Neutral Citation Number: [2023] EWCA Civ 726

Case No: CA-2022-002309

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Stuart Isaacs KC (sitting as a Deputy High Court Judge)
[2022] EWHC 2611 (Ch), [2022] EWHC 2989 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 June 2023

Before :

LORD JUSTICE LEWISON
LADY JUSTICE KING
and
LORD JUSTICE NUGEE

- -

Between :

SHAFIQ MALIK	**Claimant / Respondent**
- and -	
HENLEY HOMES PLC	**Defendant / Appellant**

- -
- -

Jonathan Cohen KC (instructed by **Grosvenor Law Ltd**) for the **Appellant**
Adam Solomon KC and Alexander Halban (instructed by **Charles Russell Speechlys LLP**) for the **Respondent**

Hearing date: 15 June 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. This appeal is against the decision of Mr Stuart Isaacs KC, sitting as a Deputy High Court Judge, (**"the Judge"**) to grant summary judgment in favour of the Claimant, Mr Shafiq Malik, on the balance of outstanding loans due to him from the Defendant company, Henley Homes plc (**"HH"**).

2. HH did not dispute that there was a large balance (in excess of £2.3m) owing to Mr Malik on a loan account but said that such monies were not repayable on demand, but, as had been orally agreed between Mr Malik and the other two shareholders of HH, only in the event of a sale or other liquidity event, or by their unanimous consent.

3. The Judge held however that this defence did not have a real or realistic prospect of success. The question on appeal is whether he was wrong to do so.

4. Despite the able submissions of Mr Jonathan Cohen KC, who appeared for HH, I am not persuaded that the Judge erred in his decision and I would dismiss the appeal for the reasons below.

Mr Malik's claim

5. There are three individuals central to the story. One of them is Mr Malik. The other two are Mr Tariq Usmani and his brother Mr Kashif Usmani. They are Mr Malik's brothers-in-law, he having married their sister.

6. The three men are equal shareholders of HH. They were also formerly the three directors of HH. That was the case from July 2001 when Mr Malik was appointed a director until 28 October 2021 when he was removed by a shareholders' resolution passed by Tariq and Kashif Usmani. The latter remain the directors of HH. Mr Malik's evidence was that he intended to challenge his removal as a director, and other aspects of their conduct, in separate proceedings for unfair prejudice, and it is apparent that allegations and counter-allegations of impropriety of various types have been made on both sides. We are not directly concerned with any of that but it does form the backdrop to these proceedings.

7. HH operates as the holding company for a number of group companies which primarily develop residential, commercial and hotel premises. Individual property developments are carried out through special purpose vehicles or SPVs for each development, either wholly owned by HH or by Mr Malik and the Usmanis personally.

8. There is no dispute that over the years the three men have built up large balances on loan accounts with HH, although the precise amount owing to Mr Malik is not agreed.

9. Mr Malik's account of these loans is in summary as follows. The loans were made by them to assist HH's business. It was agreed that the three of them would make such loans as directors of HH, and they were made without agreeing any specific terms for repayment of the loans. The loans were credited to a joint directors' loan account maintained by HH. The three of them drew down sums from the loan account (i) in the shape of monthly lump-sum payments; (ii) for their personal and regular living expenses such as car hire payments, personal tax payments and the like; and (iii) by

way of substantial payments for such things as house refurbishments. The loans were recorded in HH's nominal activity ledger under the title "Director Loan Account". This ledger starts in 2003. The loans were shown as interest-free loans owing to the directors in HH's annual accounts, each of which was signed off by Mr Tariq Usmani. On various occasions Mr Malik would receive a reconciliation, showing payments in and out and the balance due to him. The most recent he had was dated 16 June 2021 showing a balance then due to him of £2,827,795.

10. On the basis that nothing specific was agreed about repayment of the loans, Mr Malik's claim is the simple one that he is entitled to payment of the amounts due to him on demand. Having been removed as director on 28 October 2021, he wrote to HH demanding payment of the balance owed to him, and issued proceedings on 28 January 2022. Following service of HH's Defence on 3 March 2022 (which admitted that Mr Malik's loan account remained very substantially in credit in his favour, although it disputed the precise amount, giving a figure of £2,362,152) he issued an application on 29 April 2022 for summary judgment on liability for a sum to be assessed and for an interim payment in the sum of £2,362,152.

HH's answer to the claim

11. HH has given its answer to the claim three times, once in a solicitors' letter responding to Mr Malik's demand for repayment, again in its Defence, and a third time in its evidence in answer to the summary judgment application. As the Judge placed some reliance on the differences between these it is helpful to set them out in some detail.

12. First, the correspondence. By letter from its solicitors, Grosvenor Law, dated 11 January 2022, HH denied that the loans were immediately repayable, as follows:

> "The funds which you and your client have referred to as directors' loans are not properly so called on analysis.
>
> By way of background, Tariq Usmani, Kashif Usmani and your client, Shafiq Malik were shareholders in certain special purpose vehicles related to projects known as Jefferies Road, Stewart's Lodge and Lilian Baylis. On liquidation of these SPVs, entrepreneurs' relief was obtained on the capital gains made. The three men decided that, rather than receive this money in cash as shareholders in the SPVs, it would be retained by Henley Homes plc as shareholder loans for the business to reinvest to further grow shareholder value for mutual benefit. This is also evidenced by the fact that the bulk of the distributions on liquidations were in specie of stock, sundry debtors and intercompany accounts, i.e. already invested. The shareholders would draw on these loans to cover their expenses through monthly drawings from the loan account to cover their routine day-to-day living costs and, subject to the agreement of all three, any one off items providing cashflow permitted. There is nothing in writing on this but it is evidenced and represented by the actuality of how the three have accessed these loans. An example of this is when, as individuals, the shareholders have sought to purchase property in their own names – the obvious source to fund the purchases would be to draw on their shareholder loans but cashflows did not permit this, so they took out personal mortgages, personally incurring costs

thereon.

This was agreed orally between the parties and, until your client's recent demands, has been the way in which the funds have been applied and treated since that time.

They are shareholder loans which are to remain in the business until such time as either all parties agree to vary the terms upon which they are held or liquidation. They are not, properly so analysed, directors' loans repayable upon demand as you set out."

13. Second, HH's Defence. This pleaded a summary of HH's position at paragraph 3 as follows:

> "3. The Defendant denies the Claimant's claim in its entirety. In summary:
>
> 3.1. In or around 2001, the Claimant and each of Tariq Usmani and Kashif Usmani ("Messrs Usmani"), the Claimant's brothers-in-law, agreed that they would advance sums to the Defendant by way of shareholders' loans, on the basis further particularised at paragraphs 8 and 9 below. In particular, such loans were agreed to be repayable not on demand, but instead only: (1) upon the occurrence of a sale or liquidity event in respect of the Defendant; or (2) as might otherwise be agreed unanimously by the Claimant and Messrs Usmani.
>
> 3.2. Over the following two decades, the shareholders and the Defendant consistently proceeded on the basis that the said shareholders' loans, which increased and reduced over time as funds were advanced or drawn down on a consensual basis, were repayable as described above. Save for the period immediately prior to issuing these proceedings, the Claimant never contended that the sums he had advanced to the Defendant were in fact pursuant to a "director's loan" repayable on demand.
>
> 3.3. It follows that the Defendant is not liable in any amount to the Claimant, whether in debt or in damages."

14. This was expanded on in paragraphs 8 and 9 as follows:

> "8. The true position is that:
>
> 8.1. Beginning in around the early 1990s, the Claimant and Messrs Usmani were involved in business ventures together, initially as equal shareholders in Caine Developments Limited and later as the Shareholders in the Defendant.
>
> 8.2. In or around 2001, in discussions between the Shareholders, with each acting on his own behalf and jointly on behalf of the Defendant, it was orally agreed that each of the Shareholders

would loan an initial amount of approximately £10,000 to the Defendant by way of shareholders' loans (the "Shareholders' Loans").

9. The agreed material terms of the Shareholders' Loans were as follows:

9.1. The Defendant would reinvest sums lent to it under the Shareholders' Loans for the purpose of growing value in the Defendant for the mutual benefit of the Shareholders.

9.2. The Defendant would maintain the balance of the Shareholders' Loans in a joint account (the "Loan Account") which was able to be drawn down by the Shareholders from time to time to cover day-to-day living expenses and for such other purposes as might be agreed unanimously from time to time.

9.3. Except as provided for in paragraph 9.2 above, the Shareholders were not permitted to draw down sums from the Loan Account unilaterally.

9.4. The Shareholders would loan additional sums to the Defendant from time to time on the terms of the Shareholders' Loans, as might be agreed to be required by the business of the Defendant, by making additional deposits to the Loan Account.

9.5. The Defendant would pay each of the Shareholders an equal monthly amount from the Loan Account, such amount to be agreed unanimously from time to time by the Shareholders, in partial repayment of the Shareholders' Loans.

9.6. The Shareholders' Loans would not be repayable in full to the Shareholders unless and until: (1) the occurrence of a sale or liquidity event as regards the Defendant; or (2) repayment was unanimously agreed by the Shareholders."

15. Third, the evidence. This was primarily given by Mr Tariq Usmani. At paragraph 13 of his witness statement he said this:

"13. …In around 2001, the Claimant, Kashif and myself orally agreed with each other that each of us would loan the Defendant £10,000 by way of shareholder loans. In return we would each own a third of the shares in the Defendant."

16. At paragraph 19 he referred to HH's business model as follows:

"19. The Defendant's business model is based on retaining profit and using any excess or surplus funds to invest in further investments (by way of inter-company loans and/or the Loan Account) in order to increase project capacity and thus maximise shareholder wealth in the long term. In short, the profits on the sale of an SPV have

> typically been ploughed back into new developments and projects, with notional profits sometimes being committed prior to the sale and actual receipt of funds. There was typically no cash as such to distribute. There was an agreement reached between the parties at the outset of our business relationship that this would happen: i.e. that each shareholders' one-third notional profits would be credited to us, but reinvested and used to grow the business and its value. When funds were required by shareholders and available they could be distributed to the shareholders on an agreed basis but not otherwise, since our shared goal was to grow the business over time."

17. At paragraph 20 he gave an example of that dating from 2013 to 2016 in relation to the SPVs for the three projects mentioned in Grosvenor Law's letter (Stewarts Lodge, Annie McCall and Lilian Baylis). These were owned in equal shares by the three men. Surplus cash from these developments was reinvested into other business ventures, which meant that by the time the SPVs were liquidated there was a minimal amount of cash as the funds represented by the surplus had been invested in other projects and these funds were notionally credited to them equally in the loan account. The loans were therefore not surplus cash but rolled-over profits. They could not be repaid at the time and there was no expectation that they would be "given the agreement which had been reached between the parties that these notional profits would be applied to grow the business and distributed on some future liquidity event." (paragraph 21). At paragraph 22 he said that these were "notional loans made in our capacity as shareholders" and that he had spoken with Mr Kashif Usmani who agreed with this.

18. At paragraph 25 he referred to the arrangements for drawings as follows:

> "25. In setting up this system, we all agreed that living expenses could be funded through these account balances. In terms of drawings from the Loan Account, the Claimant's, Kashif's and my regular drawings consist of personal and living expenses such as medical insurance premiums, car costs and HMRC Self-Assessment personal tax payments. In addition to these, there are regular equal monthly drawing payments made to each of us. By unanimous agreement, the amount of these payments is periodically changed in response to the needs of the business. For example, in December 2011, our monthly drawings were £7,800 each. In April 2012, due to cashflow pressures on the business, the monthly drawings were reduced to £5,000 each. In April 2020, the monthly drawings were £20,000 each. By unanimous agreement, this was reduced to £10,000 each for myself and the Claimant, and £12,000 for Kashif (as his personal outgoings were greater than those of the Claimant and myself)."

19. At paragraphs 28 to 30 he gave evidence on what was agreed as follows:

> "28. As set out above, the loans which form the subject of this claim were always intended to be on the terms set out in paragraph 9 of the Defence.

> 29. In particular, the loans would not be repayable in full to the shareholders (myself, Kashif and the Claimant) unless and until (1) the occurrence of a sale or liquidity event as regards the Defendant; or (2) repayment was unanimously agreed by all of us.
>
> 30. The Claimant objects to the use of the phrase 'liquidity event' in the Defence and argues that he never uses this phrase and no agreement was reached. The wording was used in the Defendant's pleading (which I approved) as a short-hand that I and Kashif (at least) are familiar with. What was agreed between the parties was that shareholders' funds available on the sale of individual projects and SPVs which might otherwise be directly payable to each of the three of us would be reinvested into new projects and credited on loan account balances. We would only realise the cash when agreed it was needed or at an ultimate sale / winding up of the business in the future. If the Claimant claims not to have used the exact phrase, he certainly agreed to this concept."

20. At paragraph 31 he reiterated that:

> "31 … both Kashif and I agree that the loans are shareholder loans and were always intended to be on the terms set out in paragraph 9 of the Defence."

21. Mr Kashif Usmani gave a short witness statement which agreed with Mr Tariq Usmani's statement. There was also a witness statement from Mr Aslam Lala, an accountant and the interim Chief Financial Officer (or CFO) of HH. He had been CFO between January 2013 when he joined and April 2020, and had returned as interim CFO followed an illness suffered by one of his successors. His evidence is mainly directed at how the loan account has been operated in practice. He does not claim to have any personal knowledge of what was agreed when it was first established.

The Judgment

22. The application was heard by the Judge on 6 October 2022, and he handed down his reserved judgment on 20 October 2022 at [2022] EWHC 2611 (Ch).

23. Mr Cohen made a number of detailed criticisms of the judgment and I will have to look at the specific points he made below. In summary however the Judge, having set out the background and the submissions of the parties, decided as follows:

    (1) At [10] he said that the oral agreement alleged in Mr Tariq Usmani's statement was not supported by the contemporaneous documents or by the other evidence adduced on HH's behalf, giving a number of reasons for that conclusion.

    (2) At [12] he said that the agreement pleaded at paragraph 9 of the Defence and alleged in Grosvenor Law's letter differed from that described in Mr Tariq Usmani's statement, and that it was deficient in its particularisation.

    (3) At [13] he referred to HH's reliance on the way the loan account had been operated, concluding that the matters relied on were "at best neutral".

(4) At [14] he said he was unpersuaded that the position might be different at trial.

(5) At [16] he gave his conclusion that:

> "…while the defence advanced by the defendant is arguable, it does not in my judgment cross what I accept to be the relatively low threshold of having a real or realistic prospect of success."

24. On 11 November 2022 he heard argument on a number of consequential matters. His ruling on these matters is at [2022] EWHC 2989 (Ch). Among other things HH, although accepting that it was liable to make an interim payment of £2.3m, had asked for 6 months to pay. He was not persuaded by that, but granted them an extension of time for the interim payment to 23 December 2022 (42 days).

25. By his Order dated 11 November 2022 he therefore gave summary judgment in favour of Mr Malik on HH's liability to repay the loans advanced by him in a sum to be assessed, with directions for the assessment; and ordered HH to pay him £2,362,152 on account by 23 December 2022.

26. He refused permission to appeal but permission was granted by Newey LJ together with a stay pending appeal.

Grounds of appeal

27. HH appealed on four grounds, which can be summarised as follows:

(1) The Judge impermissibly conducted a mini-trial and wrongly took the view that a fuller investigation of the facts at trial would not affect the outcome.

(2) The Judge was wrong to conclude that HH's case was not supported by the contemporaneous documents, and had been advanced inconsistently.

(3) The Judge failed to take into account evidence which undermined Mr Malik's case and supported HH's.

(4) The Judge unreasonably exercised his discretion to refuse to grant HH a period of 6 months to pay.

28. In the event however Mr Cohen accepted that we did not need to reach any decision on Ground 4. It only arose if the appeal otherwise failed, and in that event he said that he would be content with making an application to us for time to pay. I therefore say no more about Ground 4.

Grounds 1 to 3

29. It is convenient to take Grounds 1 to 3 together and consider in turn each of the criticisms of the judgment advanced by Mr Cohen.

Judgment [10] – lack of support for the oral agreement

30. In his judgment at [10] the Judge gave a series of reasons for his conclusion that the oral agreement alleged by Mr Tariq Usmani in his witness statement was not supported

by the contemporaneous documents or other evidence, as follows (I have added the numbers suggested by Mr Cohen, who identified four points made by the Judge in this paragraph):

> "In my judgment, the oral agreement alleged in paragraphs 9 and 13 of Tariq's statement is not supported by the contemporaneous documents or by the other evidence adduced on the defendant's behalf. (1) It is common ground that the defendant's 2001 accounts do not record the alleged oral agreement and that there is nothing specific to that effect in the 2002 accounts. There is no evidence that the £89,250 shown in those latter accounts as amounts falling due within one year from other creditors did in fact include the loans made in 2001. (2) The contemporaneous documents do not bear out the existence of a shareholders' loan account as opposed to a directors' loan account. The defendant's ledger refers repeatedly to directors' loans. (3) I bear in mind the statements made in *O'Neill* and the other cases referred to in paragraph 6 above. I accept that there might be expected to be less contemporaneous document in the family situation of the claimant and the Usmanis than in an arm's length commercial transaction but, even so, the dearth of any documentation evidencing the alleged oral agreement is striking. The documentation relied on by the defendant is not contemporaneous with the alleged oral agreement at all and indeed, as is accepted by the defendant, there is no particularisation of the alleged oral agreement other than that it is said to have been concluded in 2001 between the claimant and the Usmanis. The references to directors' loans in various documents cannot, in my judgment, satisfactorily be explained away as the defendant sought to do as a means of drawing a distinction between the claimant and the Usmanis, on the one hand, and other staff members of the defendant, on the other. The lapse of time between then and now does not satisfactorily explain the lack of detail in the defendant's case. (4) Moreover, the defendant's explanation for the statement in its audited accounts that the loans were repayable within one year, namely that there was always a prospect that they might be repayable within that period, is unconvincing. The defendant referred to accountancy practice in support of its position but no evidence of such practice was before the court."

Lack of documentation

31. Mr Cohen advanced a series of criticisms of this paragraph. The first was that no significance should be attached to the lack of documentation as the Judge did in the passage he numbered (3). Leaving to one side the facts that the parties were all related, and had started in business together in the 1990s in a very small way, the significant fact was that everyone here agreed that there was an agreement for the loans. That was common ground. It was also common ground that that agreement was not documented, and was made orally. So it was unlike a case where one party was asserting that there was an oral agreement and the other was denying that there had been any agreement at all. Far from it being "striking" in the present case that there was no documentation, it was, Mr Cohen submitted, not striking at all.

32. I do not consider this is a fair criticism of the point the Judge was making. It is true

that even on Mr Malik's case there must have been *some* oral agreement – as Mr Cohen said, the money did not walk into the company by itself – and Mr Malik himself says that the loans were made "to assist the business", and that "Tariq, Kashif and I agreed that these loans were made to HH by the three of us as directors of HH". But the essential question is whether anything was expressly agreed about repayment, and specifically whether it was agreed that the loans could not be repaid, except in the case of sale or liquidation, without the consent of all three.

33. That I think is a most unusual term to agree. It is not suggested that the money was lent as a joint loan: the Defence pleads the initial agreement as being that "each of the shareholders would loan an initial amount of approximately £10,000". That makes it clear that on HH's case there were three loans of £10,000, one owed to each of them, not a single loan of £30,000 owed to the three jointly. That is also how the loan account was operated in practice – although written up in a single account in the ledger, the drawings on the account were drawn by, and debited against, each of the three separately, and the amounts were regularly reconciled.

34. Nor is it suggested that the loans were agreed to be left in the company for any fixed or minimum term. A loan that is not for a fixed term is *prima facie* repayable on demand and this is perhaps particularly what one would expect when the loan is interest-free. Shareholders and directors do of course not infrequently lend their companies money interest-free but they do not usually bind themselves to leave it there indefinitely or to give up their *prima facie* right to recover their money when they want to.

35. The suggested term here however is one whereby A has agreed to lend money to the company on terms that he could never recover his money (save in the event of a sale or liquidation of the company) without the consent of B and C. That is not something that one would usually expect a lender to agree, as it would mean that his money would be tied up, interest-free, and he would have no control over it at all. Unlike a simple agreement that each would lend money to the company to help grow the business, which one can easily envisage being made very informally, an agreement to this effect would have to be based on a specific agreement, intended to be binding, to include this unusual (and potentially draconian) term.

36. I think in those circumstances the Judge was fully entitled to take the view that it was indeed striking that there was no trace of such a term having been agreed in any documentation at all. He had earlier (at [6]) referred to the statement of Freedman J in *O'Neill v Avic International Corporation* [2019] EWHC 165 (QB) at [78], itself based on statements in earlier cases, to the effect that it is rare nowadays for there to be no form of electronic footprint for oral contracts. One of the earlier statements Freedman J drew on was that of Popplewell J (as he then was) in *Edgeworth Capital (Luxembourg) S.À.R.L. v Aabar Investments PJS* [2018] EWHC 1627 (Comm) at [34] as follows:

> "…the absence of a contemporaneous written record by those with business experience may count heavily against the existence of an oral contract, because in the twenty-first century the prevalence of emails, text messages and other forms of electronic communication is such that most agreements and discussions which are of legal significance, even if not embodied in writing, leave some form of electronic footprint."

I accept that that was said in the context of a dispute whether there was an oral

agreement at all, whereas in this case it is agreed that there was one, and the dispute is what its terms were. Nevertheless I think the Judge was justified in taking the view that if there had been an express agreement removing the *prima facie* right of a lender such as Mr Malik to recover his money when he wanted to, one would expect to find some trace of it being referred to somewhere.

Directors' loans or Shareholders' loans

37. Mr Cohen's next criticism was in relation to the passage he numbered (2), namely:

> "The contemporaneous documents do not bear out the existence of a shareholders' loan account as opposed to a directors' loan account."

38. Mr Cohen said that the Judge should not have put any weight on this. It was irrelevant what the loans were called, and indeed counsel had agreed before him that this was the case.

39. I agree that it logically makes no difference to the liability of HH whether the sums which were admittedly loaned by Mr Malik and the Usmanis to HH were called shareholders' loans or directors' loans. The essential question is whether it was orally agreed when the loans were made that each of Mr Malik and the Usmanis had no right to require repayment of the money owing to him without the concurrence of the others, and that does not depend on what they were called.

40. There is in fact a contention pleaded in the Particulars of Claim that since Mr Malik's loan was a "director's loan" he was entitled to repayment of it on ceasing to be a director, but it was accepted by Mr Adam Solomon KC, who appeared with Mr Alexander Halban for Mr Malik, that any such case would have to rest on an implied term (it not being pleaded or suggested that there had been any express agreement to that effect), and it is not suggested that this contention was argued before the Judge, or that there was any argument as to whether such an implication should be made. I can see that if there had been, there might well, as Mr Cohen suggested, have been room for argument whether it would pass the usual tests for contractual implication of being so obvious as to go without saying or necessary to give the contract business efficacy. So this contention can be put on one side.

41. Leaving that point aside, I agree with Mr Cohen that it is legally irrelevant whether the loans were called "directors' loans" or "shareholders' loans". These do not seem to me terms of art or to have any particular technical legal meaning. They are just descriptions. The loans were made by the three men, each of whom was at the time both shareholder and director, and I do not myself see that the right of each of them to require repayment of his loan is dependent on, or even affected by, what they are called.

42. Nevertheless I do not think this entirely undermines the Judge's point. Both parties seem to have regarded the label put on the loans as of some importance. Thus Grosvenor Law in their letter made a point of asserting that the loans were shareholder loans not directors' loans (see the last paragraph cited from their letter at paragraph 11 above); and the same point is reiterated both in the Defence (see paragraph 8.2 ("by way of shareholders' loans"), cited at paragraph 13 above) and repeatedly in Mr Tariq Usmani's evidence (see paragraphs 13 ("by way of shareholder loans"), 22 ("in our capacity as shareholders") and 31 ("the loans are shareholder loans"), cited at

paragraphs 15, 17 and 19 above). Read naturally, both the pleading in paragraph 8.2 of the Defence and Mr Tariq Usmani's evidence at paragraph 13 assert that it was expressly agreed that the loans should be advanced by way of shareholder loans.

43. Seen in this light, it is indeed noticeable that HH's documents consistently refer to the loans as directors' loans. There was in evidence HH's nominal ledger recording the loan account, headed "Director Loan Account". This started in 2003. Mr Lala's evidence was that there was no significance to the heading – it was simply a way of referring to Mr Malik and the Usmanis. But quite apart from the fact that he was not there in 2003, I think the Judge was entitled to take the view that the description of the account in this ledger did cast some doubt on whether it had recently been specifically agreed that the loans should be by way of shareholder loans. If the parties had made a point of agreeing this, why would they then describe the loans as directors' loans?

The 2001 and 2002 accounts

44. The next point Mr Cohen made was in relation to the passage he numbered (1), namely:

> "It is common ground that the defendant's 2001 accounts do not record the alleged oral agreement and there is nothing specific to that effect in the 2002 accounts. There is no evidence that the £89,250 shown in those latter accounts as amounts falling due within one year from other creditors did in fact include the loans made in 2001."

45. What is shown by HH's audited accounts is as follows:

(1) The accounts were drawn up for the year ended 31 December in each year. The Judge had those for each year from 2001 to 2020. We have not in fact seen those for 2003 onwards, but we were told that they were all in similar format to that for 2021 which we have seen. It is common ground that in the 2021 accounts the amounts outstanding to Mr Malik and the Usmanis are included on HH's Balance Sheet in the figure for "Creditors: Amounts falling due within one year" (£23,472,692), and specifically in the figure for "Other creditors" (£14,083.764) shown at note 22 to the accounts (which gives a breakdown of the £23m figure). They are also referred to in note 32 to the accounts ("Related party transactions") as follows:

> > "The company owed £8,867,280 (2020: £10,886,233) to the directors at the year end."

As I understand it, it was accepted that each of the accounts from 2003 onwards similarly included the balances outstanding to Mr Malik and the Usmanis in "Creditors: Amounts falling due within one year" and specifically "Other creditors", and that they were noted in each case in the relevant note on "Related party transactions".

(2) The accounts for the year ended 31 December 2001 follow a similar format, but although the Balance Sheet does show creditors falling due within one year as over £3.8m, the breakdown in note 12 shows that none of this is owed to "Other creditors", and there is no reference to loans to directors in note 15 on related party transactions.

(3) The accounts for the year ended 31 December 2002 do include a figure of £89,250 for "Other creditors" in the breakdown in note 13 of creditors falling due within one year, but there is again no reference to loans to directors in the note (note 16) on related party transactions.

(4) As already referred to, HH's nominal ledger for the "Director Loan Account" starts in 2003. It gives an "Opening Balance" of £25,039.56 with a date of 31 December 2003.

46. Mr Tariq Usmani's evidence was of course that there had been an oral agreement in relation to loans of £10,000 each in or around 2001. The Judge's statements that this oral agreement was not recorded in the 2001 accounts (where there was no potentially relevant entry), and that there was nothing specific in the 2002 accounts (where the only potentially relevant entry was the figure of £89,250, but this was not shown to include a loan to the directors/shareholders) were therefore accurate.

47. Mr Cohen said that although that was the case, the Judge was wrong to attach any significance to these matters. It was not disputed that the loans were made. It was not disputed that there had been *some* agreement about the loans as they would not have happened without agreement. The only question was what terms had been agreed. It did not matter that Mr Tariq Usmani might have got the date wrong in recollecting an agreement made some 20 years ago – that might at most furnish material for cross-examination, but did not mean his evidence was to be rejected entirely. The 2001 accounts showed that Mr Malik was only appointed a director in July 2001 so it would not be implausible if the agreement had been reached in 2002. There was admittedly no evidence that the figure of £89,250 shown in the 2002 accounts did include the £30,000 that Mr Tariq Usmani said was the initial loan, but it might have done. And the opening balance on HH's nominal ledger of £25,039.56 in 2003 was evidence that there was some money already lent to HH.

48. Again however I think the Judge was entitled to make the point that he did. HH's Defence and Mr Tariq Usmani's evidence both placed the oral agreement relied on in 2001. It is a legitimate comment that this is not supported by the 2001 accounts which contain no entry which it is suggested could encompass a loan of £30,000 made in 2001. Moreover although the figure of £89,250 in the 2002 accounts is large enough to include a loan of £30,000, there is nothing to show that it did. And there are grounds for suspecting that it did not. First there is the fact that the nominal ledger for the account only starts in 2003. This is unexplained if the loan had been made in 2002, let alone in 2001. Second, there is the fact that the loan is not noted as a related party transaction in the 2002 accounts.

49. Mr Cohen said that one cannot place any weight on this latter point without evidence as to the financial reporting standards at the time showing that such a loan should have been included. I do not agree. Among the related party transactions which *are* included in the 2002 accounts are amounts owed by or to companies (Henley Voltaire Investments Ltd and Osbourne Stewart Ltd) in which the directors of HH were interested, holding either a 50% or 100% interest. These can only have been included on the basis that loans due to or from companies in which Mr Malik and the Usmanis were interested were related party transactions and should therefore be disclosed; and if that is the case it must follow that loans owed directly to the three men should also have been disclosed.

50. In those circumstances I think the Judge was entitled to take into account the fact that the accounts did not appear to support the account given by Mr Tariq Usmani.

Amounts falling due within one year

51. Mr Cohen's next point concerned the passage he numbered (4), namely:

> "Moreover the defendant's explanation for the statement in its audited accounts that the loans were repayable within one year, namely that there was always a prospect that they might be repayable within that period, is unconvincing. The defendant referred to accountancy practice in support of the position but no evidence of such practice was before the court."

52. Mr Cohen said that the Judge did not explain why this was unconvincing. It was common ground, as the Judge correctly recorded in his judgment at [3], that the loans were repayable on demand, the difference between the parties being that on Mr Malik's case he could unilaterally demand repayment at any time whereas on HH's case such a demand could only be made with the consent of all three men. In those circumstances the classification of the loans as falling due within one year could only be regarded as giving any support to Mr Malik's case, or as inconsistent with HH's case, on the assumption that a loan repayable on the demand of Mr Malik alone *was* properly to be regarded as a loan falling due within the year, whereas a loan repayable on demand with the consent of all three was *not*. There was no evidence to support such an assumption and it was by its very nature unlikely.

53. On this point I accept Mr Cohen's submissions. There was indeed no evidence, either formal or indeed informal, of the correct accounting treatment, but it does seem to me natural to suppose that the reason why a loan repayable on demand is to be classified as falling due within a year is because the creditor can at any moment call it in. From the company's perspective therefore such a loan cannot be regarded as a long-term loan as it might need to find the money without notice. The accounts are of course the company's accounts and are designed to give a true and fair view of the company (for the benefit of anyone who may wish to deal with it) and for this purpose there seems to me obvious good sense in distinguishing between long-term debt which the company cannot be required to pay in the next year, and short-term debt which it can.

54. If that is right, I think it does follow that on HH's case, just as much as on Mr Malik's, the loans should have been classified as falling due within one year because they could be called in without notice, albeit that that would require the consent of both Mr Malik and the Usmanis. Or at any rate if Mr Malik wished to assert that this did not follow, it was for him to explain why it did not. It was Mr Malik who relied on the way that the loans were shown in the accounts as giving support to his case, and it was for him to establish that it did.

55. The Judge's conclusion that there was something unconvincing about HH's position on this point, being neither self-evident nor further explained, is therefore not one which I find persuasive.

56. That is not however quite the end of the point. There was in fact evidence from Mr Lala in relation to the classification of the loans as falling due within a year. This was as

follows:

> "The loans were recorded as due within one year and this is how they have always been recorded since I joined the Defendant. The question of whether they are properly due within one year has never been raised with me, or the auditors nor by Tariq, Kashif or the Claimant prior to this dispute."

57. So although I have accepted Mr Cohen's submission that the loans would have been correctly classified as falling due within one year even on HH's case, the actual position, at any rate since Mr Lala became CFO in 2013, is that the loans were not classified in that way because of a conscious decision that a loan only repayable with the consent of all three directors was nevertheless technically one that should be shown as repayable within one year. Mr Lala by his own admission was never asked to consider, or to clarify with the auditors, the correct treatment of such a loan at all. The loans were simply shown that way because they had always been.

Judgment [12]

58. Mr Cohen next criticised the Judge for what he said in his judgment at [12]. Having set out at [11] the agreement as pleaded at paragraph 9.1 to 9.6 of the Defence, he continued:

> "However, there is no mention in contemporaneous documents of an agreement to that effect and the terms alleged in paragraph 9 of the Defence and in the defendant's solicitors' letter dated 11 January 2022 differ from the terms of the alleged agreement described in paragraphs 9 and 13 of Tariq's statement. Paragraph 9 of the Defence is also deficient in its particularisation of when and how the alleged oral agreement was made. Paragraph 31.1 of Tariq's statement itself refers only to what is alleged to have been the intention that the loans would be on the terms set out in paragraph 9 of the Defence. "

59. Some of the references in this paragraph are admittedly wrong: the reference to paragraph 9 of Mr Tariq Usmani's witness statement makes no sense and should probably be to paragraph 8 where he says that the Defence is based on an oral agreement. And there is no paragraph 31.1 in his statement, and the reference should no doubt simply be to paragraph 31 (or perhaps paragraph 28 which is to the same effect). But nothing turns on this. In a perfect world judgments would no doubt never contain such errors, but the fact is that judges are both human and busy and errors do occasionally slip through – neither counsel below having spotted them in the draft judgment either. They are not to be regarded as indicative of any lack of thoughtfulness in a judge's substantive reasoning, nor in the end did I understand Mr Cohen to suggest that they should be.

60. Mr Cohen said that the Judge should not have held the lack of particularisation in the Defence against HH. He accepted that Practice Direction 16 paragraph 7.4 provides that where a claim is based upon an oral agreement, the particulars of claim should set out the contractual words used and state by whom, to whom, when and where they were spoken; and he did not suggest that it made any difference that the oral agreement here was relied on by way of defence. But he said that the Practice Direction had to be

applied sensibly and must be read as impliedly subject to the qualification "where possible" or "if you can". The point might be one that could be deployed in cross-examination at trial but could not be regarded as a knock-out blow at the summary judgment stage.

61. I accept that Mr Cohen is right that the Practice Direction cannot require you to do more than do the best you can to give the requisite particulars. But I do not think that his criticism of the Judge overall is a fair one. The Judge does not here say that this pleading point is by itself a reason to regard HH's case as not meeting the minimum standard of a real prospect of success. It is one of the matters that goes into his overall assessment. And Mr Cohen did not suggest that the Judge was wrong to make the point at all. I consider that it was a perfectly valid point for the Judge to make. I have already said that the term that Mr Malik could not recover his money without the consent of the Usmanis was an unusual term for the parties to have agreed. The more unusual a term is, the more one would expect a pleading to give chapter and verse for when and where and how it was specifically agreed. But this Defence has none of that colour.

62. Nor is it just a technical pleading point. I think the second sentence of [12], where the Judge makes the point about paragraph 9 of the Defence being deficient in its particularisation, has to be read with the third sentence where he refers to Mr Tariq Usmani's evidence, the point being that there was not just an absence of detail in the pleaded Defence, but that there was no detail given in the evidence either. Mr Cohen invited us to read this third sentence as if the point the Judge was making was that Mr Tariq Usmani only said that it was *intended* that the loans should be on the terms set out not that it was actually *agreed* they should. But I do not think this is the point the Judge was making here. I think it was rather that Mr Tariq Usmani gives no account of the agreement being reached beyond the bald statement that that was what was agreed. There is no attempt to reconstruct the occasion or occasions, or say what he can and cannot remember about them. It is of course not uncommon for a witness to be unable to be precise about dates or the words used when seeking to recall an oral agreement many years later, but a witness is usually able to give some account of what he does and does not remember, and indeed what basis he has for saying that a particular term was agreed or not. Here there is nothing which gives any credence to his statement that the loans were on the terms pleaded. That is a point the Judge was entitled not only to make but to take into account.

Conduct of the parties

63. Mr Cohen's next criticism was of the Judge's judgment at [13] where he said:

> "The defendant also submitted that the parties' conduct in the 20 or so years after 2001 is consistent with its case and inconsistent with the claimant's case and that there are other contemporaneous documents supportive of the defendant's case in the form of the internal ledger extract for 2003, emails, reconciliations which show that it was always agreed that amounts would be withdrawn on a basis of equality and unanimity and a series of letters from the liquidators of the special purpose vehicles which support the position that the loan account was to be used for substantial reinvestments in the defendant's business. Those documents are, in my judgment, at best neutral in the effect. "

64. Mr Cohen submitted that this long course of conduct was not neutral at all but supportive of HH's case. It tended to suggest that withdrawals were always made on the basis of agreement, and it was not a very large step from that to finding that the parties had indeed discussed and agreed that that should be the position.

65. I think however the Judge was not only entitled, but right to regard these matters as not of any real assistance on the critical question. It was not disputed that the loans had been made for substantial reinvestment in HH's business. That was indeed Mr Malik's own position, namely that it was agreed that the loans would be made to assist the business. That tells one nothing about what was agreed about how long they would be left there or what the parties' legal rights would be if one of them wished to withdraw his money. Equally the fact that Mr Malik was content to leave his money there to assist the business for some 20 years while he was a director and one of three equal participants in the management of the business tells you nothing about whether he was obliged to continue to do so once he had been removed as a director and had ceased to have any participation in the management.

66. The same to my mind is true of the evidence, not substantially disputed, that their withdrawals (by way of monthly payments, or to meet such expenses as car hire or tax payments, or by way of more substantial one-off payments for house refurbishments) were in practice on a (roughly) equal basis and by mutual agreement. It is not suggested that every payment was always exactly equal – that is why there were routine reconciliations – nor is it suggested that each and every payment was separately agreed. But the general principle that withdrawals should be roughly equal and on a basis they had all signed up to does not seem to me the slightest bit surprising. The three of them were not only connected by family ties but had long worked together on the basis of complete equality. There is nothing to suggest that that was anything other than a good working relationship, and it had been strikingly successful in building a very valuable business for their mutual benefit. In those circumstances there were no doubt sound reasons for Mr Malik not to upset this harmonious and beneficial relationship by demanding substantially more of his money than the Usmanis were taking of theirs or than they would be happy for him to have. That would it seems to me have been a very risky thing to do, and it no doubt never occurred to him to do so, or to them that he might. But that is all explicable by the ongoing business and personal relationship between them. It does not to my mind tell you anything about what his rights would be once the relationship had broken down and he had been removed from the board, and specifically does not tell you, or even really assist on the question, whether a term had been explicitly agreed at the outset removing his *prima facie* right to have his money back when he wanted it.

67. In my view therefore this criticism of the Judge is not made out.

Omissions from the judgment

68. Mr Cohen's next criticism of the Judge was that he omitted to consider various matters in HH's favour. He identified three of these. The first was that the three men had undoubtedly deferred taking their profits and had reinvested them in the business, and that it was surprising if this had happened without some discussion as to how the money would come out. I do not find that surprising at all. Mr Malik's evidence was that the money would be reinvested to assist the business. Neither side suggests that any particular timescale was put on that. This is not for example a case where the owners

of a start-up sketch out a plan to grow the business and take it to market within 5 or 10 or whatever years. It seems to me entirely plausible that all that was agreed was that they would each leave the money in as long as he was content to do so, which is effectively what Mr Malik's case amounts to. That cannot be said to have been uncommercial – as I have already said, he has in fact left his money in, and regularly added to it, for some 20 years, with great success.

69. The second point which Mr Cohen suggested the Judge had failed to consider was the evidence of equality and unanimity in relation to withdrawals over a 20-year period. I have already effectively addressed this point above.

70. The third point was that Mr Malik had nowhere set out his recollection of how and when agreement was reached, or what was specifically said. I do not think this is a valid criticism either. Mr Malik's case was that it had been agreed to lend the company the money but that nothing was said about repayment at all. Since there was no dispute that there had been an agreement to lend the company money, the only question is what, if anything, was said about repayment. Mr Malik could scarcely give any more details on this issue than he did, namely that nothing was said at all.

Disclosure

71. The final point made by Mr Cohen was to criticise the Judge for depriving HH of the opportunity to have the disclosure that every litigant is entitled to.

72. What the Judge said (at [14]) was as follows:

> "I am unpersuaded that the position might be different at trial from that before the court on the present application. In terms of the factual evidence, there is nothing more which can be said on the defendant's behalf than has been said in the witness statements. The defendant has not suggested otherwise. In terms of disclosure, the defendant submitted that there "may be" further documents which will come to light which would alter the present position and that it would have been disproportionate to have expected such documents to be available on the present application. I reject that submission. If there had been any relevant documentation, it could have been expected to have come to light by now, not least because the defendant has had several months in which to produce it. Yet not a single document is exhibited to the defendant's statements. In short, in my judgment there is no real substance in the factual allegations made by the defendant and there are not reasonable grounds for believing that a fuller investigation of the facts will affect the outcome of the case."

73. I do not see any error here. Mr Cohen said that it was the universal experience that what appeared to be thin or unimpressive cases might be strengthened at trial. Here it might be possible to recover the make-up of the £89,250 for "Other creditors" in the 2002 accounts; and Mr Malik might have relevant disclosure to give, for example in what he told his accountants about the loans.

74. I consider however that the Judge was entitled to take the view that it was fanciful to suppose that the disclosure at trial would be any different. It was HH's own case that

there was nothing in writing and they had had time to look for documents. I do not think the question of the £89,250, even if it were now possible to show that that included loans owed to Mr Malik and the Usmanis, would be sufficient to change the nature of the case. And I regard the suggestion that Mr Malik's disclosure might strengthen the case as far-fetched indeed.

Conclusion

75. I have now considered each of Mr Cohen's detailed criticisms of the judgment. Save in respect of the loans being shown as due within one year, I am unpersuaded that any of them is made out. Nor do I think this one point is sufficient to undermine the Judge's conclusion.

76. If one stands back from the detail and looks at the overall picture, it remains the case that HH's defence depends on establishing that it was agreed that Mr Malik could not withdraw his money, lent to the company interest-free with no fixed or minimum term, unless the Usmanis agreed to that. That for the reasons I have given would be an unusual term that would cut across his *prima facie* right to have his money when he wanted it, and would have to be specifically agreed. Yet not only is there no trace of it in the documentation; but the evidence in support of it is very thin. Moreover I agree with the Judge when he said in his judgment at [12] (in a part not specifically criticised by Mr Cohen) that the case put forward in the evidence differed from that put forward in correspondence and the pleading. I also agree with the Judge that there was no reason to think that the material available at trial would be any better.

77. There was no dispute before us as to the applicable principles on an application for summary judgment under CPR Part 24. They are summarised in the oft-cited statement by Lewison J (as he then was) in *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], which has been frequently followed and endorsed, and which the Judge referred to in his judgment (at [4]). I would however draw attention to the first two principles in that summary which are (i) that the Court must consider whether the claimant has a "realistic" prospect of success and (ii) that a "realistic" claim is one that carries some degree of conviction, which means a claim that is more than merely arguable. This reflects the language of CPR r 24.2(a)(ii) under which the Court may give summary judgment against a defendant if it considers that the defendant "has no real prospect of successfully defending the claim". I believe this was a deliberate change introduced in the CPR as opposed to the former procedure under RSC Ord 14 under which the plaintiff could apply for summary judgment on the ground that the defendant "has no defence" to a claim. Be that as it may, it is clearly established that a real or realistic prospect is required, and that a claimant can expect to obtain summary judgment if he can establish that the defence does not meet this hurdle. That is what the Judge expressly found here (at [16] – see paragraph 23(5) above). For the reasons I have given I think that was a conclusion open to him.

78. We received some argument as to the standard of review for an appellate Court in a case like this where the judge below has not heard any oral evidence and the appellate Court has the same material as he did. It is not actually necessary to resolve the point as whatever standard of review is applied I do not consider that the Judge's conclusion was "wrong" within the meaning of CPR r 52.21(3)(a), and even if I were making the decision entirely afresh I would reach the same conclusion. But I will deal briefly with the point since it was argued.

79. Mr Cohen said that there was a spectrum of respect which the appellate Court should accord to the decision of the lower Court depending on the nature of the decision of the lower Court which is challenged (see *McFaddens v Chandrasekaran* [2007] EWCA Civ 220 at [18]-[20] per Wilson LJ), and that a case such as the present falls right at one end of the spectrum such that in practice there is no discernible difference between a review and a rehearing. I do not have any issue with the suggestion that cases fall on a spectrum but I think it is going too far to say that the appellate Court in a case like this effectively conducts a rehearing. Appropriate respect should always be accorded to the decision of the lower Court, and that requires the appellate Court to show a degree of reticence. See *DB v Chief Constable of Police Service of Northern Ireland* [2017] UKSC 7 at [80] per Lord Kerr JSC:

> "The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent."

The decision of a judge, at any rate in a case like this, that a defendant has no real prospect of successfully defending a claim is an evaluative decision on the facts. It is not a pure point of law. In those circumstances I think we should only disturb his conclusion if it was one that we are satisfied was not open to him.

80. I am not so satisfied as I have already said, and I would therefore dismiss the appeal.

Lady Justice King:

81. I agree.

Lord Justice Lewison:

82. I also agree.