Neutral Citation Number: 2022] EWHC 910 (Ch)

IN THE HIGH COURT APPEAL CENTRE MANCHESTER
ON APPEAL FROM THE COUNTY COURT AT PRESTON
BUSINESS AND PROPERTY LIST: INSOLVENCY

CH-2021-MAN-000006

BEFORE HIS HONOUR JUDGE STEPHEN DAVIES SITTING AS A HIGH COURT JUDGE

BETWEEN:

(1) MR NIGEL PAUL SMITH
(2) MRS EMMA SMITH **Appellants**

-and-

(1) MR EARLE GREGORY
(2) MRS FIONA GREGORY **Respondents**

Mr Ian Tucker (instructed by **Fieldfisher LLP, Solicitors, Manchester**) for the **Appellants**

Mr Christopher Hare (instructed by **Veale Wasbrough Vizards LLP, Solicitors Bristol**) for the **Respondents**

Hearing date: 4 April 2022
Draft judgment circulated: 7 April 2022
Judgment handed down: 13 April 2022

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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII. The date and time for hand-down is deemed to be 10:30AM on 13 April 2022.
I direct that pursuant to CPR PD 39A paragraph 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.

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies

1. This is my judgment on an appeal brought against the decision of District Judge Manasse, sitting in the County Court at Preston in a personal insolvency case, by which he refused to set aside statutory demands served by the respondents (Mr and Mrs Gregory - "the Gregorys") upon the applicants and appellants (Mr and Mrs Smith - "the Smiths") alleging that they were indebted to the Gregorys in the sum of £50,000 under a loan agreement signed on 23 February 2018. The Smiths' argument was that the liability was that of Mr Smith's company, Cookeze Limited ("the company") which was, by then, in administration.

2. I begin by expressing my admiration for the clear and succinct oral judgment delivered by the District Judge immediately after the hearing on 4 August 2021 and my appreciation for the impressively persuasive submissions of both counsel who appeared before me.

3. I state at the outset that for the reasons given below I am satisfied that the appeal fails and must be dismissed.

Permission

4. I granted permission to appeal by my order made 19 August 2021. I regret that due to the pressures of listing it has taken some time for the appeal to be brought on. At the start of the hearing Mr Tucker asked me to confirm that I was hearing the case sitting in my capacity as a judge of the High Court under s.9(1) Senior Courts Act 1981. I confirmed that I was. After the hearing had concluded I realised that my order granting permission had erroneously stated that it was made in the Manchester County Court Appeal Centre and that I was sitting as a judge of the County Court. However, by virtue of paragraph 17.2(2) of the Insolvency Practice Direction 2020 (read with the definition of High Court judge at paragraph 1(8)(9)) I could only have granted permission and determined the appeal whilst sitting in my capacity as a judge of the High Court under s.9(1) Senior Courts Act 1981. Accordingly, in order to cure any procedural error and insofar as is necessary I now grant permission in that capacity and confirm that I have heard the appeal in the same capacity, as I said at the start of the case.

The question for the District Judge and the question for me

5. It is common ground that the question for the District Judge in this case was whether the debt asserted in the statutory demands was disputed on grounds which appeared to the court to be substantial: paragraph 11.4.5 of the Insolvency Practice Direction 2020 and rule 10.5(5)(b) of the Insolvency (England and Wales) Rules 2016. As held in *Ashworth v Newnote* [2007] EWCA Civ 793 at [31] - [34] there is no difference between expressions such as "substantial grounds", "genuine triable issue" or "real prospect of success"; the court should not conduct a mini-trial on disputed evidence but the court is entitled to reject evidence where inherently implausible or contradicted or not supported by the documents.

6. It is also common ground that the question for me in this case is whether I am satisfied that the decision of the District Judge was wrong: CPR Part 52.21(3)(a).

7. This is a case where, although there are some disputes of fact, the key question is the proper analysis of the loan agreement and an exchange of contemporaneous emails. I shall begin by referring to the relevant documents.

The relevant documents

8. The loan agreement is in the form of a letter written by the Gregorys to the Smiths dated 23 February 2018 and signed by both of the Smiths on that date[1] immediately below the following text:

   "THIS IS TO CONFIRM THAT

   Earle and Fiona Gregory of the above address will advance a total of £50,000 to

   Nigel and Emma Smith

   Old Orchard Farm, Roseacre Road, Wharles, Lancashire, PR4 3XE

   To be repaid when their business, Cookeze Ltd., has the ability to do so or at a requested date".

9. Before I refer to the contemporaneous emails, it is common ground that Mr Smith was the owner and director of the company and that his wife, Mrs Smith, had no formal interest in or role with the company. It is also common ground that there had been a longstanding and friendly previous business relationship between Mr Gregory and Mr Smith. It is also common ground that the company was in financial difficulties and needed a cash injection, that Mr Smith did not have the funds to do so and, as a result, there had been a meeting between the two men at which Mr Smith had asked Mr Gregory to loan £50,000. There is a dispute as to whether or not the cash injection was in part for the company and in part for the Smiths' own personal finances, but I am satisfied that I cannot resolve that dispute in the Gregorys' favour on the evidence before me. There is no suggestion from either side that there was any express agreement at the meeting as to whether the loan would be made to the company or to the Smiths personally. Although there is no witness statement evidence as to the details, it is also apparent that before the first email was sent and the loan agreement entered into: (a) Mr Gregory had indicated that the Gregorys were willing in principle to provide the £50,000; (b) on 19 February 2018, 4 days before the loan agreement was entered into, an advance payment of £15,000 was paid by direct giro credit from Mrs Gregory's account into the company account; (c) Mr Gregory and Mr Smith had also agreed that Mr Gregory would provide consultancy services to the company.

10. The first email was sent by Mr Gregory to Mr Smith on 22 February 2018 at 10:05pm and read: "Good Evening Nigel, Can you please read through the attached Consultancy Agreement, if you're happy with the content of it please sign and return? Many thanks, Earle."

11. It is common ground that the email printout appears to show that two documents were attached to the email. The first was the draft consultancy agreement referred to above and the second was the draft loan agreement. Although there is no direct evidence that the draft loan agreement was actually sent and received, it is clear that it was either attached to that email or to the subsequent email of 22 February 2018 at 11:03pm[2] which read:

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[1] Although Mr Smith dated his signature 23 March 2018 it is common ground that this was a mistake.

[2] There were two intermediate emails, but they add nothing to the case.

"Hi Nigel, Let me know if this is ok for you? How do you want the money? Just to Cookeze account or another one? Regards, Earle"

12. It is unnecessary to refer to the detail of the consultancy agreement. It is sufficient to say that it provided for Mr Gregory to provide services to the company for a minimum term of 4 years in return for a monthly payment of £2,000 and a 15% shareholding and 15% profit share. Insofar as relevant, both counsel referred me to the top, where the agreement is stated to be: "Between Nigel Smith of Cookeze Ltd Company Number 07158480 (hereinafter referred as the Company) and Earle Gregory (hereinafter referred to as the Consultant)". Mr Tucker observed that this form of wording, self-evidently drafted by Mr Gregory or on his instructions, was unclear as to whether the contracting party was intended to be Mr Smith personally or the company. Mr Hare observed, and I agree, that even though there was some lack of clarity, on any view it was significantly different to the loan agreement in that it made express reference to the company.

13. The next email was from Mr Smith, sent on 22 February 2018 at 11:10pm and read:
"What's best Earle business or personal, is it better for me then as a loan directors, [sic]?"

14. Mr Gregory replied on 22 February 2018 at 11:13pm:
"Hi Nigel, Which ever is easier for you. Best, Earle."

15. Mr Smith emailed on 22 February 2018 at 11:15pm to ask:
"If it's business will I have a tax on revenue in? If it's personal then will I have tax on it?"

16. Mr Gregory replied on 23 February 2018 at 7:44am, saying:
"Hi Nigel, You wouldn't pay any tax on it for either way you would treat it as you would treat a bank loan. Regards, Earle."

17. On 23 February 2022 at 8:53am Mr Smith emailed the loan agreement, duly signed by both himself and Mrs Smith, to Mr Gregory without further comment.

18. Finally, on 23 February 2018 at 8:59am Mr Smith emailed Mr Gregory to say:
"Then it can go into Cookeze Earle please."

19. It is common ground that on 23 February 2018 the balance of the £50,000 was paid in four further direct debit giro payments from Mrs Gregory's bank account into the company's bank account.

The judgment below

20. The District Judge's findings are neatly encapsulated in four paragraphs.

21. Having referred to the loan agreement, he said this:
"11. The applicants argue that the parties to that document or the agreement are not clear. I unhesitatingly disagree. The parties are plainly identified. The parties are Earle and

Fiona Gregory who are advancing money, and Nigel and Emma Smith who are the recipients of that money.

12. The applicants say that there is no clear repayment obligation. I disagree. There is a very clear repayment obligation; the sum advanced is repayable on demand, "To be repaid when the business, Cookeze Limited, has the ability to do so or at a requested date." The applicants say that that does not impose any personal payment obligation. I cannot see how that argument can be sustained. The reference to Cookeze is not a requirement, a stipulation, that Cookeze is to repay the debt. It is clearly in my judgment a recognition of the fact that Cookeze is in some financial difficulty and is perhaps not able to provide the income or dividends that Mr Smith needs. There is, as I said, a clear reference to "at a requested date".

22. Having previously referred to the email exchange, he said this:

"9. I have considered that email exchange carefully and in detail, and what strikes me about it is that it goes not to the identity of the parties to any loan, but to the account into which the loan should be paid and the way in which it should be accounted for by Mr Smith. It is plain that he wants the money to go into Cookeze. He is entitled to ask for that; he is the managing director, he is the sole shareholder. In fact, once he has the loan, he can (alongside Mrs Smith) do what he likes with it. He could ask for it to be paid to whomsoever he pleases, but he asks that it is paid into Cookeze's account."

23. Finally, he said this:

"13. The applicants say that the Court would need to hear live evidence as to the context of the parties' intentions. I disagree. The parties' intentions are clear. The parties intend that Earle and Fiona Gregory will advance £50,000 to Nigel and Emma Smith, and Nigel and Emma Smith will pay it back either when the business is on a more stable financial footing or at some other time, whenever it happens to be requested. It is very clear. The clause about the business is, in my judgment – perhaps an indicator as to the use to which the loan may be put, ie to assist Cookeze, but it may not be for that at all. It may be for something else. It may be to provide financial support for Mr and Mrs Smith whilst Cookeze cannot do that, whilst Cookeze is not providing the income that they need. It does not alter the parties to the loan agreement. I have said already but I repeat it, the loan is repayable on demand irrespective of the financial health of the company."

The arguments on appeal

24. On appeal Mr Tucker submits that the District Judge was wrong to conclude that the email exchange was directed solely as to the identity of the account into which the loan was paid. He submits that on a proper analysis it is clear that it was directed to the more fundamental question as to whether the borrower should be the Smiths personally or the company. Specifically, he submits that:

(i) The reference to "business or personal", given the specific reference to "loan directors" (which he submits can only have been intended to refer to a director's loan") shows that

this was intended to be a distinction of substance, namely between a loan direct to the business as opposed to a loan to the Smiths which would then be advanced by them to the company and treated as a director's loan to the company. This was not a simple question of which account the £50,000 should be transferred into.

(ii) The immediately following reference to whether the tax position would be different on a business than on a personal loan also shows that it is a distinction of substance, since the tax treatment would depend on whether the loan was a company liability or a personal liability, not on which account the £50,000 was paid into.

(iii) Mr Gregory was stating in clear terms that he was happy for the Smiths to choose whether the loan should be treated as a loan to the company or a loan to them personally and, having considered the position, the Smiths elected - in the final email sent within 6 minutes of the email enclosing the signed loan agreement - to choose the company loan option. That can only have been understood, in the context of the previous emails, to be a choice of the borrower being the company not the Smiths personally.

25. Mr Hare submits that:

(i) The entire exchange relied upon by Mr Tucker begins with the draft loan agreement which states, as clearly as could be, that the borrowers were to be the Smiths in person. Thus, when Mr Gregory asked whether the money should go to the company account or another one it follows, he submits, that the whole of the following exchange can only sensibly have been intended to address that limited question and not some more fundamental question as to whether the borrower should be different from that clearly identified in the draft loan agreement.

(ii) Mr Gregory's response ("whichever is easier for you") to Mr Smith's question can only have been understood in the context that it was of no importance to the Gregorys into which account the monies were paid, whereas it would have been of obvious importance if the party responsible for repayment was to be changed from the Smiths as individuals to a financially struggling company.

(iii) Mr Gregory's response to the tax question also shows that, whatever the thinking behind the question, the answer was that it was immaterial, because it would simply be treated as the equivalent of a bank loan and thus no tax would be payable whichever account it went into.

(iv) Read in context, the only choice which the Smiths were being given was the choice of which account the loan should be paid into, which is entirely consistent with their having signed and returned the loan agreement unamended.

(v) The final email is not only post-contractual and, hence, legally irrelevant, but in any event does not detract from the above analysis, since saying that the money can "go into Cookeze" is again consistent only with a choice of account not of borrower.

26. Mr Hare also took a more fundamental point, which is that these email exchanges are all irrelevant to the key question which, he submits, is the true construction of the loan agreement which, he contends, constitutes the entire contract between the parties. Mr Tucker submitted that the contract is to be found in the loan agreement and in the email exchanges, concluding with the final email sent at 8:59am, so that all must be read together.

27. As to the construction of the loan agreement as a freestanding document, Mr Tucker submitted that the document has to be viewed in the context that it is plainly a draft produced by Mr Gregory, who is not a lawyer, and that the wording must also be considered in the context of the loose language used in the consultancy agreement. He submits that the reference to the loan being "repaid when their business Cookeze Ltd has the ability to do so" shows that there is, at the very least, an ambiguity as to the construction of the loan agreement. However, his primary argument is that when the loan agreement is read with the email exchanges there is plainly an inconsistency between the loan agreement insofar as it does make the Smiths personally liable, and the email exchanges ending with the final email and, in his submission, the inconsistency is to be resolved on the basis of what he contends is the proper construction of the email exchanges.

28. Mr Hare supported the District Judge in his analysis of the loan agreement, pointing in particular to: (a) the clear statement of confirmation that the Gregorys will advance the £50,000 to the Smiths (and not to the company); and (b) the unqualified signature of the Smiths in their own personal capacity. He also submits that the reference to the loan being repaid when the company has the ability to do so must be read with the continuing words "or at a requested date", which is clearly not referable in any way to the company, so that insofar as the words relied upon by the Smiths mean anything they simply mean that the Smiths are, regardless of demand, under a freestanding obligation to repay the loan when the company is able to provide the funds to do so, whether directly to the Gregorys or indirectly through the Smiths. He submits that this is plainly different to an obligation, lying only upon the company, to repay the loan as borrower from the Gregorys.

29. The above arguments as advanced by Mr Tucker relate to the issue of the proper construction of the agreement. As an alternative, Mr Tucker also argued that if, contrary to his case, the loan agreement as properly construed was one made between the Gregorys as lenders and the Smiths as borrowers, that did not reflect the common intention of the parties as revealed by the email exchanges and, thus that there is a substantial case to the effect that the loan agreement could and should be rectified. Alternatively, he contended that the evidence showed that Mr Smith held that belief, that Mr Gregory knew that Mr Smith held that belief and said or did nothing to disabuse him and, that in all the circumstances, there is a substantial case for unilateral mistake rectification.

30. It does not appear that rectification was a case specifically advanced before the District Judge. However, I did advert to it as a possible alternative argument in my decision to grant permission to appeal. Since it is closely associated with the arguments actually advanced below, and since the Smiths are not seeking to rely upon any further evidence beyond that filed below, Mr Hare sensibly and realistically did not contend that the argument could not be raised on appeal. Instead, he contended that the evidence did not disclose any substantial case for rectification, whether on the basis of common or unilateral mistake.

Applicable legal principles

31. In addressing the arguments about the inter-relationship between the loan agreement and the email exchanges and the extent to which the email exchanges are relevant it is necessary to go back to first principles. These are conveniently summarised in *Chitty on Contracts* (34th edition) at 15-022 as follows:

> "Where the parties appear to have embodied their agreement in a written document, the question arises whether extrinsic evidence, that is to say, evidence of matters outside the document, is admissible so as to affect its content. Two issues are involved: first, whether it is permissible to adduce extrinsic evidence of terms other than those included, expressly or by reference, in the document; secondly, whether extrinsic evidence may be admitted to explain or interpret the words used in the document… At this point it suffices to note that different considerations apply to the admissibility of extrinsic evidence to interpret or explain a written agreement than in the case where the extrinsic evidence is relied upon for the purpose of adding another term to the contract. Extrinsic evidence admitted to interpret or explain a written document does not usurp the authority of the written document or contradict, vary, add to or subtract from its terms. It is the writing which operates. The extrinsic evidence does no more than assist in its operation by assigning a definite meaning to terms capable of such explanation or by pointing out and connecting them with the proper subject matter. Accordingly, no "parol evidence rule" (in the sense referred to above and in the following paragraphs) will apply to such a situation."

32. So far as the first issue is concerned, the parol evidence rule is summarised in *Chitty* at 15-023 as being that "If there be a contract which has been reduced to writing, verbal evidence is not allowed to be given … so as to add to or subtract from, or in any manner to vary or qualify the written contract."

33. The editors of *Chitty* note, however, at 15-024 that the rule is subject to a number of exceptions. The exception of potential relevance to this case is stated at 15-024 and 15-025 as being that extrinsic evidence of terms additional to those contained in the written document may be admitted:

> "if it is shown that the document was not intended to express the entire agreement between the parties. In such a case 'The court is entitled to look at and should look at all the evidence from start to finish in order to see what the bargain was that was struck between the parties'. If, on that evidence, the court finds that terms additional to those in the document were agreed and intended by the parties to form part of the contract, then the court will have found that the contract consists partly of the terms contained in the document and partly of the terms agreed outside of it. The parol evidence rule will not apply. If, on the other hand, the court finds that the document is a complete record of the contract, then it will reject the evidence of additional terms. But it will do so, not because it is required to ignore the additional terms or the evidence said to prove them, but because such evidence is inconsistent with its finding that the document does contain the entire terms of the parties' agreement".

34. As to the second issue, the approach to the admissible "matrix of fact" or "available background" is summarised at 15-055 as being as follows:

> "The courts will, in principle, look at all the circumstances surrounding the making of the contract and available to the parties (usually referred to as the "factual matrix" or "available background") which would assist in determining how the language of the document would

have been understood by a reasonable person in their position. The range of materials on which the modern courts now draw is considerably wider as the ambit of the "factual matrix" has increased, permitting the court to draw upon a greater range of materials when seeking to put the words of the contract in their context and interpret them accordingly".

35. The relevant factual matrix does not, however, extend to pre-contractual negotiations, although such evidence may be used to support a claim for rectification [15-059]. Nor does it extend to evidence of conduct subsequent to the making of a contract, although again such evidence may be relevant in a claim for rectification [15-060].

36. As regards ambiguity in a contract, the position is explained as follows at [15-087]:

"A word or phrase in a contract may be open to more than one potential meaning or interpretation. In such a case the court will consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances".

37. In relation to the principles applicable to contract construction generally, I was referred to recent guidance given by the Supreme Court in cases such as *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 and *Arnold v Britton* [2015] UKSC 36, to which I was referred by counsel, with each relying upon those individual passages which particularly supported their respective cases. These principles have recently been referred to and summarised by the Master of the Rolls, Sir Geoffrey Vos, in Britvic plc v Britvic Pensions Ltd [2021] EWCA Civ 867 at [16-21] and there is nothing further which I need add to that summary.

38. In relation to common mistake rectification, counsel were agreed that the principles are as set out at [176] of the judgment of the court in *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361 as follows:

" .. Before a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an "outward expression of accord" - meaning that, as a result of communication between them, the parties understood each other to share that intention."

39. In relation to unilateral mistake rectification, counsel both referred to the summary in the judgment of Buckley LJ in *Thomas Bates & Son v Wyndhams Ltd* [1981] 1 W.L.R. 505 at 515-516.

"For this doctrine—that is to say the doctrine of *A. Roberts & Co. Ltd. v. Leicestershire County Council*—to apply I think it must be shown: first, that one party A erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain; secondly, that the other party B was aware of the omission or the inclusion and that it was due to a mistake on the part of A; thirdly, that B has omitted to draw the mistake to the notice of A. And I think

there must be a fourth element involved, namely, that the mistake must be one calculated to benefit B. If these requirements are satisfied, the court may regard it as inequitable to allow B to resist rectification to give effect to A's intention on the ground that the mistake was not, at the time of execution of the document, a mutual mistake."

40. Mr Hare also emphasised that rectification was not a plea to which the court should lightly accede, referring to the *FSHC* decision where the court said at [173] that for rectification, there "is rightly a demanding test to satisfy and one which affords appropriate respect to the primacy of the final, agreed, written terms of a contract", and at [174]) that "[a]s a matter of policy, rectification should be difficult to prove", agreeing with Professor Paul Davies that "[f]ormal, written contracts should be presumptively upheld and instances of rectification should be rare. Any other approach would undermine the importance commercial parties put on the final written agreement".

Discussion and conclusions

41. The logical starting point is the loan agreement itself. That is because it is, on its face, a self-contained and complete contract for a loan. It emanates from the lenders, who it identifies by name and address, it also specifies the amount, identifies the borrowers by name and address and specifies the relevant repayment terms. Finally, it is signed by the borrowers in acceptance of its terms.

42. In agreement with the District Judge it is quite clear in my judgment that the lenders and the borrowers are clearly identified, with the latter being the Smiths and not the company. It is also quite clear that repayment is to be made either when the Smith's business of Cookeze Ltd is able to do so or on a requested date. It cannot seriously be suggested that, simply because the first repayment trigger is the company's ability to repay, the obligation to repay lies upon the company as opposed to the Smiths. That would be fundamentally inconsistent with the statement that the money would be advanced to the Smiths, and moreover the second repayment trigger has no necessary connection with the company. Whilst possibly superfluous, given the Gregorys' right to demand repayment on request, it is not commercially absurd to include a primary obligation to repay by reference to the ability of the company, as - on the Smiths' case - the sole intended ultimate beneficiary of the loan, to do so. There is nothing remotely unlawful or unusual in a loan being made to those involved in a company to enable them to make an equivalent loan to their company. Even if it was known that Mrs Smith had no actual involvement in the company there is nothing remotely unlawful or unusual in a loan being made jointly to the business owner and his or her spouse or partner with a view to obtaining better security (subject of course to any argument - which is not made here - that the lender is unable to enforce the loan against the spouse or partner due to having actual or constructive notice of any invalidating factor such as undue influence).

43. Thus the key question, in my judgment, is whether the Smiths can rely on the email exchange either to show that the loan agreement was not intended to express the entire agreement between the parties and that terms additional to those in the document were agreed and intended by the parties to form part of the contract or to show that if regard is had to the email exchange as part of the relevant factual matrix it shows that the loan agreement would have been understood by a reasonable person in their position differently to that to which it appears to a reasonable person without that background knowledge.

44. I am not quite as confident as the District Judge that the email exchange unambiguously refers only to the account into which the loan should be paid, rather than - at least arguably - to the identity of the party who is to be legally responsible for repayment. In particular, I accept Mr Tucker's submission that, on an objective analysis, the query by Mr Smith as to whether the loan should be "business or personal", especially given the specific reference to "loan directors" and the subsequent question as to whether the tax treatment would be different dependent on whether it was a business or a personal loan, is capable of being read as a query as to whether the loan should be made to the Smiths, as envisaged by the proposed loan agreement, and then on by them to the company, or direct to the company.

45. However I agree with the District Judge that, as he said at [13], the court does not need to hear live evidence as to the context of the parties' intentions to determine the questions as to the terms of the contract and their construction. That is because these questions are to be objectively ascertained by reference to the relevant communications between the parties, in circumstances where the Smiths do not contend that anything relevant was said or done up to the point of conclusion of the contract which is not in the email exchanges themselves.

46. It follows, I agree with Mr Hare, that this court is in as good a position as any court dealing with this case at any future trial to determine these questions and, therefore, that this court ought to do so.

47. In my judgment the Smiths' argument cannot succeed on any realistic analysis. That is for the following reasons:

    (i) The draft loan agreement is as clear as it could possibly be that the Gregorys' proposal was that the loan would be made to the Smiths personally. The Smiths could not credibly have argued that this would not reasonably have been apparent to them as non-lawyers, given the short and straightforward nature of the draft. The accompanying email, whichever it was, did not give Mr Smith the option of choosing between a loan to the company or to the Smiths personally. The subsequent email exchanges must be read in that context.

    (ii) The starting point of the subsequent email exchange is, as Mr Hare submitted, a straightforward question from Mr Gregory as to whether the money should be paid into the company account or a different one, in the factual context that £15,000 of the loan had already been paid direct into the company account. This could not sensibly have been understood as a question whether the loan should be to the company or to the Smiths personally.

    (iii) In the context of that question, Mr Smith's reply ("what's best business or personal, it is better to me then as a loan directors?") cannot be read as a clear question as to whether the loan should be to the company or to the Smiths personally. With the benefit of the forensic analysis applied by Mr Tucker the question may be seen to betray a lack of understanding by Mr Smith as to whether or not it would make any difference if the payment went direct into the company's account or indirectly via a payment into the Smiths' account and then onwards via a director's loan into the company account. To that extent the question is, on an objective analysis, ambiguous. However it is equally

apparent from the same objective analysis of Mr Gregory's answer ("whichever is easier for you") that he did not understand or seek to answer the question in the way now suggested by Mr Tucker. The same is true of Mr Smith's follow-up question ("if it's business will I have a tax on revenue in? if it's personal then will I have a tax on it"). Again, it can be seen with the benefit of a forensic analysis that there is a lack of understanding and an ambiguity, but again Mr Gregory's reply ("you wouldn't pay any tax on it for either way you would treat it as you would treat a bank loan") shows that he did not understand or seek to answer the question in the way now suggested.

(iv) It follows that at the point when the Smiths signed and returned the loan agreement in its unamended form the most that can be said is that the exchanges betrayed a potential confusion in Mr Smith's mind as to whether or not the account into which the loan was to be paid would make any difference to the legal, financial or taxation position. What they do not demonstrate on any view is either Mr Smith asking a clear question whether or not the draft loan agreement should be treated as a loan to the Smiths, for them to funnel to the company, or direct to the company, or Mr Gregory stating in response to any such question either that it should be treated as a loan direct to the company or that the Smiths could decide for themselves whether they wanted it treating as a loan direct to the company or not. Thus, what the exchanges do not on any view demonstrate is either an agreement between Mr Gregory and Mr Smith that the loan agreement should be treated as a loan to the company direct or an agreement that the Smiths had the option to treat the loan agreement as a loan to the company direct.

(v) Insofar as there was, on any objective analysis, any doubt about the meaning and effect of the email exchange, that ought to be answered in the Gregorys' favour given that the Smiths returned the loan agreement duly signed without amendment and without any clear contemporaneous statement to the effect that they were signing it on the basis that it was to be read and treated as an agreement for a loan direct to the company or as giving them the option to treat it as such. If they were seeking to introduce an important amendment to the terms of what was clearly intended to be a contractual document it was incumbent upon them to make that clear and, on any view, they signally failed to do so.

(vi) I am prepared to accept in the Smiths' favour that the gap of no more than 6 minutes between the return of the signed loan agreement and the final email ("then it can go into Cookeze please") is sufficiently modest to enable it to be treated, at least arguably, as substantially contemporaneous with the conclusion of the loan agreement. But even on that basis the wording is nowhere near sufficiently clear or unambiguous to alter the conclusions already expressed. It follows that I am unable to accept that it was, as Mr Tucker sought to characterise it, an exercise of the option to choose whether the loan agreement was to be accepted by the Smiths personally or by the company.

(vii) In legal terms, therefore, the email exchange does not introduce any terms additional or different to the terms contained in the signed loan agreement and nor are they such as to demonstrate that the parties to the signed loan agreement intended it to be a loan by the Gregorys to the company. Indeed I am not persuaded that it would be legally justified to permit the email exchanges to be deployed with a view to seeking to show that the clear and unequivocal references in the signed loan agreement to the borrowers being the Smiths should be construed as references to the company, which is why it seems to me that if this argument had any traction at all it would have to be on the basis of a claim for rectification, to which I next turn.

48. The Smiths' insuperable problem as regards common mistake rectification follows inexorably from the conclusions I have already reached. For common mistake rectification, since there is no question here of a prior concluded contract, it would be necessary to show that when the loan agreement was signed and returned the parties had a common intention that the borrower should be the company which, by mistake, the document did not accurately record and that as a result of their communications they understood each other to share that intention. Leaving aside for a moment the need to show that both parties actually had that common intention, it is plain that any such shared understanding as to that intention was not apparent from the email exchanges which, as I have said, demonstrated no more than ambiguity at best.

49. In oral submissions Mr Tucker ingeniously sought to extend the argument by contending that the common intention was that the Smiths should have the right to exercise the option to treat the loan agreement as being between the Gregorys and the company, however this fails for the same reasoning, namely that any such intention was not apparent from the email exchanges.

50. As to unilateral mistake rectification, it seems to me that the Smiths' case suffers from equally insuperable objections, for the following reasons.

    (i) The evidence simply does not demonstrate that the Smiths positively believed at the time that the loan agreement was a contract between the Gregorys and the company or that the Smiths had the option to convert it to such. There is no clear or compelling evidence to this effect such as to contradict the clear evidence as it appears from the email exchanges that - at its highest - Mr Smith did not actually have any clear understanding either way as to the effect of the loan agreement as signed. I agree with Mr Hare that the need for convincing evidence applies as much, if not more, to unilateral mistake rectification as it does to common mistake rectification, and it is not enough for the Smiths simply to assert, once the liability for the debt became a real issue, that this is what they believed. Whilst I accept that there is evidence that it was included in the company accounts as a loan to the company, what the balance sheet as at 28 February 2019 actually states is "Loan Account Gregory", which seems to me to be essentially ambiguous.

    (ii) Even more fundamentally, the evidence does not demonstrate that the Gregorys either believed that it had been agreed that the loan agreement was an agreement between themselves and the company or that the Smiths had the option to convert it to such, nor that they knew that the failure of the loan agreement to provide for either was due to a mistake on the part of the Smiths or that they had omitted to draw the mistake to the notice of the Smiths. Mr Tucker submits that this knowledge is demonstrated from the tenor of the email exchanges. But since, as I have said, Mr Gregory's answers provide no basis for any inference that he knew that Mr Smith wanted the loan agreement to be with the company and believed that it was, that is nowhere near enough. This is not a case where it is sufficient for the Smiths simply to assert that they have a reasonable prospect of establishing this knowledge via cross-examination in circumstances where there is simply a complete absence of contemporaneous or other documentation to provide any real support for such a case.

51. For all of the above reasons I am satisfied that the appeal fails and must be dismissed.

52. Since providing this judgment in draft the parties have very helpfully agreed a consequential order, which I will make.

53. There are however two disputes as to costs: first, whether they should be paid on the indemnity basis; and second, the amount of the necessary summary assessment.

54. As to the first, Mr Hare submits that both the District Judge and I concluded that the merits of the Smiths' case were weak and that the arguments advanced were unmeritorious. Mr Tucker submits that since I was prepared to grant permission to appeal the defence cannot have been entirely without merit. I agree with Mr Tucker. Indeed not only did I grant permission but I had to address the arguments in some detail, concluding at [44] that I was not quite as confident as the District Judge that the email exchange unambiguously refers only to the account into which the loan should be paid, rather than - at least arguably - to the identity of the party who is to be legally responsible for repayment. However, in my judgment Mr Hare is on stronger ground as regards the wasted costs of the abortive hearing of 17 January 20200, which had to be adjourned because the Smiths had failed to obtain a transcript. I have to bear some responsibility for this because, having used a pro forma when granting permission on the papers, I erroneously failed to delete the standard reference to having read the approved transcript of the judgment below. In fact, no transcript was by then available. However, as Mr Hare submits, even if the Smiths' advisers might conceivably, albeit mistakenly, have believed on receipt of the decision granting permission that a transcript had been obtained and approved through some other source, that belief cannot possibly excuse the failure to respond to the repeated requests made by the Gregorys' solicitors for a copy from August 2021 onwards. Had they responded and engaged the error would have been discovered and either a transcript obtained in time to allow for an effective hearing or the hearing adjourned in time sufficient to save costs being wasted. That conduct on the behalf of a represented appellant does justify indemnity costs in my judgment.

55. As to the costs of the abortive hearing, the costs schedule is in the sum of £2,246.50 and I am satisfied that on the indemnity basis this is allowable in full. As to the costs of the appeal hearing on 4 April 2022 the costs schedule is in the sum of £12,391.20. That is challenged on various grounds, including the hourly rates which exceed the guideline. Mr Tucker submits that whilst, as he rightly concedes, the demands of undertaking specialist litigation may well justify an uplift, this is still a relatively straightforward case about a modest value statutory demand. I agree. Mr Tucker also objects to various attendance costs claimed. I agree to an extent. Taking both of these points into account I allow £10,000. The total awarded is therefore £12,246.50. It would appear that VAT will be chargeable, unless the Gregorys are VAT registered and can reclaim the VAT. Subject to production of a certificate to confirm that they are not VAT registered or cannot reclaim VAT, VAT may be added.