



Neutral Citation Number: [2022] EWHC 2611 (Ch)

Claim No: BL-2022-000169

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**BUSINESS LIST (ChD)**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL  
Date: 20 October 2022

**Before:**

**STUART ISAACS KC (sitting as a Deputy Judge of the High Court)**

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**Between:**

**Shafiq Malik**

**Claimant**

**Henley Homes PLC**

**Defendant**

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**Mr Alexander Halban** (instructed by Charles Russell Speechlys LLP) appeared on behalf of the Claimant.

**Mr Fraser Campbell** (instructed by Grosvenor Law) appeared on behalf of the Defendant.

Hearing date: 6 October 2022

## **Approved Judgment**

**This judgment was handed down by the judge remotely by circulation to the parties' representatives by e-mail and release to The National Archives. The date and time deemed for hand down is deemed to be 10.30am on 20 October 2022.**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

**Stuart Isaacs KC:**

1. The claimant is a shareholder and, until his removal in October 2021, was a director of the defendant, which has grown from modest beginnings into a successful property development company. The other shareholders of the defendant, who remain directors, are the claimant's brothers-in-law, Tariq and Kashif Usmani. By an application notice dated 29 April 2022, the claimant applied for summary judgment on the defendant's liability to repay loans made by the claimant to the defendant in an amount of over £2 million and for an interim payment of what is said to be the undisputed amount of £2,362,152. Demands for repayment were made at the end of 2021 and the start of 2022 but liability was disputed in a letter dated 11 January 2022 from the defendant's solicitors to the claimant's solicitors on the ground of an alleged oral agreement.
2. The defendant's case is summarised in that letter:

*“Tariq Usmani, Kashif Usmani and [the claimant] were shareholders in certain special purpose vehicles. ...*

*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 [the defendant] 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 these 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 [the defendant'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 set out by you.”*

3. It is common ground between the parties *inter alia* that loans were made by the claimant and the Usmanis to the defendant in order to fund the defendant; that the loans are repayable on demand; and that the defendant's indebtedness to the claimant and the Usmanis is substantial. The defendant's position that the loans are repayable on demand is premised on the agreement of all three lenders to that effect; the claimant's position is that a demand may be made by any one of them for the return of his loan.

4. In support of the application, the claimant advanced four broad arguments: (1) the defence of an alleged oral agreement is contradicted by the contemporaneous documents; (2) the defendant's evidence does not support the case advanced by it; (3) the court is in as good a position as would be a judge at trial; and (4) even if the alleged oral agreement was made, it would be commercially unworkable. In all the circumstances, the claimant submitted that the defendant has no real prospect of defending the claim and that, in application of the principles laid down by Lewison J in *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] which have been followed and applied in later cases, he was entitled to summary judgment.
5. For its part, the defendant submitted, also in application of those principles, that its defence has a real prospect of success and that summary judgment should therefore be refused.
6. In arguing against the existence of the alleged oral agreement, the claimant drew attention to various statements in the case-law, notably in *O'Neill v Avic International Corporation* [2019] EWHC 165 (QB) at [78], referring to *Blue v Ashley* [2017] EWHC 1928 (Comm) and *Edgeworth Capital Luxembourg Sarl v Aabar Investments* [2018] EWHC 1627 (Comm) which highlight the rarity nowadays of there being no form of electronic footprint for oral agreements and to the absence of a contemporaneous written record potentially counting heavily against the existence of an oral agreement. In *O'Neill*, it was said, referring to *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) and *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2014] EWHC 3615 (Comm), that the best approach for a judge to adopt in almost every commercial case is to be guided principally by the contemporary documents and the inferences which can be drawn from them and from known or probable facts rather than the oral evidence of witnesses.
7. The claimant submitted that the defence is contradicted by all of the contemporary documents. The company accounts, approved by the directors and certified by the defendant's auditors as giving a true and fair view of the defendant's affairs, consistently record over many years that the loans were owed to the directors and fell due within one year. That is in particular the case for the 2021 accounts filed in August 2022. The evidence of Mr Aslam Lala, the defendant's own Chief Financial Officer from January 2013 until his retirement in April 2020, who returned subsequently as its interim CFO, is to that effect: paragraph 43 of his witness statement dated 2 September 2022 says that the question whether the loans are properly due within one year has never been raised by or with anyone prior to the present dispute. That statement in the accounts is inconsistent with the terms of the alleged oral agreement. As stated in *McCarthy v Tann* [2015] EWHC 2049 (Ch) at [40] by Mr Registrar Briggs, the audited accounts of a company are primary documents which may be relied on to provide an objective account of its financial affairs. Although the defendant's evidence is that the first loan was made in 2001, the accounts contain no record of any such loan.
8. The defendant submitted that the loans were properly recorded in the accounts as repayable within one year because there was always a prospect that they might be, on both parties' respective cases. *McCarthy v Tann* was a very different case which involved a disputed debt in the context of an insolvency which did not appear at all in the company's accounts. The defendant fairly accepted that there was nothing in the defendant's 2001 accounts recording the alleged oral agreement and nothing specific to

that effect in the 2002 accounts, although it argued that the £89,250 shown in those accounts as amounts falling due within one year from other creditors was large enough to accommodate the loans made in 2001. The defendant pointed out that Mr Lala only joined the defendant in January 2013.

9. The claimant next submitted that Tariq Usmani's statement does no more than make an assertion that the alleged oral agreement was made, without any proper particularisation of, for example, where and how it was made. The statement also refers in paragraph 13 to a different term that the claimant and the Usmanis would each loan the defendant £10,000 in return for which each would own one-third of the shares in the defendant. Tariq's statement says in paragraph 9 only that such alleged oral agreement was made in around 2001 by the shareholders. The claimant submitted that this evidence provides no proper basis for a trial judge to conclude that the alleged oral agreement relied on by the defendant was made.
10. 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. 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. 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. 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. 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.
11. Paragraph 31 of Tariq's statement also cross-refers to paragraph 9 of the Defence, which includes a statement of truth signed by Tariq and which sets out the material terms of the alleged agreement 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."*
12. 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.
13. 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.
14. 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.

15. The claimant finally submitted that, as the Court of Appeal found in *Loveridge v Loveridge* [2021] EWCA Civ 1697, the alleged agreement was unrealistic since it would mean that, without the Usmanis' agreement, the claimant could never recover his loans, however much he might need the funds and however poor the defendant's financial position might be. The defendant, for its part, submitted that *Loveridge* was an entirely different case on its facts and that, while the alleged agreement might be inconvenient to the claimant as a minority shareholder, it was not uncommercial. I accept that the unworkability of an alleged agreement may point against the existence of the agreement which is alleged. However, I do not regard the claimant's submission as in any way conclusive and prefer the defendant's submission.
16. For the above reasons, 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.
17. The defendant also argued, somewhat faintly, that there was little to be gained in case management terms by awarding summary judgment on liability now because there will, as is common ground, need to be further proceedings on quantum anyway. I do not regard that consideration as amounting to some other compelling reason, or indeed any reason, for not awarding summary judgment on liability if, as I have concluded, the claimant is otherwise entitled to it. On the contrary, effective case management requires that an issue which can properly be determined summarily should be so determined.
18. Accordingly, the application for summary judgment on liability succeeds. I shall hear further argument on whether there should be an interim payment and, if so, in what amount, and on the question of costs.