

HE SAID, SHE SAID: CONFLICTING EVIDENCE AND UNDOCUMENTED AGREEMENTS

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This article considers the decision in *Singh v Singh and others* [2016] EWHC 1432 (Ch) and the court's approach to evidence where one party claims an agreement/arrangement that is contradicted by the formal documents (and which the other side denies). Covertly obtained evidence is also considered.

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INTRODUCTION

How do English courts and tribunals decide claims in which one party seeks to rely on an agreement or arrangement that is: (i) contradicted by the formal documents; and (ii) denied by the other side?

This is a surprisingly common occurrence in commercial disputes, which we sometimes encounter in our own practice. A recent High Court decision provides useful guidance on how the evidence will be assessed in such cases, and reiterates the importance of the parties' contemporary documents and actions.

We consider this case below and highlight some of the key lessons and issues to bear in mind, as informed by wider case law and our own practical experience of such claims.

SINGH V SINGH

In *Singh v Singh and others* [2016] EWHC 1432 (Ch), the claimant asserted joint ownership of two companies which manufactured and supplied window products. He sought a declaration that his shares were held by the first defendant in a constructive trust.

The corporate documents did not support that position. Specifically, a director resignation form and a stock transfer form appeared to show that the claimant had previously surrendered his interest in the first company. There were no documents to show that he had ever held shares in the second company.

The claimant's case was that, for commercial reasons relating to a previous business, he and the first defendant had privately orally agreed that their joint ownership would be concealed from the rest of the world. Externally, therefore, the first defendant would be presented as the sole owner of both companies.

Unsurprisingly, the first defendant denied this. On his case, the claimant had lacked the funds to invest equally in the business or provide security for its obligations. Therefore, as shown by the documents, the claimant had willingly surrendered his ownership stake, thereafter being merely an employee of both companies.

As the court observed (*at* [8]):

"This is not an uncommon situation, and the court is frequently required to decide between the conflicting accounts given long after the fact of private and undocumented arrangements by reference to such documents and contemporary evidence as exists and to the actual behaviour of the parties, which may allow inferences to be drawn about their private agreements and so which of the accounts now presented is more reliable. The decision is ultimately as between the credibility of the oral evidence of the competing parties."

In this instance, the court took account of several factors relating to the parties' "contemporary evidence" and "actual behaviour", as discussed below.

In particular, the claimant had secretly recorded conversations between him and the first defendant which starkly contradicted the latter's account (and the documents on which he relied). The judgment quotes extensively from the transcripts of those conversations and states (*at* [69]):

"... the conclusion from these conversations is inescapable, and is that these two companies were established, as the claimant contends, on the basis that they would be equally owned between the claimant and the first defendant ... That actual agreement is sufficient to establish the constructive trust for which the claimant contends."

In light of this conclusion, the claim was upheld.

ASSESSING THE EVIDENCE: CONSISTENCY IS KEY

The first quotation above neatly summarises the courts' approach to assessing evidence in such cases. Particularly when the formal or contractual documents are said to give a misleading picture (or do not exist), the court must ultimately decide: which side has presented the more credible oral evidence?

In any trial, the court or tribunal will certainly pay close attention to the attitude and demeanour of each witness. These factors will inevitably colour the court's view of the oral evidence. However, the two critical measures by which witness credibility is ultimately judged are: (i) the contemporaneous documents (if any); and (ii) the parties' conduct before the dispute arose. The party whose oral evidence is more consistent with those two yardsticks will almost always prevail in a dispute of this kind.

Conversely, where these measures conflict with a party's case, the result is very often inconsistent oral evidence, as witnesses attempt to reconcile the conflicting positions. Such inconsistency will also inform the court's view of credibility.

This principle can be observed even in the largest and most complex disputes of this kind. For example, in *Berezovsky v Abramovich and others* [2012] EWHC 2463 (Comm), the claimant alleged that there had been four oral agreements between him, the first defendant and others relating to the ownership of two very substantial Russian companies. This was a high profile, highly complex dispute of enormous value. However, even here, the court noted that: "Because of the nature of the factual issues, the case was one where, in the ultimate analysis, the court had to decide whether to believe Mr Berezovsky or Mr Abramovich" (at [96]).

The court then summarised its findings on the credibility of each side's principal witnesses, before exhaustively considering the oral evidence, as against the "circumstantial evidence", that is, the twin yardsticks identified above. Ultimately, it was the inconsistency of Mr Berezovsky and his witnesses (both with the circumstantial evidence and with each other) that proved fatal to his claim.

Of course, *Singh* was a far smaller and more straightforward case. However, the court took much the same approach here as it had in *Berezovsky*. The court in *Singh* was clear that: "The claim turns on the relative credibility of the claimant and the first defendant as witnesses" (at [12]). In assessing that credibility, the court observed that it may sometimes draw inferences from the other witnesses' oral evidence, though it was of limited use in this case, having been "contradictory and potentially influenced by their loyalty to one or other party" (at [9]).

The court therefore focused on the key elements of circumstantial evidence identified above. In relation to the conduct limb, it observed (at [10]) that: "... evidence of the roles actually played by the parties themselves may be relied on; was the claimant's actual involvement in the companies consistent with ownership status?". This is why the parties' recorded conversations proved so important to the outcome - the contemporaneous, unguarded interactions between the two men were overwhelmingly more consistent with the claimant being a joint owner, entitled to manage and take profits from the business.

The court also had regard to other aspects of the contemporaneous documents and conduct, such as: the provision (and labelling) of party funds; inconsistencies in the corporate documents; accounting records and representations made to banks. (Reference was also made (at [6]) to a large quantity of contemporaneous WhatsApp messages, though these did not directly influence the court's verdict.) All of these aspects were consistent with the picture presented by the tape recordings, further supporting the court's conclusion.

COVERTLY OBTAINED EVIDENCE

Covertly obtained evidence, particularly recorded conversations, can be very powerful in this type of dispute. As the court noted in *Singh* (at [11]): "... there can be great value in what is said in such circumstances, where the parties plainly know the truth of the matters they are discussing and are talking (at least on one side) freely about them." Clearly, the first defendant's frank admissions and repeated reassurances, in his own words, were critical to the outcome of the case.

However, this kind of evidence should not be regarded as risk-free. In the same paragraph of *Singh*, the judge cautioned: "It is true to say that these [recordings] must be approached with some caution, as there is always a risk that where one party knows a conversation is being recorded but the other does not the content may be manipulated with a view to drawing the party who is unaware into some statement that can be taken out of context."

Such caution is consistent with the established English law position in respect of covert evidence, particularly where it may have been obtained unlawfully or unconscionably. As stated by the Court of Appeal in *Memory Corp v Sidhu* [2000] 1 WLR 1443, at [1458]: "Certainly the court should not condone any illegal conduct. But the court's general attitude to evidence obtained by questionable means ... indicates that the court may admit such evidence without condoning illegality, although the court always has to decide what weight to give it."

We have encountered tape recording evidence in our practice, on more than one occasion. In our experience, parties can sometimes regard such evidence as a "silver bullet" against their opponent's case, but considerable caution is required, for a number of reasons:

- A covertly recorded conversation, even if superficially damaging to the other side, may not actually establish the full facts required to make/defend a claim. Particularly where an alleged agreement is complex, any recorded statements will need to be sufficiently clear and unambiguous to satisfy the legal argument being advanced.
- The recording itself may be inadmissible, depending on the circumstances. (For example, a recorded call may breach applicable legislation, such as the Data Protection Act 1998, the Regulation of Investigatory Powers Act 2000, or the Human Rights Act 1998.) In practice though, English courts have been willing to accept such evidence, preferring to impose costs sanctions where they disapprove of how the evidence was obtained. (See *Jones v University of Warwick [2003] EWCA Civ 151*, in which a secret video recording had been obtained by deception amounting to trespass. The appellant argued that the court had acted unlawfully in admitting such evidence, given how it was obtained. The Court of Appeal disagreed, noting the court's wide discretion (per CPR 1.1 and 32.1) to decide whether evidence should be admitted.)
- Recorded conversations may raise issues as to whether an alleged agreement was entirely lawful or enforceable, and/or may raise regulatory issues. Moreover, once proceedings have commenced, such evidence will be disclosable to the other side (assuming it is relevant).
- Significant complications can flow from this point. For example, even if one seeks to withhold a recording (for example, on the basis of irrelevance or privilege), case law suggests that the other side may still be able to obtain it. (See *Property Alliance Group Ltd v Royal Bank of Scotland Plc [2015] EWHC 3341 (Ch)*, in which a claimant had secretly recorded meetings with two of the defendant's former employees, seeking useful material. This fact was inadvertently disclosed to the defendant, who then sought disclosure of the recordings - the claimant's attempt to resist on the basis of litigation privilege was unsuccessful.) The obvious risk is that one's opponent is then able to exploit any adverse statements in the recording(s), effectively reversing its impact.
- As was made clear in *Singh*, courts and tribunals will be very conscious of the fact that one party was aware of the recording and the other was not. That can count against the party seeking to rely on a recording, if it appears that the conversation has been steered or manipulated towards a specific litigation goal.

- Of course, a dispute will always be determined according to legal principles and the available evidence. However, judges are also influenced by their instinctive view of the merits and what appears fair. As Lord Sumption once put it, "Most judges start from the answer and work backwards." Therefore, if a recorded conversation reveals improper conduct by the party seeking to rely on it, that may adversely impact which "answer" the judge is inclined to start from. Examples of such conduct may include: seeking to "trap" the other person into an admission; being argumentative or angry, or suggesting an unlawful or dishonest course of action.
- As a commercial matter, there may be a reputational cost for the relying party in deploying such evidence in open court. The impact within one's market of being seen as an untrustworthy or unscrupulous business partner may be disproportionately damaging, relative to the value of the recording evidence. (This effect may be heightened by any perceived or actual illegality in obtaining the recording.)
- For the same reason, such evidence will be wholly unsuitable if the parties may wish to retain a commercial relationship after the dispute.

In view of the above, the best use of a covert recording is often as a pressure tool prior to the commencement of proceedings. Especially where a recording indicates potential reputational damage or embarrassment for one's opponent, it can often be referenced to good effect in pre-action correspondence. There may well be value for the other party in preventing such evidence from emerging, even if it is not as legally significant as in *Singh*.

UNDOCUMENTED AGREEMENT EVIDENCE: KEY TIPS AND ISSUES

Singh concerned individuals, in a relatively low-value commercial dispute. However, disputes around alleged undocumented agreements can and frequently do arise in all sorts of commercial contexts, including disputes of very high value (as in *Berezovsky*). They will often arise in the context of a dispute between shareholders, or a dispute relating to a sale of shares.

In such cases, the following key points should be borne in mind:

- The key factual issue will usually be the credibility of the oral witness evidence.
- That credibility will largely be determined by the consistency of the witnesses as against the contemporaneous documents and the parties' actions. Those factors in turn will usually impact the internal consistency and plausibility of each side's oral evidence.
- The courts will be particularly influenced by the parties' conduct prior to any dispute; this may well

trump the documents where the two are in conflict (as in *Singh*).

- In our experience, evidence of fund transfers and banking records can be very useful in this context - parties tend to have good reasons for making payments, transfers or financial guarantees, and such actions cannot easily be explained away later on.
- Covert recording evidence can be a powerful, but double-edged sword. Consider whether it can be used at the pre-action stage to apply pressure and/or encourage settlement. If such evidence is used, take care to avoid the dangers set out above.
- Given the above point, one should carefully consider the purpose, likely strength and potential risks of such evidence **before it is created**, if at all possible.
- If faced with covert recording evidence, look for any misrepresentation, manipulation or poor conduct that can be used to minimise or discredit the evidence (or, potentially, to have it struck out).

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