All England Reporter/2004/November/Ali v Al-Basri and another - [2004] All ER (D) 290 (Nov)

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Ali v Al-Basri and another

[2004] EWHC 2608 (QB)

Queen's Bench Division

Tugendhat J

18 November 2004

Trusts - Resulting trust - Acquisition of property - Declaration - Contribution to purchase price.

The claimant was born in Iraq of Saudi Arabian parents. The first defendant was born in Iraq in 1955 and was of Iraqi nationality at least until after his marriage to the second defendant, who was British by birth. The claimant issued proceedings against the defendants. She claimed that subsequent to arriving in the United Kingdom, she was told by the first defendant that it would assist with her asylum claim if she entrusted any cash sums and jewellery that she held to the care of the first defendant and accordingly handed over such items. Thereafter the claimant pleaded that with her consent part of the moneys provided by her were used for the purchase of various properties and accordingly the defendants held those properties in trust for her and had failed to account to her for rents received. She asked for relief by way of declarations as to the ownership of the properties, an account of the sums used to purchase the properties, return of the jewellery and moneys unpaid and an account of rents due to the claimant in respect of the properties.

The second defendant submitted that she was only involved in the matter to a very small degree.

The court ruled:

On the evidence, the deposits for some of the properties were all funded out of the claimant's money with her authority. The first defendant invested in other properties for the claimant's benefit, for which he had not accounted anything. The claimant's claim in respect of some of the other moneys failed as there was no basis upon which the court could hold that she had discharged the burden of proof upon her of showing that the first defendant had received any such money. The second defendant knew that the money used for the properties came from the claimant.

It followed that the claimant was entitled to an account of profits on the properties to which she was beneficially entitled.

Andrew Roy (instructed by Attiyah Lone) for the claimant.

Michael Mulholland (instructed by Slater Heelis Collier Litter, Manchester)

Dilys Tausz Barrister.

Judgment

[2004] EWHC 2608 (QB)

QUEEN'S BENCH DIVISION

18 NOVEMBER 2004

MR JUSTICE TUGENDHAT

APPROVED JUDGMENT

I DIRECT THAT PURSUANT TO CPR PD 39A PARA 6.1 NO OFFICIAL SHORTHAND NOTE SHALL BE TAKEN OF THIS JUDGMENT AND THAT COPIES OF THIS VERSION AS HANDED DOWN MAY BE TREATED AS AUTHENTIC.

MR JUSTICE TUGENDHAT:

1. Mrs Souad Ali (the Claimant) was born in Iraq of Saudi Arabian parents in 1946. Mr Akeel Al-Basri (the First Defendant) was born in Iraq in 1955 and was of Iraqi nationality at least until after his marriage in England to Mrs Al-Basri (the Second Defendant). The Second Defendant is British by birth. The Claimant paid to the First Defendant very large sums of money after she came to the United Kingdom in 1993. She also claims he received other money and property of hers. The First Defendant says that he has paid back, or paid to her, everything that he received from the Claimant, or for her. The Claimant claims that her money was used by the Defendants to buy properties, which are held on trust for her by the Defendants. The Defendants do not dispute that the Claimant's money enabled them to buy certain properties, but they say the money was an interest free unsecured loan, and so that the properties are not held on trust for the Claimant.

2. There are a large number of disputed matters of fact. For reasons which will become apparent, it is necessary to consider in detail the contemporaneous documents.

BACKGROUND

3. All three parties are graduates. The Claimant and First Defendant have Arabic as their first language. The Claimant has been married a number of times in her undeniably eventful life. Her first child is a daughter born in 1969. She lives in Saudi Arabia. The Claimant's second marriage was in 1972 to an Iraqi doctor. Her eldest son Hussain Al-Jassas (Hussain) was born in 1979. The Claimant last saw her second husband in 1980. The authorities took him away and took control of all his property. The Claimant then started a trading business in Baghdad.

4. Meanwhile in 1977 the First Defendant had arrived in the United Kingdom with a government scholarship to study. He graduated in 1982 and had started a takeaway restaurant business towards the end of his studies, no doubt to help finance them.

5. Hussain had been born in the United Kingdom on a visit here and the Claimant came back to this country for medical treatment for him. She married again in Iraq under pressure from the authorities and had two more sons one born in 1985 and one in 1988. The first of these was also born in London. For the purposes of her visits to London she maintained a bank account with BCCI at their Hyde Park branch in London.

6. While in Iraq she suffered a number of bereavements as a result of the Iraqi government's oppression. Following the death of her mother and other family members, she inherited a number of properties in Baghdad including a supermarket. By 1990 the Claimant's position in Iraq had become increasingly difficult and she decided to flee to Saudi Arabia. She left with her children and such possessions as she could put into a small bag. She smuggled some money in a container for milk for the children.

7. Her misfortunes continued on her arrival in Saudi Arabia. Coming from Iraq, she was viewed with suspicion. Her husband pronounced a talaq. She was detained in custody in Saudi Arabia, and later was released from custody subject to conditions. By October 1992 the position of the Claimant was so desperate that it attracted the sympathetic attention of a newspaper. The two younger boys have an inherited disability, which required expensive medical treatment. She took up employment as a schoolteacher. She was the head mistress of a school for some months in Saudi Arabia in 1992-1993. She decided to flee again and in July 1993 she arrived in the United Kingdom.

8. Meanwhile the Defendants had met while students and subsequently married. In the very early 1990s the Defendant had a number of business interests on a modest scale. He was struggling in 1991 and 1992. The second Defendant was a project manager and she has been employed throughout the period since her graduation. Initially she had a modest starting salary of some £6,000 but by 1993 I accept that it was larger than that. Without any disclosure of documents on this topic, I am unable to find what her salary was. By 1993 the Defendants owned a two bedroomed house in Bolton, which they had bought with the aid of a mortgage.

THE HISTORY OF THE RELATIONSHIP BETWEEN THE PARTIES

9. The first contact between the Claimant and the First Defendant was in the form of a telephone call from Iraq. This followed some contact with a mutual friend or acquaintance, concerning medicine for the Claimant's children. The First Defendant, as an Iraqi established in England, finds that there are many occasions on which less fortunate Iraqis apply to him for assistance of one kind or another, which he is willing to provide. He was willing to help the Claimant. He met her on her arrival in the UK in July 1993 and helped to find the family accommodation at an address in Brompton Villas in London. Soon after that, he found accommodation for her in Lillie Road. In oral evidence she accepted that he had paid the deposit of £600 for that. The Claimant's English at that stage was very poor. Over the years it has improved. It is still not good.

10. In order to obtain the visitor's visa, which enabled her to enter the UK, the Claimant had obtained funds in Saudi Arabia, although it is not clear what the source of those funds was. On 22nd September 1993 the Immigration and Nationality Department of the Home Office, at Lunar House in Croydon, issued to the Claimant a letter recording that she had applied for asylum in the United Kingdom and that this application was under consideration. She was not permitted to take employment. Her address in the UK is given as the First Defendant's address in Bolton although this has been crossed out. The document is stated to be valid until 22nd September 1994, or until the asylum application is decided, whichever is earlier.

11. There is no dispute that the First Defendant was present with her that day. Much else is in dispute and I will have to return to it. A number of bank documents came into existence on that date. The most important of these is a paying in book of Barclays Bank, with printed slips relating to an account in the First Defendant's name at a branch in Bolton. It is in respect of an account numbered 80097403. I will consider it in more detail below.

12. The Claimant alleges that she handed substantial sums of money to the First Defendant which are represented by credits to this account and by the paying in slips, whereas the Defendant says that the credits are substantially his own funds and he paid back to the Claimant the proceeds of some travellers cheques. I will have to return to this in detail later.

13. Apparently contemporaneous with the asylum application are two undated documents, one headed "Psychological report" and the second headed "Medical report". These were produced on disclosure by the First Defendant. He says they were among documents left with him by the Claimant in 1997. She says that he had them as from the date they were prepared. The medical report refers to a letter from the Riverside Hospital dated 21st October 1993, so must have been prepared after that date. It records her health as found on examination. It records that she was suffering from diabetes and other disorders. It also records a scar, which the Claimant informed the doctor was the result of injuries she received during her imprisonment in Saudi Arabia. The Psychological report refers to her own suffering while in prison and to the imprisonment of her three sons in Saudi Arabia. The psychologist records that the Claimant was genuinely distressed but could not state that she was suffering from a psychological disorder.

14. At About this period the Claimant states that the First Defendant gave her money, helped her to shop and to obtain benefits and housing. There is no dispute that he did give her assistance along these lines.

15. At the end of October 1993 a number of other documents came into existence, which are crucial to the issues in dispute. There is a document dated 30th October 1993 on paper headed "Olympian Systematic" with an address which is that of the home of the Defendants at that time in Bolton. The name or address also appears in Arabic printed on the paper. That is the trading name under which the First Defendant was conducting his business at the time. The first section of that one page document appears to be produced on a printer from a word processor. This and a number of other documents prepared by the First Defendant contain minor spelling mistakes of the kind to be expected of a person whose first language is not English. They are quoted as they were written. The document dated 30th October 1993 reads as follows in English:

> "TO WHOM IT MAY CONCERN
>
> This is a confirmation that the amount of money available in the account below it has been deposited for the fever of Mrs Soad Ali and in case of any accident resulting in my death the money which is available in this particular Account (below) should be paid to Mrs Soad Ali without any delay."

16. There then follows six lines handwritten in Arabic, which it is common ground, are to the same effect as the English text. There then follows the details of the Bank account referred to above. It is in the name of the First Defendant. The account number is the same as the one previously mentioned namely 80097403. The address of that branch of Barclays Bank is given in Bolton. Finally at the end of the document there appears the signature of the First Defendant in both Arabic and English.

17. On the same date, 30th October 1993, there is a document which appears mostly in Arabic. The document has a fax header suggesting it has been faxed from Jeddah, but it is signed by the Claimant and addressed to a bank in Jeddah. The bank is Al Bank Al Saudi Al Fransi. It is a copy of instructions initially sent to that bank. They read as follows, as translated into English:

> "Dear Sir,
>
> I wish to express my thanks for your concern in the telephone conversation between us. Please kindly send the sums under the account numbers recorded below in my private account deposited with your esteemed bank"

There then followed three account numbers, and the text continues:

> "Please also do not close my accounts numbered above with you, but retain a sum of 1,000 Saudi riyals in each account.

> Please send the sums as soon as possible to the United Kingdom to the account of my relation Mr Akeel Al-Basri. The details of his account are recorded below."

There then follow his account details, which are identical to those appearing on the previously mentioned letter. The text continues:

> "With greetings, thanks and regards in advance"
>
> There then follows the signature of the Claimant and a rubber stamped receipt dated 3 November 1993.

There are then some words in manuscript which have been translated as follows:

> "Please assist me by sending the sum very urgently because [several illegible words] thanks"

18. There appears to have been faxed from Jeddah with that document a copy of another document headed 'TELEX TRANSFER'. This document is a printed form of the bank to which the instructions had been sent. It is dated 8th November 1993. The Claimant is identified as the remitter. The amount is £81,621. The value date is 10th November 1993. The beneficiary's details are the First Defendant's details as given in the preceding document. And it states: "customers signature as per letter attached".

19. The letter of instruction from the Claimant to the bank is exhibited to the First Defendant's witness statement, together with an internal memorandum on the headed paper of the Saudi bank. The memorandum is in manuscript addressed to the Claimant and attaches a copy of her instructions in relation to the transfer of £81,621 and a copy of the transfer document.

20. The First Defendant assisted the Claimant in making this transfer to his bank account. The receipt of the money is not in dispute. What is in dispute is the terms on which it subsequently came to be held by the Defendant, the use to which it was put and the extent to which it was repaid. I shall have to return to this later.

21. On 22nd November 1993 the whole of the sum standing to the credit of account 80097403 were transferred out of that account and into another account with Barclays bank in the name of the Defendant. Account 80097403 was closed on 31st December 1993. The total sum transferred was, I am told, £90,000.

22. From the time of her arrival in the UK the understanding of the Claimant and the First Defendant was that, either an Iraqi national had no right to open a bank account in the UK, or, if such an account existed, it would be frozen pursuant to the United Nations resolution and the British regulations enforcing that freeze on or Iraqi assets in the UK. On 6th December 1993 the Deposit Protection Board in London addressed a letter to the First Defendant at his home address in Bolton referring to the liquidation of BCCI. It includes the following:

> "BANK OF CREDIT AND COMMERCE INTERNATIONAL SA (BBCI) IN LIQUIDATION - EMERGENCY LAWS (RE-ENACTMENT & REPEALS) ACT 1964
>
> I refer to our recent telephone conversations concerning the residential status of Mrs Souad Mohsen Ali. I confirm that Mrs Ali is regarded as a resident of Iraq for the purposes of the above Act. Although she has received Home Office permission to remain in the UK while her application for asylum is decided, or twelve months which ever is the earlier, the permission is not sufficient to regard her as permanently resident in the UK.
>
> Residents of Iraq are subject to the Treasury Directions under the Emergency Laws (Re-Enactment & Repeals) Act 1964, which impose certain restrictions on their accounts. The-

> se restrictions prohibit the Deposit Protection Board from making payments otherwise than to a blocked "Iraqi account" with a branch in the UK. In the circumstances, therefore, the Board are unable to make a payment to your personal account Barclays bank as Mrs Ali's Power of Attorney. Would you please provide me with payment instructions in favour of an "Iraqi account" with a branch of a bank in the UK. If Mrs Ali does not hold a bank account, it may not be possible for payment to be made to her until such time as a bank account is opened or the current restrictions are lifted".

23. The First Defendant explains that this arose because he was assisting the Claimant to obtain payment from the liquidation of BCI through the Deposit Protection Board. He had suggested that he act as her attorney for the purposes of receipt of monies payable to her.

24. At no stage in these proceedings has the First Defendant alleged any illegality on the part of the Claimant as a defence to these proceedings. But I consider the possible relevance of that below.

25. In between December 1993 and March 1995 the First Defendant says that he received monthly bills from a mobile phone operator, which totalled £819 and which he paid. He says the bills relate to use of a phone by the Claimant. She denies this. There are no vouchers. I shall have to return to this and other disputed matters later.

26. On 8th December 1993 there was signed a document on the headed paper of an advocate, Mr Mohammed, in Baghdad. In translation it reads as follows:

> "Receipt
>
> I, the undersigned, Salim Abdul Karim Al-Basri have received an amount of only 65,068 dinars from the solicitor Mr Turkey Abdul Azziz Mohammed, considered to be from the account of Ms Souad Mohsen Ali (Umm Hussain), which [??? rubbed out ???] from Kassem Hamid [???? rubbed out ???]
>
> Received by"

There then appears the signature of Mr Salim Al-Basri. Mr Salim Al-Basri is the First Defendant's father. There is a power of attorney in the bundle dated 12th July 1994. It is a document which is typed or printed largely in Arabic it declares and acknowledges that the Claimant has appointed Mr Salim Al-Basri "as my representative and confirm that he is acting on my behalf by an irrevocable general power of attorney". It contains a very comprehensive delegation of powers, including a power to sell or rent property. The Claimant's address is given as Sullivan Court. The First Defendant's, father was an elderly man of some celebrity in the literary world in Iraq. His assistance to the Claimant was arranged by the First Defendant. It was not the sort of work he usually undertook.

27. The authenticity of the receipt for the 65,000 odd dinars is not an issue. There are issues as to the sterling equivalent of that sum and what became of it. The Claimant alleges that she has not received it. The First Defendant alleges that she has. There was no formal evidence of exchange rates, but an extract from an Iraqi publication is before me. It records that in December 1993 the exchange rate between the dinar and the US Dollar was 134.7 dinars to US$1, and that the dinar fell to 2660 to the US$ by December 1995. At the December 1993 rate, 65,000 dinars would have been worth about US$500. But by the time of the Defendants' visit to Jordan in 1998 the figure would have been much lower. I accept that it would have been about one tenth of that sum, or about £30. The Claimant contends that more favourable rates were available on the black market. The sums in sterling are not large in relation to the other figures in dispute in this case, and it is not necessary for me to make a finding as to exactly what the rate of exchange was. I conclude that it was roughly £30, as the Defendants contend.

28. On 18th February 1994 Barclays Bank issued a statement of account to the First Defendant in respect of account 50104973. The title of the account is "Mr A Al-Basri Two account". It records transactions between 30th November 1993 and 14th February 1994. Amongst the transactions there are six withdrawals from Cash Dispenser machines, two in the sum of £100 and three in the sum of £20 and one in the sum of £200. The withdrawals are on between 29th December and 7th January. The withdrawals are all from a cash dispenser in Earls Court, London. The Defendant claims that he lent a bank card to the Claimant and that these withdrawals from Cash Dispenser machines in Earls Court totalling £5,320 were made by her or one of her sons on her behalf.

29. The Claimant admits she did briefly have such a card but denies she made these withdrawals. However, the Claimant admits that he did give her money after the visit to the Home Office in September 1993, that he did help her with her shopping, with her rent and with other matters. Indeed the Claimant says that the First Defendant controlled everything in her life. The First Defendant does not agree that matters went as far as that, but he asserts that he did help her with money. He has given different accounts of how often he stayed with the Claimant. At first he said that he had stayed with her every two to three weeks in 1993, while on his visits to London. These visits were for the purposes of his business. In cross examination he reduced that to a total of six to seven overnight visits with an uncertain number of visits during the day.

30. The next document chronologically is dated 8th January 1994. It one of the central documents in the case and is hotly disputed. It is hand written in its entirety on a plain unheaded sheet of white paper. On one side there appears the following text

> "8/1/94
>
> This is a personal agreement between Mrs Soad Ali and Mr Ali Akeel Al-Basri for general and tax purpose to confirm that any monies paid in the past, present or the future by Mrs Soad Ali to Mr Akeel Al-Basri is based on a private loan with no interest, the only condition is to return the monies when required by Mrs Soad Ali."

There then follows some text in Arabic which, it is agreed, is to the same effect. Below the Arab text there is on the right hand side of the page some Arabic words meaning 'signed by' followed by the signature in English of the First Defendant and the date '8/1/94'. On the left hand side of the page are words in Arabic meaning "signature of Mrs Soad Mohsen Ali" followed by a large X. Below those words there appear in blue ink Arabic writing which reads as to its first line, as translated, "your sister". That is followed in the next line by the signature of the Claimant and in the last line by the words in Arabic 'London 12/1/1994'. On the other side of the piece of paper is some text covering three lines in Arabic, which read as follows in translation

> "Remark:
>
> Dear Soad; please photocopy this letter after signing it, keep the photocopy, and send me back the original in the post. Thanks. Akeel."

31. The piece of paper shows marks of folding consistent with it having been placed in an envelope. The Claimant accepts that the writing in blue ink is hers but she says the paper was signed by her in blank at the request of the First Defendant, who stated he needed it for the purpose of a letter he was preparing on her behalf in relation to BCCI. I shall return later to give an account of what the First Defendant says about it.

32. On 8th February there is recorded a receipt of £9,000 on the bank statement referred to above for bank account 50104973. There is no dispute about the receipt of this money. The First Defendant claims that it was a loan to him under the terms of the agreement dated 8th January 1994, which is disputed. The total of the two figures which the First Defendant admits having received, £81,621 and £9,000, is £90,621. The

Claimant says that this £9,000 was sent by her daughter to one of her sons and transferred from his account to the First Defendant's and that the First Defendant gave to the Claimant one of the two copies of the bank statement which appear in the bundle as confirmation that the sum had been received.

33. On about 20th February 1994 the second Defendant bought a property at 156 Sullivan Court in Fulham, London. The purchase price, as stated to the Abbey National Plc and recorded in a letter from them dated 25th February 1994 was £50,000. It was paid in cash to the vendors. There is now no dispute that the source of those funds was the money paid by the Claimant to the First Defendant, whether, as she says to be held on trust or, as he says, following 8th January 1994, as a loan without interest or security. The Abbey National letter is addressed to the second Defendant's solicitor, a Mr Akka, and states that the Abbey National is prepared to lend to the Second Defendant, whose address is given in Bolton, the sum of £40,125 to be secured by a mortgage the details of which are then set out. The mortgage is to be at the rate of £7.74%, with initial monthly repayments of £306.31. The loan was to be covered by and endowment policy. The repayment term is 25 years. The funds are to be available from 21st February 1994. Apart from the Abbey National letter, no documents relating to this transaction have been disclosed by the Defendants. I am not told what the premiums for the Endowment Policy were. The Defendants say that the source of the funds to service this borrowing was to be, and was in fact, the rents received from the letting of the property. The first tenant of Sullivan Court was the Claimant.

34. Before turning to the arrangements with her, I note that this was the first of four property investments by the Defendants in and between February and August 1994. The Claimant has been informed of a fifth such investment in December 1998. The second Defendant said in evidence that he and his wife are now the owners of some ten or more properties. The purchase price of the five properties as given in a Schedule to the Defence and the First Defendant's witness statement, totals a figure of the order of £280,000. The deposits are some £25,000 with the balance being borrowed from various lenders.

35. There is an agreement for letting a fully furnished flat at Sullivan Court on an assured short hold tenancy. The landlord is named as the First Defendant with his address in Bolton. The tenant is named as the first Claimant. Three of her sons are also named. On the side of the page there is a handwritten note dated 25th February 1994 signed by the First Defendant reading "the tenant is Mrs Soad Ali". The term is stated to be six months from 20th February 1994 and the rent £360 per week payable in advance by equal weekly payments, the first payment to be made on 20th February. The document is signed by the Claimant and the First Defendant. There have also been produced by the First Defendant a set of documents headed "Housing Benefit Landlord Schedules" which are print outs showing the rent credited to the bank account number 60213632 in the name of the First Defendant, as landlord, although it is the Second Defendant in whose name the property is held. The tenant is identified as the Claimant at Sullivan Court. There is credited £2,400 for the period 21st February 1994 to 15th May 1994. The payments were in instalments of £400. The last period for which there is a schedule is 9th January 1995 to 22nd January 1995. A total of £7,400 was paid by instalments in addition to the £2,400.

36. The First Defendant alleges that he paid £600 for furniture and appliances for the property at Sullivan Court. He debits this to the Claimant in a Schedule to the Defence in which he purports to show how he has repaid all the sums paid to him. The first two payments on the Schedule are the £819 and £5,320 to which I have already referred. The next four entries on the Schedule are sums of £500 said to have been paid in cash on 21st March, 28th March, 7th April and 12th April, followed by a sum of £1,000 said to have been paid in cash on 22'd April 1994. The receipt of these sums is disputed by the Claimant.

37. The schedule was prepared for the purpose of these proceedings. The First Defendant refers to it as follows in his witness statement:

> "All these monies (the £81,621 plus £9,000 equals £90,621) were paid back in cheques and cash. Attached hereto is a schedule of payments in relation to this loan..."

38. In evidence he made clear that this document was not prepared from contemporaneous sources or documents, unless that specifically appeared from the document itself. In relation to some of the entries, for example the Debit Card withdrawals, the contemporaneous document is clear, in that case a bank statement. In relation to three of the cash payments of £500 in March and April 1994 there are bank statements where a cheque number is given and the accountant has written onto the statement from the cheque stub the word "cash". There are no receipts. In his evidence in chief the Defendant explained that he had had a contemporaneous record of all of these payments in a book. I readily accept that evidence. But he went on to say that the contemporaneous document had been lost before the action had been brought and he attributed this to the fact that he lived with his two small children. He said that his schedule was not precise. He said that it was not made up a lie, but that he had had to struggle to prepare it. He said he could not recreate the book he had lost.

39. About 6th May 1994 the First Defendant bought a property at 5 Wendover Court in London W3 for the price of £38,000. The amount of the advance from the Bradford and Bingley Building Society was £34,000, repayable over a period of 25 years at a fixed rate of interest until 31st March 1995 of 4.99%. There was a requirement that an Endowment Policy on the life of the First Defendant be taken out for £34,000. The monthly mortgage payment was for interest only in the sum of £165.50. No documents have been produced relating to this transaction other than the letter from the Building Society offering to make the advance.

40. On 1st June 1994 a payment of £51,135 was made to the Claimant's son Hussain by transfer from the First Defendants account with Barclays Bank number 50104817. While that payment is not disputed by the Claimant, she does dispute that it is a repayment of any of the monies previously paid to the First Defendant. The First Defendant says that it is a repayment. The Claimant says that it is an entirely separate transaction in relation to money that reached the First Defendant ultimately from a property trader based in Saudi Arabia named Mr El Hassan. Apart from the oral evidence of the Claimant and the First Defendant there is no other evidence or document showing the source of this sum of money.

41. There is a document signed by the First Defendant and dated 24th June 1994 which reads as follows:

> "AGREEMENT
>
> CONSIDERATIONS:
>
> This is a Loan agreement between;-
>
> Mr Akeel Al-Basri & Mrs Soad Ali
>
> where Mrs Soad Ali lent Mr Al-Basri £44,375.00.
>
> In return, Mrs Soad Ali will receive payment from Mr Akeel Al-Basri to the amount of 50% of the saling price of the following properties at the time when the properties are eventually sold:-
>
> Properties:
>
> a) 156 Sullivan Court, Fulham, London, SW6 3DN.
>
> b) 5 Wendover Court, North Acton, London, W3 OTG.
>
> Conditions:
>
> The price and date of the sale of the above properties are the sole decisions of Mr Akeel Al-Basri."

The document is apparently printed from a word processor. There are spaces below for the signature of the First Defendant, which are completed as indicated above, and for the Claimant, which are blank.

42. This document is in dispute. The Claimant says she received it from the First Defendant, but that it was not accurate and she did not sign it. She says it was not accurate because she had never provided a loan, and the advances she had made were far in excess of £44,375. She says that the receipt of the document made her so angry that she became ill and had to go to hospital. The Defendant does not contest the authenticity of this document. He says he has no recollection of it at all and can offer no explanation for it.

43. On 7th August 1994 the Defendant alleges that he paid £1,200 to the Claimant's son Hussain. The Claimant and Hussain dispute this. This item appears as the tenth entry on the schedule of monies allegedly repaid to the Claimant. There is no contemporaneous supporting document.

44. On about 30th August 1994 the second Defendant bought a property at 10 Woodhill Drive, Prestwich, Manchester. The offer of advance from the Britannia Building Society dated 18th July 1994 records that the purchase price was £77,950; the advance was £74,000 repayable over 25 years at an interest rate of 7.75%. The monthly repayments are given as £439.16p. This became the Defendants family home in place of their former home in Bolton. It has three bedrooms rather than two. No documents have been disclosed in relation to this transaction other than the offer of advance.

45. On 30th August 1994, according to the First Defendant's schedule of payments, he paid £1000 in cash to the Claimant. A cheque made out to cash in that amount was debited on that day according to the bank statement for account 50098183. This is an account in the name of the First Defendant trading as "Olympian Systematic". It is the same account from which as noted above cash was withdrawn in sums of three lots of £500 in March and April. Receipt of these sums is disputed.

46. The First Defendant's schedule records that on 9th September 1994 there was a payment to the Claimant by cheque of £717.75 from account 60213632. There is no cheque or other contemporaneous document relating to this.

47. On 30th September 1994 the Claimant signed as a deed a document headed "Declaration of Trust". The document is said to be made on that date between herself as trustee and her daughter living in Saudi Arabia as beneficiary. It reads as follows

> "WHEREAS:
>
> 1. The beneficiary is a national of and resides in the Kingdom of Saudi Arabia and as a married woman cannot hold and operate a bank account there.
>
> 2. The beneficiary is unable to travel to and cannot reside in the United Kingdom but is able to send money from Saudi Arabia and has sent sums of £1,500, £8,000 £10,000 and £51,000 to the trustee both directly and through messengers to be used solely for the use and benefit of the beneficiary.
>
> 3. At the direction of the beneficiary the trustee has opened a bank account in the name of the beneficiary's brother Hussain Al Jassas and has deposited all the aforesaid sums of money in it and has agreed to open and operate this account solely for the use and benefit of the beneficiary and to accept this trusteeship without any retainer.
>
> NOW THIS DEED WITNESSES as follows:

> The Trustee declares that she holds the aforesaid sums totalling £70,500 (herein after called the trust fund) UPON TRUST for the use and benefit of the beneficiary solely..."

The document goes on to declare that the trust fund be kept only at such banks as the beneficiary may direct in the name of the trustee or of the beneficiaries brother Hussain.

48. The Claimant said in evidence that this document was prepared on an occasion when her daughter did come to London, but that she remembers little about it. There was no evidence about its purpose. The defendant draws attention to the close the figure £51,000, which is close to the sum which he had himself paid to Hussain some three months earlier on 1st June, namely £51,135.

49. On 4th October 1994 the Defendant made out a cheque in the sum of £443.84p payable to the Claimant and drawn on his account 60213632. This cheque is disclosed. It is stamped as received by the Nationwide Building Society and appears to have been presented through the Society on 5th October 1994. This is the first reference to that account. It is not in dispute that the Claimant has an account with the Nationwide Building Society. She has not disclosed any documents relating to it in spite of being requested to do so by the Defendant and in spite of my stating that she was required to do so. No satisfactory explanation has been given for this omission on her part. Although he complains of this non disclosure on the part of the Claimant, Mr Mulholland, counsel for the Defendants, has not asked me to make any order beyond the one that I have made, namely that the documents be produced.

50. On 10th November 1994 the Housing Services Department of the London Borough of Hammersmith and Fulham wrote to the First Defendant a letter headed with the name of the Claimant and her address at Sullivan Court. The letter reads as follows

> "I have been consulted by the above with regard to her housing problems.
>
> From the information available, it would appear that Mrs Ali has an assured tenancy at the above address.
>
> If you require possession of the property you should first serve a Notice of Seeking Possession in the prescribed form, stating on what grounds you are seeking possession. Once the notice has expired, if you still require possession of the premises you must apply to the court for a possession order.
>
> Mrs Ali also informed me that the central heating system, the washing machine and the cooker are not working properly. Could you please arrange for repairs to be carried out urgently...."

51. On 24th November 1994 the First Defendant purchased a property at 57 Waverley Gardens, London NW10. The offer of advance from the Britannia Building Society dated 25th October 1994 records that the purchase price was £51,000, that the advance was to be £48,450 repayable over 25 years at an interest rate of 6.75%, and that the monthly payments are to be £238.78. There is no specific reference to how the capital is to be repaid, but I infer that this too was an interest only repayment figure. The deposit was £2,550. No documents relating to this investment, other than the offer of advance, have been disclosed by the Defendants.

52. On 4th January 1995, according to the First Defendant's Schedule, he paid the sum of £1,365.50 to the Claimant by a cheque. This is denied and there is no contemporaneous document or copy of the cheque. The cheque is said to have been drawn on account 60213632.

53. After the proceedings had been brought, the First Defendant wrote to Barclays Bank, and on 26t May 2000 he received a reply as follows

> "I write in response to your request for us to provide copy cheques on account numbers 60213632 and 50098183, unfortunately cheques under £1000 are destroyed by the bank after 3 years... the request for cheques over £1000 has been actioned."

The Defendants have produced no copy of the cheque in the sum of £1365.50. The First Defendant said he had produced all the cheques provided by the bank.

54. On 27th January 1995 the First Defendant's schedule shows a payment allegedly made in cash drawn by cheque number 100263 on account 50098183. There is a bank statement for this account showing a cheque of £800 paid on that date and the accountant has written against it the word "cash". The receipt of either figure is disputed.

55. On 20th February 1995 the Claimant left Sullivan Court. In his schedule there are two entries made by the First Defendant relating to this. The first is a sum debited to the Claimant in the amount of £1000 said to be unpaid rent for five weeks. The second item is £450 said to be repairs to the flat due to the damage by the Claimant. There are no contemporaneous documents. Since this and the other properties apart from Woodhill Drive, were investment properties, and since the First Defendant had the services of an accountant, it might have been expected that invoices relating to expenses, particularly unreimbursed invoices, would have been kept for tax purposes. If so they have not been produced. I have been given no documents and little background information about the management and finances of the investment properties.

56. On 14th March 1995 BT issued a Phone Bill in respect of phone number 071-736-6020 in the sum of £501.29. The number, it is common ground, is that of the Claimant's flat in Sullivan Court. It is addressed to the First Defendant at Woodhill Drive. There is no dispute that he paid it. The Claimant alleges that the bill relates to phone calls made by the First Defendant whilst he was staying with her. There was little evidence about this bill. I note that the major part of it (£434.72) is brought forward from the last bill, a copy of which is not provided to me, and that of the call charges of the period in question, much the greater part (namely £50.53, after discount but before VAT) is in relation to calls to Saudi Arabia. Some of these were on 27th February and 7th March, the latter being for some 25 minutes.

57. On 20th March 1995, according to the First Defendant's schedule, £1000 was paid in cash to the Claimant. There are no contemporaneous documents.

58. On 27th June 1995 the Immigration and Nationality Department of the Home Office wrote to the Claimant and to her two younger sons informing them that they have been recognised as refugees in the United Kingdom under the Convention Relating to the Status of Refugees and they were granted leave to remain until 27th June 1999. They could then apply for indefinite leave to remain.

59. On 16th September 1995 there started a series of nineteen payments each of £500 made on 16th of each month from October 1995 to April 1997. The cheques were drawn on account 50098183. There are a number of other payments recorded on the First Defendant's schedule through this period. The Claimant admits that a total of £9500 has been paid to her although she does not identify which of the payments she accepts are genuine. She disputes the rest.

60. The nineteen payments referred to all have the marking "loan" or "Mrs Ali" where they are recorded on the bank statements. The first one so marked is 23rd October 1995 on the bank statement for that account which still bears the name "trading as Olympian Systematic". It appears that by 4th March 1996 the Claimant had a bank account in the name of Mrs Al-Jassas with Barclays Bank in South Kensington, because there is a letter referring to a lost giro cheque for £300. I have not seen any documents relating to that account. A few of these payments of £500 are evidenced by cheques, in particular one dated 16th August 1996 and another

16th October 1996, with a third dated 16th November 1996. None of the copies produced to me show evidence of having been presented.

61. On 16th August 1996 the Claimant married a Mr Talibani. He was a PhD student at a British university. The marriage was not a success and the couple have divorced.

62. On 30th September 1996 there is a second 'Declaration of Trust' in which the Claimant is named as the trustee and her daughter in Saudi Arabia as the beneficiary. It includes the following recital

> "The beneficiary is unable to travel to or cannot reside in the United Kingdom but is able to send money from Saudi Arabia and has sent the sum of £500 (five hundred pounds) every month together with other monthly sums to the Trustee totalling £25,000 (twenty five thousand pounds) over and above the sum of £70,000 (seventy thousand pounds) already held by the Trustee upon trust in a declaration of trust made upon 30th September 1994 for the sole use and benefit of the beneficiary...."

By the deed the Claimant declares she holds the aforesaid sums on trusts similar to those previously embodied in the 1994 deed. There has been no evidence from the Claimant or anyone else about this document. The First Defendant notes that the monthly sums of £500 are similar in frequency and amount to the monthly sums that by then he had been paying and as, to some extent, the Claimant accepts she had received from him.

63. On 16th December 1996 there are in fact two payments recorded in the First Defendant's Schedule, the one of £500 and an additional one of £1,500 said to have been paid in cash. The First Defendant accepts that this appears to be illogical and he cannot explain why he should have made two payments in this way on the same dates.

64. The last of the monthly payments was 16th March 1997. On 11th April 1997 the First Defendant's Schedule records a payment of £6,000. There is no contemporaneous evidence of receipt and it is not marked "loan" in the bank statement

65. On 21st April and 6th May 1997 large sums of money were drawn in cash from the Midland Bank International Branch in Poultry London. Two envelopes appear marked £2,500 in £50 notes. On 8th May 1997 the Claimant's daughter executed at the British Embassy in Riyadh a General Power of Attorney in favour of the Claimant.

66. On 10th May 1997 the First Defendant signed a receipt, which is not in dispute and which reads as follows. There are five lines of Arabic text written on a sheet of paper, which has no heading. There then follows English text:

> "This is a receipt of £95,000 from Mrs Soad Ali as Trustee for her Mony. Will return her Mony when she requires it. date 10/5/1997".

There then follows the signature of the First Defendant and the following further text in the form of rubber stamps:

> "We certify this to be a true copy of the original Salfiti and Co"

An address is then given in Knightsbridge and the document is signed and dated 9/7/98. T here is no dispute that the Claimant went to Manchester where she gave that sum in cash to the First Defendant.

67. Very shortly afterwards the Claimant went to Holland. It appears that for two nights at the beginning of June she stayed at the Amsterdam Marriott Hotel where she incurred a significant bill in the sum of 812 Dutch Guilders. She says she took with her £5000, which she had obtained from the sale of a Mercedes car. There is no dispute that the Defendant went to join her in Holland. Why he went is a matter of dispute. He says he took with him £20,000 in cash which she required him to pay to her out of the money she had deposited barely a fortnight before. She says that, on the contrary, he came to demand more money from her and she gave him the whole of the £5,000.

68. On 19th June 1997 the Defendants opened a joint account with the Bank of Scotland (Isle of Man) Ltd in Douglas. The initial credit was £1,000. Thereafter numerous deposits in sums varying between £5,000 and £17,000 were made on and between 2nd July and 21st July 1997, until the balance reached its maximum of £88,000. Thereafter there were withdrawals, to some of which I shall refer later, with the result that by 5th August 1998 the balance had dropped below £10,000. The account was virtually empty at the beginning of January 1999 and closed on 13th April 1999.

69. On 1st August 1997, according to the First Defendant's schedule, he repaid a further £7,000. The Claimant disputes this. There is no corresponding debit in the Bank of Scotland Account. The First Defendant says he had not deposited all of the £95,000 in that account, as is clear, and that there were cash funds available to him from other sources which he does not identify.

70. On 19th August 1997, according to the First Defendant's schedule, he made a payment to her of £2,500 by cheque drawn on account 50098183. There is a corresponding entry on the bank statement against which there is written in manuscript by the Claimant's name the word "loan". There is also a document type written in Arabic in two different versions. One version has Arabic handwriting on it (shown in italics below). In translation it reads as follows

> "Bank Statement
>
> Paid In
>
> 100,000 (95 thousand cash, 15/5/97; 4 thousand cash to Holland, a thousand cash)
>
> 5,000 rent
>
> Total 105,000
>
> ---
>
> Withdrawn (16/9/95-21/12/97)
>
> 2500 on 19-8-1997
>
> (Hussain's studies, 500 pounds for 18 months for Alla Tahir)
>
> 200 on 6-10-97 (cheque)
>
> 3500 on 3-10-1997 (car)
>
> 5000 on 24-4-98 (to buy a car) (cheque of 50 thousand)
>
> 1000 value of 20 grills
>
> Total withdrawn 12,200

105,000 - 12,200 = equals

92,800 available balance

(45, 000)

(47,800)"

71. On 22nd August 1997 there is a manuscript document written largely in Arabic, although headed in English with the word 'Fax'. It bears the Claimant's signature but otherwise is in the handwriting of the First Defendant. The Claimant claims that her signature is forged. It is addressed to Mr Qasim Abdullah and is said to be from Mrs Souad Mohsin Ali Al Wayli. After introductory words it reads as follows in translation:

> "I request sending the balance of my Account (...) and keeping 1000 Riyal ... and not close my account. I will still request keeping my account information confidential. The transfer shall be into the following account in Britain"

There then follows the details of the First Defendant's account number 50098183 written in English. The account number of the Saudi Account of the Claimant which is referred to in the document is one of those which has previously been referred to in the instructions to the bank on the 30th October 1993.

72. On 3rd October 1997, according to his schedule, the First Defendant paid the Claimant £3500. There is a cheque drawn on the Bank of Scotland account in that amount which is marked as having been presented through the Halifax Plc on 6th October 1997. It is one of two cheques in that amount, which appear on the Bank of Scotland statements as debited on 8th October. The Claimant says she is unsure as to whether she received this money. The identity of the payee is not clear from the cheque. The sum appears to correspond to the entry on the "bank statement" in Arabic referred to above where such a figure appears against the handwriting "car". On 6th October 1997 the First Defendant records a payment to the Claimant £200 which she admits having received. In cross-examination she did accept the £3500 was paid to her.

73. Also on 6th October 1997, according to the First Defendant's schedule, there was a cash payment of £300 to the Claimant. This she does not admit. There is no contemporaneous record.

74. On 6th November 1997 the First Defendant alleges he repaid £4,000 in cash. There is no contemporaneous record of such a sum, and it is not accepted by the Claimant. The First Defendant's schedule refers to what appears to be different sources for this money, one of which is a cheque cashed in Bolton on 6th November in the sum of £1,100 from his account 50098183. The balance is said to come from account 60213632 and account 60998117.

75. On 25th February 1998 the First Defendant drew up a document apparently printed through a word processor as follows. It has his own name and address in the top left hand corner and the Claimant's name and address in the top right hand corner followed by the date. The text is in English and reads as follows

> "Dear Mr Al-Basri
>
> This is a conformation that I Mrs Soad Ali give you a permeation to pay Mr Allah Tahir the amount of £50,000 (sterling) on my behalf. This payment will be a deducted of the balance of my cash account which is in your position.
>
> Note this letter is to be endorsed posted with a covering letter from a solicitor.

Yours sincerely"

It is then signed twice, apparently by the Claimant. There then follows the stamp of Salfiti and Co., and the signature of Amgaad Salfiti, a solicitor, dated 4 March 1998. Above his signature appear the words in manuscript:

"I confirm that Mrs Soad Ali is known to me and that she signed the above document before me Salfiti and Co. gave no legal advice to either party."

76. On 6th March 1998 the First Defendant signed a cheque on the Bank of Scotland account in favour of Mr Al Tahir in the sum of £50,000. The cheque was not immediately presented and has a complicated history. To which I will come.

77. On 12th March 1998, according to his schedule, the First Defendant paid a further £2,500 to the Claimant. According to his statement on account 50098183, a cheque in that amount was cashed in Bolton on that date. There is no other evidence contemporaneous or otherwise as to the destination of those funds. The Claimant does not admit receiving them.

78. On 22nd April 1998 the First Defendant alleged that he repaid a further £5,000 to the Claimant. There is a copy of the cheque marked to show that it has been presented through the Nationwide Building Society on 19th May 1998. In cross examination the Claimant did accept that she had received that sum.

79. On 5th May 1998 the Bank of Scotland wrote to the Defendants confirming their instructions not to pay the cheque for £50,000 issued on 6th March 1998.

80. On 30th May 1998 the First Defendant issued an invoice in the name of his firm " Olympian Systematic" for 20 multifunction grills for making kebabs in a total of £1,000.16.

81. On 24th June 1998 the Claimant signed a letter, which appears to have been drafted by the First Defendant. It has her name at the top followed by the date and then reads as follows

"To whom it may concern

Regarding: £95,000 cash paid to Mr Akeel Al-Basri

Dear Sir/Madam,

This is a conformation that I have paid Mr Akeel Al-Basri the amount of pounds £95,000.0 pence cash. The source of payment is Midland Bank.

I am enclosing the Midland Bank letter confirming the payment of the Cash to my son Houssein Al Jassass"

It is signed by the Claimant. There then appear the following words:

"This letter is witnessed and certified by the firm of solicitors below"

(these words appearing to be printed by the First Defendant) and there then follows the stamp of Salfiti and Co., and a signature dated 25th June 1998.

82. The cheque for £50,000 was presented but returned unpaid. The Bank of Scotland wrote to the Defendants on 1st July accordingly.

83. On 10th July the First Defendant issued a cheque for £5,000 on the Bank of Scotland account payable to the Claimant. This was cleared through the Nationwide Building Society on 14th July and receipt is admitted by the Claimant. On 28th July a cheque on the same account in favour of the Claimant was issued by the First Defendant in the sum of £45,000 which was also cleared through the Nationwide Building Society on 30th July.

84. The issue of these three cheques for £50,000, £5,000 and £45,000 was surrounded by considerable controversy and distrust between the Claimant and the First Defendant. It is clear that by this time their relationship had deteriorated. I am unable to make any findings as to the reason for this. There is no dispute that £50,000 was eventually repaid to the Claimant by the First Defendant.

85. In 1998 the First Defendant's father died. The First Defendant's mother met the First Defendant with the second Defendant in Jordan. The Claimant alleges that at this meeting the First Defendant received £50,000 in respect of money collected on her behalf from rents and the sale of property by the First Defendant's father. There is no evidence of this other than the statement of the Claimant. She says:

> "I telephoned Akeel's house to speak to him but Akeel's sister told me about her father's will and about how Akeel was meeting his mother in Jordan and how her father's wishes would be complied with... in Jordan Akeel's mother handed Akeel all the accumulated rents over a period of six years, collected from my properties in Baghdad. The amount of rents would have been in the region of £50,000. This amount was handed in cash to Akeel and Akeel never handed the money over to me."

Both the First Defendant and his sister, who has given evidence by way of a statement under the Civil Evidence Act, deny that there was any such conversation or that any money was handed over other than the sum of approximately 65,000 dinars referred to above. There being no other evidence relating to this matter at all, I can say at once that I reject the claim in its entirety. There is no evidence at all as to the amount. The fact of receipt by the First Defendant of these sums is at best (for the Claimant) admitted by the First Defendant's sister. There is no evidence that she had personal knowledge of the matter. It is not explained how she had authority to make admissions for her brother.

86. On 4th October 1998 the Claimant, with the assistance of her son and of a friend of her son, wrote a letter to the second defendant. The letter was a request to the second Defendant to persuade the First Defendant to return what the Claimant said was the money, which she had paid to him in 1993 and 1997. She refers to a "partnership" in respect of two houses in London and to the First Defendant having denied that "partnership" in 1994. She also refers to the £95,000 being in trust. The second Defendant denies having received that letter and I am unable to find as a fact that she did. Its main relevance therefore has been as to what the Claimant was saying about her claim at that time.

87. On 22h d December 1998 the first and second Defendant bought in their joint names a property in Copley Close London. The purchase price was £62,000 funded by an advance on mortgage on Mortgage Express of £56,275, leaving a balance of £5,735. Again there are no documents disclosed other than the offer of advance.

88. In about June 1999 Hussain went to Manchester to see the First Defendant. He met the First Defendant in a pub. He gave evidence that the First Defendant wrote on a small triangle of paper torn off from a larger sheet two figures namely £30,000 and £33,084. Initially the First Defendant challenged the authenticity of that paper. Subsequently, having seen the original in court, he accepted that it was his. It is common ground that at one point in the meeting the First Defendant said that he had given everything back. However,

Hussain says that he later said words to the effect that he may have a few thousand left and that the figure of £33,000 was what he had left. The First Defendant denies this and says that represented the figure which had been repaid in cash, or thereabouts.

89. At about this time the First Defendant made allegations to the police of harassment by Hussain. They had a further meeting in London when their paths crossed by chance, but it led to nothing. The Claimant pursued her complaints through members of the Muslim community, which the First Defendant characterised as slandering him.

THE CLAIM

90. On 19th October 1999 the Claimant instructed Rajah Solicitors in Wembley. She says they are a firm who specialise in immigration matters. On her instructions they wrote a letter dated 19th October 1999 to the First Defendant as follows:

> "Re Trust Fund of Mrs S Ali"
>
> We have been consulted by Mrs Soad Ali...
>
> We are instructed that you are holding substantial amount of funds in trust for out client. Please confirm that and let us have detailed statement of account in respect of trust funds in the next seven days."

91. On 9th March 2000 the Claimant instructed new solicitors to write a letter, which they did, as follows:

> "We are instructed by Ms S Ali and have your letter 24th October 1999 addressed to Raja solicitors [that letter is not before me].
>
> We now have detailed instructions from Mrs Ali The sums involved include:
>
> (1) £23,000 given to you to hold for our client - 22nd September 1993
>
> (2) £81,621 given to you to hold for her - 10th November 1993
>
> (3) £45,000 out of pounds £95,000 given to you to hold for our client's daughter on 15th May 1997.
>
> We understand that from our clients money you were to purchase properties at 156 Sullivan Court SW6, 5 Wendover Court W3, 222 Merioneth Court W7, 57 Waverley Gardens NW 10 and 10 Woodhill Drive, Prestwich. You appear to have purchased all these properties in your name or in the joint name of yourself and your wife. Our client will expect interest on the amounts held and on the income from the relevant properties.
>
> Unless we receive your proposals for repayment to our client in seven days, proceedings will be taken without further notice."

92. The First Defendant must have passed that letter to Mr Akka, because he wrote on the First Defendant's behalf a reply dated 5th April 2000. It reads as follows

> "We are instructed by Mr Al-Basri, and have been handed a copy of your letter to our clients of 9th March 2000.

> We are aware that our Client has replied to you directly, but we are instructed to make it quite clear that any legal action brought by your Client will be strenuously and vigorously defended.
>
> We would welcome sight of documentary evidence of the sums allegedly paid by your Client to ours, as set out in your letter, and also a copy of the written agreement, whereby our client allegedly agreed to purchase the properties referred to in your letter for your Client. Please also confirm how the properties were to be held by our Client or your Client's behalf.
>
> We look forward to hearing from you."

93. On 11th April 2000 the Claimant's solicitors replied to the Defendants solicitors as follows

> "We enclose two documents which we believe to be signed by your client. We are seeking public funding for our client to institute proceedings. We would be interested to know if he denies receiving funds from our client."

I infer that the documents enclosed were the letter of 30th October 1993 and the receipt of 10th May 1997.

94. As already noted, apparently as a result of that letter, on 26th May the Defendant received a response from Barclays Bank stating that they would action his request for copies of cheques over £1000.

95. Proceedings were issued on 25th April 2002. The way in which the matter proceeded is of assistance to me in reaching the conclusions I have to reach on the disputed matters of fact. Accordingly I set out the course of the proceedings so far as relevant.

96. In the Particulars of Claim the Claimant states her claim as follows:

> "5. Subsequent to arriving in the United Kingdom the Claimant was told by the First Defendant that it would assist with her asylum claim if she entrusted any cash sums and jewellery that she held to the care of the First Defendant. Accordingly the Claimant handed over to the First Defendant:
>
> (1) Cash travellers cheques totalling at least £7,000.
>
> (2) 10,000 French francs.
>
> (3) US $ 1700.
>
> (4) 6000 Saudi Rials.
>
> (5) 500 Kuwaiti Dollars [sic].
>
> The First Defendant told the Claimant that he was going to pay these sums into a bank account. The Claimant accompanied the First Defendant to the East Croydon Branch of Barclays Bank and waited outside while the First Defendant claimed to be opening an account there.
>
> 6. Further in or about September 1993 the Claimant handed the First Defendant jewellery to be kept by the First Defendant on the Claimant's behalf. The Claimant had previously had this jewellery weighed in Saudi Arabia and it was worth in excess of £50,000 none of this jewellery has been returned by the Defendants to the Claimant."

> I pause to note that this is the first occasion on which any mention of jewellery had been made by the Claimant. The Particulars of Claim then referred to the payment of the £81,621 in 1993, and of £9,000 in 1994. The pleading continues as follows:
>
> "9. Thereafter with the Claimant's consent part of the monies provided by the Claimant were used for the purchase of two properties, one at 156 Sullivan Court, London SW6 bought for a price of £49,500 and one at Wendover Court, London W3, bought at a price of £38,000. It was expressly orally agreed at the time of the purchases that the monies deposited by the Claimant with the First Defendant were to be invested in these properties. Accordingly the Defendants hold these properties on trust for the Claimant."

97. There is then a similar pleading in relation to Merioneth Court, Copley Close and Waverley Gardens and Woodhill Drive. The difference is that it is alleged by the Claimant that the First Defendant told her that he was intending to invest in these properties and she acquiesced in this so that the properties she said were held on trust for her. She goes on to plead that the Defendants have failed to account to her for the rents received on the properties save for the sums of pounds £500 a month paid from September 1995 to March 1997. There is then pleaded the payment of the sum of £95,000 in cash in May 1997 and the repayment of £50,000 by way of two cheques one of £5,000 and one of £45,000.

98. There then follows a paragraph which reads

> "17 In 1997, the Claimant whilst travelling to Holland with the First Defendant, entrusted him with a further amount of £5,000 in cash. The First Defendant informed the Claimant that it was unwise for the Claimant to travel holding large sums in cash. The First Defendant promised to hold the monies for the benefit of the Claimant".

99. There then follows the claim in relation to the money allegedly passed to the First Defendant on his visit to Jordan. The pleading continues with a recital of her demand for repayment and it is said that the First Defendant said he had nothing to give her but he had sent her "an unsigned anonymous financial statement which contained a calculation purporting to show a balance due to the Claimant of £92,800". That appears to be a reference to the document that I have referred to above as being in Arabic and headed Bank Statements. I am unable to make a finding as to who drafted that document.

100. The Claim then asks for relief by way of declarations as to the ownership of the properties referred to in the pleading, an account of the sums used to purchase the properties, return of the jewellery and monies unpaid and an account of rents due to the Claimant in respect of the properties and payment of the amount found due.

101. On 7th October 2002 the Claimant gave Further Information pursuant to requests by the First Defendant. These answers include detailed particulars about the property which she had acquired in Iraq, and details of the jewellery which she was claiming had been entrusted to the First Defendant. The Further Information also includes extensive particulars setting out conversations which the Claimant said she had with the First Defendant about the acquisition of the various properties. The particulars also include very detailed descriptions of the interiors of the various properties. It is pleaded that the second Defendant played no part at all in these arrangements. Answer 38 reads as follows:

> "The Claimant contributed all the monies in the sense that she contributed the capital and the rents were there to support further borrowing. The Defendant contributed no capital of his own; the Claimant believes that in any event he had no capital to contribute...."

102. The Defence was served on 3 July 2002. The following are the parts of it to which I need draw attention. There is an admission that the First Defendant's father recovered some 55,000 Iraqi dinars for the Claimant

in 1993 of which, it is said, the sterling equivalent is about £28. As to the events of September 1993 the pleading is as follows

> "5 Save that it is admitted and averred that the First Defendant, at the request of the Claimant, encashed approximately £1,500 of sterling travellers cheques and exchanged 200 French francs for a sterling equivalent of £22, which monies were there and then handed to the Claimant, each and every allegation contained in paragraph 5 of the Particulars of Claim is denied...

103. There is a denial of receipt of any jewellery. It is admitted that the sum of £81,610 was received by the First Defendant on 10th November 1993 and that the £9,000 was received on 8'h February 1994. It is pleaded that the whole of that sum has been repaid to the Claimant by the First Defendant as "the Claimant is aware".

104. In further information of that allegation given on 15th January 2003 it is stated that the total of £90,610 was repaid by way of cheques amounting to £64,923.38 and cash amounting to £25,689 between 481 December 1993 and 16th April 1997.

105. The Defence then addresses the acquisition of the properties, which is admitted. In relation to all of them it is pleaded

> "It is denied that there was ever any agreement whether express or implied between the Defendants or either of them and the Claimant in respect of the purchase of these properties. It is denied that any monies the property of the Claimant were used in the acquisition of the same. In the premises it is denied that any trust can arise in favour of the Claimant..."

106. Further information of that allegation was given on 15th January 2003 it is there said:

> "Purchases of these properties were by way of mortgage and personal money. Documentation regarding how much personal money was used and other matters in this regard shall be produced on disclosure"

107. So far as the payment of money in Holland is concerned there was a simple denial. In the further information served on 15th January 2003 it is stated

> "It is admitted that the Defendant travelled to Holland specially to meet the Claimant to pay her back the sum of money which she required as a matter of urgency "

There is a denial of every allegation in relation to the Jordan meeting.

108. In response to an Unless Order, the Defendants gave a second set of Further Information on 17th March 2003. In that they were asked to state precisely how the properties had been financed giving the precise source of the money used. The answer is as follows:

> "4. Purchases of these properties were by way of mortgage and personal money. Attached hereto marked exhibit B is a schedule of properties stipulating how the purchases were funded. Further attached hereto is schedule C exhibiting letters from lenders.
>
> 5. The monies used were the Defendants' since the loan monies to Mr Al-Basri had become his in accordance with the loan from the Claimant. The First Defendant therefore being free to use the loaned money as he wished"

They have never given the disclosure promised on 15th January other than those letters.

A similar answer is given in relation to all the properties. As to the repayments of money there is an exhibit a containing the schedules to which I have already referred.

The word "loan" in that answer to the request for Further Information is striking. It is the first occasion on which it appears in a document exchanged between the parties since the dispute began.

109. Nine days later the Defendants signed their list of documents for the purposes of disclosure. Item 21 is "agreement between Mrs Ali and Mr Al-Basri with translation 8/1/1994". That is the first mention of that document. This is surprising. In paragraph 7 of the Defence, in which it is admitted that the Claimant had requested the First Defendant to hold for her a sum of money that was to be transferred from Saudi Arabia and that the sum of £81,610 was transferred on 10th November 1993, it is also pleaded as follows.

> "(c) .... that she did not want to have any title to it in the United Kingdom. It thereafter became apparent that the reason for this was because it would prevent or prejudice her claim to benefits;
>
> (d) she therefore wanted to transfer the same to the First Defendant; but that;
>
> (e) the First Defendant was to repay her such sums as she may require as and when she might require it;
>
> (f) the First Defendant had agreed to the same; ...

As I have already noted, at paragraphs 10 and 11 of the Defence the Defendants state "it is denied that any monies the property of the Claimant were used in the acquisition of [any of the properties]".

110. On 24th April 2003 the Claimant prepared and signed a witness statement, which was typewritten but to which there were added substantial manuscript amendments. This was retyped on the 14th May 2003. The other witness statements in the case were made in April May and the beginning of June 2003.

111. On 16th June 2003 the case came on for hearing before His Honour Judge Geddes. By that time the Claimant no longer had the assistance of solicitors and she appeared in person. This was clearly too much for her. She did not appear for the second day of the hearing and Judgment was entered against her in default. However, she immediately applied to set it aside on the grounds that she had to go to hospital and it was set aside on 30th July 2003. On 20th August 2003 a third firm of solicitors was instructed by the Claimant.

112. On 27th September 2004, that is less than one month ago, the fourth and current firm of solicitors came on the record acting for the Claimant. However, the previous solicitors were by then refusing to release the Claimant's papers. As a result the bundles before me consist, so I understand, of copies of copy documents which had been used in the trial in 2003.

113. The hearing started before me on Monday 11th October 2004. Mr Mulholland counsel for the Defendants immediately submitted that the claim against the Second Defendant was inadequately pleaded and should be struck out unless amended. On the morning of Tuesday 12th October Mr Roy, counsel for the Claimant, submitted a draft amended Particulars of Claim, which Mr Mulholland did not oppose. I give leave to make this amendment.

114. The proceedings took an unusual course to which I shall refer later. But as they progressed it appeared to me that the alleged loan agreement of 8th January 1994 had assumed great importance in the Defendants' case. I drew attention to the fact that it did not appear in the pleaded Defence. As a result of that intervention, a draft amended Defence was submitted on Monday 18th October and I gave permission for the amendments, which were not opposed. As amended paragraph 7 of the Defence includes the following:

> "d) she therefore wanted and proposed to transfer the same to the First Defendant by way of an interest free loan; but that
>
> e) the First Defendant agreed the same;
>
> f) the said agreement was reduced to writing in an agreement in English and Arabic (the material terms whereof being identical in each language) and the same was signed by the First Defendant on 8th January 1994 and by the Claimant on 12th January 1994.
>
> g) That thereafter the parties acted on the basis that the said sum was a loan and the Claimant demanded repayment of various sums from time to time and the same were repaid by the First Defendant".

Various other amendments were made. There was introduced a specific denial that the properties were purchased at the direction or instigation of the Claimant or that her approval had been sought or obtained. And there was a denial of the amended case recently made against the Second Defendant.

115. Much of Monday 12th October was lost while the Claimant's new solicitors copied further bundles. They and Mr Roy had only come into the case a few days before the trial started and neither can therefore be held responsible for what I can only describe as the chaotic state of the bundles that were put before me. I understand both are acting under a Conditional Fee Agreement. The documents which I have are in the form in which they were exhibited to pleadings to witness statements. They are therefore not in chronological or any other logical order. There is substantial duplication and omission of relevant documents. The length and cost of the trial have been increased substantially as a result.

116. It is clear that issues of disclosure have not been adequately addressed on either side. Although, as I have noted, neither side is pleading illegality or anything similar, the Defence does suggest in paragraph 7(c) that the reason (or, in the Amended Defence, 'a reason') why the claimant asked the First Defendant to hold money for her was that if she did not do that it would prevent or prejudice her claim to benefits. If that suggestion were true it might have provided a basis for the Claimant, and possibly for the First Defendant, to resist disclosure of documents on the grounds of privilege against self-incrimination. Neither party has raised that claim before me. In fact, it seems to me that whatever the position over social security benefits, the initial and primary concern underlying the arrangements that were made between the parties was the fact of the United Nations Sanctions freezing Iraqi assets within the UK and elsewhere. No submissions have been made to me about the relevant law either of social security benefits or of sanctions. Accordingly nothing in this judgment is to be taken as expressing my view of either area of the law. What I do have to consider, at least to some extent, is what the Claimant and the First Defendant thought the law was, because that assists me or may assist me in understanding the otherwise very unusual course they took.

THE TRIAL AND THE APPLICATION FOR A STAY OF PROCEEDINGS

117. The Claimant started her evidence in chief on Monday 12th October. There were immediate problems. She is deeply suspicious of everybody who has come into contact with her. She has no trust in her former lawyers. She was not prepared to accept that the witness statement written in English with her hand written additions accurately set out what she wanted to say, and the evidence in chief had to proceed almost in the traditional fashion save that (without objection from Mr Mulholland) it proceeded largely by leading questions. That was the only way in which in practice it could proceed. The Claimant sat with an interpreter. At no point

did the First Defendant suggest that the interpreter had misinterpreted anything which the Claimant said. I would like to thank him in this judgment for performing what seemed to me a very difficult job.

118. Cross examination of the Claimant commenced at about 11.30 on Tuesday 12th October. At 12.40 I had to take the first of numerous short adjournments to enable the Claimant to recover her composure. The hearing resumed in the usual way after the mid day adjournment at about 2pm. Before three o'clock the Claimant was clearly unable to continue further. At that point Mr Hussain Al-Jassas, her eldest son, was interposed and his evidence took the rest of the day. On Wednesday 13th October the cross-examination of the Claimant resumed at 9.40 am. About fifty minutes later it was again necessary to adjourn briefly for the Claimant to recover her composure. The evidence resumed at about 10.40 and another similar adjournment was necessary some 40 minutes later. The hearing adjourned at 12.30 and was due to resume at 15.00 hrs due to another commitment of mine. When the hearing did resume at 3.10pm the Claimant was too unwell to continue and the evidence of Mr Jameel was interposed.

119. The Claimant's cross examination resumed at 10.40 am on Thursday 14th October. At about 11.40 the Claimant had what appeared to me to be a serious crisis. She recovered her composure and resumed giving evidence at 11.55 but only for half an hour, when another adjournment was necessary. The situation improved in the afternoon. One short adjournment was necessary at about 2.20pm. The Claimant's cross-examination was completed at about 3.35pm. There was no re-examination. I then heard the evidence of the Second Defendant for the remainder of the afternoon and expected to hear the evidence of the First Defendant at 10.30 on Friday 15th October.

120. I wish to note that none of the difficulties which the Claimant suffered in giving her evidence can be attributed to any fault on the part of Mr Mulholland. He performed a very difficult task with courtesy and restraint. The atmosphere in court between the parties was highly emotional at least on the side of the Claimant who was accompanied by her sons and others. Mr Roy also did his best to ensure that the proceedings could be conducted in as amicable and as orderly a fashion as possible.

121. At 10.30am on Friday 15th October I was asked by the parties to allow them time to discuss the matter between themselves. By this time the interpreter was no longer present. I was informed that a difference had arisen between himself and the Claimant after the court rose the previous evening and that he no longer wished to attend. He has not attended since. The Claimant clearly does now understand some English and can communicate in English with great difficulty. However, her sons are fluent in both English and Arabic and she was content to proceed with such interpretation as they could give her.

122. After various requests to me for further time I returned to court at 12.35pm. Mr Mulholland then asked me to order a stay of the proceedings in order for there to be tried a new issue that had arisen between the parties, namely whether in the immediately preceding two hours they had reached a binding compromise or not. The First Defendant alleged that they had. The Claimant denied that they had. I was informed that the parties had conducted their discussions entirely in Arabic, as one would expect, and that as a result there was no lawyer involved at all. Through Mr Mulholland the First Defendant offered to undertake to issue proceedings for a declaration that a compromise had been reached. He sought directions that pleadings be dispensed with, that witness statements be exchanged within 14 days and that the matter of the compromise be listed for trial with an estimate of half a day. It was suggested that the trial might be by a master or a circuit judge. The proposal was that was if it was found that no binding compromise had been reached the matter could then be brought back before myself with as little delay as possible, as though it were part heard.

123. I refused the application for a stay and gave my reasons for doing so. I decided to continue hearing the case and I indicated that I would in any event reserve judgment. I said that when I notified the parties that I was ready to give judgment they would have an opportunity, if so advised, to make any further application they wished to make arising out of the alleged compromise. I would consider afresh at that stage, if necessary, any application for a stay that may then be made. I did give the parties that opportunity before sending

out this judgment to them in draft. The response was that neither party wished to make any application arising out of the alleged compromise.

124. It was not until after the midday adjournment that I was able to hear the evidence of the First Defendant. The First Defendant gave evidence over two days, his cross-examination ending at about 4 pm on Monday 18th October. I sat a little late to complete the re-examination and questions I myself wished to ask him. The First Defendant gave evidence calmly and without interruption.

ISSUES OF FACT AND HOW THEY ARE TO BE APPROACHED

125. It thus appears that there are a number of important issues of fact which I have to resolve. They include:

> a) Did the Claimant in 1993 give the First Defendant cash and travellers cheques to hold for her, and if so in what amounts.
>
> b) Did the Claimant give the First Defendant jewellery to hold for her in September 1993 and if so what and at what value.
>
> c) Was the £90,610 held on trust, as the Claimant contends, or as a loan as the First Defendant contends.
>
> d) How much of the £90,610 that the Claimant paid to the First Defendant did the Defendants repay, or otherwise account for?
>
> e) If the money was held on trust, did the Defendants use the money paid to them by the Claimant to acquire each of the properties in question, and if so, do the Defendants hold the properties they purchased on trust for the Claimant.
>
> f) How much of the £95,000 that the Claimant paid to the First Defendant did the Defendants repay.
>
> g) Whilst the Claimant was in Holland in 1997 did she give a further £5,000 to the First Defendant.
>
> h) Did the First Defendants mother give to him in Jordan a sum of the order of £50,000 to pass to the Claimant in respect of the properties which the First Defendants father had helped her with.

126. Insofar as these questions raise or include issues of fact, and given the most unusual way in which the Claimant's oral evidence was given, and her highly emotional state, I must ask myself how I am to approach the resolution of these questions. I have been greatly assisted in approaching this by the extra judicial writing of Lord Bingham in a chapter headed "The Judge as Juror: The Judicial Determination of Factual Issues". This is published in "The Business of Judging", Oxford 2000, pages 3 and following, where it is reprinted from Current Legal Problems, vol 38 Stevens & Sons Ltd 1985 page 1-27. The relevant passages start at page 5 and continue through to page 15.

127. The following extracts assist me in the task I have to perform.

> "...Faced with a conflict of evidence on an issue substantially effecting the outcome of an action, often knowing that a decision this way or that will have momentous consequences on the parties' lives or fortunes, how can and should the judge set about his task of resolving it? How is he to resolve which witness is honest and which dishonest, which reliable and which unreliable? ...

The normal first step in resolving issues of primary fact is, I feel sure, to add to what is common ground between the parties (which the pleadings in the action should have identified, but often do not) such facts as are shown to be incontrovertible. In many cases, letters or minutes written well before there was any breath of dispute between the parties may throw a very clear light on their knowledge and intentions at a particular time. In other cases, evidence of tyre marks, debris or where vehicles ended up may be crucial. To attach importance to matters such as these, which are independent of human recollection, is so obvious and standard a practice, and in some cases so inevitable, that no prolonged discussion is called for. It is nonetheless worth bearing in mind, when vexatious conflicts of oral testimony arise, that these fall to be judged against the background not only of what the parties agree to have happened but also of what plainly did happen, even though the parties do not agree.

The most compendious statement known to me of the judicial process involved in assessing the credibility of an oral witness is to be found in the dissenting speech of Lord Pearce in the House of Lords in *Onassis v Vergottis* [1968] 2 Lloyds Rep. 403 at p.431. In this he touches on so many of the matters which I wish to mention that I may perhaps be forgiven for citing the relevant passage in full:

'Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.

Every judge is familiar with cases in which the conflict between the accounts of different witnesses is so gross as to be inexplicable save on the basis that one or some of the witnesses are deliberately giving evidence which they know to be untrue. There are, no doubt, witnesses who follow the guidance of the Good Soldier Sveyk that 'The main thing is always to say in court what isn't true', *The Good Soldier Sveyk* (Penguin edn. 1983, 382) as a matter of principle, but more often dishonest evidence is likely to be prompted by the hope of gain, the desire to avert blame or criticism, or misplaced loyalty to one or other of the parties. The main tests needed to determine whether a witness is lying or not are, I think, the following, although their relative importance will vary widely form case to case: For this, as for much of the ensuing discussion, I acknowledge my debt to the Hon. Sir Richard Eggleston QC *Evidence, Proof and Probability* (1978), 155.

(1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;

(2) the internal consistency of the witness's evidence;

(3) consistency with what the witness has said or deposed on other occasions;

(4) the credit of the witness in relation to matters not germane to the litigation;

(5) the demeanour of the witness.

The first three of these tests may in general be regarded as giving a useful pointer to where the truth lies. If a witness's evidence conflicts with what is clearly shown to have occurred, or is internally self-contradictory, or conflicts with what the witness has previously said, it may usually be regarded as suspect. It may only be unreliable, and not dishonest, but the nature of the case may effectively rule out that possibility.

The fourth test is perhaps more arguable...

And so to demeanour, an important subject because it is the trial judge's opportunity to observe the demeanour of the witness and from that to judge his or her credibility, which is traditionally relied onto give the judge's findings of fact their rare degree of inviolability ...

I have a hunch which I cannot begin to justify, that in days of yore trial judges rather prided themselves on and had considerable confidence in their ability to discern the honesty of a witness from the showing which he made in the witness box. Be that as it may, the current tendency is (I think) on the whole to distrust the demeanour of a witness as a reliable pointer to his honesty. Let me quote passages from the extra-judicial utterances of three very experienced trial judges...

And lastly an advocate's view from Mr A.M.Gleeson, QC...

Reasons for judgment which are replete with pointed references to the great advantage which the trial judge has had in making he personal acquaintance of the witness seem nowadays to be treated by appellate courts with a healthy measure of scepticism. What might be called the Pinocchio theory, according to which dishonesty on the part of a witness manifests itself in a manner that does not appear on the record but is readily discernible by anyone physically present, seems to be losing popularity. 'Judging the Judges', Australian Law Journal, vol 53 (July 1979), 344.

Seeing that we have so great a cloud of witnesses, any additional observations by me are plainly unnecessary. But I shall of course make some. There are, I feel sure, occasions on which a witness leaves a judge with a profound conviction that he is, or is not, telling the truth. This may not derive from anything he has said or failed to say but may be based ultimately on impression. As such it is probably impossible to explain or justify in rational terms. Whether his conviction was soundly based the judge is unlikely ever to know, so that he has little of no check on the accuracy of his own impressions, but if an impression is strong enough he will be unable in conscience to deliver a judgment which does not give effect to it. A firm judgment of this kind formed by one whose judgment is supposed to be his stock in trade is, I think, not lightly to be overridden. I would furthermore suggest that many judges, with years of forensic experience behind them, are likely to have developed some skill at recognizing certain types of rogue, particularly if the type is one they have met before. But subject to those qualifications I ally myself with the doubters. The cases which vex a judge are not those in which he is profoundly convinced of a witness's honesty or dishonesty. In those cases, whether his conclusion is right or wrong, the decision for him is easy. The anxious cases are those which arise not infrequently, where two crucial witnesses are in direct conflict in such a way that one must be lying but both appear equally plausible or implausible. In this situation I share the misgivings of

those who question the value of demeanour- even of inflexion, or the turn of an eyelid- as a guide. To Mr Justice MacKenna's percipient remarks I would simply add three addenda:

First, ability to tell a coherent, plausible and assured story embellished with snippets of circumstantial detail and laced with occasional shots of life-like forgetfulness, is very likely to impress any tribunal of fact. But it is also the hallmark of the confidence trickster down the ages.

Secondly there is (I think) a tendency for professional lawyers, seeing themselves as the lead players in the forensic drama, to overlook how unnerving an experience the giving of evidence is for a witness who has never testified before.

The architecture of the Law Courts in the Strand, with its blend of the ecclesiastical (in the entrance hall) and the custodial (in many of the upper corridors), and the lay-out of the courts themselves, with the witness raised up and isolated like a lone climber on a peak in the Dolomites, might almost have been designed to maximise his unease. It would rarely, in my view, be safe to draw any inference from the fact that a witness would seem nervous and ill at ease; and if he did not it could well be because he had taken a tranquilliser to fortify himself for the ordeal so that his apparent calmness would be equally lacking in significance.

Thirdly, however little insight a judge may gain from the demeanour of a witness of his own nationality when giving evidence, he must gain even less when (as happens in almost every commercial action and many other actions also) the witness belongs to some other nationality and is giving evidence either in English as his second or third language, or through an interpreter. Such matters as inflexion become wholly irrelevant; delivery and hesitancy scarcely less so. Lord Justice Scrutton once observed; 'I have never yet seen a witness who was giving evidence through an interpreter as to whom I could decide whether he was telling the truth or not' *Compania Naviera Martiartu of Bilbao v Royal Exchange Assurance Corporation* (1922) 13 L1. L. Rep. 83 at p. 97. If a Turk shows signs of anger when accused of lying, is that to be interpreted as the bluster of a man caught out in a deceit or the reaction of an honest man to an insult? ... To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm...

If too much attention has over the years been paid to the demeanour of the witness in guiding the trial judge to the truth, too little has perhaps been paid to probability. I do not use that word in any mathematical or philosophical sense, but simply as indicating in a general way that one thing may be regarded as more likely to have happened than another, with the result that the judge will reject the evidence in favour of the less likely. I think most judges give weight to this factor in reaching their factual conclusions. Mr Justice MacKenna, in the paper from which I have already quoted, has said that he habitually did:

When I have done my best to separate the true from the false by these more or less objectives tests, I say which story seem to me the more probable, the plaintiff's or the defendant's, and if I cannot say which, I decide the case, as the law requires me to do, in the defendant's favour.

Lord Justice Brown spoke to rather similar effect, also in the paper previously quoted:

Sometimes one has to rely on probabilities and on circumstantial evidence; which I always thought was less unreliable than oral evidence. But the judge's own opinion about probabilities can be dangerous, being based on his own, perhaps limited experience. Like all motorists, I thought I could see what the probabilities of a motor accident were, but I was quite incapable of judging the probabilities of a factory accident. *'Judicial Reflections', Current Legal Problems* (1982), 6.

In choosing between witnesses on the basis of probability, a judge must of course bear in mind that the improbable account may nonetheless be the true one. The improbable is, by definition,

as I think Lord Devlin once observed, that which may happen, and obvious injustice could result if a story told in evidence were too readily rejected simply because it was bizarre, surprising or unprecedented....

Different views have been expressed of the frequency with which judges encounter deliberately untruthful witnesses. Sir Richard Eggleston took a rather gloomy view:

In my experience, judges tend to overrate the propensity of witnesses to tell the truth. Since judges regard breach of the obligation imposed by the oath as a serious crime, as indeed it is, they tend to think that witnesses will be as overawed as those who impose the sanction of an oath think they ought to be. In fact, I do not think many people feel any sense of wrongdoing when they swear falsely, so long as they can persuade themselves that they are doing it in a good cause. *Evidence, Proof of Probability*, 159.

One must certainly accept that of the thousands who take the oath each year it would be a tiny minority who would be constrained thereby to tell the truth for fear of spiritual penalty. But Lord Justice Browne expressed a more generous opinion-not, I feel sure, accounted for by the difference of national jurisdiction:

I think that in civil cases (unlike criminal cases) the witnesses are seldom lying deliberately. But I am very sceptical about the reliability of oral evidence. Observation and memory are fallible, and the human capacity for honestly believing something which bears no relation to what really happened is unlimited. *'Judicial Reflections', Current Legal Problems* 1982,5

I respectfully agree although, regrettably, somewhat less wholeheartedly than I should have done some years ago.

The tests used by judges to determine whether witnesses although honest are reliable or unreliable are, I think, essentially those used to determine whether they are honest or dishonest: inconsistency, self-contradiction, demeanour, probability and so on. But so long as there is any realistic chance of a witness being honestly mistaken rather than deliberately dishonest a judge will no doubt hold him to be so, not so much out of charity as out of a cautious reluctance to brand anyone a liar (and perjurer) unless he is plainly shown to be such. There are three sources of unreliability commonly referred to by judges when rejecting the evidence of honest witnesses...".

128. The principal sources of unreliability in the present case are loss of recollection and wishful thinking. There is a further source of unreliability in the present case, not mentioned by Lord Bingham, namely a concern that what the parties were doing was or might have been illegal, and a desire not to incriminate themselves. The first source of unreliability mentioned by Lord Bingham does not apply in this case: it arises where a witness has seen an accident or incident occurring over a short space of time and there is uncertainty as to what the witness has actually seen and not seen.

129. I have set out the chronology of events as it appears from the documents in the way that I have in the light of Lord Bingham's guidance. My overall impression of the two protagonists is as follows. The Claimant appears to me to have a genuine sense of grievance. But she is emotional to the point of hysteria. Evidence given on different occasions and in different witness statements is inconsistent and often contradictory. Since she gave her evidence through an interpreter, and since, not being either Saudi or Iraqi myself, I have no knowledge of how a sincere or indeed how an insincere witness in the position of the Claimant might be expected to behave. In addition she has clearly been much affected by the sufferings that she has undergone in Iraq and Saudi Arabia. So demeanour is really of no assistance to me at all. I formed the impression that the Claimant believed that what she was doing was in a good or just cause and that she felt little restraint in saying anything that might promote that cause whether she could in truth recollect it or not.

130. So far as the First Defendant is concerned I accept that he is a person who genuinely and altruistically has helped Iraqis who find themselves in this country in difficulties of one kind or another. On the other hand as he was constrained to admit in cross-examination, he has been capable of dishonesty, particularly in relation to tax and social security benefits, albeit in circumstances where he considered himself to be in a moral dilemma. I form the impression that he was unwilling to be candid with the court. One example is that, until he was giving his evidence in chief, there had been no mention of there being any contemporaneous record of the sums received from and paid to the Claimant. Although I have no hesitation accepting his evidence that such a document must have existed I do not accept his explanation for its non-production, that is to say the fact that he has two small children at home and it has got lost. More significantly he has not been candid in raising the agreement which he says was made in writing on 8th January 1994, or in admitting that it was indeed the Claimant's funds which were the source of the monies used to acquire so many properties so quickly in 1994, and other properties. He has not provided me with any context with which to assess his evidence. By that I mean that I would have expected a businessman of his education, and with the assistance of accountants, to produce to me evidence of the scale of his business affairs in 1993 and thereafter, so as to show that the funds deposited in the bank in September 1993 were what he said they were, namely substantially monies arising out of his business. There has been no disclosure by either Defendant of any but the offers of advance in relation to the acquisition of the properties, and no disclosure of the profits and servicing of the loans. The First Defendant is clearly much more concerned about the possible illegality, if that was what it was, of his dealings with the Claimant than is the Claimant herself. .

131. Both parties were clearly setting out to avoid the effect of the UN sanctions upon the Claimant. So far as the Claimant's position was concerned, they appear to have regarded this as a worthy aim. But having decided to proceed as they did, the parties appear to have omitted to obtain the services and advice of bankers, solicitors, accountants and others whom they knew, and who might normally have been involved in the management of sums of money of the kind the Claimant had. When a person decides to proceed in such a way, there is a serious risk that what he does will not comply with the requirements of the law.

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132. I deal first with the claim for jewellery. I accept that a lady of the Claimant's background would have had, and she did have at some point, jewellery of the kind she describes. The jewellery was rings, earrings bracelets necklaces watches and the like. Equally I accept that the jewellery may have been valued at as much as £50,000. But I cannot accept the evidence that this jewellery was handed to the First Defendant. If it had been I believe the Claimant would have raised the issue before she did, which was only when these proceedings commenced. I would need a high degree of proof to find that the Defendants had in effect stolen the Claimant's jewellery. I find that they have not. It seems to me much more likely that it has been lost or sold along the appalling journey that the Claimant has taken from Baghdad to this Court in London. As she says herself in her witness statement, she had tried to sell her jewellery in Saudi Arabia but had difficulty because she could not demonstrate where she had acquired it. Having something valuable and portable to sell at a time of misfortune has traditionally been one of the reasons for having jewellery.

133. I turn now to the money. I have little evidence from the Claimant to explain how she was able to gain admission to the United Kingdom. She certainly did not claim asylum at once. As the letter from the IND shows, she arrived on 30th July 1993 and made her application for asylum on 21s' September 1993. It is probable that she came with money. The Defendant says in his witness statement that she had a visitor's visa from the British Embassy in Saudi Arabia and a cheque totalling £25,000 from a Saudi Prince. This expression is unclear and I have seen no evidence that she had a personal cheque of that amount. She denies that she did. But it seems to me that what she probably had, and I so find, is money in the form of travellers' cheques or cash to something of that value.

134. Some of this money would have been spent in August and September in accommodation, which I accept to have been a hotel in Earls Court, then at lodgings in Brompton Villas, then in Lillie Road London. These addresses are not cheap to live in but neither are they extravagantly expensive. The Claimant proba-

bly had a substantial amount of money left with her on 22nd September 1993. The amounts which she claims she had, I have already set out in a quotation from her Particulars of Claim. Where these precise figures come from I do not know. I have seen no document to substantiate these exact figures and I doubt the Claimant could remember them exactly.

135. The First Defendant says that on that September day in Croydon he had to deposit some cash and cheques from his business into his bank and it was for that reason he went to the Croydon branch. He said that the Claimant asked him to cash some travellers cheques totalling £1,500 and exchange 200 French francs. There is no doubt the 200 French francs were deposited because there is the bank statement entry of £22.97. He says these amounts were handed to the Claimant there and then.

136. The paying in book contains some 30 slips all but four of them being unmarked. The original was produced at the trial. The first two pages are stubs. The first stub is dated 6th November 1992. It records a deposit of £461.63 for which there is a stamped bank receipt issued in Bolton. The second stub is dated 15th December 1992. The deposit is £500, which is stated to be in the form of cheques. The bank receipt is issued in Wythenshawe. The third stub has been torn out.

137. The fourth stub is dated 22nd September 1993. It records a deposit of £2,500 in notes and £7,700 in cheques making a total of £10,200. The bank receipt is with a stamp showing Central Croydon. The fifth stub has been torn out. The sixth stub is dated 22nd September 1993. In the box with the printed markings for cheques there is the figure of 20,000 which appears as 20,000, followed by two hand written noughts in the pence column. The total is written identically, but is preceded by a printed £ sign. There is in different ink in large capital letters the marking "F/Francs T/chqs". In red ink there is a red ballpoint squiggle that resembles the cashier's mark on the previous stub, and the words "to be negotiated". The squiggle and the words 'to be negotiated' are in red ink. There are no other markings in the book which appear to be relevant. In evidence the First Defendant said that he had no recollection of the figure of 20,000. The only explanation he could offer for it was that it might have been a mistake for 200FrF. I do not accept that he mistook 200FrF for 20,000FrF. I am confident that the bank official who stamped the stub and wrote upon it did not mistake 200 for 20,000.

138. The bank statement of account for that account for the period ending 30th September 1993 contains only six records of transactions, apart from a few pence credited for interest for the period 21st June to 19th September. The opening balance is £605.78. There is a credit of £50 on 10th September. There are two payments made by cheque for sums of £25 and £130.78 pence. There is a transfer to a business account of £500 and then there are two entries of relevance to this case. The first is dated 24th September the details are "Central Croydon" "REM" and the receipt against that entry is £10,200. The last entry is as follows "200 FrF RE TCHQ from Croydon" against an entry of £22.97p dated 27th September.

139. The only bank statement from account 80097403 which I have is the one I have already recited. It is a personal account and not a business account so far as appears from the bank statement. For the period 31st August 1993 to 27th September there is no payment in comparable in value to the £10,200 credited on 24th September.

140. I have the bank statements from the business account in the name "trading as Olympian Systematic" from 31st March 1994 when the credit balance was £1,955.96 and a selection of pages up to 17th January 1997 when the balance was £5,927.26. The balance shown on the sheets that I have only rarely exceeds £6000. There is no recorded payment in of a sum anywhere approaching £10,200. Most payments in are well below £1000 and only very few exceed that figure, none exceeding £2000. The First Defendant gives no explanation as to why he would have paid money from his business into account 80097403 when he had, as it appears, a business account which had been open for many months before that. I note that the sheet number for 31st March 1994 is number 24 from which I infer that the account had been open for up to 24 months.

141. I find that the cheque stub dated 22nd September 1993 bearing the figure 20,000 is a receipt by the bank for travellers' cheques in the sum of 20,000 French Francs. Taking the value given for 200 French Francs credited on 27th September 2003, the value of the 20,000 was therefore £2,297. One of the missing bank credit stubs can be accounted for by the 200 French francs. The other stub which shows £7,700 in cheques I find was for sterling travellers cheques. The notes of 2,500 I find were sterling notes. If the Claimant did have US Dollars and Saudi riyals or Kuwaiti dinars in cash it is probable that they would have been exchanged for sterling, but whether they were or not, I find that the £2,500 was money from the Claimant as well. I am unable to make any finding as to what became of the proceeds of the 20,000 French Francs once in the First Defendant's hands. Since disclosure is not complete it is possible that they were in fact credited to a different account.

142. By 22 September 2003 I find that the relationship between the Claimant and the First Defendant was one of trust and confidence in which he owed her duties of loyalty. He was a fiduciary. He represented her in her dealings with BCCI, and helped her deal with the Home Office, and in obtaining accommodation. He introduced her to his father to help with her affairs in Iraq. He received the money on 22 September in that capacity, and not as a loan.

143. The document dated 30 October 1993 is in my judgment intended by the parties expressly to recognise that the £81,621 and the £9,000 were to be held in a specified account in the name of the First Defendant, 'dedicated' (as he said) to the Claimant's funds. It was to be held on trust, or in a fiduciary capacity, for the Claimant. The First Defendant made clear in his oral evidence that he understood the concept of a trust in English law. He said that it meant that he was not free to use this money at all, that he had no right to use it without the Claimant's instructions. He used the words 'as Trustee' advisedly in the receipt dated 10th May. He also understood the need for a new legal arrangement if he was to be free to use the money for his own purposes. Mr Mulholland accepted that there was a trust created initially.

THE DOCUMENT DATED 8TH JANUARY 1994 AND THE PROPERTIES.

144. This purports to be a new legal arrangement by which the First Defendant is to hold any 'monies paid in the past present or the future' on the basis of a private loan with no interest, and with no condition other than to return the monies when required by the Claimant.

145. I have already described this document and the belated way in which it was produced. The evidence of the Claimant is that she did not sign this document and had not seen it before it was produced. She says that at some point she provided the First Defendant with her specimen signature for the purpose of him assisting her with her financial affairs, in particular with BCCI. She says that she gave him two signatures on blank pieces of paper. She says the expression "your sister" is comparable to the English Expression "yours sincerely". The First Defendant does not disagree with this except to say that he regards it as more informal than the English expression. So he says it would not be appropriate for a business letter. She says her signature was also required for a letter to Saudi Arabia, and she points as an example to the one signed on 22nd August 1997. Her signature does appear on that document in the bottom left hand corner but without the words "your sister". In fact she says that the signature is a forgery. I do not need to consider that further. Asked why she put the date 12 January 1994 under her signature, if she signed the document in blank, she replied that was the date she gave him the document. She says that the First Defendant never mentioned tax difficulties to her.

146. In his witness statement the First Defendant says this:

> "I agreed to have the money transferred to me on the assumption that I would cash it and pay it back to her. Before the money arrived it was thought that I would be able to keep the money in a second account, which would be dedicated to her funds. On the same day as Mrs Ali re-

> quested the funds to be transferred from her account in Saudi Arabia to my Barclays Bank account number 80097403 I wrote a note indicating that this account would contain monies belonging to her and that there should be no confusion if I died or was injured. Copies of the purported translation of the said document and the document itself, both dated 30th October 1993 are annexed... however, when the money arrived I asked Mrs Ali to take her money. She asked me to keep the money and wait for a while until she could open a bank account. I explained to her that I could not keep the money because it was confusing my account for taxation purposes and I was worried that the tax office might think I was making undeclared profits. Then I accepted and agreed that she would lend me the money as a personal loan to be paid back as and when she required it. We both signed and agreement on 8th January 1994 and the money was kept and returned on the basis of a personal loan no more no less...'

147. In his evidence in chief the First Defendant denied ever having obtained documents from the Claimant signed blank. In cross-examination he said that they agreed that the money received would be a loan and that they did so days after the transfer and that was at the Claimant's suggestion. He said he had to put it in writing for the accountant. He said he explained to the Claimant that he would send a letter for her to sign and that he sent it by post in a stamped addressed envelope. He says she signed it and sent it back. I pause to note that this is of course inconsistent with his witness statement in which he says they both signed it on 8th January. This second account is more consistent with the document, which bears two dates the second being 12th January. The document does also, so far as I can tell, appear to have been folded in a manner consistent with it having been sent through the post. In cross examination it was pointed out to him that by the end of 1993, before this document was signed, all the money in account 80097403 had been paid out into another of his accounts and the original account.

148. During cross-examination on his witness statement the First Defendant gave a new and different explanation for the genesis of the document. He said that if he had wanted to do her favour he could have, but why should he? He said that his accounts were disclosed to the taxman. He said that if the Claimant had been a member of his family he would have done her a favour by keeping the money on trust, but he had already done a favour by receiving the money from her and he did not want to go further. Hence she offered a loan. He accepted that the arrangement under the letter of 30th October would not have been confusing for tax purposes. He said that the Claimant did not suggest that he continued to hold the money on trust and that it would have been "cheeky" if she had. He then says that even if that word was a bit strong, for his part he was not prepared to do it. However, he had to admit that his own 1997 receipt for the £95,000 is in terms a trust.

149. In answer to questions from me the First Defendant accepted that for his own tax purposes it would make little difference whether the money was held under the terms of the letter of 30th October or by way of loan, because under each arrangement it is clear that the funds were not parts of his profits. He said the real reason was not taxation but "I didn't want to assume this burden of managing her affairs for nothing. It was a polite excuse. I didn't want her money but when she offered a loan that was a new phase." He said she offered the loan. Asked by counsel why he had moved the money from account 7403, he said he could not remember, but there was nothing cynical about it and that he only moved it after they had agreed a loan arrangement. He said that if he had wanted to rip her off he would have said that she owed him the money from Iraq and then she would not have had any rights at all. He had no bad intentions.

150. The statement that it was the Claimant who suggested the loan is not credible. Also relevant to the agreement dated 8th January 1994 is the one dated 24th June 1994 signed by the First Defendant but not by the Claimant, which acknowledges a loan of £44,375 and proposes a 50% split, as described above. The First Defendant, as already noted, did not dispute the authenticity of this document but he said he could not remember signing it and he could not explain it. He said he did not type it. It seems to me very similar to documents that he did type or have printed, and I think it probable that he did produce this document. If it is genuine (as I find it is) and the Claimant did not accept it, which she clearly did not, it is hard to reconcile with the alleged loan agreement said to have been made orally before 22nd November 1993 (the date on which

the contents of account 97403 were transferred to the business account) and recorded in writing on 8th and 12th January 1994.

151. The First Defendant's evidence is also implausible for another reason. It is his case that the use of the money to acquire properties was entirely his doing and that he did not act on the directions or instructions of the Claimant. He accepts they may have talked a bit about it incidentally but that is all. He accepts that she did visit some of the properties, but said that she was being nosey. If the loan agreement was as put forward by him, it would have been one in which she was giving to a businessman who to her knowledge and on his own account had not had an easy time over the previous years, and who did not have capital of his own, what can only be described as a very large unsecured loan to be used for a purpose which meant that the money was not available to be repaid promptly. The Claimant was in a very vulnerable position, but she is a woman of experience education and determination and I have no doubt that she would have been appalled at such a prospect. In relation to the documents she did not sign on 24th June 1994 she gave evidence that when she received it she became very angry in fact so angry that she had what was a suspected to be a heart attack and went into hospital. I am not surprised. I accept that evidence. It is not credible at all that she would have docilely signed away her money in the way alleged by the First Defendant. On the other hand, her version of events, which is that she directed and participated in the acquisition of the properties using her money in entirely plausible. She had experience of owning and managing properties in Baghdad, unlike the First Defendant who had no experience of owning or managing investment properties. I accept that the First Defendant had contacts with estate agents who were his customers in his IT business. The idea that the First Defendants money should be used for acquiring properties to be held for her benefit makes sense and I accept that was what the arrangement was. Whether the Second Defendant is in fact a trustee is a point that I shall have to consider separately.

152. It is right that I should mention one point taken on behalf of the First Defendant as tending to suggest that his version of events is correct. That is that the Claimant became a tenant of Sullivan Court as I have recited. The First Defendant of course says that it was a genuine tenancy because the Second Defendant was, according to the Defendants' case, the legal and beneficial owner of the properties. He was however concerned that the Claimant might not be entitled to housing benefit if she was in receipt of the money which he says he was paying to her. The substantial payments which he said he made start at that time and were generally in the sum of £500 as I have recited above. He accepts that he became concerned as to whether the Claimant was entitled to housing benefit. He says that initially he thought that the refugees affected by the United Nations Sanctions received their funds from the United Nations and not from the DHSS. But he recognises that at some time in 1994 the belief he claims he had was wrong and that the Claimant should not be receiving housing benefit and money from him at the same time. He says he felt awful about it being a taxpayer all his life. He said he took the matter up with her and she did not share his concerns. He did not want to do anything about it, he said, because he did not want to cause difficulties for her. In effect he felt he was in a moral dilemma. He accepted that he should have stopped receiving housing benefit long before he did. But the problem came to an end with the tenancy, at least in so far as receipt by him or his wife of housing benefit was concerned. However, the importance of the point was, he said, that it showed that the Claimant could not be, as she claims, the beneficial owner of the property. I note the argument but I cannot accept it. On the facts that I have found them to be, the Claimant was the tenant of someone she believed to be her trustee. I have not received submissions which would enable me to decide whether this was a fraud on the benefits agency or not. What is clear is that the First Defendant thought it was, even on his own version of events.

153. The burden of proving the document dated 8th January 1994 is admittedly on the First Defendant. He has entirely failed to discharge the burden of proof upon him of persuading me that it is a genuine document. I find that no such agreement was reached whether orally in November 1993 or in writing in January 1994.

154. Had I not reached this conclusion, and had I accepted that the document did record a genuine agreement, I would have had to consider whether it was valid, or voidable for undue influence or misrepresentation. Mr Roy advanced arguments, which seemed to me to be compelling, that if genuine the document

would have been induced by undue influence. The new agreement would have been a plain example of a trustee or fiduciary putting himself in a position where his duty and his interest conflicted. There was that degree of trust and confidence in the relationship that the First Defendant, in whom it was reposed, was in a position to influence the Claimant into effecting the transaction. It was a case where undue influence would be presumed.

155. Moreover, the alleged arrangement was induced by the misrepresentation that it was required for tax purposes, when on the basis of his admissions in evidence, it was not so required. It was required because the First Defendant thought that he ought to be rewarded for his services, since the Claimant was not a relation of his.

156. I have found the Claimant's evidence on this issue to be correct, so these questions do not arise. No case in undue influence or misrepresentation was pleaded, because of the way in which the loan agreement itself was pleaded for the first time, as a result of an intervention by me during the case.

HOW MUCH HAS BEEN REPAID OR ACCOUNTED FOR?

157. I turn now to consider what monies the Claimant did or did not receive from the First Defendant. In the absence of any contemporary record from the First Defendant and any acknowledgment of receipt by the Claimant, the First Defendant recognises that he is in difficulties in establishing that he has repaid any money which the Claimant does not admit. In his evidence in chief he explained what he had not explained before, namely that the schedule attached to the Further Information of his Defence and to his witness statement, was not prepared from contemporaneous documents and was not based on his memory but, insofar as it referred to cash was simply an attempt to reconstruct what he thought must have happened to support his contention that he had repaid everything. He does not now claim that the figures in the schedule are precise in a sense that any particular cash payment can be attributed to the repayment of the money to the Claimant. He simply selected from the bank statements figures which arrive at that amount.

158. Nevertheless it is common ground that the Claimant did make payments from time to time and on the Claimant's case he was staying with her and her children overnight on many occasions and provided them with help in the form of cash and shopping and the like. There is therefore considerable credibility in the First Defendant's case that he repaid more money than can be demonstrated by looking at contemporaneous documents.

159. Two documents that he does point to are the two Declarations of Trust between the Claimant and her daughter. These of course are not documents which he saw contemporaneously or which concern him directly. He submits that they may have been prepared to explain how the Claimant, while on benefits, came to be in receipt of the money which she had received from the First Defendant. He points out that the figures in the Declaration of 30th September 1994 are £1,500, £8,000, £10,000 and £51,000. The evidence that these sums were sent from Saudi Arabia by the Claimant's daughter is the Claimant's own oral statement, coupled with the statement in the first Declaration of Trust that the daughter could not hold a bank account herself in Saudi Arabia. Apart from the £81,621 there is no evidence that funds came through the banking system at all from Saudi Arabia. It will be recalled that the £81,621 was transferred from bank accounts in Saudi Arabia on instructions signed by the Claimant from bank accounts apparently in her own name. The Claimant in evidence said that the £51,000 came from Saudi Arabia from a different remitter. There is no evidence to support that other than her own statement. The similarity of the figure to £51,135, which was admittedly paid to Hussain by the First Defendant on 1st June 1994, with the £51,000 in the Declaration of Trust, suggests that the two figures may be the same. Moreover the other figures are not dissimilar from the £9000, which the First Defendants admits he received on 8th February 1994, and for which there is no documentary trace in any banking documents, and the £10,200 paid in to the First Defendant's account in Croydon. The £9,000 could be the balance of the money which the Claimant brought with her from Saudi Arabia and which she

had not previously given to the First Defendant when as I have found, she gave the sums which she did give on 22nd September 1993.

160. I think it is probable that that is the source of the £9,000 because otherwise there should be evidence of receipt of the money from Saudi Arabia through the banking system. The figures in the Declaration of Trust thus correspond very approximately to the funds that the Claimant had brought with her from Saudi Arabia, that is the first three figures and the figure of £51,000, which had been repaid by the First Defendant out of the £81,621.

161. More illuminating from the point of view of the case of the First Defendant is the second Declaration dated 30th September 1996. As already recited that records the receipt, allegedly from Saudi Arabia, of monthly sums of £500 with other monthly sums totalling £25,000 over and above the £70,000 approximately referred to in the 1994 Declaration of Trust. I have evidence of the monthly payments of £500 from the First Defendant to the Claimant. The ones for which there is evidence in the form of cheques did not total £25,000. It seems to me likely that the Claimant had indeed received instalments of £500 with other monthly sums, which had in fact been paid by the First Defendant. These funds had ultimately originated from Saudi Arabia, but, as I find, they had been received in the form of £500 instalments from the First Defendant.

162. I therefore find that the First Defendant had repaid sums totalling £25,000 out of the money deposited with him, in addition to the admitted repayment of £51,135. In her oral evidence the Claimant accepted that the First Defendant had paid the £600 deposit for Lillie Road. In addition I accept that the two telephone bills, £819 and £501.29, were paid for the benefit of the Claimant and should be treated as repayments of the money paid by the Claimant to the First Defendant. In addition I have found that the £5,320 out of cash dispensers in Earls Court were monies paid to the Claimant by the First Defendant. All of these sums, therefore, stand to be credited to the First Defendant against his receipt of the sums which I have held that he received in Croydon on 22nd September 1993, through the banking system on 3rd November 1993 and from the Claimant on 8th February 1994.

163. I find that the account between the parties stood approximately as follows:

		Received by 1st Def	**Repaid by 1st Def**	**Properties acquired by Defs**
22/09/2003	Croydon	10,200.00		
22/09/2003	Croydon	2,297.00		
22/09/2003	Croydon	22.97		
03/11/1993	Saudi bank	81,621.00		
14/12/1993	Mobile phone		819.00	
1993	Lillie Road		600.00	
Dec 93	Dinars say	30.00		
08/02/1994	Hussain cash	9,000.00		
29/03/1994	Sullivan Ct			10,000.00
06/05/1994	Wendover Ct			4,000.00
01/06/1994	Hussain		51,135.00	
12/07/1994	Total ATM		5,320.00	
29/08/1993	Woodhill Drive			0.00
24/11/1994	Waverley Gdns			2,550.00
14/03/1995	Telephone BT		501.29	
30/09/1996	Instalments		25,000.00	
16/03/1997	7 x £500		3,500.00	
		103,170.97	**86,875.29**	**16,550.00**

164. I find that the deposits for Sullivan Court, Wendover Court, Waverley Gardens were all funded out of the Claimant's money with her authority. So far as Woodhill Drive is concerned, for which the deposit was as £3,950, the position is different. I accept that the Claimant consented to her money being used to fund the deposit for this property, and so that this property would be held on trust for her, if in fact her money was used to fund the deposit. The evidence of the Defendants is that they were able to fund that deposit out of the sale of their property in Bolton and out of the earnings of the second Defendants. This evidence is plausible, but they have produced no documents to show how the purchase was funded. So I leave over the question whether they did nor did not fund their new home out of their own resources to the taking the of the account which will be necessary. The figures in the above table are my findings of fact, save for the £16,550 which will be subject to adjustments in the taking of the account.

165. I find that the First Defendant had invested at least £16,550 in properties for the Claimant's benefit. The above table shows that the sum invested in the properties is slightly higher than the difference between what the First Defendant received, and what he repaid. But this does not show that the First Defendant has accounted for everything for which he should account. The repayments of £500 per month cannot be counted twice. If, as the First Defendant says they are repayments of the advances made to him, then he has not accounted at all for any profit from the investment properties. If, as the Claimant says, they represent rents, then to that extent the original advance is unaccounted for.

THE £95,000 PAID ON 10TH MAY 1997.

166. Since receipt of this sum is admitted it is not necessary for me to decide why this strange transaction occurred. I am unable to reach a finding of why it occurred, or why the relationship between the parties broke down. There is no doubt that the First Defendant signed the receipt quoted above in which he stated the money was held by him as trustee for the Claimant. I note that the figure of £95,000 is £8,124.71 in excess of the sums which I have found the First Defendant had repaid to the Claimant by cash or cheque or through the banking system. Where the difference of £8,124.71 came from I do not know. There is no evidence of fresh money having been received directly from Saudi Arabia. As a matter of arithmetic £95,000 is the equivalent of the total of the two sums £25,000 and £70,000 referred to in the Declaration of Trust of September 1996. It seem likely therefore that it is the totality of the sums repaid by the First Defendant to the Claimant plus a sum which she retained from the initial funds which she brought to the UK in July 2003 and of which, as I found a substantial part remained on 22nd September 2003.

167. The Claimant now admits having received repayment of £61,200 made up of £2,500 on 19th August 1997, £3,500 on 3rd October 1997, £200 on 6th October 1997, £5,000 on 24th April 1998, another £5000 on 10th July 1998 and £45,000 on 28th July 1998. That leaves a balance of £33,800. Meanwhile the Second Defendant had acquired Copley Close with the payment of a deposit of £5,735 on 22nd December 1998. It is clear from the First Defendant's evidence that other properties have been acquired since then.

168. The First Defendant's explanation for this shortfall is that he paid the Claimant in cash £20,000 in Holland on 1st June 1997 and a further £7,000 in cash on 1st August 1997. The First Defendant also claims to have made some other repayments on 6th November 1997. He claims to have repaid £4,000 and £300. He also claims to have repaid £2,500 on 12th March 1998. There is no contemporaneous or other documentary support for this contention by the Claimant. On the other hand the Claimant claims that she paid £5,000 to the First Defendant in Holland.

169. I am unable to make any sense of either parties' evidence in relation to the events that occurred in Holland. It makes no sense to me that the First Defendant should have gone to Holland with £20,000 in cash. He made very large cash deposits with the Bank of Scotland on 19th June, that is about two weeks after the trip to Holland. So there is no doubt that he would have had £20,000 in cash in his house in cash at that time out of the money brought there by the Claimant. On the other hand he accepts that on his account he must have had more cash than that in the house, because the total deposited with the Bank of Scotland by the

end of July 1997 was some £88,000. If he had paid £20,000 in cash to the Claimant in Holland there would have been left only £75,000 cash out of what she paid to him. No explanation is offered for the difference of £13,000. The First Defendant was asked to explain the source of the £7,000 which he said he had paid. I note that £7,000 is as a matter of arithmetic the difference between the £95,000 received on 10th May and the £88,000 deposited in the Bank of Scotland account. But the First Defendant did not say that the £7,000 came from the Claimants' money deposited with him on 10th May. He said that I should not be surprised that he had £7,000 in cash. He said that by 1997 he had an income and some six or seven properties, and cash of this amount would be available to him. He did not identify where it came from.

170. I find that the figure of £33,800 is unaccounted for. I am unable to find that either party's case as to what happened in Holland is established. Neither has discharged the burden of proof upon them in relation to those allegations.

171. I note that the figure which I have found to be unaccounted for is very close to the figure which Hussain told me the First Defendant had written on the scrap of paper which the First Defendant had first denied, and later recognised to be his writing. I accept Hussain's evidence that the First Defendant, after first denying that the owed the Claimant any money finally admitted that he did have a few thousand pounds due to her and that after looking at some papers he said that the money left was £33,000, and that he wrote that figure on the scrap of paper. He subsequently revised it upwards by £84.

172. However, on 22nd December 1999 the First Defendant acquired Copley Close with a deposit of £5,735. I find that the deposit was funded out of the money held on trust and not yet repaid.

173. No disclosure has been given of the other properties which the Defendants or either of them have acquired so as to bring the total up to ten or eleven, the figure given in evidence by the First Defendant.

174. Meanwhile, the First Defendant has, with the second Defendant, been receiving rents and possibly other benefits from the enjoyment of the properties acquired with the use of the money received from the Claimant on trust. There has been no disclosure in relation to that at all, nor any accounting of any kind whatsoever.

175. I have, as already indicated, entirely rejected the Claimant's claim in respect of the money which she alleges she was told was to be handed by the First Defendant's mother to him in Jordan. There is simply no basis upon which I could hold that she had discharged the burden of proof upon her of showing that the First Defendant had received any such money.

CONCLUSION AS TO THE FIRST DEFENDANT

176. There was at one time a point taken on the Claimant's title to sue in respect of money which she claimed to be her daughter's. That point has been abandoned. It follows that the Claimant is entitled to a declaration that such interest, if any, as the First Defendant has in each of the properties, Sullivan Court, Wendover Court, Waverley Gardens and Copley Close is held on trust for her.

177. So far as the position up to 16th March 1997 is concerned, the figures are necessarily somewhat approximate, but the Claimant is entitled to an account of the profits derived from the properties acquired by the First Defendant, from the use of the Claimant's funds. Credit must be given in so far as those funds have already been accounted for. The figures in the last column of the table are, as I said, approximate, so far as the cost of the property is concerned, and the final figure must await the outcome of the account to be taken.

178. So far as the position since the payment of £95,000 on 10th May 1997 is concerned, I find that the Claimant is entitled to a money judgment in the sum of £33,800 less the deposit for Copley Close £5,735 giving a balance of pounds £28,065.

179. The Claimant is entitled to an account of profits on the four properties which I have held are ones to which she is beneficially entitled. In the course of that accounting I would permit the First Defendant, if so advised, to invite the court to make him some allowance for his skill and labour in managing the investments at the request of the Claimant. The principles are set out in *O'Sullivan v Management Agency and Music Ltd* [1985] 1 QB 428. This is not an indication one way or the other as to whether such an application is likely to succeed. It is simply an opportunity for the First Defendant to make it if so advised.

THE SECOND DEFENDANT

181. I turn now to the position of the Second Defendant. So far as the properties are concerned, in the light of my findings, I have to consider the consequences of the fact that she is the person in whom the legal title of Sullivan Court and other properties is vested.

182. The claim against the Second Defendant is pleaded as follows. In the amended Particulars of Claim, after reciting the payment of funds to the First Defendant, it is pleaded that with the Claimant's consent, part of the monies provided by her were used for the purchase of Sullivan Court amongst other properties. Accordingly, it is said, "the Defendants hold these properties on trust for the Claimant". Further in paragraph 14, it is pleaded that properties including Sullivan Court have been let and "the Defendants have failed to account to the Claimant for the rents received from the properties save that the First Defendant paid the Claimant £500 a month from September 1995 to March 1997".

183. Then by amendment it is pleaded as follows

> "20 The case against the Second Defendant is as follows:
>
> a) The money that the Second Defendant used to purchase the above properties was the trust money of the Claimant.
>
> b) The Second Defendant knew the source of the money.
>
> c) The Second Defendant was intimately involved in using the money, both as the First Defendant's wife and as the purchaser of the property.
>
> d) The Second Defendant therefore knew that she was receiving trust property at the time of receipt.
>
> e) Alternatively the Second Defendant later gained knowledge that the money in question was trust property but continued to deal with it in a manner inconsistent with the trust.
>
> f) The Second Defendant is therefore liable to the Claimant as a constructive trustee".

184. In the Amended Defence its denied that the Second Defendant had knowledge of any breach of trust or duty by the First Defendant or that it is otherwise unconscionable for her to retain her own property. It is not pleaded that she gave any consideration for the properties of which the legal title is in her name.

185. The evidence of the Claimant in relation to the Second Defendant is short. There is no dispute that the Second Defendant from time to time answered the telephone when the Claimant rang the First Defendant at

home. The Second Defendant speaks only very little Arabic and the Claimant speaks only very little English. The scope for communication between them was limited. They only met once.

186. The Second Defendant signed the Statement of Truth in the Defence and she made a written witness statement. In her witness statement she states that she believes that the Claimant's claim is false and she goes on as follows.

> "3. I wish to make it clear that my husband has full knowledge of all the properties we have purchased whether in my name alone or in both our names.
>
> 4. I would like to make it further clear that all properties purchased have been done so using our own funds and from our own mortgage acquiring capabilities.
>
> 5. I have been told by my husband that he had a personal loan from [the Claimant] in 1993 from which the funds have all been returned "

187. In her oral evidence in chief she stated that she would never have contemplated buying a home on the basis that the Claimant or anyone else should share in it. In relation to the offer of an advance by the Britannia Building Society for the purchase of Woodhill Drive she says that it was never suggested to her that the money came from the Claimant. According to her, the mortgage came from her own earnings from her job. She has worked full time for the last eighteen years since she graduated. She says she does not know about the dealings with the Claimant other than the fact that her husband dealt with the Claimant and was friendly with the Claimant and that the Claimant needed his assistance like many of his friends.

188. In cross-examination the Second Defendant described how the First Defendant was an electronic engineer by background and had worked in a factory in Salford. She said that he had had many business enterprises including as a designer, and as an owner of a take away restaurant. She on the other hand had worked full time in employment throughout. When asked about the answers given to the request for Further Information on 17th March 2003 (where it is said that the monies for the deposit on Sullivan Court were the Defendants' money since the loan monies to the First Defendant had become his in accordance with the loan from the Claimant and the First Defendant was free to use the loan money as he wished) she persisted in saying that she had not said that the deposit came from the loaned money and as far as she was concerned, she was committed to the mortgage. As far as sourcing the deposit was concerned she said this sort of money did not seem beyond her resources. She said the deposit was from our own funds although it is ten years ago. She went on to say that she was aware that there was a transaction with the Claimant in 1993 and that she would have been aware of it at the time. But, she said, at that time her career was taking off as a Project Manager in a large tour operator. She said that she had obtained a position where she felt able to move to a new family house. The business side of matters was she said down to her husband, he was doing the thinking. The money, she said, was a personal loan to the First Defendant, as she understood it. She did not believe there were any particular terms. The Claimant could have it back when she wanted. It was a matter of friendship.

189. When asked how the money was going to be paid back when the Claimant asked for it if it was invested in property, she said that you can always raise loans when you have property. Asked why Sullivan Court was in her name, she said that the mortgage was raised based on her salary and that the name could always be changed. And then she said it was her husband's business and she did not know the source of the deposits. Her name was on the mortgage because of her salary. When the claim arose, she said her husband was dealing with it and as far as she was aware the money had been paid back. She said she did not know there was anything untoward going on and she trusted her husband implicitly.

188. In answer to questions from myself about the offer of the advance to both her and her husband from Mortgage Express on 22nd December 1998 she said that her income was the source of the deposit.

189. The Second Defendant appeared to me to give her evidence orally with caution and care. I can draw no conclusions from her demeanour.

190. The undisputed facts are that on and between 29th March 1994 and 24th November 1994, and excluding Woodhill Drive, some £16,500 were invested as deposits for Sullivan Court, Wendover Court and Waverley Gardens. Of these £10,000 had been invested in Sullivan Court. Moreover Sullivan Court was bought without a mortgage initially, the whole purchase price being paid in cash. £50,000 was vastly in excess of the Second Defendant's income in March 1994 and it is not credible that she thought that either she or her husband had access to such funds on their own. Whether or not they would get a mortgage may not have appeared to them to be a great risk but nevertheless a risk it was. I cannot accept that the Second Defendant was as little involved in the matter as she says.

191. I find that the Second Defendant knew that the money used to pay for Sullivan Court came from the Claimant. Since I have rejected the First Defendant's evidence that there was a loan agreement in late 1993 or early 1994 between him and the Claimant, and since I have accepted the Claimant's evidence that she was actively involved in the purchase of Sullivan Court as well as giving instructions, if I accept the Second Defendants evidence that she was told that the money was a personal loan by the Claimant to the First Defendant without there being any particular terms other than that she could have it back when she wanted, then I would have to find that the First Defendant had lied to the Second Defendant about the agreement between himself and the Claimant.

192. I do not accept that the First Defendant did lie to the Second Defendant. I think that the Second Defendant would have been very sceptical had she been told that the Claimant, a refugee widow with dependent children, had made such an unconditional loan, once he had invested so much of it in buying houses. I think she would have been concerned about the ability of the First Defendant to repay it. I find that the Second Defendant did know that the source of the funds for Sullivan Court, and for that matter the other properties (subject to further investigation in relation to Woodhill Drive) was money entrusted by the Claimant to the First Defendant, and not lent to him.

193. Further, the investment transactions described by the Second Defendant in which she was involved, she says were carried out entirely by the First Defendant on her behalf. He was therefore her agent for this purpose. His knowledge is to be attributed to her. I would in any event have held that it would unconscionable for her to retain any beneficial interest in property obtained in breach of trust by the First Defendant in the circumstances of this case, if I had not found that she had actual knowledge.

194. In *Bank of Credit and Commerce International (Overseas) Limited v. Akindele* [2001] C h 437, 455E, having reviewed the authorities, Nourse LJ with whom the other members of the court agreed stated

> "... I have come to the view just as there is now a single test of dishonesty for knowing assistance so ought there to be a single test of knowledge for knowing receipt. The recipient state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt."

195. In that case, the Defendant had made arrangements with BCCI which were artificial in nature and gave him the benefit of a high rate of interest. However, there was no evidence that the Defendant was aware of the internal arrangements within the bank which led to the payment to him of the sums he received. On the facts it was held that there was not sufficient reason for the Defendant in that case to question the propriety of the transaction which he had entered into some two years earlier at a time when no one outside the bank had reason to doubt the integrity of its management and in a form which the Defendant had no reason to question.

196. In the present case the arrangement which the First Defendant has described to me as the one which the Claimant proposed to him and to which he agreed is so manifestly disadvantageous to her that a reasonable and honest person familiar with business matters would be bound to question it. The Second Defendant is an intelligent businesswoman. If she had thought that her husband had really agreed such terms with the Claimant, and then invested the money in houses, she would have definitely thought that something untoward was going on.

197. Accordingly I find that the claim against the Second Defendant in respect of the property Sullivan Court and Copley Close is made good. She holds the legal titles on trust for the Claimant.

198. Whether or not there are any other properties acquired in the name of the Second Defendant in respect of which a trust exists in favour of the Claimant, and if so the extent of the Claimant's interest, will appear on the taking of the account.

ILLEGALITY

199. As mentioned above, at no stage in these proceedings has the First Defendant alleged any illegality on the part of the Claimant as a defence to these proceedings. Nor do the Defendants make any submissions on the equitable doctrine that a Claimant must come to court with clean hands. However, it is clear that the First Defendant was helping the Claimant to avoid the consequences of the freeze on Iraqi assets. As I understand the position, sanctions against Iraq were lifted in 2003 after the second Gulf War. I have considered whether this is a case where the transaction is manifestly illegal so that the court should of its own motion refuse the relief sought on that account. The authorities were recently considered in *Pickering v McConville* [2003] EWCA Civ 554. The authorities make clear that the court should not decline to enforce a transaction on grounds of illegality unless it is satisfied that to refuse enforcement on grounds of the perceived illegality would not involve any palpable risk of injustice to the claimant by reason of her inability to rebut the illegality by adducing additional evidence or making submissions. The legislation on sanctions against Iraq has not been put before me. I do not have to hand any of the Treasury Directions under the Emergency Laws (Re-Enactment & Repeals) Act 1964. As I understand at least one form of the legislation (The Iraq (United Nations Sanctions) Order 2000 SI 2000 No 3241), the prohibitions are not absolute, but are subject to possible licences from the Treasury. The freeze on Iraqi held assets must have created great difficulties to otherwise honest people finding themselves persecuted by the former regime in Iraq. It was presumably not the purpose of the UN sanctions to render destitute those made widows, orphans and refugees by that regime. How this result was in practice avoided in relation to Iraqi refugees in the UK I do not know. In the absence of submissions I think that there would be a serious risk of injustice if I were to decline to enforce the claim of my own motion. In any event, I have not been able to form even a preliminary view as to what would be the proper response by the court to the illegal avoidance of sanctions which comes to light at a time when the sanctions are no longer in force.

FORM OF ORDER

200. I will invite counsel to put forward drafts of the order that should be made at this stage. This should include directions pursuant to the Practice Direction to CPR Part 40, para 1.1. Depending upon what the issues are, it may be appropriate for some issues to be determined in a further application to myself, and others to be determined by a Master.

201. I shall after judgment also consider what interest should be awarded to the Claimant in respect of the money judgment.