accept counsel's submission that any assessment of Mr Mondell's credibility not only faces the difficulty that he has pleaded to relatively recent convictions involving dishonesty, but that it also has the additional problem that he did not tell the truth about the facts underlying these convictions when they were put to him in the witness box in this case.

22. Secondly, in January 2017 Mr Mondell had further difficulties with officers from the local authority. In that month he appeared in court in relation to a criminal charge arising out of the improper use of a disabled "Blue Badge". The newspaper account of events, which was not seriously disputed by Mr Mondell when giving evidence before me, explained how he had arrived at Craven Cottage football ground a few minutes before the start of football game, had parked his black Jeep in a parking space and had placed a Blue Badge on the dashboard to justify not paying a parking charge. When he was challenged by council officers, he alleged that he was parking on behalf of his uncle who was the Blue Badge holder and was disabled. He then made an

attempt in front of the local authority officers to telephone his uncle to establish where he was but appeared to be unable to reach him. Mr Mondell then handed the Blue Badge to the council officers and drove off. The Blue badge was indeed owned by Mr Mondell's uncle but this incident was a charade because, at the relevant time, Mr Mondell's uncle could not have been joining him to attend a football match because he was in prison. Mr Mondell initially pleaded "not guilty" to this charge but changed his plea midway through the trial, finally admitting that he did not park in order to meet his uncle. I accept the submission that this incident not only suggests that Mr Mondell is prepared to disobey the law when it suits him to do so, but it also suggests that he is prepared to lie when challenged and to sustain those lies until the point when it becomes unsustainable.

23. Thirdly, prior to the issue of these proceedings, Mr Coleman made an application in the Medway County Court under action number E00ME569 for pre-action disclosure against Mr Mondell whose address at that time was recorded as 78a Munster Road. The application said:

> "The intended Claimant [Mr Coleman] is aware through his own direct conversation and communication with the intended Defendant [Mr Mondell] that the intended Defendant has accurately recorded the loan of £250,000 in his personal tax return and accounts as a deductible loss in the context of assessing his personal liability for tax. The Intended Defendant [this must be an error and should refer to the "intended Claimant"] has requested copies of the intended Defendant's tax records in order to evidence this but the intended Defendant has refused"

24. That application was supported by a witness statement from Mr Coleman dated 12 July 2018. The significance of this application was obvious. If Mr Mondell had referenced the payment of £250,000 as a loan in his UK tax returns and claimed relief in respect of that loan, that would be strong evidence that the true nature of the transaction was that it was a loan and not simply a sum paid to purchase shares. This matter came before District Judge Green on 19 March 2019. The order records as follows:

> "AND UPON Mr Mondell giving evidence on oath that he has not in any communication submitted by him to HMRC may reference weathered directly or indirectly to the sum of £250,000 or any part thereof paid by him to Direct Entry Solutions Ltd and nor has any company in his control made any such reference in any such documentation submitted by it"

Based upon this information, the District Judge made no order on the application for pre-action disclosure and there was no order as to costs.

25. Once Mr Mondell had instructed solicitors to represent him in these proceedings, a List of Documents was filed on his behalf. No reference was made in that List to disclosure of Mr Mondell's tax returns. An application was made by the Claimant's solicitors for an order specific disclosure but that application was not determined prior to trial and it remained to be dealt with as a part of a series of applications at the start

of the trial. When counsel for Mr Coleman made that application, I asked Mr Mondell's counsel to explain why there was no reference to the returns in his List of Documents. The explanation advanced by Mr Mondell's counsel was that Mr Mondell had not referred to this transaction in any tax return submitted by him between 2016 and 2019 because he had not submitted any tax returns for those years.

26. Other documents in this case suggest that Mr Mondell owned assets and property which had a net value of £3.5M. He accepts that, during these years, he was the owner of 7 residential properties in London which were rented out to tenants and produced a net income of about £11,000 per month, with net mortgage payments of about £3,000 per month. He also had £110,000 in a bank account with Santander. Mr Mondell's, through his counsel, advanced the explanation that Mr Mondell assessed that he had sufficient allowable expenses that these exceeded his income in each of the relevant years, and accordingly he considered that he was under no obligation to file a tax return. He had no real explanation as to why he had not explained this position to the District Judge who made the pre-action disclosure order. The wording of the order plainly implies that Mr Mondell had been filing tax returns, albeit returns which made no reference to relief sought in connection with a £250,000 loan. Mr Mondell also confirmed that he had reached the view that he had sufficient allowable expenses to avoid any form of tax return without seeking any accountancy advice. His evidence was subsequently confirmed by a supplementary witness statement which stated that he had not filed an income tax return for any of the years from 2016 to 2019. It states "*The reason why I did not file income tax returns for these years is that in all these years my expenses exceeded my income. Therefore it was not necessary for me to file tax returns*".

27. I have the greatest possible difficulty in accepting this evidence as showing Mr Mondell anything other than someone who will change his evidence to suit the occasion. I reach that conclusion in part because it seems inherently incredible that somebody who has such extensive financial and property interests could reach a conclusion, without financial advice, that his allowable expenses were sufficient to permit him not to submit any tax return at all. It may well be entirely appropriate for HMRC to conduct such investigations as they may consider appropriate to determine whether tax assessments should have been filed by somebody who is a multimillionaire businessman in receipt of rental income from 7 London residential properties, and I invite the solicitors for the Claimant to send a copy of this judgment to HMRC. It seems to me that either Mr Mondell did submit tax returns and has misled this court about their existence. Alternatively, he has not submitted tax returns when he plainly ought to have done so. I am not in a position to know which is true but, whatever is the true position, it does nothing to assist Mr Mondell's credibility.

28. Further, this explanation is clearly different to the evidence that Mr Mondell gave to the District Judge because that evidence was based upon the case advanced by Mr Mondell that an order for him to make disclosure was not necessary was not needed because his tax returns had not referred to the £250,000 "loan". He did not say that a disclosure order was pointless because Mr Mondell had not filed any tax returns, so there were no documents to disclose.

29. I fully accept that the fact that Mr Mondell may have acted dishonestly in the past, whether in relation to matters which gave rise to his criminal convictions or in relation to questions about his tax affairs, does not mean that any presumption arises that his

evidence in relation to the material facts of this case should be rejected. The fact someone has acted dishonestly in the past does not necessarily mean they are always dishonest or are being dishonest about a particular matter. However, in assessing Mr Mondell's overall credibility, Mr Mondell's counsel fully accepted his past convictions into account as well as the evidence about his tax affairs are matters that I am entitled to take into account.

The evidence of the conversations on 30 September and 3 October 2016.

30. Following the telephone discussion on the afternoon of 30 September, Mr Coleman was sufficiently encouraged about the potential of receiving funds from Mr Mondell that he turned around and returned to London rather than travelling to Spain to meet Mr Hellier. Mr Coleman said he called his wife to explain that he was not going to Spain because he may be able to raise the funds by way of a loan from Mr Mondell. He also called key staff at DES to say that he was not going to Spain because he was pursuing another option to secure the funds.

31. It appears reasonably clear that, following the telephone call, Mr Coleman was enthusiastic to explore the option of entering into an agreement with Mr Mondell because he thought this was a better deal for him than the likely deal with Mr Hellier. That enthusiasm makes complete sense if Mr Coleman's version of events is correct. However, on Mr Mondell's version of events, Mr Coleman's enthusiasm is inexplicable. On any view, a sale of 50% of Ninurta for £250,000 was a significantly less attractive deal for Mr Coleman than the offer that he had already rejected from Mr Hellier. For these purposes it is not material whether the "1.2m" was a reference to €1.2M and not £1.2M. I consider that, by this stage, it must have been apparent to everyone that shares in DES had little real value and therefore Mr Hellier's offer was, in effect, was an offer to purchase 100% of the shares in Ninurta for €1.2M or possibly the slightly higher sum of £1.2M. Mr Coleman had just rejected this offer on the grounds it had undervalued the company. I therefore cannot see any rational basis upon which he would have become enthusiastic about an offer to sell 50% of the shares in Ninurta for less than €300,000. If Mr Mondell's account of events was correct, he was offering to buy shares in Ninurta at a far lower value than the value offered by Mr Hellier. Even taking account of the fact that, under this arrangement, Mr Coleman might have retained 50% of Ninurta, it seems to me almost inconceivable that Mr Coleman would have become enthusiastic about selling 50% of Ninurta for £250,000 when he had, in effect, already rejected an offer for €1.2M for the whole company. It thus seems far more likely that, at least at this stage, Mr Coleman's account is correct and the offer by Mr Mondell was to loan the money to him, albeit that Mr Mondell wanted security for that loan.

32. Mr Coleman drove to Mr Mondell's house in Munster Road to discuss the proposed transaction. There was a conflict of evidence as to whether the discussions at Mr Mondell's house involved a loan or a share sale. Ms Vilena Kafina, Mr Mondell's partner, was in the house at the time of the discussions and supports Mr Mondell's account. However, her evidence is of limited value because, as she explained, she was substantially concerned with looking after the children and preparing a meal and only appears to have dipped into the conversations occasionally. I do not consider I was assisted by her evidence concerning the conversations that took place on that occasion.

33. Mr Coleman's evidence was that, whilst Mr Mondell wanted some security for the loan, he did not want to sign a written loan agreement and did not want to either fix a definitive date for repayment or agree a level of interest. Whilst that may appear both informal and unusual for a £250,000 loan, I bear in mind that this was a transaction between 2 experienced businessmen who were personal friends who went on holiday together. Accordingly, the elements of formality one would expect to see in an arm's-length commercial transaction may well not have been present. The loan was seen by Mr Coleman as a generous offer of assistance provided to him by a friend. This level of informality was perhaps understandable given the background of friendship between these 2 men.

34. Mr Coleman then called his lawyer in Spain, Ms Mitra Kaviani ("**Ms Kaviani**"). I have had the benefit of hearing evidence from Ms Kaviani, albeit somewhat surprisingly she kept no records of the material events because they happened at such speed. She has set her account of events out in detailed but un-dated letter that was used for the pre-action disclosure application, in a witness statement in these proceedings and in her oral evidence. Ms Kaviani's account of events has been very largely consistent throughout and I have no doubt that, despite the fact she was engaged as the lawyer for Mr Coleman, she was genuinely attempting to assist the Court by giving honest evidence to the best of her recollection. Where there is a dispute between her evidence and the evidence given by either Mr Coleman or Mr Mondell, I accept the account of events given by Ms Kaviani.

35. In her letter, Ms Kaviani explains the information she was provided in the initial phone call, which Mr Coleman has recorded as taking place at about 7pm on 30 September, very shortly after the meeting at Mr Mondell's house. She said:

> "He [Mr Coleman] told me that his business in the UK was about to file for insolvency as he/the business had gone into bad debts. He then explained to me that Mr Mondell was an old family friend and a successful businessman based in London who fortunately was willing to help him out in this extremely delicate situation by lending his company the amount of money he needed to rescue the business"

36. It seems to me of considerable significance that, immediately after the meeting at Mr Mondell's house on 30 September, Mr Coleman was describing the proposed transaction to Ms Kaviani as a "loan" arrangement. I therefore consider that Mr Coleman's evidence is to be preferred that the essential nature of the transaction agreed between him and Mr Mondell on 30 September was that Mr Mondell would make Mr Coleman a loan, and that the loan was agreed to be secured over the Ninurta land in a way that had not yet been clarified.

37. Mr Mondell then commenced making a series of payments to DES which Mr Coleman then used to pay creditors. £40,000 was paid on the evening of 30 September and those funds were immediately used by Mr Coleman to pay debts owed by DES, including staff wages. The fact that payments were made before the paperwork identifying the transaction was concluded is further evidence of the essential informality of this arrangement at the time.

38. Mr Coleman and Mr Mondell then travelled together to Spain on Sunday 2 October 2016 in order to finalise the arrangements on the next working day, namely Monday 3 October 2016. Mrs Indre Coleman was in Spain on that occasion and made a meal for Mr Mondell and repeatedly thanked him for his "enormous favour" during the meal. That evidence is entirely understandable on Mr Coleman's case but is difficult to understand on Mr Mondell's case because, on his case, he was acquiring a 50% share in a property company which had land which had recently been valued at approximately €3M for only £250,000. Whilst I fully accept that Mr Coleman was in an extremely difficult financial situation with regard to DES at this time, I cannot see how either Mr or Mrs Coleman could have considered that he doing them an enormous favour by buying a 50% interest in Mr Coleman's property company from them for far less than they considered it was worth.

39. Mr Coleman and Mr Mondell went to Ms Kaviani's office at about 11am. Mr Coleman recalls that they were in Ms Kaviani's office for about 40 minutes before they left to attend the office of the notary. During that period Ms Kaviani explained what happened next in her letter as follows:

> "On October 3rd Mr Coleman and Mondell visited my office and explained the situation in further detail. Mr Mondell Stated that he was not a moneylender and that the funds were he and his girlfriend's savings. Mr Coleman's business 20 £50,000 in order to help out a friend but he wanted security - a charge over Mr Coleman's Spanish assets.
>
> The 3 of us went immediately to the notary in Marbella to draw up an agreement. Neither a charge or mortgage would work as security due to the fact that there was not enough time to organise a valuation of Mr Coleman's company, Ninurta SL's assets.
>
> The only solution to address the time sensitivity was to allocate Mr Mondell 50% of the share capital of NINURTA SL, a company structure that Mr Coleman purchased in October 2014. …..
>
> I arranged all papers to be signed and the gentleman signed in a hurry and left back to the UK to arrange the further payments of the loan"

40. Mr Mondell's evidence was that, when he arrived at Ms Kaviani's office, she was expecting the transaction to be a loan arrangement and was surprised that it involved the sale of shares. That evidence supports the evidence that Mr Coleman and Ms Kaviani had discussed a loan arrangement during a telephone call on 30 September. Ms Kaviani unequivocally rejects the suggestion that the transaction was ever discussed in her presence as a simple sale of the shares. Her consistent evidence has been that both men understood that the shares were being transferred to Mr Mondell as security for a loan. She rejected the idea that the transaction was ever supposed to take effect as a simple share transfer, whatever the transfer document may have provided. Her evidence was that she had assumed that Mr Coleman and Mr Mondell had signed a loan agreement in England and describes herself as being "*furious with*

Mr Coleman" for not having had a written loan agreement. Her evidence was that Mr Coleman and Mr Mondell agreed that the transfer of the shares was a "quick fix" to provide security for Mr Mondell, and she recalls Mr Mondell using the word "security" to describe the nature of his holding of the shares.

41. As part of this arrangement, it was agreed that Mr Mondell would become an "administrator" of the company. Ms Kaviani explained that she had suggested this because Mr Mondell was concerned that leaving Mr Coleman as the sole administrator (which I understand to be the Spanish equivalent of a company director) of the company would reduce the value of his security because Mr Coleman would be free to sell the land without his approval.

42. Events then moved to the notary's office. At this point it became clear that there was a difficulty with executing a mortgage over the Ninurta land because the usual arrangement was that a valuation of the land had to be undertaken under Spanish law prior to the execution of the mortgage. Given the pressure of time, there was no opportunity to secure valuation. Whilst it is possible in Spanish Law for the mortgagee to waive the requirement for a valuation, it appears that either this was not appreciated at the time or Mr Mondell was not prepared to give a waiver. The next option to provide security was for the execution of a pledge over the shares. However, the evidence from both Ms Kaviani and Mr Mondell was that Mr Mondell considered that a simple pledge would not provide him with sufficient security. Accordingly, as Ms Kaviani explained in her letter, her witness statement and in oral evidence, it was agreed that ownership of the shares should be temporarily transferred to Mr Mondell as security for the loan.

43. The document drawn up by the notary passed beneficial ownership of 50% of the shares in Ninurta to Mr Mondell. There was nothing in this document which recorded that the transfer of the shares was part of a wider loan agreement or imposed any obligation on Mr Mondell transfer ownership of the shares back to Mr Coleman if he offered to repay the purchase price namely €291,263, which equated to £250,000. Mr Mondell then made the further payments to DES to the agreed amounts.

44. There is evidence from others that, on various occasions between 2016 and 2018, Mr Mondell described the arrangement that he had concluded with Mr Coleman as being a "loan". I heard evidence from a friend of Mr Coleman, Mr Paul Terry, who described being with both Mr Coleman and Mr Mondell on a series of occasions December 2017, including one occasion which he described as a "thank you" meal held by Mr Coleman to express his appreciation to Mr Mondell for his generosity in providing funds to save DES. Mr Terry was clear that both Mr Coleman and Mr Mondell described the transaction as a loan. When he was cross examined, it was suggested to Mr Terry that Mr Coleman had described the transaction as a loan and this was not contradicted by Mr Mondell. Mr Terry firmly rejected that suggestion, saying both men described the transaction as a loan. I accept that evidence.

45. I also heard evidence from Mr Neil Jeeves, who is now a partner in Begbies Traynor, who are insolvency practitioners. His evidence is particularly important because he met Mr Mondell in November 2016, shortly after the transaction was set up in Spain. At this point DES was facing a potential administration and it was therefore important for the proposed administrators to have discussions with the company's principal

creditors. Mr Mondell and his partner had recently provided £250,000 to the company and were listed in the company's accounts as being creditors.

46. Mr Mondell met with Mr Jeeves on 6 December 2016. Mr Jeeves enquired from Mr Mondell he wished the loan to be treated in the event the company went into administration. Mr Jeeves says that Mr Mondell informed him that he had obtained security for the loan from Mr Coleman in Spain and therefore had no particular concerns about repayment. The broad effect of that conversation was that, although the money was paid to DES, Mr Mondell had loaned the money to Mr Colman and not DES, and that he had security for that loan.

47. As a result of that conversation, Mr Jeeves adjusted the company accounts to treat the transaction as a loan from Mr Coleman to DES as opposed to a loan by Mr Mondell. Thus, in effect, Mr Coleman's overdrawn directors loan account was reduced by the amount of the funds advanced by Mr Mondell and his partner. It was put to Mr Jeeves by counsel for Mr Mondell that Mr Mondell had described the transaction as a sale of shares by Mr Coleman to Mr Mondell. Mr Jeeves was clear that this was not how the transaction was described by Mr Mondell. He said it was described by Mr Mondell as being a loan between them, and that he held security for the loan over some land in Spain. Mr Jeeves has no interest in success by either party in this action and I accept his evidence about how transaction was described to him by Mr Mondell.

48. In early 2018, Mr Coleman secured sales of plots 2 and 3 for €700,000 each, with an option to buy plot 5 for €800,000. Those funds allowed him to offer to repay the monies which had been advanced to him by Mr Mondell, and he approached Mr Mondell with an offer of repayment. Mr Mondell responded by saying that Mr Coleman's offer meant he "felt like a mug". That expression is used in a detailed email dated 3 April 2018 from Mr Coleman to Mr Mondell. There was no dispute that this was how Mr Mondell described how he felt at the time.

49. I can understand why Mr Mondell used that expression if he had made an interest free loan to Mr Coleman, only to find that Mr Coleman used that loan as a platform to restructure his interests in DES and, at the same time, had seen the value of his Spanish property assets substantially increasing. Mr Mondell may have considered himself to be a "mug" because Mr Coleman had substantially improved his financial position on the back of support provided by Mr Mondell but, as no interest was due on the loan and he received no other profit from the transaction, all of the benefit of these arrangements accrued to Mr Coleman and none of the benefits accrued to Mr Mondell. However, if Mr Mondell considered that he held 50% of the shares in Ninurta, his description of his own state of mind is hard to understand. He had no reason to consider that he was a "mug". Mr Mondell had invested £250,000 in a company which now had about €1.3M in cash, had agreed an option to sell another plot of land owned by the company for €800,000 and continued to hold 2 further plots of land that were worth around a further €1M. Rather than feeling like a "mug", Mr Mondell ought to have felt that his investment of £250,000 in Ninurta had been spectacularly successful.

50. Mr Mondell responded to the request to transfer the shares back to Mr Coleman for £250,000 by an email dated 3 April 2018 in which he referred to that fact that the deed they had both signed transferred ownership of the shares to him, but he offered to sell the shares back to Mr Coleman for "360k", without saying if that offer was

pounds sterling or euros. It seems more likely that this was an offer of a sale of €360k than £360k because that was approximately 25% higher than the original sum paid by Mr Mondell and he referred to Spanish property increasing by that level between 2016 and 2018. A sale at €360k would have provided Mr Mondell with a profit on the overall transaction, consistent with increase in the value of land.

51. However, by this stage, I consider that the combination of the Ninurta land and the company's assets meant the company was worth about €3M. Accordingly, Mr Mondell was offering to sell 50% of the shares for about 12% of the value of the company. Mr Mondell explained in evidence why he had been prepared to forego such a large proportion of the value of his investment if he thought he was a 50% owner of the company. He said, in effect, that he was doing this out of friendship for Mr Coleman. I do not accept that evidence because, by this stage, the parties were clearly in the early stages of a dispute with the positions marked out on both sides. Having seen Mr Mondell give evidence I do not consider that it is not likely that he would give up a sum of over €1M because of his commitment to his friend. It seems to me far more likely that Mr Mondell realised that Mr Coleman had profited very substantially as a result of the generous financial assistance he had provided and that this "offer" was Mr Mondell's attempt to obtain some measure of financial benefit from himself as a result of his generosity. In effect, he wanted to secure a share of the benefits Mr Coleman had obtained out of his generosity.

52. It would, of course, have been open to Mr Coleman to recognise that Mr Mondell had been very generous and that he had profited substantially as a result of a combination of the financial lifeline provided to him by his friend and, no doubt, the very considerable amount of work he had undertaken to turn around DES and to market the properties owned by Ninurta. Mr Coleman did not do so but decided to hold Mr Mondell to the terms of his original agreement.

What was actually agreed between Mr Coleman and Mr Mondell?

53. By Particulars of Claim dated 12 June 2019 the Claimant advanced his case for, in effect, specific performance of the oral agreement. However, he claimed at paragraph 3 that the agreement was that the shares in Ninurta "would be pledged to the Defendant" and claimed at paragraph 6 that the shares were duly pledged to the Defendant as security for the loan. The Defendant, who at that stage was acting in person, filed a Defence which claimed that the Claimant but this case was a "total fabrication of the truth". He claimed that the Claimant had agreed to sell him 50% of the shares in Ninurta for €291,263 and that share sale agreement was duly notarised on 3 October 2016 at the Notary Public office in Marbella, Spain.

54. Directions were made for the appointment of a single joint expert on Spanish law and a helpful report was provided by a jointly qualified English and Spanish lawyer, Ms Maria Paloma Espana Ramos. This report confirms that the effect of the deed signed by Mr Coleman and Mr Mondell is to transfer legal and beneficial ownership in the Ninurta shares to Mr Mondell. Accordingly, the Claimant's pleaded case that this transaction was a "pledge" is simply incorrect. By the time the witness statements were served, it was accepted on all sides that Mr Mondell had not been prepared to accept an agreement constituting a pledge of shares.

55. At the outset of this trial I raised the question as to whether the real case being advanced by Mr Coleman on the evidence was that the Deed which transferred ownership of the shares to Mr Mondell was subject to the terms of an oral collateral agreement, and that what the Claimant was really seeking to do in these proceedings was to enforce the terms of that oral collateral agreement. However, it seemed to me that if this case was to be advanced by the Claimant, it needed to be properly pleaded because it was a significantly different case to the original case based on a pledge of shares as made out in the Particulars of Claim.

56. Counsel for the Claimant broadly accepted that criticism of the existing pleading and sought permission to amend her case. I gave permission and gave my reasons for giving permission in a short oral judgment. I also gave permission for the Defendant to amend his Defence. Accordingly, unsatisfactory as it was to amend the cases at a late stage in order to broadly fit with the evidence advanced in the witness statements, by the end of the trial the pleadings reflected the cases that both parties were seeking to advance.

57. Mr Mondell's primary case was that I should accept his evidence where it diverged from Mr Coleman. I reject that submission. I do not regard Mr Mondell as a witness on whose evidence I can rely.

58. However, Mr Mondell's counsel advanced a secondary case which was, in effect, that even if this transaction started as a proposed loan, all that changed when the form of security was agreed at a late stage to be the transfer of the share. He submits that if the agreement started as a loan agreement, it nonetheless later became a share sale because, even if this was agreed at a late point, that was the form of transaction that the parties agreed and there was insufficient evidence to support a case that, in effect, the parties had agreed that Mr Coleman would have an option to repurchase the shares at the same price.

59. In response, counsel for Mr Coleman accepts (contrary to her original pleaded case) that the form of transaction her client signed was an transfer of the ownership of the shares from Mr Coleman to Mr Mondell, but submits that this transfer deed was only part of a wider oral agreement between Mr Coleman and Mr Mondell under which the transaction was agreed, in substance, to be a loan and that the transfer of shares was only ever intended to be security for Mr Mondell. She thus argues that there was a collateral oral agreement which Mr Coleman is entitled to enforce notwithstanding that the form of transfer deed was an outright sale of the shares.

The nature of a collateral contract?

60. In the period leading up to the signing of any written agreement there are almost always discussions between parties to a proposed agreement about the terms of a proposed contract and how any future relationship between the parties is anticipated to change in the light of the agreement. Where parties set out their agreement in a written document, the document is usually taken to reflect the final form of the agreement between the parties and to contain the terms they have agreed. However, there can be occasions on which a written document only contains part of the overall agreement between the parties. In such a case, giving effect to the written agreement alone would result in injustice because it would mean that the court was only giving

effect to part of the overall agreement between parties. Chitty on Contracts at 13-004 explains the position as follows:

> "It may be difficult to treat a statement made in the course of negotiations for a contract as a term of the contract itself, either because the statement was clearly prior to or outside the contract or because the existence of the parol evidence rule prevents its inclusion. Nevertheless, the courts are prepared in some circumstances to treat a statement intended to have contractual effect as a separate contract or warranty, collateral to the main transaction. In particular, they will do so where one party refuses to enter into the contract unless the other gives him an assurance on a certain point or unless the other promises not to enforce a term of the written agreement"

61. All parties agreed that the primary question in this case was whether there was an oral collateral contract. By the end of submissions it seems to me that all parties had agreed that, in order to reach a decision on that point, I was required to ask myself whether an interested and objective observer who had been present on both 30th September and in all of the meetings on 3rd October and who had heard the statements made by Mr Coleman and Mr Mondell and their reactions to any statements made by Ms Kaviani would have been satisfied on the balance of probabilities that (a) there was an oral agreement between Mr Coleman and Mr Mondell relating to matters which went beyond the terms of the Deed executed to transfer the shares, (b) if there was such an agreement, was this agreement intended to form part of the overall legal arrangements between Mr Coleman and Mr Mondell between Mr Coleman and Mr Mondell transaction agreed between the 2 men, and (c) was there consideration to support the oral agreement. If each of those conditions are satisfied, both counsel agreed that the court should give effect to the oral agreement.

62. The authors of Chitty observe at 13-005 "*It is undoubtedly true that the courts are nowadays much more willing to accept that a pre-contractual assurance gives rise to a collateral contract, so that such collateral contracts are no longer rare*". That sentence was cited with approval by Mr Justice Warren in *Times Travel (UK) Limited, Nottingham Travel (UK) Limited v Pakistan International Airlines Corporation* [2017] EWHC 1367 (Ch) at §234. Accordingly, if the parties to this arrangement genuinely made an oral agreement that this transaction was, in substance, a loan and that ownership of the shares was only being transferred to Mr Mondell to provide him with security pending the repayment of the loan, that oral agreement is enforceable notwithstanding the fact that its terms were not reduced to writing and notwithstanding the fact that the limitations on the beneficial ownership of the shares which was being transferred to Mr Mondell was not included as a term of the Deed. This case thus turns on what was, in fact, agreed between Mr Mondell and Mr Coleman in the notary's office on 3 October prior to signing the transfer deed.

63. The general approach to the assessment of evidence so as to determine whether discussions between individuals reaches the threshold of a legally enforceable contract was set out by Lord Wilson in *Wells v Devani* [[2019] UKSC 4 at §17 to §18 as follows:

"17. The question whether there was a binding contract between Mr Devani and Mr Wells required a consideration of what was communicated between them by their words and their conduct and whether, objectively assessed, that led to the conclusion that they intended to create a legally binding relationship and that they had agreed all the terms that the law requires as essential for that purpose. Lord Clarke explained the relevant principles in this way in RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH [2010] UKSC 14; [2010] 1 WLR 753, para 45:

> "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

18. It may be the case that the words and conduct relied upon are so vague and lacking in specificity that the court is unable to identify the terms on which the parties have reached agreement or to attribute to the parties any contractual intention. But the courts are reluctant to find an agreement is too vague or uncertain to be enforced where it is found that the parties had the intention of being contractually bound and have acted on their agreement. As Lord Wright said in G Scammel & Nephew Ltd v HC and JG Ouston [1941] AC 251, 268:

> "The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has

> no choice but to say that there is no contract. Such a position is not often found."

64. That is the approach I have followed in assessing whether the evidence suggests that an arrangement which, as I have found, started as a proposed loan arrangement ever changed to being an outright sale of the shares for £250,000. The question is whether an objective observer would have thought that the Deed was being executed to transfer ownership outright to Mr Mondell or only to give security to Mr Mondell. That turns on whether an objective observer, listening to the discussions, would have thought that the parties had agreed that this transaction was, in substance, a loan and that Mr Coleman retained the right to pay off the loan and seek a return of the shares.

65. Having heard both Mr Coleman and Mr Mondell give evidence, along with Mrs Coleman and Ms Kafina, and having heard the evidence of Ms Kaviani, Mr Jeeves and Mr Terry, it seems clear that the original transaction was structured as an interest free loan which was, in some manner, to be secured on Spanish property. I accept that, given the time pressures, a time came when the original mechanism of giving that security by a mortgage over land was no longer possible. At that point, I accept that the parties agreed to transfer ownership of the shares to Mr Mondell as security for the loan. Despite the fact that the precise arrangements for the repayment of the loan and the transfer back of the shares may not have been discussed, it seems to me that the evidence establishes overwhelmingly that an independent observer who had listened to the original conversation on 30 September in London and then the conversations in both Ms Kaviani's office and at the notary's office would have understood that ownership of the shares was being transferred by Mr Coleman to Mr Mondell as part of an overall loan agreement. The agreement was that Mr Mondell held the shares as security for the primary obligation owed by Mr Coleman to repay the money which was being lent to him by his friend. I accept that the parties may not have discussed precisely what would happen at the point that the loan felt to be repaid. However, given that from the beginning to the end of this transaction, the parties discussed this arrangement in terms in which the money was being paid as a loan and that any property held by Mr Mondell was simply security for that loan, it seems to me that an observer would have clearly understood that this was being agreed notwithstanding the absence of detailed discussion about how the shares would be transferred back to Mr Coleman as and when he discharged his primary obligation to repay the loan. I also find as a fact that this was how Mr Mondell understood the arrangement at the time, as shown by his subsequent references to the transaction as a loan and his subsequent offer to sell the shares back at a price which only made any sense in the context of a transaction that started as a loan.

66. The consideration for the loan agreement was the transfer of ownership of the shares. It follows that, having carefully considered all of the evidence, all of the elements exist here to give rise to a collateral contract.

67. In those circumstances, Mr Coleman has the right to repay the loan on an interest-free basis and require the shares in Ninurta to be transferred back to him. It also seems to me clear that it was implicit that Mr Mondell's position as an administrator of the company was solely for the purpose of protecting his security. Accordingly, once he has been repaid and has no continuing ownership of the shares or other legitimate interest in the company, that purpose has been fulfilled. If Mr Mondell were director of an English company under these terms, it would have been open to Mr Coleman to

insist on his resignation. However, the question as to whether or not Mr Mondell should be required to resign as administrator is a matter for the courts in Spain and is not a matter for me. Nonetheless, in case it is of assistance to the Spanish Court, I find that it was an implied term of the oral agreement reached between Mr Coleman and Mr Mondell that the sole purpose for which Mr Mondell have been appointed as a director of Ninurta has come to an end.

68. I will leave it to the parties to discuss terms of an appropriate order.