Case No: F10CL303

IN THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building,
Strand,
London, WC2A 2LL

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Before:

HIS HONOUR JUDGE GERALD

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Between:

HASSAN KHAN	**Claimant/Part 20 Defendant**
- and -	
HABIB KHAN	**Defendant/Part 20 Claimant**

- -
- -

MR WILLIAM SKJOTT (instructed by JPC Law for the **Claimant/Part 20 Defendant**
MR SIMON BUTLER (instructed by Alexander Shaw Solicitors) for the **Defendant/Part 20 Claimant**

- -

Approved Judgment

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HIS HONOUR JUDGE GERALD:

1. For reasons which will become apparent, this has been a rather unusual and perplexing case which has been difficult if not impossible to understand, in which the claimant sues his younger brother, the defendant, for £194,021.28 apparently in debt, the defendant counterclaiming for an account which is now restricted to £41,000.

2. Certainly until around 2017, there was a close bond between the defendant, they being two brothers in a Pakistani family of 11 children. The claimant is the eldest son, now in his late fifties, so occupying the not unusual traditional role of assuming especial responsibility for his younger siblings within the family.

3. Following the death of their father in 1987, the claimant treated the defendant, now in his mid to late 40s, as his own son. And the two had a particularly close and trusting relationship. For reasons which will become apparent, the claimant occupied a pivotal role in managing the defendant's finances in London, certainly until 2015/2016.

4. The claimant has lived in London since childhood. He is a well-educated, fluent English-speaking accountant who has held quite senior roles in various companies.

5. The defendant is illiterate Urdu and Pashtu speaker, having left school in Pakistan aged 14 or so. He moved to Spain in around 1996. He came to London a few years later, where he remained until returning to Spain in 2003, then returning to London in 2006, only to be deported back to Spain in 2009 where he remained until returning to London in May 2015, where he has lived ever since.

6. The defendant has a smattering of English, as he does work in London and has passed low level tests such as being a minicab driver and security guard. However, whenever legal or other documents have needed his involvement or to be signed, at all material times, certainly until 2016/2017, the defendant relied upon his elder brother, the claimant, and basically signed documents where his older brother told him to. Those documents range from documents relating to the purchase of various properties, their rental, opening bank accounts, managing the monies within those accounts, applying for visas, and such like.

7. Given the claimant's qualification and his fluency in English and his position within the family and specifically in relation to the defendant as his as it were surrogate father, it was natural that the claimant assumed a central role in the defendant's life so far as his English assets were concerned. As the defendant said, which I accept, in broad terms he did what his elder brother told him to.

8. The claim for repayment of a so-called debt of £194,021.28 is broken down in three ways. First, £167,840 is claimed in respect of what is described as a property loan. As will become apparent, it is no such thing. Secondly, a £17,530 loan to purchase a property in Pakistan. And, thirdly, £8,651.28 which itself comprises 3 separate alleged loans. I will deal with each in turn, adopting some of the definitions or shorthand which have been used in the pleadings and during the course of these proceedings.

The £167,840 "property loan"

9. The property loan started life in the claimant's consolidate particulars of claim issued on 16th January 2019, in which it was baldly claimed that £144,021 was claimed against the defendant being the amount "currently outstanding and owed to the claimant" relating to an original loan of £145,000 which had allegedly been made to the defendant to assist him with the purchase of a property called 128 Church Lane which had been purchased in these brothers' joint names in 2001. In his amended consolidated particulars of claim dated 12th June 2020 that amount has been increased to £167,840, a schedule apparently particularising the £144.021 having been provided in October 2019 with an updated schedule provided shortly before commencement of trial showing the alleged amount of £167,840.

10. Anyone reading the original consolidated particulars of claim would conclude that the £144,021 represented the unpaid balance of an original alleged loan of £140,000 lent by the claimant to the defendant in 2001 for the purchase of 128 Church Lane. However, it is nothing of the sort. The £144,021 (now £167,840) represents a sort of running account allegedly based upon the claimant's contemporaneous computer-based accounting which he claims that he maintained of monies or some of the monies passing between the two brothers, which has been sort of retrofitted to take into account a decision made by the Family Courts in November 2015, to which the defendant was also a party, which determined the beneficial ownership of 128 Church Lane.

11. This so-called running account comprises not only money allegedly lent by the claimant to the defendant, but also covers claims for unpaid rent and various other things relating not only to the defendant's occupation of 128 Church Lane, but also a prior occupation of another property which I will come to in a moment.

12. Before explaining the schedule in a little more detail so that one can understand what actually is being claimed, it is necessary to set out the essentially undisputed background to how this claim came to be made. All of it centres upon the purchase of 128 Church Lane. As I have said, it was purchased in 2001 in the joint names of the claimant and the defendant for, it seems, around £195,000. Certainly it was purchased partly with the proceeds of sale of a different property at 37 Sunnymede Road which the defendant had jointly purchased with another brother, Tariq. Certainly another part of the purchase monies, either £145,000 (as the claimant asserts in these proceedings) or £120,000 to £130,000 (as the defendant counter asserts in these proceedings) was provided by the claimant.

13. In November 2013 the claimant's then wife petitioned for divorce. On 27th November 2015 Deputy District Judge Crowther determined that 128 Church Lane was beneficially owned by the claimant and defendant jointly. As I have already said, both the claimant and defendant were parties to that aspect of the ancillary relief dispute with the claimant's then wife.

14. Before the Family Court, it was the common sworn position of the claimant and defendant that 128 Church Lane was solely and absolutely owned by the defendant and that any monies which had been provided to initially assist with its purchase had long since been reimbursed to the claimant by the defendant. It was therefore their joint position that no monies were outstanding between the two of them at that point in time, namely November 2015. Furthermore, in subsequent witness statements relating to the

ancillary relief claim of his then wife, it was the claimant's position that it was he, the claimant, who owed the defendant money, not the other way round.

15. From the time of purchase of 128 Church Lane in 2001 until July 2015, when the defendant moved into 128 Church Lane with his family having returned to England from Spain in May 2015, it had been rented out at an average of £15,000 per year. The claimant, being the English speaker and the accountant and the older brother and based in London whilst the defendant was predominantly in Spain, handled all of the material paperwork, albeit that the defendant signed the odd tenancy agreement, and also managed the collection of payment of the rent into the bank accounts – initially Santander, then Nationwide or Woolwich, and finally Barclays – which were all in the sole name of the defendant.

16. That, of course, would all be consistent with the defendant being the sole owner of the property, or at any rate it being agreed between the brothers that the only individual entitled to the rental income was the defendant irrespective of the actual legal or beneficial ownership. Each of those accounts was opened by the defendant with the assistance of the claimant. In other words, the claimant being the English speaker would arrange for the accounts to be opened and get the defendant to sign the necessary documentation, the defendant being able to write his signature in English, which is not uncommon in this particular community.

17. During this approximately 14-year period from 2001 until about July 2015, around £200,000 of rent was raised and received from this property. All or most of it was, it would seem, paid into one or other of the rent accounts, or the accounts in the sole name of the defendant into which the money was paid. Throughout the majority of this period the defendant was overseas and it was the claimant who managed and had access to the accounts. At the time of the Family Court decision, November 2015 there was at least £41,000 in that account. Sometime during 2016 the claimant (to use the word used during the course of these proceedings) "emptied" that account and took the £41,000 for himself. That forms the basis of the counterclaim.

18. Consistent with their common position before the Family Court as to the defendant being the sole absolute owner of 128 Church Lane, it would follow that the only person entitled to the money in the rent account, specifically the Barclays account in which the £41,000 resided at the time of the Family Court decision, would be solely owned by the defendant.

19. In the claimant's form E and witness statements and general position before the Family Court both before and after the November 2015 decision, there was no suggestion of any nature whatsoever either that the claimant had any interest in what I have described as the rent account, specifically the £41,000 plus then standing to its credit, or that the defendant owed the claimant any money at all, whether it be rent or anything else. That for a Family Court would be highly material, because if money is owed to a divorcing party that, if recoverable, is treated as an asset of that individual and is taken into account in the ultimate ancillary relief consideration and order.

20. I now return to the schedule to explain how the originally £144,021 but now £167,840 is made up, and I should say, as I have already alluded to, that it is rather difficult to understand, and certainly a high degree of sophisticated and rather obscure mental gymnastics is required to understand this document prepared by an accountant, namely

the claimant. I should say that the starting position of £144,021 was nowhere explained in the original consolidated particulars of claim other than an assertion that that was what remained as the unpaid balance of the original alleged loan of £145,000. And indeed nowhere in the present consolidated particulars of claim is it very clearly set out or explained. Indeed I think I am right in saying that it does not actually form a formal part of any of the particulars of claim at all. Be that as it may, I will now do my best to try to explain it.

21. The starting-off point is the so-called loan of £145,000 made to purchase 128 Church Lane in 2001. On the basis of the claimant's evidence before me, that remained outstanding between the brothers in 2015/2016, it being recalled that the opposite was stated to the Family Court. The £145,000 shown as being advanced in 2001 is then retrofitted or adjusted by deduction of £100,000 as at 2001, making a net balance of around £45,000.

22. It is the claimant's case that following the decision of the Family Court in about October 2016 he reached an agreement with his brother, the defendant, that £100,000 should be knocked off the amount outstanding to reflect the fact that the Family Court had determined that they were 50/50 owners. That assertion is not pleaded until the 12th June 2020 amended consolidated particulars of claim, namely some 3½ or 4 years after the agreement is alleged to have been made, albeit that it is rather Delphically referred to in the not very comprehensible schedule served in October 2019. And, of course, it involves an acceptance by the claimant that he deceived the Family Court.

23. The next element of the schedule is a claim for £142,483 as representing 50% or one half of the rent of 128 Church Lane from 2001 to 2020. The bald assertion here is that because the Family Court had decided that the brothers were 50/50 owners, it followed that the defendant was liable to pay the claimant one half of the rent which had actually been received until he occupied the property in July 2015, thereafter he being liable for the usual occupation rent of one of two joint owners.

24. This element is something which has also been retro-adjusted or retrofitted sometime subsequent to the Family Court decision, it not being clear when. Fundamentally, it forms no part of the claimant's pleaded case or witness statement or other evidence that at any stage did he agree with the defendant that the position relating to the rent which had actually been collected from tenants into the rental accounts held in the defendant's sole name should be adjusted or reallocated at all.

25. Neither was there any suggestion that there had been any agreement that the defendant should from his occupation in July 2015 onwards pay rent in relation to his occupation of the property, nor indeed was there any suggestion that the defendant had ousted or excluded the claimant from his occupation.

26. More fundamentally, this claim is also in direct contradiction of the common position before the Family Court not only relating to the assertion that the defendant was the sole absolute owner, but also in various witness statements of the claimant that he, the claimant, had no claim in relation to any rental or other monies in relation to 128 Church Lane.

27. The third element of this schedule comprises £30,800, being one half of the rent of 17 Wood Lane, which is owned by the claimant and, it seems, the defendant, which the

defendant had occupied between 2006 and 2009. I say "it seems" it was owned by the claimant and the defendant, but happily it is not something I have to consider. But in the family proceedings it was the claimant's position that it was owned 50/50, but the claimant now seems to be claiming that the claimant owns it in its entirety and is claiming the entirety of the rent apparently due in respect of that property.

28. This claim for rent again is in direct contradiction to the claimant's position in the Family Court, where there is no suggestion that there is any money owing from the defendant to the claimant in respect of rent or anything else in respect of Wood Lane.

29. The fourth element is a claim for a total of £63,200 of loans which apparently have been made from the claimant to the defendant or his wife from the period 2002 to 2017. These are listed in the amended consolidated particulars of claim, which it will be recalled are dated 12th June 2020, there being no clear claim in relation to any of these sums prior to that date, albeit that I am told they are somehow embedded somewhere in the figures in the schedule which I am referring to.

30. Fifthly, a total of £84,647 interest accrued on the running total is claimed against the defendant on the footing that it had been agreed at the outset in 2001 that the defendant would pay the amount which the claimant had to pay on his Santander or other loan, which he the claimant had had to raise in order to provide the funding for the purchase of 128 Church Lane.

31. This again, of course, is in direct contradiction to everything which was said in the Family Court, not least because there was no suggestion of any loan at all to the defendant. Furthermore, it was the common ground of both brothers that it was the defendant and not the claimant who had ultimately provided the purchase monies, from which (as night follows day) it would follow that if, which the defendant certainly accepted, the claimant provided some funds to facilitate the purchase, all had been repaid by the defendant a long time ago.

32. The final element represents credits of £198,292. These credits cover the whole period from 2001 until 2017 and are described in three different ways. They are described as repayment of £178,027. That, as far as I understood it, represents monies which were primarily withdrawn by the claimant from the rent account in the defendant's sole name, but some money came from elsewhere. Secondly, £14,400 which was received by the claimant from the defendant during the period 2006-2008 in relation to discharging some of the expenses relating to the defendant's occupation of Wood Lane – albeit it is not very clear where that money came from, whether it is from the rent account in the defendant's sole name or elsewhere. Then, thirdly, there are repayments of £5,865. The point to bear in mind here is that as far as I understood the evidence the overwhelming majority of this money came from accounts in the defendant's sole name which the claimant had access to in respect of which the majority of the bank statements, so far as I have been told, are no longer available.

33. There is a further sum which is omitted from the schedule which is £41,000. As I have said, £178,027 is in a line or row described as "Repaid", and that goes from 2001 to 2015. Sums were taken out each year – I have no idea when they were actually taken – in varying amounts. The final sum was £6,650 taken out in 2015. The following year, 2016, the claimant took out the £41,000 to which I have already referred. I will come back to that in a moment, but that is omitted it would appear from this statement.

34. In relation to this aspect of the claimant's claim it essentially depends on the credibility of the respective parties, the claimant bearing the burden of proof.

35. To describe the amount as a "debt" is divorced from reality and truth, because even taking the claimant's evidence at face value, and bearing in mind that he is an accountant and has been for many years in senior positions at respectable companies, the only way in which this document could properly be described is some form of self-serving account. I say "account" in the true sense which a lawyer would understand.

36. The reason it is self-serving is because it is essentially a figment of the claimant's imagination. What he has done is at some stage subsequent to the divorce proceedings decided that he is going to reallocate, to recalculate on an annual basis the various monies which he says are owed by the defendant, but they are not owed in the sense of repaying of a loan or advance because the majority of the monies claimed relate to assertions of entitlement to be paid for rent, which are then set off by monies which the claimant himself has taken from the rent account which was managed by the defendant.

37. In addition to that, there are all sorts of other bits and pieces which are included, none of which would properly be regarded, or could in any way be linked to the so-called alleged original £145,000 loan back in 2001.

38. If, which I do not accept for a moment, there was any agreement by the defendant that interest would be paid upon the original £145,000 (which again I do not accept), there is no possible basis for that to be applied to any of the monies in this, as I have perhaps rather pejoratively described it, self-serving account, for the simple reason that there is no evidence or suggestion anywhere that the defendant has ever agreed to pay the claimant any rent in respect of the property from 2001 onwards, or otherwise, and in any event, even if he had, quite how that could possibly be regarded as triggering an obligation to pay interest reflective of the claimant's borrowing from Santander (or whoever he was borrowing the money from) defeats me.

39. I am unable to accept that any of these sums, whether they be called debts or otherwise, are liable to be paid by the defendant to the claimant. As I have said, this depends principally upon the credibility of the claimant. First, all of these allegations are in direct contradiction to the claimant's position in the Family Court, where he confirmed on oath that nothing was due from the defendant to the claimant. This can be viewed in a number of ways. Either so far as the base allegation of £145,000 plus interest loan is concerned it is *res judicata*. It was an essential aspect of the case before the learned deputy district judge that there was no money outstanding between the brothers and there was no suggestion that there had ever been any agreement relating to an interest-bearing loan, and the learned deputy district judge decided that it was impossible because there was no such evidence, and furthermore, alternatively, this is a straight abuse of process for the claimant to now re-litigate something which is in direct contradiction to that which he said before the deputy district judge and was rejected by her.

40. But it is not actually necessary to rely upon either of those principles, because the claimant's position before me is in such direct contradiction to that which he said previously that I am simply unable to accept a word of what he says to me which is different from that which his brother, the defendant, says.

41. I should also say that in closing submissions the claimant's counsel adopted a rather disingenuous position of saying that the defendant was estopped from asserting that any funding of the purchase of 128 Church Lane had been repaid by him by reason of that having been disposed of by the deputy district judge, but that the claimant for some reason was not estopped from asserting that indeed there had been such an interest-bearing loan. Quite why what is sauce for the gander should not be sauce for the goose I do not know. Be that as it may, I have no doubt that the claimant is not telling the truth in relation to there being any loan or any outstanding loan in relation to the purchase of 128 Church Lane.

42. Drilling down in a little more detail, I am unable to accept that there was any agreement, let alone discussion subsequent to the family decision in October 2016 to the effect that £100,000 credit would be given against the original loan of £145,000. The defendant flatly denied that there had ever been any such discussion. That, in my judgment, had the ring of truth about it. He is illiterate. He is not well versed in financial matters. Quite how and why that would have been done would have been somewhat lost upon him. He relied upon the claimant, his well-educated accountant elder brother, who he trusted, to sort matters out. Furthermore, it was the defendant's position in the Family Court and before me that any funding which had been provided to facilitate the purchase had long been reimbursed to the claimant. Furthermore, why would there have been any such discussion at all, given that both parties have accepted before me that they are bound by the decision of the Family Court. Surely, I say somewhat rhetorically, the brothers would as between themselves have let sleeping dogs lie.

43. This leads on to the second point which is this rather mind-bending exercise of re-crediting to the defendant £178,027 taken by the claimant mostly from the rent accounts in the defendant's sole name, re-crediting that to the defendant on an annual basis, and then charging back to the defendant one half of the rent which it is said the defendant should have accounted for in relation to 128 Church Lane, being £142,183. At no stage until provision of the schedule in October 2019 was there any suggestion that this exercise should be gone through, and indeed at no stage in the family proceedings or subsequently has it ever been suggested by the claimant that either before or after that decision there was any agreement with his brother that the claimant should be entitled to one half of the rent actually received or actually collected in relation to 128 Church Lane, or that the defendant should be liable to pay one half of the rent subsequent to his occupation in July 2015. As I have already said, there is no evidence or suggestion by the claimant that he and his brother had in October 2016 or otherwise agreed that the position previously should be re-jigged to take into account what had been decided by the Family Court.

44. In my judgment, what the claimant has done is an illustration of his approach to managing the defendant's financial affairs which reinforces the evidence the defendant gave which is essentially that the claimant just sorts things out as he decides and tells the defendant what to agree to. Here there is no evidential basis upon which the claimant should be obligated to repay all of the money which he has taken from the account over the years, or that the defendant should be liable to pay one half of the rent paid over the years.

45. What the claimant has done at some stage – which I do not know when but presumably before issuance of these proceedings, but certainly subsequent to the parties falling out sometime in 2017 – is that he has decided "This is what the Family Court decided, and

therefore it seems to me that this is what would be sensible and fair to do." That does not follow. I cannot see why, irrespective of what the Family Court decided, that this court should not approach matters on the footing that it was at all material times agreed between the parties that, as was the case, the defendant was entitled to the entirety of the rental income from 128 Church Lane right up until the time when the defendant himself went into occupation, and that over the years up until the end of 2015 there have been various withdrawals from that account by the claimant which are now undocumented and impossible to work out but which were largely orchestrated by him in respect of which the defendant now makes no complaint.

46. Furthermore, I can see no reason why this court should not take the approach that the defendant as one of two joint owners was not entitled to go into occupation in July 2015, as he did, with no obligation to account to the claimant for any rent in relation to his occupation of the property. In this regard I should say that there has been no suggestion to me that the defendant has in any way ousted or excluded the claimant. As far as I understand it, and as I say no submissions to the contrary have been made to me, the usual position is that all beneficial owners of real estate are entitled to occupy it. Sometimes one does, sometimes both do, sometimes neither do. But there is only an obligation to account or pay rent if either there has been an express agreement to that effect, or if one of two joint tenants has excluded or ousted the other from occupation. That is not this case. That has not been suggested. It is not pleaded.

47. Furthermore, in the claimant's own witness statements in the family proceedings he has made clear that there is no expectation of rent from the defendant. Indeed, he goes further to say that it is he, the claimant, who owes the defendant some £225,000 in relation to 128 Church Lane because he says in some convoluted way that because it is in truth the defendant who owns the entirety of 128 Church Lane, notwithstanding the decision of the Family Court, i.e. in 2016 subsequent to that decision, the claimant must pay to the defendant one half of its then value, being £225,000. That to my mind is just mental gymnastics which is all designed to try to buttress what he has previously said, and was rejected by the Family Court, but to portray him as a man of honour as regards his brother, so denuding the size of his estate by £225,000 in order to reduce that which would be available to his former wife. That, of course, was all rejected by the Family Court.

48. This leads me on to the third point, which relates to a claim for rent in relation to 17 Wood Lane. As with all of the other aspects of this claim which I have dealt with to date, at no stage until October 2019 (service of the schedule) was there any suggestion as far as I can see that the defendant should be paying rent in relation to his occupation of Wood Lane from 2006 to 2009. The strange thing here, as I have already said, is that some £14,400 was paid by the claimant to the defendant in relation to expenses regarding this property for that period of time. I say that, because that is what is in the schedule. I suspect that what in reality happened is that the claimant utilised money in the rent account held in the defendant's sole name to pay off expenses in relation to Wood Lane. Be that as it may, it is common ground that those monies were provided from the defendant's resources to the claimant. Where that is done, that strongly indicates that, as in many families, a member of that family is permitted to occupy accommodation which is owned by another member of the family on the footing that the person in occupation will defray expenses, and to wait until 10 years after vacation

of the property, 13 years after entering into occupation of the property, to first lay claim to rent is simply not credible.

49. Here, of course, one must remind oneself of what the claimant said in the family proceedings. What he said in his 26th January 2016 witness statement is:

> "On my form E I have stated that I owe £10,000 to my sister and produced evidence to support this in court papers, and £1,000 to my brother Tariq. In addition, I have to make good in full the furniture belonging to my brother which is being used by tenants at 17 Wood Lane c. £8,000. Other obligations have been stated above in terms loan/mortgage and balance of legal costs for divorce proceedings.
>
> "I have an agreement with my brother since 2006 in respect of 17 Wood Lane which I am going to have to keep to which will mean that I will have to share the net proceeds of this property with him c. £22,000. I cannot get away from this obligation. I would need to pay him £111,000."

There is no suggestion that it is the defendant who owes the claimant money for Wood Lane, let alone any reference to any liability to pay rent. It is in that witness statement that there is also reference to the claimant strangely owing the defendant £225,000 in relation to the half share of 128 Church Lane which the court said was the claimant's and not the defendant's.

50. I now move to the further loans of some £63,000 which are first adumbrated with any clarity in the amended consolidated particulars of claim dated 12th June 2020. As I have said, these list sums of money paid between 2002 and 2017. That is the first time in 18 years since 2002 (being the first alleged payment) that these have been listed. I simply find this extraordinary and incredible and am unable to believe and accept that if any of these monies were advanced, they were not at some stage somehow repaid or reimbursed to the claimant.

51. Firstly, there is no suggestion in any of the divorce proceedings that there was anything outstanding from the defendant, whether monies were paid to the defendant or from his wife, to the claimant. Secondly, one of the major elements of the claimant's evidence has been that the defendant had no money. He was this illiterate soul originally from Pakistan residing in Spain and then England variously acting as a labourer or such like. He had no money and therefore the claimant had to keep advancing money for him and his wife. The problem with that is that the defendant was, as the claimant previously had stated under oath, the sole and absolute owner of 128 Church Lane in respect of which, as I indicated earlier, over £200,000 was received into the defendant's sole bank account by way of rent. Therefore, it seems to me that if these sums were provided by the claimant to the defendant, or on his behalf, either they would have been or were reimbursed to the claimant from the joint account, or they would have been – the claimant being an accountant who had full access to that account – or they were from some other sources which I do not know about.

52. That deals with the key elements of this aspect of what is described as the property loan, but I would like to now more generally make observations on the claimant's credibility,

it being self-evident from what I have said so far that I did not find him reliable, frank, honest, or indeed coherent. At many times during his cross-examination it was almost impossible to understand what he was saying. At many times he seemed to misunderstand the question and get it completely upside down. As I said at the very outset, I have struggled to understand the claimant's case. But in relation to his general credibility, what I say is as follows.

53. First, the essence of his case before me is that I must accept that he lied to the Family Court. That, of course, is quite a strong thing to say, and before the claimant answered any of the cross-examination relating to that matter he was given the customary warning against self-incrimination, but blithely continued (after I think taking advice) that he was perfectly happy to admit to perjuring himself before the Family Court. If he perjured himself there, why should I believe him now? But I do not accept he did. Furthermore, it was he who was in control as, as it were, paterfamilias, and it was he who was in control of the rental monies from 128 Church Lane and of the defendant's bank accounts, and it was the claimant who must have taken at least £200,000 out of that account, and at no stage has that been properly accounted for. He over the years had all of the documentation relating to that as far as I can tell, but the vast majority of those documents have now been lost.

54. That leads on, secondly, to the schedule and the pleading. As I said earlier, this in my judgment is an exercise in fantasy. It is simply creating a schedule out of thin air. It is based upon a straightforward lie in relation to there being any outstanding loan. It is then fictionalised by deduction of £100,000 credit, and then re-crediting monies taken by the claimant and then being debited in relation to various alleged rental obligations of the defendant, which is extremely difficult to follow but is simply unsupported by evidence. It is a fantasy, because it is something which occurred in the claimant's head without any factual or legal basis.

55. Next, the schedule to which I have referred (page 17A of the core bundle) is, I am told, based upon what has been described as a contemporaneous running schedule, in other words it was a schedule which is to be found in bundle D, pages 598-616, which is supposed to show the monthly receipts and outgoings between the two brothers. The problem with that so-called running schedule is that it also has been retrofitted by the £100,000 deduction and all sorts of other bits and pieces which simply would not have been contemporaneous, in the sense of being done at the time. Virtually all of the underlying documentation has disappeared.

56. That leads on to the next point, which I regard as also an important point seriously damaging the claimant's credibility, and that is that he is an accountant. Even as we speak, even as I give judgment, there is no suggestion that the claimant at any stage has informed the Revenue that he has at any stage been entitled to rental income from 128 Church Lane. Neither, of course, has the defendant. But it is the claimant who is the accountant, who if he was entitled at any stage from 2001 to 2019 or 2020 to any of that rental income it is he who should have been frank and honest and included those in his tax returns, but he has not done that. Of course, it is quite likely that, given the defendant has received all of this money and appears to have been entitled to it so far as I can tell, if the Revenue is notified of this he will face a very large tax bill. But I am not going to get into that, because this relates to the claimant's credibility.

57. The next point I would make is that this aspect of the claim is essentially non-justiciable. Not only is the running account incomplete because it is not a full and accurate record of all the transactions and flowing of money passing between the brothers, many of the descriptions on it are simply wrong.

58. For example, it refers to an advance or loan of a certain amount of money, there being one for example of £800 (which seems very small but is just an illustration) which in actual fact was money which the defendant had provided to the claimant for onward transmission to his wife in Spain and Pakistan. So there nobody would sensibly regard that as being an advance or a loan or a repayment of that because it was not, but this accountant does describe it in that way. That is a very small illustration of how impossible it is to regard this as a true running account of everything which happened between the parties.

59. As the learned deputy district judge said in her decision back in 2015:

> "The documentation, rightly described by the wife's counsel as 'incomplete, late and piecemeal' makes it impossible to carry out a thorough forensic examination of Habib's finances, so I can only make general findings."

The same can be said of the claimant's finances. No documents which I have been taken to have emerged since the learned deputy district judge's findings to make matters any clearer.

60. I then go back to the £41,000 taken from the claimant from the defendant's account in 2016. If one looks at the line or row describing the £178,027, as the claimant's counsel accepted, each entry appears to be on the basis that it is a cash receipt. In other words, it is money which has actually been received by the claimant from the defendant, presumably from the rent accounts. The claimant quite properly was therefore asked to accept that there was a further £41,000 which it is accepted was withdrawn in 2016. He accepted that. He was then asked why that is not on his schedule, to which his answer was that that had somehow been accrued or taken into account of in the previous years. The minute that is stated it is simply impossible to understand how an accountant could say such a thing. It makes no sense. How do you know before 2016 that you are going to withdraw £41,000 in 2016? You do not know that. If a schedule is prepared in respect of this line on the basis that it appears to be cash payments or receipts, how could that possibly include this sum which is withdrawn in 2016? The furthest which can be said is that it is some strange retrofitting, retrospective accrual of something which was done later.

61. In this respect I find not only that this is an illustration of the incredibility and incomprehensibility of the claimant's evidence, but also as a matter of fact that there was an additional £41,000 taken in 2016 by the claimant from the defendant's account which the defendant did not agree to and was not aware of and therefore which the claimant owes the defendant and must repay him. Had the bank statements and material documentation been to hand, it would have been possible to work out whether or not that £41,000 had somehow been included in the previous entries in this schedule, but they are not available and that is the responsibility of the claimant as the keeper of the accounts, as it were.

62. In reaching these conclusions, I have not overlooked the evidence of Waheeda, the claimant's niece who gave evidence, and also of her husband. However, I do not find that their evidence is of any assistance in supporting the claimant's case.

63. The final point I would make about the so-called property loans is that virtually all of them are, of course, statute-barred because they relate to alleged loans, which of course did not take place, most of which go back to 6 years before issuance of the proceedings, but not all. However, I do not need to and will not make any specific findings in relation to those because I am simply unable to accept that any of the sums claimed, whether they be alleged debts properly so-called or some other form of relief, are due and owing from the defendant to the claimant.

The £17,530 "loan" to purchase property in Pakistan

64. The next claim relates to £17,530 which the claimant, it is accepted, provided to the defendant from the joint account he held with his then wife in March 2010. It is the claimant's evidence and case that that money was provided to the defendant for the specific purpose of the defendant purchasing certain properties in Pakistan, which the defendant wrongly did in his own name and has since sold one of those plots and retained the proceeds of sale and therefore now is obligated to reimburse to the claimant the £17,530.

65. The defendant's position, which I accept, is that he asked his brother, the claimant, to transfer £17,530 to him in order to enable the defendant to purchase some property in Pakistan, which he did. The defendant rightly accepts that that £17,530 did appear to come from a joint account of the claimant. However, the defendant was not to know that it was not his, the defendant's, money. He asked his elder brother to transfer £17,530 of his, i.e. the defendant's money. The claimant had full access to and control of the defendant's rent accounts. Certainly there was plenty of money, as far as I can tell, on that account.

66. Therefore, there is no reason to suppose that so far as the defendant was aware, and indeed was the case back in March 2010, that that money was not the defendant's money. Where particularly an educated accountant is, as it were, controlling the family finances, not just because his younger brother is illiterate but also because he is based in Pakistan, it seems to me that it is incumbent upon him to be extremely clear and precise about retaining records. He has not done that. Furthermore, there is no suggestion anywhere in the divorce proceedings that the defendant owes the claimant £17,530, or has purchased any property on behalf of the claimant in Pakistan for the claimant. This is something which, if it was true, should have been disclosed in the family proceedings, but it was not.

The £8,651.28 "loans"

67. This takes me on to the third and final element of the claimant's case which relates to a total of £8,651.28 which he says was provided to the defendant in one of three different ways.

68. First, it is said that in March 2014 just over £11,000 was provided by the claimant to the defendant to discharge liabilities in relation to the claimant's forthcoming marriage in I think October 2014 in Pakistan. It is the claimant's pleaded case that £4,453 was

not spent and therefore must be repaid. This I should say is a somewhat extraordinary claim because, firstly, it was first made some 5 years after the event; secondly, at the time (2014/2015) the claimant had full access to the defendant's rent account. So *if* there was any money due and owing from the defendant to the claimant, the claimant would have just taken it. Thirdly – and this is the most extraordinary part – when asked in cross-examination how that very precise sum was reached, the claimant said that he could "estimate" that that was the amount which had not been expended. That, it seems to me, is an extraordinary basis upon which to make a claim. It should be said that, as far as I am aware, the disclosed receipts relating to this wedding do not total the £11,000-odd which was transferred from the claimant to the defendant, but it is the defendant's position that when the claimant came over to Pakistan he reimbursed his brother whatever was not paid. Be that as it may, it seems to me that it is simply not credible that any sum remains in relation to this element.

69. Next, in November 2014 it is said that the claimant paid to the defendant £3,161.75 in order to facilitate the defendant transferring the properties which it is alleged that the defendant should have purchased in the claimant's name in respect of which he had been provided some 4 years previously the £17,530. I simply do not accept that that was the basis upon which the monies were provided to the defendant because there was never any such agreement, and furthermore any such monies have long since been repaid or reimbursed if they ever were.

70. Finally, in November 2016 it is said that monies were provided to the defendant once he was in England to assist him with getting insurance in order to be a minicab driver, and that the £1,049 remains outstanding. I do not accept that any sum remains outstanding to the claimant.

Generally

71. I should say here that so far as the claimant is concerned one of his explanations as to why he was lying in the Family Division was because he at that stage was under huge pressure and was mentally unstable owing to the family proceedings and so on. There is no evidence to support that. He also went on to say that his misrepresentations were not intentional and therefore he was not lying, even though that is the word I have used. But that in my judgment, if one looks at his witness statements and the evidence which was given in the Family Court, is simply incredible because they are detailed and specific. I cited a few paragraphs from one of them. If one looks at the rest of that witness statement and the other documentation which he submitted to the Family Court, including a form E, it is in my judgment incredible and impossible to accept that he was at that stage in any way suffering from any pressure which would materially affect the accuracy of that which he said. Rather, what he has done in this court before me is lied, repeatedly stating that he did not disclose and accepting that he did not disclose and misled matters in the Family Court when in fact that is not true.

The £41,000 counterclaim

72. I now turn to the counterclaim by the defendant, which in broad terms was a counterclaim for monies received by the claimant from the defendant's rent account. In that respect, it is now confined to recovery of the £41,000 which the claimant as it were emptied from that account in 2016.

73. In my judgment, there is simply no explanation or justification which has been provided to me which would justify the claimant removing that £41,000. I accept the defendant's evidence that that was without his consent, or authority, or knowledge. I therefore find that the claimant must reimburse to the defendant that £41,000. The reason, I suspect, that the defendant has not sought a full account is because, as will be clear from what I have already said, it is now impossible for any sensible account to be prepared because the majority of the documentation is no longer available, for whatever reasons.

74. I therefore dismiss the claimant's claim and order the claimant to pay the defendant £41,000.

[*After further submissions*]

Indemnity Costs

75. In my judgment, indemnity costs should be ordered for the following reasons. First, the starting plank of the claimant's case was that what he had said in the Family Courts was untrue, but that he was telling this court the truth. There was never any prospect that that would succeed, because both parties had adopted a common position in the Family Court which was that there was no outstanding loan between them, and there was no basis in the Family Court and no evidence before me which could justify such a change in position. It is always open to a litigant in later proceedings to assert that he has previously lied or misled or made material errors in previous proceedings, but where such allegations are made under oath, and as I have found are unfounded, it is in my judgment an aspect of the upholding of the administration of justice that such allegations should not be made lightly and should be made with solid evidence, and there was none here.

76. Secondly, a key aspect of the claimant's claim was for payment of rent by the defendant principally in relation to a period when the property at Church Lane had been tenanted to a third party and rent paid into the sole account of the defendant for his sole benefit. That was the position implicitly in the Family Court. In order for that to be unravelled there would have to be a claim that there had been an agreement that, following the family judgment, everything would be undone. There was no such allegation of agreement. Therefore, that aspect of the claimant's case had no pleaded basis.

77. Thirdly, there was no proper basis upon which it could be asserted that rent was due in respect of the occupation of Wood Lane from 2006 to 2009, because it was in total contradiction to that which had been said in the Family Court.

78. This leads on to the next point which is that almost the entirety of the claimant's principal claim is based on a schedule which the claimant himself produced, but for reasons which I have stated it is without factual or legal basis, all or most of it being in flagrant contradiction to the common position adopted between the parties in the Family Court.

79. Finally, in relation to the other elements of the claim pursued, again the overwhelming majority of them were, for reasons I stated in my judgment, in flagrant contradiction to the position adopted in the Family Court. As I have said, a party is always free to recant upon previous positions adopted under oath in court, but such new proceedings as this should not be taken lightly and should only be done on solid bases. That is not the

position here. The reason why I say it should only be done on solid bases is because the upholding of previous determinations by the court is central to the administration of justice, and it is part of its integrity.

80. For a claimant, as in this case, to turn around and seek to undo that which has previously been done without any notification to other affected parties, or any suggestion or invitation that matters should be revisited vide the claimant's former wife's entitlement if the claimant were right in what he had said to further financial relief consequent upon the court having been misled back in 2015 and 2016, absent anything like that it seems to me that these factors are sufficient to take this extremely unusual case out of the norm and to justify the awarding of indemnity costs in favour of the defendant against the claimant.

81. It should be a salutary lesson, and I do to some extent bear in mind that the claimant is the educated sophisticated accountant seeking to recover monies from his illiterate non-English-speaking younger brother in contradiction to a common position which they had adopted in relation to the claimant's ex-wife. That provides an unattractive context for these proceedings and is an albeit small factor for me to take into account. It is difficult to resist the conclusion that the claimant is seeking to utilise and use this court to take advantage of his illiterate younger brother and his insouciance in a way which appears to be similar to that with which he managed his affairs between 2001 and 2015, and indeed 2016 where he admitted taking £41,000 through the agency, I think, of his niece from the defendant's bank account which held rental monies.

This Judgment has been approved by HHJ Gerald.