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IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
[2018] EWHC 2075 (Ch)



No. CH-2017-000274

Royal Courts of Justice

Thursday, 5 July 2018

Before:

JUDGE ELIZABETH COOKE

(Sitting as a Deputy High Court Judge)

B E T W E E N :

ASHOK SHAH

Applicant

- and -

JAIVANT SHAH & ORS

Respondents

MR T. ROE QC and MISS C. SHUFFREY (instructed by Kapoor & Co) appeared on behalf of the Applicant.

MR G. ROSEMAN (instructed by Labrums Solicitors LLP) appeared on behalf of the First Respondent.

J U D G M E N T

ELIZABETH COOKE:

- 1 This is an appeal from a finding of fact made by Master Bowles in his decision of 1 November 2017 that in 2001, Ashok Shah owned a property known as the Christella Villa as an asset of a partnership with his brother. The Christella Villa is one of twelve properties on an estate known as the Christella Development, and it is agreed that it is Villa No. 7 on that estate. The consequence of Master Bowles's finding is that Ashok will have to account to his brothers Jaivant Shah, Bharat Shah, and Narendra Shah for the value of the Christella Villa following the ending of the partnership. Ashok's position is that he does not own it and has never owned, although at one stage he had been interested in buying it.
- 2 Because of the shared surname, I refer to all the brothers by their first names without intending any disrespect. Narendra left the partnership in 1997 on the basis that his brothers would indemnify for future liabilities. So although he is the fifth party to this action, he has not taken any part in it.
- 3 I heard the appeal yesterday on 4 July 2018. Ashok was represented by Mr Thomas Roe QC and Ms Chloe Shuffrey of counsel, and Jaivant by Mr Gideon Roseman of counsel. I am grateful to all for their helpful arguments. It was agreed at the end of the day that I would give my decision today after taking some time to prepare. Accordingly, strictly speaking it is a prepared *ex tempore* judgment rather than a reserved judgment.
- 4 I admit some of the fresh evidence and I allow the appeal, and in the paragraphs that follow, I give my reasons under five headings: first, the factual and procedural background; second, the law; third, the fresh evidence and the criteria in *Ladd v Marshall* [1954] 1 WLR 1489; fourth, Ashok's conduct in the appeal; and fifth, my conclusion.

The factual and procedural background

- 5 I turn first to the factual and procedural background. The question of the ownership of the Christella Villa is one element in a much larger dispute. Before 2001, the four brothers (three from 1997) had a business partnership. They operated cash and carry outlets in this country and bought and sold properties and investments in India. In 2001 they made an agreement that brought their partnership to an end and purported to list the assets and liabilities of the partnership. I say "purported" because on more than one point Master Bowles found it to be inaccurate.
- 6 It follows that, after the date of that agreement, the partnership's assets listed in the 2001 agreement had to be disposed of or accounted for. There was, in effect, a winding up period. Not all the properties were in the names of all the brothers. Land was bought in the name of one or more of them presumably on the basis of convenience but regarded as partnership property. In all cases, it seems the legal title was held by one or more of them; there is no evidence that they used nominees. One of the liabilities listed in the 2001 agreement was a debt for £510,000 incurred some 13 years previously and owed to Mr Gudka, by then deceased.
- 7 In October 2012, a property called in the proceedings the "Bombay Flat" was sold. Master Bowles found that it was sold secretly by Jaivant and Bharat so as to keep the proceeds out

of Ashok's hands. When Ashok found out, he sought payment. In response to that, as Master Bowles found, Jaivant's son Nirav took a gratuitous assignment of the debt owed to Mr Gudka by all four partners and sued Ashok alone for it together with interest of over £4.5 million. Thus, Nirav is the claimant in this action although for reasons that will appear he is not a party to this appeal. Master Bowles found that Nirav's action was brought:

“...as a tactical move and was designed to put pressure on Ashok and to deflect him from his pursuit of Jaivant in respect of the proceeds of the Bombay Flat.”

8 Ashok's response, as well as defending that claim, was to bring Part 20 proceedings against his three brothers to require them to contribute to the loan and also to account for various properties. They responded by requiring an account from him.

9 This litigation is far from over and at least two further hearings have been listed but there have been two trials so far. One was before Alison Foster QC sitting as a deputy high court judge to decide the action for debt. Ashok admitted in the course of that trial that his defence was a fiction. The deputy judge gave her judgment on 22 December 2016. The other trial was before Master Bowles and related to the claim and counterclaim for account. That trial established the ownership of various assets and some of their valuations and the findings of fact made at that trial will inform the further trial in November 2018 when an account will be taken.

10 As I said, Master Bowles found that the Christella Villa was owned by Ashok and his wife. The evidence he had before him about this was, for the three Part 20 defendants, the 2001 agreement and the evidence Mr Arun Shah who said in his statements that he “came to learn” that Ashok had bought the villa, but also said that he thought Ashok had either cancelled his deal to buy it or had sold it. Mr Arun Shah did not attend the hearing before Master Bowles. For Ashok, the Master had the statement of a witness who gave evidence by video link from India, Mr Chittiappa.

11 There was no documentary evidence of title before Master Bowles. In July 2016, Ashok made a request under CPR Part 18 asking whether Jaivant had any title deeds or other documentary evidence that the villa was, as he claimed, in the name of Ashok and his wife, for copies if so and if not for information as to the basis of his case about that property. The answers to those three questions were,

“(a) is it likely?,

(b) not applicable, and,

(c) this is what Mr Ashok told two brothers”.

12 Turning back to the evidence before Master Bowles, Mr Chittiappa is a director of Eastern Industrial and Engineering Works (Bangalore) Pvt Limited (“Eastern Engineering”). His evidence was that Eastern Engineering was involved in the development of the Christella Villa and had been the registered owner; that it had never been sold to Ashok Shah and was “currently registered in the name of a Mr K Appaya” and had been so since 1995. Mr Chittiappa said in cross-examination that the development was completed in 1998/1999 and that Ashok had, at one stage, been interested in the villa, that he had kept it “on hold” for him, but that Ashok withdrew his interest in 2000.

13 Ashok's evidence was that he had been interested in the property and that the three brothers were all interested but that he withdrew because he did not have the funds. He said that the

reason why the property was listed in the 2001 agreement was that the brothers were planning to purchase it. The Master was swayed by inconsistencies between Ashok and Mr Chittiappa's evidence and their inconsistencies with the 2001 agreement. He also took the view that Mr Chittiappa's evidence that Mr Appaya was the registered owner was inconsistent with his claim to have had the villa on hold on some sort of informal option to Ashok. On those bases, he found for Jaivant on this issue.

- 14 In the course of his decision, the Master made findings about the credibility of Ashok and Jaivant. He noted that Ashok had lied about the debt to Mr Gudka. He presented a sustained false defence that Jaivant had promised to indemnify him, which he withdrew in the course of the trial when presented with overwhelming evidence to the contrary. The Master acknowledged that Ashok had done this because he was frightened about the debt, which did not excuse his sustained dishonesty but gave it a context and an explanation. Otherwise, and in contrast to Jaivant, the Master said that Ashok on the whole tried to answer questions honestly. As to Jaivant, the Master noted the tactical resurrection of the debt claim and said he was "not impressed" by Jaivant as a witness and had no doubt at all that in a number of areas he had behaved dishonestly and lied to the court.
- 15 Accordingly while the Master found that neither Ashok nor Jaivant had a clean bill of health when it came to honesty, in terms of credibility and a willingness to give honest evidence Ashok came off considerably better.
- 16 Following his decision, the Master gave directions dated 24 November 2017. Ashok was directed to provide evidence as to the value of the Christella Villa and of the price obtained for it if he had sold it. In compliance with that direction, Ashok made a witness statement dated 28 November 2017. He said that he had applied for permission to appeal the Master's decision about the villa and then said this at paragraph 5:

"[5] It has proven to be very difficult to obtain documents from India. I have engaged lawyers in India to track down any information as they can in respect of this development and, in particular, in respect of Villa No. 7. I am told that after extensive enquiries and after much difficulty they have been able to extract the documents which now are as exhibits to this statement.

...

[9] I am still awaiting further documents from India. I am told that by a procedure known as obtaining an "encumbrance certificate" it may be possible to get further documents in respect of the ownership of Villa 7 and I have asked the Indian lawyer to obtain this. Once these are received I shall, with leave of the court, produce them in evidence here and in support of my appeal."

- 17 I say more about the exhibited documents later. One was a sale deed in respect of Villa No. 6 dated 2012 which includes a reference to Villa No. 7 being owned by Mr Appaya. Ashok explained that he provided these deeds as evidence of the value of the villa. If he did not own Christella Villa then, of course, he was not going to be able to give any direct information about it.
- 18 A later witness statement from Ashok, which I will come to later, explains that at this stage, the lawyer instructed by him was a Mr Ramanbhai Patel and that some of the documents included were not obtained by Mr Patel but from Mr Chittiappa.

- 19 On 28 November, Ashok instructed an Indian firm called Legal Torque to investigate the ownership of the Christella Villa.
- 20 Ashok sought permission to appeal on two grounds. One related to the valuation of certain other properties and permission was refused by Nugee J on 26 February 2018. On the other ground, Nugee J said that he was sceptical of the chances of success in appealing the findings about the Christella Villa but accepted that it was going to depend upon whether he was allowed to adduce further evidence, and so he gave permission.
- 21 On 20 March 2018 Ashok served on Jaivant some further documents now produced through Legal Torque in India including encumbrance certificates from the local deeds registry which provided an official record of the acquisition of the development in 1995 by Mr Appaya and the subsequent sales off of eleven out of twelve villas, the twelfth unsold villa being No. 7, the Christella Villa in issue here. He also produced, I think in early March, a report from Legal Torque expressing the opinion that Mr Appaya was the owner of Villa No. 7.
- 22 There followed some correspondence in which Jaivant's solicitors sought information about the difficulties said to be involved in obtaining that further evidence, obviously with an eye to the *Ladd v Marshall* criteria.
- 23 On 29 April, Jaivant applied for the appeal to be struck out unless further evidence was filed.
- 24 At a hearing on 23 May, Barling J declined to make an unless order but ordered that Ashok produce a witness statement from his Indian lawyers explaining the difficulty they had had in finding evidence of title. I revert later to the precise words of Barling J's order.
- 25 On 6 June 2018 Ashok served on Jaivant a witness statement from Suparna Umashankar an advocate at the Bar of Karnataka, explaining her firm's investigations, their 13 visits to the deeds registry, and the difficulties they had had in extracting documents from the deeds registry, from Mr Chittiappa, and from others. I come back in the penultimate section of this decision to the allegations now made as to whether that witness statement amounted to compliance with the order of Barling J.
- 26 At any rate, it can be seen that the process leading up to the hearing before me has been fraught with dispute. It is right to add that the hearing was listed as a rolled-up hearing at which the application for permission to appeal the valuation issue was also to be heard but, in the end, that was not pursued.

The law, *Ladd v Marshall*, and the overriding objective.

- 27 An application to adduce new evidence on appeal inevitably invites consideration of the criteria set out in *Ladd v Marshall* [1954] 1 WLR 1389. There are three and they are well-known. First, it must be evidence that could not, with reasonable diligence, have been adduced at the trial. Secondly, it must be such that had it been available, it would have made a difference, although it need not have been decisive. Thirdly, it must be apparently credible.
- 28 The decision in *Ladd v Marshall* of course long pre-dates the CPR. CPR 52.11(2)(b) simply states that appeal court will not receive evidence which was not before the lower court unless it orders otherwise. In *Webster v West Norfolk County Court* [2009] EWCA Civ 59, Wall LJ said at paragraph 135 that the *Ladd v Marshall* criteria survived the introduction of the CPR. In *Terluk v Berezovsky (No.2)* [2011] EWCA Civ 1534, Laws LJ amplified the

Court of Appeal's approach by saying that the *Ladd v Marshall* criteria remain important but do not place the court in a straitjacket. The discretion in CPR 52.11(2)(b) has to be exercised in the light of the overriding objective of doing justice, but the old criteria "effectively occupy the whole field of relevant considerations to which the court must have regard in deciding whether, in any given case, the discretion should be exercised to admit the proffered evidence". It is worth noting that in *Zipvit Limited v The Commissioners for Her Majesty's Revenue and Customs* [2018] EWCA Civ 1515, the Court of Appeal felt able to admit fresh evidence even though it was available on the internet.

29 What I take from all this is that the rule as to the admission of fresh evidence on appeal is as set out in the CPR, and the court's discretion must be exercised in the light of the overriding objective, but that the matters addressed in *Ladd v Marshall* will always be relevant to the exercise of that discretion. Accordingly, in my assessment of the fresh evidence, I pay close attention to the *Ladd v Marshall* criteria.

The fresh evidence from the *Ladd v Marshall* criteria.

30 With that in mind, what is the fresh evidence that I am asked to admit?

31 The fresh evidence has arrived in three tranches; some was exhibited to the witness statement of 28 November 2017; a report by Legal Torque was produced early in March; and further evidence was produced by Legal Torque and served on Jaivant's solicitors on 20 March 2018. I am going to leave the report of Legal Torque out of account because I believe the application relates to the documents obtained from India rather than to the Indian lawyer's opinion evidence. In listing the items of fresh evidence sought to be adduced, I have made use of Mr Roseman's very helpful schedule. I have omitted the very last item on that schedule, an auditor's report and accounts for Eastern Engineering, because it does not seem to me to be in the bundle or to be relied on anywhere except in Ms Umashankar's witness statement. That omission makes no difference to the outcome of this appeal.

32 So with his witness statement of 28 November 2017, Ashok produced the following:

- a) A legal scrutiny report which an English conveyancer we would call a report on title, written for a mortgagee certifying Mr Appaya's ownership of the Christella development, dated January 1995. The borrower is said to be Eastern Engineering, of which it will be recalled Mr Chittiappa is the managing director.
- b) A copy of the conveyance of the Christella development to Mr Appaya dated 19 May 1991 executed by Mr Chittiappa as his attorney.
- c) A plan of the development.
- d) A power of attorney from Mr Appaya to Mr Chittiappa.
- e) A deed of sale for Villa No. 3.
- f) A deed of sale for Villa No. 6.

33 These items in themselves do not go very far although I note the reference in the sale deed for No. 6 to Mr Appaya's ownership of No. 7. They demonstrate the starting point of the current situation, namely the acquisition of the Christella development by Mr Appaya in 1991, the close involvement of Eastern Engineering, Mr Appaya's continued ownership in 1995, and a couple of sales off.

- 34 On 20 March, Ashok served the following:
- g) An electricity bill from 2017 and a maintenance bill for 2017 for Villa No. 7 paid by Eastern Engineering.
 - h) Property tax receipts from 2008 to 2018 paid by Mr Appaya.
 - i) Five encumbrance certificates for individual villas not including No. 7 - none records a purchase by Ashok.
 - j) Two sale deeds, again for individual villas other than No. 7, neither recording Ashok.
 - k) An encumbrance certificate for the whole development from 2004 to 2017.
 - l) An encumbrance certificate for the whole development from 1991 to 2004.
- 35 Items G, H, and J, are consistent with Ashok's position but are not by any means decisive. The maintenance bills and property tax receipts deal with the period from 2008 so, again, are consistent but not decisive.
- 36 Crucial, to my mind, are the items I have numbered K and L. These are not private documents. They are encumbrance certificates produced by the local deeds registry. There are two because records were manual until 2004 when the system was computerised. The more important one is the certificate from 1991 to 2004 which records Mr Appaya's purchase of the whole development and the sale off of eleven villas. Villa No. 7, by elimination, remains unsold. The same is seen from the certificates covering 2004 to 2017. Villa No. 7 remains unsold.
- 37 So what we have is a public record of the continued ownership of the Christella Villa by Mr Appaya from 1991 to 2017 and a number of other documents, some public in the form of encumbrance certificates for individual properties, and some private which are consistent with that. I now turn to the *Ladd v Marshall* criteria.
- 38 First, could this evidence have been obtained with reasonable diligence for the hearing before Master Bowles? It became clear from Ashok's most recent witness statement that the first four items were obtained by him from Mr Chittiappa directly and not through or by Indian lawyers. Some of the later items were also obtained from Mr Chittiappa but only, according to Legal Torque, after some persuasion and reassurance. In any event, the first four items are of little or no importance in the face of the rest of the documents some of which are public documents. So in what follows, I am going to disregard items A, B, C, and D. My decision to admit the fresh evidence relates to items E to L.
- 39 Suparna Umashankar's affidavit sworn on 5 June 2018 goes through the efforts required to obtain these documents: the 13 visits to the deeds registry, and the meetings with the Christella Villas' owners' association and with Mr Chittiappa. Essentially, she says that it took a great deal of time and effort to obtain this material.
- 40 It is said by Mr Roseman for Jaivant in his skeleton argument that this is "drive". The question that springs to mind is obvious. If it was so easy, why did not the Respondents do this themselves? It was in their interests to prove title although, of course, they would not have been pleased with the outcome of their investigations had they made them but if it was this easy, why did they not try? I have no reason to doubt the truth of what Suparna Umashankar says. Her descriptions of the visits, enquiries, and efforts are convincing and I

find that the obtaining of the incumbrance certificates did indeed take many visits to the deeds registry and to individuals, and a considerable amount of time and persistence.

- 41 Should Ashok nevertheless have obtained this material as a matter of reasonable diligence? From his point of view the Christella Villa was one of a number of properties in dispute before Master Bowles. He had Mr Chittiappa's evidence which he might reasonably have expected to carry some weight. The evidence against him on this property was thin in view of the fact that even on Jaivant's own account, the 2001 agreement was not wholly accurate and Mr Arun Shah's evidence was ambiguous. Clearly, Ashok could have instructed Indian lawyers to unearth the public records of title, but he did not do so and it is argued for him that it would not have been proportionate for him to do so.
- 42 I speculate that neither Ashok nor Jaivant was actually aware of deeds registration and it did not occur to either of them to look for a public record of ownership. I say that particularly in the light of the Part 18 requests made by Ashok and of Jaivant's rather off-hand response, ("Is it likely?", quoted above) and also in light of the fact that the first lawyer instructed by Ashok, Mr Patel, did not take this step and it was left to Legal Torque to point out that this was the thing to do. So for Ashok to have known how to obtain this evidence before the hearing would probably have taken some persistent research quite apart from the actual obtaining of it. I find that the evidence, items E to L above, could have been obtained for the hearing but only at the cost of effort that would have fallen outside the range of reasonable diligence.
- 43 Second, is the evidence credible? Certainly, the evidence obtained from the deeds registry is credible in two senses. First, I accept that the certificates provided are genuine. They are provided by the local deeds registry and there is nothing to suggest that they are fabrications. Secondly, they are credible evidence of the legal title to Villa No. 7. I noted above that there is a process of elimination involved. Villa 7 appears to remain unsold because there is no record of sale. The encumbrance certificates are not certificates of titles such as might be obtained from a register of title but in a deeds registration system, where a deed cannot be used in evidence unless it is registered, the deeds registry's records are likely to be accurate.
- 44 I also note Master Bowles's findings about the unreliability of statements of price in Indian conveyancing documents. He found that tax evasion is commonplace and that documents cannot be relied on as evidence of value. However, the certificates are not relied on as evidence of value but as evidence of fact of ownership and the occurrence of sales off. To that extent, I regard them as highly credible and likely to be presenting a true picture.
- 45 Might there have been a hidden sale off of Villa No. 7? It is not impossible but it is highly unlikely for the reasons I have given and even more unlikely because of the consistency with the encumbrance certificates of the electricity, maintenance, and tax bills. Mr Roseman said nothing to cast doubt on the credibility of the encumbrance certificates in either of the two senses I have set out. They are strong and credible evidence of the legal title of the Christella Villa having remained with Mr Appaya throughout.
- 46 Third, would these items have made a difference to the Master's findings? Undoubtedly, yes. They are wholly inconsistent with the case presented by Jaivant. They are consistent with one of the views expressed by Arun Shah, namely that Ashok never bought from him, and with Ashok's and Mr Chittiappa's evidence.
- 47 Without this evidence, the Master had to do his best with very scanty material. He took note of the inconsistencies between what Ashok and Mr Chittiappa said. But it may be that what

one regarded as a reservation of the property, the other may have regarded as informally keeping the property on hold. The evidence about the completion of the development is by no means persuasive. Again, it may simply be a matter of one or other of them taking a different view. They seem to me to be relatively minor inconsistencies. Presented with objective evidence from a public source about the legal title, it is likely that the Master would have taken a wholly different view particularly as that public evidence clearly contradicts the 2001 agreement. So I find that the fresh evidence would have made a great difference to the Master's findings and would have led him to find in Ashok's favour as to the ownership of Christella Villa.

- 48 Accordingly, the *Ladd v Marshall* criteria are met. However, my discretion is to be exercised in the light of the overriding objective and the need to do justice. Mr Roseman's strongest objection to the admission of this evidence was that he had not been able to cross-examine Ashok or Mr Chittiappa on it at the trial so as to discover whether the equitable title to Villa No. 7 might have been different. The encumbrance certificates record the legal title but did Mr Appaya hold the villa in trust for Ashok and his wife? That was not Jaivant's case, of course. His case was squarely that the legal title lay with Ashok and his wife.
- 49 I very much doubt that that line of cross-examination would have been plausible or would have yielded any results. The partnership property was owned in different combinations by different brothers but they did not use nominees and there was no reason for them to so. It is now how they operated.
- 50 The other side of that coin is that, had the evidence been produced for the hearing before Master Bowles, Jaivant and Bharat would have been cross-examined on it and would have found themselves in considerable difficulties.
- 51 The most important factor, I think, on these facts is the credibility of the fresh evidence. It is clear that the legal title to the Christella Villa remains with Mr Appaya. Whether for his benefit or that of Eastern Engineering is not known and is not material. It would be unrealistic and unjust for this court to take an account later this year on the basis of evidence which is now demonstrably false. Ashok did not own the Christella Villa. Accordingly, I admit the fresh evidence listed at items E to L above.

Ashok's conduct in the appeal

- 52 It is argued on Jaivant's behalf that Ashok has lied in the course of this appeal and that it should be dismissed for that reason. What is said is that in paragraph 5 of his witness statement quoted above, Ashok said that he had obtained certain documents exhibited thereto with great difficulty from Indian lawyers. The order of Barling J required him to obtain evidence from those Indian lawyers, the ones referred to in his paragraph 5 and the wording of the order makes that perfectly clear. Ashok did not do so. He obtained affidavit evidence instead from Legal Torque whom he did not instruct until 28 November 2017. So it is said that he was lying when he said on 28 November that he had instructed Indian lawyers, and he failed to comply with the order of Barling J.
- 53 In response to this allegation made at a very late stage in Mr Roseman's skeleton argument, Ashok has made a further witness statement on 29 June. He explained there that he obtained some of the exhibits to his 28 November statement from Mr Chittiappa after much persuasion. The two deeds of sale did indeed come from an Indian lawyer, Mr Patel, who had great difficulty getting hold of them but by the time of the hearing before Barling J, what everyone was interested in was the evidence produced by Legal Torque on 20 March and therefore he believed that what the judge and what Jaivant's representatives wanted was

evidence from Legal Torque of the difficulties they faced. It has also been explained, and I accept, that Legal Torque were, in fact, instructed on 28 November 2018.

- 54 In response to Ashok's latest witness statement, Mr Roseman says that Ashok has therefore lied in paragraph 5 of the 28 November witness statement because not everything came from an Indian lawyer but some things came from Mr Chittiappa. Indeed, Mr Roseman says that Ashok's witness statement of 29 June has to be disregarded and that all of it came from Mr Chittiappa although he has not asked to cross-examine Ashok on his latest witness statement. Mr Roseman says that therefore Ashok got permission to appeal on false pretences. Moreover, he has not complied with the order of Barling J. Moreover, his solicitor lied in an application put in on 19 June for permission to rely on the evidence of Legal Torque in saying that that evidence was given pursuant to Barling J's order.
- 55 I accept Ashok's explanation for what he has done and I accept what he says in his latest witness statement about the problems with the documents.
- 56 To see what has happened, we have to go back to a witness statement made in support of the application to Barling J in which Jaivant's solicitor listed the fresh evidence produced by that date including the encumbrance certificates and other material produced by Legal Torque. I refer to paragraphs 34 to 36 of Mr Oberio's witness statement of 29 April 2018 when in particular to paragraph 36 when he specifically complains about the absence from Legal Torque's March report of any reference to the extent of the enquiries or difficulties they had faced. In answer to that complaint it was perfectly natural and to be expected that Ashok requested and produced a witness statement from Legal Torque. I expect that he would have faced vitriolic complaint on behalf of Jaivant had he not done so. As Mr Roseman fairly said at the hearing yesterday, they were interested in everything, not just in the early material produced in November.
- 57 It is accepted on Ashok's behalf that the wording of Barling J's order requires, read literally, evidence from the lawyer referred to in paragraph 5 of the November witness statement. It was not appreciated by Barling J or by Jaivant's representatives at that stage that this was not Legal Torque and it was probably not appreciated by Ashok's representatives either. Essentially, the order was drawn up in such a way that it did not reflect what the judge or Jaivant actually wanted which was set out in paragraphs 34 to 36 of Mr Oberio's witness statement. The failure to comply with the literal terms of the order was inadvertent.
- 58 I accept that Legal Torque's witness statement was provided to the court by Ashok in good faith and in an endeavour to provide what Jaivant's representatives wanted. They had, by this time, received the report and evidence from Legal Torque and quite reasonably wanted to know how it had been undertaken. To suggest that Ashok is in contempt of court for providing that evidence instead of providing something from Mr Patel who had only been temporarily and peripherally involved is unrealistic. It seems to me consistent with Jaivant's behaviour throughout these proceedings and with Master Bowles's findings about Jaivant's credibility that this was an attempt to distract the court's attention from the cogent evidence now provided as to the title.
- 59 I am sorry that Mr Roseman accused Ashok's solicitor of lying and I make it clear that I have no doubt that she was wholly honest in what she said in the application of 19 June. She believed that what had been done was in compliance with Barling J's order. It would have been very strange for her to take the view that he was, in fact, supposed to produce something far less helpful and which would not have met Jaivant's representative's reasonable wish for evidence about the material from Legal Torque.

- 60 It is accepted that paragraph 5 of Ashok’s witness statement was inaccurate but I find that that was carelessness rather than dishonesty. At that stage, he was trying hard to get information out of contacts in India. He was focused on the lawyers although Mr Patel was really not delivering the goods. He wrote in general terms and a little carelessly about his efforts and without the intention to mislead. For that reason, I also reject the idea that he obtained permission to appeal on false pretences.
- 61 Finally, my conclusion. I have admitted the fresh evidence. What of the appeal itself? I am, of course, very cautious about allowing an appeal from a finding of fact where the court at first instance had the advantage of seeing and hearing witnesses. Master Bowles saw and heard the parties and was able to reach careful conclusions about their credibility but his finding about the ownership of the Christella Villa was not based on any influence from either of the witnesses. He was doing his best with very limited evidence.
- 62 In *Armagas Ltd v Miundogas SA (“The Ocean Frost”)* [1985] 1 Lloyd’s Rep 1, at [56]-[57], Robert Goff LJ observed:
- “The probabilities and possibilities of the case may be such as to impel an appellate court to depart from the opinion of the trial judge formed upon his assessment of witnesses whom he has seen and heard. I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony and in particular by reference to the documents in the case.”
- 63 Here, the court is presented with documentary evidence that the case put forward by Jaivant and Bharat about the ownership of Christella Villa cannot possibly be true. It is evidence produced not by an individual but by a lawyer who has obtained it from the deeds registry. It certainly outweighs the dubious evidence of the 2001 agreement, the ambivalent evidence of Arun Shah, and any conclusions reached by inference from inconsistencies between the evidence of Ashok and of Mr Chittiappa.
- 64 Having admitted the fresh evidence, the conclusion is compelling that I have to allow the appeal. The Christella Villa was not held in the names of Ashok and his wife, nor is there any evidence from which it could be inferred it was held in trust.
- 65 I bear in mind the need for finality in litigation but, of course, Master Bowles’s findings did not produce finality. They were a preliminary for the taking of an account and, if his finding on this point remains undisturbed, that account will be taken on false premises. Mr Roe QC has also put forward a number of other points about Master Bowles’s decision. In the circumstances, I do not need to deal with them and I make my decision without regard to them.
- 66 Accordingly, I allow the appeal. In view of the fact that Mr Roe has not been able to attend today due to a prior commitment, I am content to receive written submissions on costs.
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