Neutral Citation Number: [2020] EWHC 909 (QB)

Case No: QB-2018-003978

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2020

Before :

RICHARD HERMER QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT OF JUSTICE

- -

Between :

(1) GML INTERNATIONAL LTD **(2) STEFAN PAUL PINTER** **(3) TRIDENT FIDUCIARIES (IOM) LTD AS TRUSTEES OF THE BERRY REVOCABLE TRUST**	**Claimants**
- and –	
JONATHAN HENRY MARTYN HARFIELD	**Defendant**

- -
- -

Yash Bheeroo (instructed by **Keystone Law**) for the **Claimants**
Philip Edey QC and **Thomas Ogden** (instructed by **McDermott Will & Emery**) for the **Defendant**

Hearing dates: 17 – 21 February 2020

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Approved Judgment

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.

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MR RICHARD HERMER QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 17 April 2020.

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RICHARD HERMER QC:

A: INTRODUCTION

1. This case is a dispute about sums of money paid by the Claimants to the Defendant between December 2008 and April 2014. The precise sums are a matter of dispute but total approximately £850,000 excluding interest. There is no dispute between the parties that most of the monies were paid in the amounts claimed and on the dates claimed, rather the dispute concerns the nature and legal effect of the payments. The Claimants contend that each of the payments were by way of loans to the Defendant for which they now seek repayment. The Defendant disputes this. He accepts that he received the payments but contends that they were not loans at all but rather payments made to him in part performance of a compensation agreement he alleges he entered into with the Second Claimant in May 2006.

2. The claim has some unusual evidential features, including allegations of involvement of the Bulgarian mafia, criminality at Russian banks, arguments about the dress code that would have applied to a disputed meeting at the Ritz Hotel and the engagement of a firm of investigators staffed by former members of the Israeli intelligence services. For all of that, this case remains a simple claim for monies said to be owed under contract which falls to be resolved by applying trite principles of contract law and employing a well settled analytical framework to disputed evidence.

The Parties

3. The First Claimant is a financial services company. The Second Claimant, Mr Pinter, is a director and underlying beneficial owner of the First Claimant. The Third Claimant is Trustee of an Isle of Man Trust which is a revocable family trust set up by the Second Claimant. In almost all respects relevant to the claims the Defendant's dealings with the three Claimants was with the Second Claimant, Mr Pinter.

4. The Defendant, Mr Harfield, is a Chartered Accountant. Much of his relevant experience is set out in the body of this judgment. He is currently employed as a director of E-Pay International Limited, a company registered in England & Wales.

The issues

5. The issues for me to decide are as follows:

   i) What was the legal effect of each of the payments made by the Claimants – specifically, were they loans, or rather were they payments made pursuant to the alleged compensation agreement with the Defendant?

   ii) If some, or all, of the payments were loans then what were the terms of the loans, in particular as to repayment?

   iii) If some, or all, of the payments were loans then were they 'non commercial agreements' as defined by s.189(1) of the Consumer Credit Act 1974 and, if not, are the loans enforceable?

iv) In respect of any sum payable to the Claimants, then for what period is the Claimant entitled to interest pursuant to s.35A of the Senior Courts Act 1981 (the parties having helpfully agreed, at the conclusion of trial, an 'in principle' rate of 2% above Bank of England base rate)?

6. Although the Defence raised issues of limitation and estoppel, these were not pursued at trial. The overwhelming focus of the parties at trial was the first issue, namely the nature and effect of the payments made by the Claimants to the Defendant, which revolved around the decidedly binary dispute as to whether they were loans or compensation.

The evidence presented to the Court

7. I received witness statements and heard oral evidence from the following witnesses of fact:

i) Mr Pinter, the Second Claimant;

ii) Mr Stohner, a former director and former underlying beneficial owner of the First Claimant;

iii) Mr Harfield, the Defendant;

iv) Mr Boyarkin, the Defendant's former civil partner.

8. The Second Claimant and the Defendant were subjected to over a day of cross examination each. In addition, I received into evidence, on behalf of the Claimants, the agreed witness statement of Mr Shah, a partner in the First Claimant's accountants.

9. Two related and striking features of the claim and defence are firstly that the material events occurred many years ago, indeed the purported oral agreement relied upon by the Defendant is said to have been made in May 2006, almost fourteen years ago. Secondly, neither that purported agreement nor any of the purported loans were ever reduced into written documents. Their existence and terms are sought to be inferred by the recollection of witnesses and ancillary documentation. The witness statements of the parties and their witnesses were all signed in 2019 many years after the relevant events giving rise to the claim and a considerable amount of evidence, particularly that of the Defendant, was premised upon recollection of numerous meetings and telephone calls that took place many years ago. In addition to the recollection of witnesses, the parties produced four lever arch volumes containing over 1,500 pages of contemporaneous documentation. Unsurprisingly in these circumstances, a focus of argument was the comparative weight that should be given by a Court to contemporaneous documentary evidence as opposed to the recollection of witnesses, not least in the context of a case in which some of the key events were as far back as 2006. This is a subject to which I return below.

B: THE FACTUAL BACKGROUND

The Bulgarian Bank

10. The events arise out of the purchase by an investment fund known as 'Growth', together with another unconnected fund ('Hillside'), of a 20% share in a Bulgarian Bank called the First Investment Bank ('FIB'). Growth was a fund managed by the First Claimant and the Second Claimant was also a director of it. Hillside was managed by an investment management company, 'Thames River', which was an entirely separate entity to any of the companies connected to the First or Second Claimant save that they had previously worked collaboratively on investment opportunities. I shall refer to them collectively as the 'Minority Shareholders'.

11. At the time of this purchase the Defendant was the Chief Executive Director of FIB, a post he had held since July 2002. He had known the Second Claimant on a professional basis since 2003 when Mr Pinter had commenced discussions which led to the First Claimant arranging a number of subordinated loans by Growth, Hillside and others to FIB.

12. The purchase of the minority stake in FIB by Growth and Hillside took place in August 2005 albeit it did not complete until the end of that year. The shares were purchased equally by the two funds from the European Bank for Reconstruction and Development ('EBRD') for the sum of 13 million Euros. A further sum of 7 million Euros was also jointly paid by Growth and Hillside to the majority shareholders, two Bulgarian nationals, Mr Minev and Mr Mutafchiev (the 'Majority Shareholders'), in consideration of them entering into a shareholders agreement (the Shareholders Agreement).

13. The relationship between the Majority and Minority Shareholders went sour quickly. In the spring of 2006, Growth and Hillside were approached by an independent member of FIB's Supervisory Board, Mr David Mathew, and were told about concerns that he and the Defendant shared that the Majority Shareholders were causing FIB to issue improper loans for their ultimate benefit and those of entities closely connected to them not least in the Bulgarian energy sector. Later, the Defendant expressed these concerns directly to the Second Claimant and also raised suspicions that the Majority Shareholders might have connections with organised criminal gangs[1].

14. In late March 2006, the Second Claimant, in accordance with rights enjoyed under the Shareholders Agreement, was appointed as the Minority Shareholders' representative for the Supervisory Board of FIB. The Second Claimant used the opportunity provided by attendance at his first Supervisory Board meeting in April 2006 to raise some of the concerns brought to his attention by Mr Mathew and the Defendant which were increasingly shared by the Second Claimant and the Minority Shareholders.

15. The concerns expressed at the meeting by the Second Claimant were not welcomed by the Majority Shareholders. During what was described as an acrimonious meeting, Mr Mutafchiev (who was not present at the Supervisory Board itself) came to find the Second Claimant and asked him to step outside. He is said to have told the Second

[1] I make plain that whilst the fact of the allegations levelled by the parties against the Majority Shareholders is relevant background to this claim, nothing in this judgment should be read as expressing any view, let alone reaching any conclusions, as to whether or not such allegations are well founded. The Majority Shareholders are not parties to these claims and indeed may well be unaware of their existence.

Claimant that he should not interfere with FIB's business and if he was not prepared to comply with this demand then the two investment funds were not welcome as shareholders.

The Alleged Agreement at the Ritz

16. The Defendant alleges that at this point in the timeline he entered into a compensation agreement with the Second Claimant ('the Ritz Agreement').

17. The Defendant's evidence is that on 11 May 2006 having returned to Sofia from a Florentine holiday resolved to leave FIB. He stated that he spoke on the telephone to the Second Claimant on that day to inform him of the decision that he was intending to leave FIB. The Defendant describes the Second Claimant's response as appearing 'frantic' and that he expressed deep concern about the impact that the proposed departure would have on the FIB's liquidity. It is said by the Defendant that in light of the Second Claimant's gratitude for the role played by the Defendant he made plain that (in addition to being welcome to work for the First Claimant) he and the Minority Shareholders would not see him suffer any detriment by staying at FIB. The Defendant's evidence is that the Second Claimant "*gave a clear commitment that I would be properly rewarded for my contribution to a successful outcome of the Minority Shareholders' cause if I were to lose my job or my position were to become untenable (i.e. if I were forced to resign)*"

18. The Defendant alleges that as a result of that discussion he agreed not to resign immediately but to discuss matters further with the Second Claimant at a face to face meeting when he was next in London.

19. The Second Claimant does not recall a specific conversation with the Defendant at this time (although does not dispute that he might have spoken to him) but is adamant that he never gave any such promises.

20. The Defendant says that he then met with the Second Claimant at the lounge outside the Rivoli Bar at the Ritz Hotel in Piccadilly on 24 May 2006. The conversation is said to have again revolved around the Second Claimant's desire that the Defendant remain at the helm at FIB. The Defendant says that the Second Claimant clearly stated that if he remained at FIB but subsequently lost his job (including if his position became untenable or he was forced to resign) then both he and the Minority Shareholders (in his words):

> "would compensate me for any financial loss or detriment I suffered as a result of continuing in my role; and
>
> pay me 5% of any gain made by the Minority Shareholders on their investment on the sale of the minority shareholding."

21. The Defendant also says that the Second Claimant insisted that this agreement would need to be confidential because of unexplained internal reasons in his company. The Second Claimant denies ever meeting the Defendant at the Ritz and is adamant that he never entered any agreement with him.

22. Whether these discussions occurred at all, and whether, even if they did, an agreement of the type alleged was struck, is a central issue in these claims and I will return to it in more detail later in this judgment.

The Minority Shareholders' Exit

23. On 30 May 2006, Growth and Hillside received notice that the Majority Shareholders intended to call an Extraordinary General Meeting of shareholders. One of the items on the agenda was to remove the requirement for unanimity of decisions of the Supervisory Board, thereby depriving the Minority Shareholders of the veto they effectively exercised. Another item sought the dismissal of an independent member of the Supervisory Board, Mr Mathew.

24. The following day, the Second Claimant telephoned Mr Mutafchiev to express his concerns at both of these proposals. In a follow-on email the next day the Second Claimant, seeking to summarise the contents of their call, reiterated his concerns and requested that both of the two contested items be removed from the agenda.

25. On 2 June 2006 the Second Claimant wrote to his counterpart at Hillside setting out a spreadsheet analysis of possible improper lending by FIB to entities related to the Majority Shareholders. The Defendant was copied into this email and he is referred to in it as a source of some of that information.

26. On 14 June 2006, the Second Claimant wrote in his capacity as a member of the Supervisory Board to KPMG Bulgaria, who were FIB's auditors. The Second Claimant sought detailed information regarding the loan verification audit procedures that KPMG had recently undertaken. A copy of the letter, including a Schedule seeking information about certain borrowers was sent to Mr Mutafchiev and Mr Minev. A draft had already been shared with the Defendant.

27. This letter in turn led to a meeting on 22 June 2006 between the Majority and the Minority Shareholders in London in which the latter's concerns about lending practices were again expressed. The Majority Shareholders responded by offering to buy Growth and Hillside's stake in FIB. No agreement was reached but one of the two Majority Shareholders threatened that it was within their powers to unilaterally float FIB on the Sofia stock exchange and thereby invalidate the shareholder agreement.

28. That threat appeared to have been actioned when in around mid-July 2006 Growth and Hillside received notice to attend an EGM of shareholders of FIB to be held in Sofia that August. The stated agenda included a resolution permitting a public listing of its shares. Appreciating that this amounted to a serious threat to their investment both Growth and Hillside determined to stop it.

29. Thus, on 1 August 2006, proceedings were commenced in this Court by the Minority Shareholders seeking injunctive relief to prevent the adoption of the proposed resolutions (the Shareholders Agreement contained a clause that disputes be subjected to the exclusive jurisdiction of the Courts of England & Wales). This application led to the subsequent Order of Cooke J of 8 November 2006 in which he granted the Minority Shareholders a permanent injunction.

30. The imposition of the permanent injunction appears to have been a catalyst for an increased offer from the Majority Shareholders to Growth and Hillside. In December 2006 negotiations led to an offer of 61 million Euros which on any view amounted to an excellent return on the 20 million Euros investment made the previous year. As the Second Claimant volunteered in cross examination, this was the best investment the business had ever made.

31. The sale was completed and the monies transferred to Growth and Hillside in February 2007.

The Defendant moves on

32. In the period between the grant of the injunction and the sale of the Minority Shareholders' interests the Defendant left FIB. In the last week of November 2006 he announced to the Supervisory Board that he was resigning following what he describes as a furious interaction with Mr Mutafchiev and two incidents of physical intimidation on the streets of Sofia. On 4 December Mr Mutafchiev asked him to leave as soon as possible which he did over the weekend of 9 to 10 December 2006.

33. The Defendant secured a position as the CEO of Ocean Bank in Moscow in December 2006. At a meeting the following month he was able to offer the Second Claimant a non-Executive role on the Board.

34. The Defendant describes his experience at Ocean Bank as disastrous and in February 2008 he left. His evidence as to his time at Ocean Bank also contains a number of serious allegations against the Second Claimant to the effect that he conspired with the owners of Ocean Bank together with the Majority Shareholders of FIB to create a sham transaction. The alleged purpose of this supposed transaction was to create a 'stealth dividend' whereby sums could be paid by the Second Claimant to the Majority Shareholders of FIB. This in turn is said to have been necessary because the sale price for the minority shares was deliberately overstated. I deal with this allegation briefly later in this judgment but record here that there was no evidence at all to corroborate the Defendant's very serious allegations.

35. In the same month, the Defendant was offered a job by the Second Claimant in a Ukrainian bank 'BKR' in which Growth had a significant minority stake. That fell through but the following month, March 2008, he was offered a job by the Second Claimant at GML Capital which he took up in April 2008.

The 'Stolen' Cypriot Accounts

36. In either November or December 2008 (there is a dispute about the precise dates which I do not consider to be material) the Defendant asked to speak privately with the Second Claimant. There is a very real dispute about what was said at this meeting but it is agreed that the Defendant explained to the Second Claimant how the previous year, in January 2007, he had discovered that his life savings held in FIB Cyprus accounts had been stolen by the Majority Shareholders. The Defendant stated that Mr Mutafchiev confirmed to him that the money had been taken from his account and indicated that it was in response to perceived treachery in siding with the Minority Shareholders. Over the coming years, as detailed further in this judgment, the Second Claimant and the Defendant took a number of steps in order to seek recovery of the sums. Whilst for

much of this period the Second Claimant believed the Defendant's account of the theft of his funds to be true, he no longer does.

The First Payment

37. Shortly after a December meeting between the Second Claimant and the Defendant, on 22 December 2008, the First Claimant made a payment to the Defendant of the sum of £275,000. There is no dispute that this payment was made by the First Claimant and received by the Defendant. What is very much in dispute was the nature and purpose of that payment. This was the only payment made by the First Claimant. Save for two payments six years later to third parties made by GML Capital (and reimbursed by the Second Claimant), thereafter all payments were by either the Second Claimant from his own funds or by the Third Claimant at the request of the Second Claimant.

38. The parties produced a very helpful schedule setting out the date on which each payment was made, the amount and the identification of the relevant documentation contained in the trial bundles. A copy of that schedule is appended to this Judgment and reference to payment numbers are to those set out in its first column.

The Defendant leaves GML

39. The Defendant remained at GML Capital until August 2009. He left, with the full support of the Second Claimant, to take up a post at a Saudi finance company, Deutsche Gulf Finance ('DGF'). Unfortunately, this did not prove to be a successful career move and his contract was terminated in May 2010. In May 2010 the Defendant received a payment of £25,000 this time from the Second Claimant personally (Payment 2). It is accepted that this was repaid by the Defendant.

40. The Defendant found himself in a dispute with DGF as to his severance pay and also states that his Saudi bank account had been frozen. This dispute did not resolve until November 2010 when he achieved a settlement of approximately £268,000. During that period he received a further eight payments from the Second Claimant (Payments 3-10), the nature of which are all disputed.

41. In June 2010 the Second Claimant introduced the Defendant to a firm of private investigators called RISC Management Limited. The purpose of their instruction was to assist in the recovery of the sums said to have been stolen from the Defendant's Cypriot accounts.

42. In November 2010, the Defendant secured a job as the Chair of a small trade finance company called Delta Trade Finance ('DTF'). Unfortunately, DTF went into voluntary liquidation in September 2011 although the Defendant stayed on until January 2012 in order to attempt to rescue the company. During this period at least a further ten payments were made by the Second Claimant (and one by the Third Claimant) to the Defendant (Payments 12 to 21) – the nature and effect of which are all disputed.

43. In June 2012, the Defendant was offered a partnership with Ernst & Young (EY) in Prague. In the interim (counting up to the end of June 2012) he had received a further nine payments from the Second Claimant (Payments 22 to 30). Thereafter the Second Claimant made five further payments to the Defendant, the last on 7 April 2014 (Payments 31, 33, 36-38). In addition, the First Claimant seeks repayment of two sums

said to have been paid on behalf of the Defendant (Payments 34 and 35) to a London law firm and a Cypriot law firm as part of the attempts to recover the sums that the Defendant had said were stolen from him.

Procedural History

44. Legal proceedings were in fact first intimated by the Defendant rather than the Claimants. In a Letter Before Claim of 10 July 2017, the Defendant outlined a claim against the now Second Claimant for breach of contract alleging that he failed to honour the Ritz Agreement, and a claim for fraudulent representation.

45. The Defendant's letter asserted that his entitlement to damages for breach of contract amounted to approximately £4.7 million including interest, alternatively approximately £7 million for fraudulent representation. As it has transpired, no claim was ever served by the Defendant, nor any counterclaim made in these proceedings.

46. The Claimants served their Claim Form on 30 April 2018. A number of interlocutory orders were made including an order removing parts of the Defendant's witness statement (per Master Cook on 7 January 2020 with a costs order against the Defendant in the sum of £29,000) and an order recording the withdrawal of the Defendant's application for specific disclosure and his proposed application to rely on the evidence of a private investigator from the firm 'Black Cube' (by consent, with the Defendant ordered to pay £35,000 costs incurred in respect of the latter application).

C: THE CORE DISPUTE

47. The core dispute is whether some, or all, of the payments made by the Claimants to the Defendant were loans (the Claimants' case) or were payments made pursuant to the compensation agreement forged at the Ritz (the Defendant's case).

48. There is no dispute that the Claimants bear the burden of proof in establishing that the payments were loans. This requires they establish that each of the payments were legally binding loans. Strictly speaking there is no corresponding obligation on the Defendant to 'prove' the existence of the Ritz Agreement, indeed the Defendant is not required to prove anything. Thus, even if I were to find that there was no agreement reached at the Ritz it would still not relieve the Claimants of the obligation to prove that each of the payments were loans as alleged. In a case such as this however that truism only takes the Defendant so far. The nature of the dispute on the pleadings and evidence is starkly binary. If I conclude that the Ritz Agreement did not exist then (whilst not strictly relieving the burden of proving each of the loans) it would materially assist the Claimants in the forensic unlocking of the dispute. That is not least because (i) the Defendant does not (nor really could he) advance any positive alternative factual case beyond his reliance on the existence of the Ritz Agreement to counter the Claimants' evidence that the payments were loans – for example asserting that they were gifts or ex gratia payments or non-legally binding loans and (ii) in rejecting the existence of the agreement the court will have necessarily rejected the central evidence of the Defendant that the Ritz Agreement was forged as alleged, with significant deleterious implications for his credibility. It would in turn be capable of providing, at least a partial, concomitant endorsement of central aspects of the evidence of the Second Claimant.

The Claimants' Case on the Core Dispute

49. The Second Claimant was responsible for arranging the payment on behalf of the First Claimant of £275,000. Thereafter the payments were either from his own personal accounts or, in respect of two payments, were disbursements made by the Third Claimant at his request.

50. The Second Claimant was clear in his evidence that he considered that each payment was a loan, and was always understood by the Defendant to be a loan. He acknowledged that on some occasions neither he nor the Defendant might have used express words about a payment being a loan but (save for some of the payments in respect of recovery of the Cyprus funds) it was always a response to a request for money and would have been well understood by both parties to have been additional loans.

51. The Second Claimant accepts that there were never any formal written loan agreement(s) notwithstanding the frequency of the payments and the very high cumulative sums that he paid out. His evidence was that as these started as a loan to a close colleague and thereafter were to someone he considered a close friend, he did not consider the payments required formalisation. He described during cross examination how at the time that Payment 1 was made the dynamic at the First Claimant's offices were "*...like a family firm. We all sit in one room. Mr Harfield and I sat no more than 20 feet apart during his tenure there. We travelled together to all kinds of places and Mr Stohner really liked Mr Harfield, as did I.*"

52. Consistent with this, documents before the Court showed that at relevant times the First Claimant had made loans to another member of staff and that the Second Claimant had made personal loans to at least one other person.

53. His evidence was supported by his former business partner Mr Stohner. He was an impressive witness who was assiduous in making plain that he could not remember much by way of detail (which I find unsurprising in light of the passage of time). He did however have a very clear memory of the loan to the Defendant because it was the source of such friction between him and the Second Defendant that it became a contributing factor in his decision to depart the business. As well as giving evidence of specific conversations with the Defendant about repayment of the loans he also described, in his oral evidence, his growing frustration at the generosity of the Second Claimant. He said, in answer to a question put in cross-examination "*This was Mr Pinter's great personal generosity interfering in my opinion with his business judgment in certain cases. Mr Harfield's loan was to my mind one of those cases... .... I try to keep the business and the personal separate and Mr Pinter feels the opposite way. He's very close friends with a lot of business colleagues and is very generous to them and that can create difficulties when those colleagues are unable to repay loans*."

54. There were two additional factors that the Second Claimant said explained the absence of a written loan agreement(s) – firstly that he believed that repayment could be readily achieved when the Defendant recovered monies from the Cypriot accounts which he believed should be a straightforward result to achieve and secondly, he always thought that the Defendant's requests would be the very last one to be made. As I will set out below, both these explanations are consistent with the contemporaneous documentation.

55. The Second Claimant categorically disputes that there was ever any agreement to compensate the Defendant whether at the May 2006 meeting at the Ritz or at all. The submission of the Claimants is that the large number of contemporaneous documents clearly show that these were all loans and not compensation payments.

The Defendant's case on the Core Dispute

56. The Defendant's case is that having decided to leave FIB during his holiday in Florence, he was only persuaded to stay in post because of the terms offered by the Second Claimant, first in the telephone call on 11 May 2006 and then firmed up at their meeting at the Ritz. His evidence is that the Second Claimant was desperate for him to remain in office because of the grave risks that a departure might have for the investors. He only agreed to stay because of the very clear terms offered to him by the Second Claimant. Had it been otherwise, he stated, he would have left and the Minority Shareholders would never have achieved the highly advantageous terms of the sale of their stake in FIB.

57. The Defendant states that he became increasingly frustrated with the Second Claimant in the intervening years and in a number of meetings he impressed upon him orally his contractual entitlement under the Ritz Agreement which the Second Claimant acknowledged.

58. The Defendant's case is that there were never any loans. The payments made to him were not loans but part performance of the obligations owed under the Ritz Agreement. His evidence is that over the following years he became increasingly adamant in his conversations with the Second Claimant (albeit in person, not writing) that the obligations required payment. He alleges that Second Claimant was adamant that the terms of the Ritz Agreement be kept not only from the Second Claimant's business partners but that no reference to it could ever be made in writing. He accepts that he made some payments back to the Second Claimant but these were not (save in one instance) repayments of loans but rather transactions made to assist with the Second Claimant's finances which were themselves quickly reimbursed to the Defendant in cash.

59. The Defendant provided two lengthy witness statements describing his transactions with the Second Claimant and setting out his explanations for the contents of the documents, and why his version of events is to be believed. This was expanded upon during the course of his extensive cross examination. I will address the points that he raised when I turn to my conclusions on the evidence.

The Legal test

60. There was no dispute between the parties as to the legal test governing whether or not a legally binding contract was entered into at the time of each loan. The basic requirements for proving the existence of the contract were summarised by Leggatt J (as he then was) in Blue v Ashley [2017] EWHC 1928 Comm at §48:

> "Generally speaking, it is possible under English law to make a contract without any formality, simply by word of mouth. Of course, the absence of a written record may make the existence and terms of a contract harder to prove. Furthermore, because

> the value of a written record is understood by anyone with business experience, its absence may – depending on the circumstances – tend to suggest that no contract was in fact concluded. But those are matters of proof: they are not legal requirements. The basic requirements of a contract are that: (i) the parties have reached an agreement, which (ii) is intended to be legally binding, (iii) is supported by consideration, and (iv) is sufficiently certain and complete to be enforceable: see e.g. Burrows, " A Restatement of the English Law of Contract " (2016)"

The Approach to evidence and fact finding

61. One striking feature of this case, stemming from an agreement said to have been brokered in 2006 and payments first made in 2008, is the lack of either written loan agreements or a compensation agreement.

62. Another striking feature of this case is that all four witnesses who gave evidence before me, not least the two central protagonists, superficially, presented as credible. Both the Second Claimant and the Defendant are educated, sophisticated people with long experience at a relatively high level in international finance. Their backgrounds, sophistication and experience was reflected in the manner in which they gave their evidence. Although plainly different personalities, their tone and presentation in the witness box was generally measured and to a large degree hewed closely to their written statements. Furthermore, to an outside observer, their accounts of what occurred, although mutually exclusive, are broadly credible – either loans to a valued colleague and friend, or a compensation agreement to stay in a job that was on any view very challenging, for the considerable financial benefit of the other party. Neither version of events, of themselves, is outlandish or illogical.

63. If this had been a case based purely on the competing recollections of the witnesses it would have been very difficult indeed to determine where truth lay, or at least which version of events was the more probable. This though is decidedly not such a case. To the contrary, the Court was provided with over 1,500 pages of relevant documentation created contemporaneously with the events giving rise to the claims. This includes not least a significant amount email correspondence between the Second Claimant and the Defendant over the course of a number of years. The documents are relevant both for what they reference and also for what they do not. Thus, whilst this is not a case in which the purported legal transactions themselves have been formally embodied in writing it is a case in which relevant interactions between the parties have left a well-defined electronic footprint.

64. The importance of contemporaneous documentation to judicial fact finding was considered by Leggatt J in the case of *Gestmin v Credit Suisse UK & Another* [2013] EWHC 3560 (Comm) which has become a touchstone for the correct approach to evidential analysis[2]. Unsurprisingly the skeleton arguments served by both parties referred to it. The relevant passages, which I set out below, observe the fallibility of

[2] Although not referred to by the parties, Gestmin was recently considered by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 – see §§88 et seq. The Court emphasised that Gestmin was not seeking to lay down any golden rule permitting the Court to ignore other sources of evidence.

human memory and the concomitant importance of contemporaneous documentation when a Court is called upon to assess what did, or did not, occur many years ago, particularly in commercial cases.

> "Evidence based on recollection
>
> 15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
>
> 16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
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> 17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).
>
> 18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

21. It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.

22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view,

> to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

65. I do not take these passages in general, nor the guidance in paragraph 22 of Gestmin in particular, to be setting down a fixed rule, or any form of irrebuttable presumption, that documentary evidence is always to be preferred to the evidence of witnesses with which it might conflict. There may for example be circumstances (and the Defendant contends that this is one) in which documents can be demonstrated to be inherently unreliable (for example because they were designed to give cover to unlawful acts), or other cases in which oral evidence can throw an entirely different light on the apparent meaning of a document. In any event, the existence of relevant documentation does not provide the court with any form of automatic shortcut or forensic heuristic by which it is relieved of its obligation to take into account all the evidence relied upon by the parties. The authority is however an important restatement of long established guidance on the judicial approach to fact finding, reflecting another classic statement, that of Robert Goff LJ in *The Ocean Frost* [1985] 1 Lloyd's Rep 1 at p.57:

> "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth. I have been driven to the conclusion that the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case."

66. Lord Goff's formulation was recently cited by Males LJ in Simetra Global Assets & Others [2019] EWCA Civ 1413, where at paragraph 48 he said:

> "In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not

> only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence."

67. In this case the parties frequently communicated by email and their contents reveal not only their personal relationship at the relevant time but also something of the nature of the requests for payments. The documents undoubtedly provide an extremely important source of evidence both in and of themselves and also as a means of testing the veracity of the irreconcilable recollections of the witnesses.

The Electronic Footprint

68. I set out below, in chronological order, some of the relevant documentation. It is not exhaustive (the trial bundle contained over 300 separate documents) but it is lengthy because I have reached the conclusion that in this particular case the documentation does very materially assist in ascertaining the real nature of the relevant transactions between the parties.

a) On 19 December 2008, emails from the First Claimant to its accountants show that it (including the Second Claimant's former business partner Mr Stohner) believed that the £275,000 was being paid to the Defendant as a loan "*GML International Limited will make a loan in an amount of GBP 275,000 on 22 December to Jonathan Harfield"*. The Defendant's case is that, for reasons that were never satisfactorily explained, the Second Claimant wanted to keep the real purpose of the loan (repayments under the Ritz Agreement) secret not just from Mr Stohner and all others at the First Claimant, but their business partners at Thames River/Hillside. This alleged need for secrecy was said to exist notwithstanding that the purported terms of the Ritz Agreement included payment to the Defendant by the First Claimant (and presumably Hillside) of 5% of their profits from the sale of their minority shares.

b) On 18 February 2010, Mr Stohner sent an email to the Second Claimant discussing a proposed bonus for the Defendant covering the period in which he worked as a partner at GML (the Defendant had left by this stage). Mr Stohner's email stated, amongst other things:

> "Jonathan also borrowed £275,000 from the company...
>
> I think we have been very generous to Jonathan. A normal firm or employer wold not have provided the loan... At the same time, I know that Jonathan is grateful

to us and will try to assist us in any way he can in the future.

Let's discuss your view on Jonathan's bonus. Then I (or you) need to provide guidance to Nilesh on how/when Jonathan will repay the loan. I expect he earns a high salary now and should be able to be begin paying down the loan on a monthly or quarterly basis, unless there are other problems I'm not aware of."

c) On 28 March 2010, the Defendant wrote an email to the Second Claimant. It is expressed as being a very private email, albeit the Defendant suggested in both his written and oral evidence (without any corroborating evidence) that its terms were essentially requested by the Second Claimant and was a means to dupe Mr Stohner into continuing to believe the payments were loans rather than compensation.

"...It is also rather rare for me to write relatively lengthy and personal emails but this is an exception. Much of this email is very private so I would be pretty mortified if it were to fly round the office. However, given all that you have done for me, you probably know more about me in some ways than anybody else...

Personally, it has taken me more than three years to come to terms with what happened at FIB. It is only now that there is any sense of emotional healing. It is rather sporadic too. Sleeping is still enormously difficult. However life is life and ones tries to move forward and face the world afresh. I am fortunate in having you as a friend and in the time I spent with GML. You kindly offered me GBP 50,000 as a bonus which is not only generous but places me in a further hugely embarrassing position. Things remain very tough financially...

On the question of the bonus, at this moment GBP 25,000 would help me greatly from a cash flow perspective and perhaps you would be willing to remit this to me overseas... I shall remit the GBP 25,000 back to you over the coming months as we agreed when my finances should ease a little. However I cannot accept a bonus per se and my obligations to you, because of all your kindness and flexibility, remain at GBP 275K. The personal healing process requires regaining dignity and self-respect. Repaying you (however and whenever) is part of that process...

One final comment on the question of my obligations to you. I agree we should discuss more thoroughly during

> one of my forthcoming trips to London. By the way my forthcoming guaranteed bonus is US $187,500 in January 2011 and the same in January 2012. These amounts should substantially go to you and represent the best change (sic) of my being able to settle the score in your favour...
>
> So, once again that you for everything."
>
> [Emphasis in original]

d) On 23 May 2010, the Defendant emailed the Second Claimant asking in express terms for a loan to tide him over whilst he was in dispute with his then Saudi employers:

> "...Thank you for your understanding, listening so patiently, and be so kind as ever to help me. In the literal sense, God know what I would have done without you!... ....
>
> Could I ask you to lend me GBP 25,000 until I either receive these moneys or until an overall settlement is reached? Otherwise, as we discussed, I shall run into trouble rather quickly. If you are agreeable, could you remit to the same bank account as before?... ...
>
> Another thank you for some office space. No doubt I shall see you a little more over the weeks ahead but do not want to impose more than I have already done so or to be bothersome on the shop floor... ...
>
> Very best wishes and again thanks that words cannot express."

e) On 11 June 2010, the Defendant emailed the Second Claimant updating him on his employment disputes, which were unconnected to GML. The email states, amongst other things "*thank you so much for your support today, both financially and otherwise*."

f) On 16 June 2010, the Defendant forwarded to the Second Claimant email correspondence with a company called RISC, who were to be employed to seek to recover the sums said to have been stolen in Cyprus. At the Defendant's request the Second Claimant agreed to pay the upfront costs of the investigators although be bridled at the levels of costs because he considered recovering the sums should be easy. The Defendant's gratitude on the face of his email was palpable:

> "If you do underwrite the pursuit of my assets from our Bulgarian friends, then please agree between each other

> that it can be done on a contingency basis for your benefit as well as mine. This allows me to maintain some semblance of dignity and to reciprocate to you (in addition to the hard moneys that I already owe to you and GML International) for your unparallelled (sic) kindness and support. If we do recover Euros 2 million, nothing would give me greater pleasure than not only to repay everything to you and GML International but also for you to benefit in some way. As I said, such an arrangement gives me the chance to maintain some human dignity and to reciprocate you which I dearly wish to do. I do have fire in my belly for this mission and your involvement is hugely important to me and not just financially."

The Second Claimant in his reply stated "*... I won't expect a share of recoveries because it is your money!*"

g) A few days later, on 22 June 2010, the Second Claimant wrote to Mr Stohner updating him on the Defendant's status. He stated that he had been counselling the Defendant about his almost certain departure from his job in Saudi Arabia, helping him get a new job in London, and providing assistance in facilitating the return of his money from FIB. The Second Claimant told Mr Stohner:

> "...This is in aid of getting him liquid so he can repay our loan.
>
> He's almost certainly heading for having his contract with Deutsche Gulf paid out, which would be a little money to repay us, but not enough because unless he gets another job, he will need money to live on."

h) A further email was sent by the Second Claimant to Mr Stohner on 8 September 2010 again updating him on the Defendant. He stated that he had been spending '*a huge amount of time advising Jonathan*' on recovery of his money from FIB and his exit from Deutsche Bank, noting that he had underwritten and paid his legal fees in respect of both. He also noted how he had been helping him secure the job as CEO of Delta Trade Finance. He told Mr Stohner:

> "The great news is that he is going to be paid USD 500k by Deutsche in relation to his dismissal... .... This will allow him to repay me for the legal fees I have paid, clear some other debts, keep a bit of money for his own expenses and repay a meaningful part of his loan from GML International..."

Noting that RISC were extremely confident of securing the return of the Defendant's stolen funds, he stated:

> "If/when this happens, Jonathan will clear the balance of the loan from GML International."

i) On 29 September 2010, the Defendant wrote to the Second Claimant asking for a cheque for £10,000 as he was "*not sure I will manage until the DB/GHF moneys come through, I hope by the end of next week. If you are kind enough, and have no objection, would you mind if I drop the office tomorrow...*"

j) On 2 November 2010, the Defendant gave the Second Claimant a handwritten letter together with a gift of a watch that he said his mother had bought him on his appointment as CED of FIB. The letter states:

> "You have rescued me and my family over the past months, indeed years. I am not sure how to say 'thank-you' and you know that financially things remain precarious. However, I wish to show my gratitude and appreciation... ...
>
> The enclosed is for you and how you came by it is something that one day I hope you will tell Aidan as an example of human kindness...
>
> Thank you, Stefan, for everything. You have been wonderful."

k) On 26 November 2010, the Second Claimant emailed the First Claimant's accountant to give him the details of a repayment by the Defendant of £10,000 towards his loan from the First Claimant. He stated "*Further payments can be expected, but probably not before May 2011 which is when his salary will start to be paid in his new job.*"

l) On 3 January 2011, the Defendant wrote to the Second Claimant asking for more money, "*... please could I beg some of your time in the near future? I need to discuss finances to tide me through until I officially go onto the Three Delta payroll and ask for your help with this. I also want to discuss various approaches to RISC which had been going through my mind. I know it is a real bore to you but solving the Bulgaria problem is essential for me if life is to work out in any meaningful way.*" The Second Claimant replied that evening, "*I meant to say when we spoke earlier that if you need money before Thursday, I can easily get a check (sic) dropped off to you if you tell me how much you need.*"

m) On 20 January 2011, the Defendant emailed the Second Claimant because, amongst other things, "*I need to beg your help on tax and for February*".

n) On 23 January 2011, the Defendant emailed the Second Claimant because "*I owe HMRC GBP 21,555.81 on 31st January 2011. I wonder if you would be so hugely kind as to let me have a cheque for GBP 31,555,81 when we meet on Thursday. I am enormously grateful to you.*"

o) On 16 March 2011 the Defendant emailed the Second Claimant. He stated, amongst other things:

> "...I was extremely grateful for your additional help when you visited our office earlier this month as it enabled me to pay for some outpatient tests and treatment for mother...
>
> ...
>
> I am intending to take a salary from DTF from 1st May with first payment at end of May and to take back salary at end of July (to avoid HMRC suspicions). This amount circa £60k is for you without question or doubt. We must then agree on how I should settle the remaining substantial obligations over time. This weighs on my mind especially as you have been so utterly supportive over so many things and for so long. I hope that you have not become too fed up or weary of me."

p) On 30 March 2011, the Defendant emailed the Second Claimant to update him on his mother's health. He stated, amongst other things, "*I have thanked you many times before for all that you have done for me but I can tell you that I have never been so grateful to somebody as I am to you over the past few weeks. Without your financial help, I am pretty sure that mother would have died. It is not easy (and the burden on you has been considerable). Thank God Stefan for your kindness.*"

q) On 6 April 2011, the Defendant emailed the Second Claimant again asking for money. He stated, amongst other things:

> "You very kindly agreed to keep me afloat until I receive my first salary at the end of May and we agreed the amounts when we met in January 2011. I have tried to keep within these amounts and you also very kindly made an advance to me in early March 2011…
>
> Overall, may I ask if I could have an additional £6,000 over and above what we agreed in January 2011. I estimate that I need £16,000 to get through to the end of May 2011. If you are agreeable, and I am entirely at your mercy on this, would you be willing to split this evenly between £8,000 as soon as possible and £8,000 at the beginning of May?
>
> I am so sorry to be begging from you and hope that you do not lose patience or grow to dislike me in some way. You know that I rely on hugely for support in so many ways. By the end of May, I should be on my own feet month to month and in July cash should begin to flow back the other way (i.e. me to you) when I take the moneys due to me from November 2010 to April 2011 (inclusive)."

r) On 18 April 2011, the Second Claimant and the Defendant exchanged emails about the ongoing investigation into the Cypriot funds. The Second Claimant was becoming increasingly frustrated at lack of progress. He told the Defendant:

> "I confess that I will never probably understand why you conducted yourself the way you did in terms of your personal finances and expenditures in the wake of the theft. If I had been you, and had decided that I din't have the courage to go after the Subjects to recover the stolen money and knowing that ALL of my life's savings were gone, I would have embarked upon an extreme austerity drive, saving every penny, foregoing holidays, learning to cook etc., etc. and rebuilt my savings until I had a financial cushion to fall back on if my future career ran into difficulties... Had you embarked on an austerity drive, you'd have possibly had the option to forget about the whole horrible FIB experience and moved on if you so chose. But you really don't have that option at this point because of your earlier choices."

The Defendant replied, stating "*On the lifestyle question, yours is a rational and logical comment. However, after this type of experience, people (including me) often fail to behave logically and rationally.*"

s) On 26 April 2011, the Defendant wrote again to the Second Defendant asking for money. He said "*Officially, I become employed by DTF on 1st May but could I ask you if you would be so kind as to let me have a cheque sometime in the not to (sic) distant future to enable me to cover May?? This should be the last time I have to ask you!!*" [Emphasis in original]. In evidence, the Defendant suggested that the last line was ironic because he sought to convey his frustration that he should by now have received the millions of pounds owed to him by the Second Claimant. Even on the face of the document this is a difficult meaning to construe – seen in the context of all the previous and subsequent requests this becomes almost impossible to sustain.

t) On 18 September 2011 the Defendant wrote again asking for money:

> "Hi S, please could you be so kind as to let me know if you are able/willing to extend the financial help that I requested before you leave to Georgia? ...You probably hate me for asking and for being a pest but I no longer expected to be in this position... A simple text or brief email from you would put my mind at rest. I am very much the supplicant."

The following day he wrote again stating "*Thank you for saving me*".

u) On 9 October 2011, the Defendant wrote to the Second Claimant disclosing some extremely personal details and explaining that he was at a very low point indeed. He thanked the Second Claimant "*for being there for me*". He stated, "*Stefan, the purpose of this email is to help me by telling you of where I stand in terms of my thinking (in itself, self indulgent), to thank you for being there for me and assisting me both financially and as a human being, and to tell you of what I want to achieve for the future. I hope that last Monday was the "bottom" and I feel pathetic. However, getting a stable job and rebuilding my self-confidence and (sic) well as my finances must be at the top of my objectives.*"

v) On 11 October 2011, the Second Claimant requested that the Third Claimant make a disbursement to the Defendant. When questioned as to its purpose by the trust administrator the Second Claimant stated "*Jonathan Harfield is a friend of mine and former colleague. He has some short-term cash flow problems, so this loan from the Trust is simply to alleviate these problems until he is able to liquidate some investments.*"

w) On 14 November 2011, the Second Claimant emailed the Defendant. He wrote in sympathetic and encouraging terms about the problems the Defendant was facing and his efforts to address them. He also expressed concern that consultants engaged to seek recovery of the Cypriot accounts were charging excessive fees which he thought "*seems to me like highway robbery*" but caveated that opinion by expressing "*but it is your money.*"

x) On 22 December 2011, a further payment was made by the Third Claimant at the request of the Second Claimant who informed the administrator that "*This is a further loan to my close friend Jonathan Harfield, which will be repaid within six months.*"

y) On 7 March 2012, the Defendant made a further request for money. "*Dear Stefan, without wishing to impinge on your generosity or take you for granted, I forgot that I have to pay my tax adviser and I have been chased. I am wondering whether if it is possible for you to me have a cheque for £18,500 instead of £17,500. I apologise for asking but have been running on "empty" save you (sic) kind £5,000 since the end of December 2011.*" The next day an email thanked the Second Claimant for his "*financial support*".

z) On 23 April 2012, the Second Claimant and the Defendant exchanged a number of emails. The Second Claimant was agitated that the Defendant had appeared to have got himself into further financial difficulty by an unsuccessful bout of trading. The Defendant appeared to have suggested (in a conversation rather than an email) that he had not used monies from the Second Claimant to trade. The Second Claimant reviewed the trading history and challenged this. He stated in his email "*So when you say that you were never using money that I'd loaned you to speculate on currencies, that is SIMPLY NOT TRUE even when you were not*

altered.". The Defendant wrote back. He did not dispute the categorisation of monies provided as 'loans' but rather stated "*I have nothing to hide from you. I have never thought of myself of speculating with your money*."

aa) A fuller explanation followed from the Defendant later that day. In an email he stated, amongst other things:

> "Whatever, the circumstances I again apologise with complete humility. I attach great importance to honesty and integrity. If I have fallen short of these standards, it is both erroneous and sinful...
>
> I accept that I have behaved incredibly stupidly and need to pull myself together. I am trying to do this both by seeing a psychiatrist and by getting a new job. You mean a huge amount to me **NOT** just because I am financially reliant on you at present but because in my eyes you represent to me the best that humanity has to offer. Be assured that **you are not funding a gambling habit**... I have used these moneys to cover some living expenses and pay down some of the remaining final debt remaining from 2006. I have been trying to do my best. As promised on the telephone this evening, I shall now close all forex accounts and they shall remain closed. This is a commitment."
>
> [Emphasis in original]

bb) On 9 June 2012 the Defendant wrote to the Second Claimant with a further request for money pending taking up employment at EY. This email also included disclosing highly sensitive and personal information. The Defendant described his attempts to raise money in order to "*enable me to stabilise some of the final credit and charge card debts and to seem me though to September financially without troubling you again....*". The Defendant proceeded to request further financial help until he received partnership drawings from EY, he stated:

> "I am sorry to be such a huge burden. I really have tried every route to get things under control but in truth the only route is a job and this is looking as certain as anything now that the EY offer letter is signed. If you are able/willing to assist me, then cheques or transfers would be gratefully received...
>
> ...
>
> Stefan, thank you again for being there for me. The last six years have been a horrible situation for me and a massive yoke for you at a time when business has been

> tough. Words are easy but you know everything and my thankfulness is heartfelt.
>
> ...
>
> Finally Stefan thank you. Moving to Prague is a new beginning and I am looking forward to both the hard work and the challenge. I am more conscious that without your huge support over the past six years I would have gone bankrupt, been expelled from the Institute of Chartered Accountants and very likely have been homeless. As I have said to you before, you have been wonderful."

cc) On 1 August 2012, the Second Claimant's patience appeared to be wearing thin. The Defendant's email to him stated "*Thank you for taking my call and I am sorry. I do understand about drawing the line. At last, from September, I shall be working and making a new start in life. I do need £20k and I apologise as I realise the hardship to you."*

dd) By September 2012 Mr Stohner was becoming increasingly concerned about the Defendant's failure to repay his loan to the First Claimant. On 28 September 2012 he wrote to the Second Claimant stating "*It is long past time that Jonathan repaid his loans to GMLI. What amount of his salary and what portion of his bonus have you agreed will be paid to GMLI?*" The Second Claimant then spoke to the Defendant and reported back by email to Mr Stohner on 30 September 2012 that he would start paying back in November and would also be making additional payments when his London flat was sold. The Second Claimant also noted that when the Defendant recovered his Cypriot monies (stating *"it really is a matter of 'when' rather than 'if'"*) that the GML debt would be paid in full. The Second Claimant emailed the Defendant a few weeks later asking him to start small monthly payments to GML from November stating "*it would be very helpful from an audit standpoint*." The Defendant replied noting that he was cash flow positive but it was rather less than expected and so requested that they spoke to agree an amount for repayment. Thereafter five small monthly payments were made by the Defendant.

ee) On 26 June 2013 the Second Claimant emailed the Defendant. The Second Claimant was very keen that the Defendant progress attempts to recover his Cypriot funds and had helped him engage the law firm, Sidley Austin, to assist. The Second Claimant urged the Defendant not to 'lose his nerve' and that it should be straightforward to recover the funds. He also noted:

> "Plus GML and I really do need you to repay the bailouts for the credit cards, the forex trading etc. I didn't even suggest when you sold your flat that some of those proceeds should find their way in GML's direction, because I suspected that you had other issues to finally resolve."

The Defendant's reply did not dispute the reference to the need to repay 'bailouts' to both the First and Second Claimant.

ff) On 25 October 2013, the Second Claimant wrote an email, in exasperated terms, having received a further request for money from the Defendant. He stated, amongst other things:

> "Jonathan, this is absolutely the end of my relentless series of bailouts of you because you can't make ends meet. Whatever it takes for you to live within your means, whether that involves moving to a smaller flat, eating lentils three meals per day or whatever, you MUST live within your means, like every responsible person in the world must do.... ..... in light of your financial predicament, it is all the more unfathomable that I had to virtually drag you to meet with Howard to commence the FIB recovery efforts, and that your Mother would be so reluctant to join the effort to save you financially. It is well beyond the time for politeness and trying to accommodate concerns and sensibilities because your creditors have been so forebearing....
>
> That I instructed payment of GBP 15,000 to you today means that I am GBP 15,000 further away from owning a home in the UK and having financial security, which I well and truly deserve after working so hard on behalf of others who I care about, including you, that I very nearly killed myself.
>
> You say that you are grateful and relieved that I bailed you out yet again, which is obvious and which I can understand. However, I am GBP 15,000 (plus USD 11,000) further away from a quiet life when I might enjoy the fruits of my labour and hope to actually meet my grandchildren rather than perish from stress beforehand.
>
> I should not have to work myself to death so you can pay your bills."

gg) On 21 November 2013, the Defendant wrote to the Second Claimant asking him to relax the pressure he felt he was under to recover the Cypriot funds. For the first time in the correspondence he refers to not being properly rewarded over the events that led to his departure from FIB in 2006. He reported that his mother "*...feels that I made a huge contribution to the success of the GML/TRC investment in FIB but that this led to my downfall which was not really rewarded. For me this is not a factor any longer and am thankful that you have stood by me. The anger and pain have evaporated.*"

hh) By February 2014 the Second Claimant was frustrated at the lack of progress in the attempts to secure the Defendant's Cypriot funds. He emailed on 24 February that "*... I sincerely need some closure on this, having invested so many hundreds and hundreds of hours, and so many hundreds of thousands personally in you.*"

ii) On 7 April 2014 the Second Claimant made yet another payment to the Defendant having been told three days previously by email that the Defendant "*simply cannot cope without some help, so I am asking you.*"

jj) In May 2014 the Defendant obtained a report from the investigatory firm KCS. This had been funded by the Second Claimant in yet another attempt to assist in the recovery of the Cypriot monies. In fact, the report contained considerable criticisms of the actions of both GML and Hillside in the sale of their minority stake in FIB and recommended that the Defendant be compensated for his role in securing their exit[3]. This was followed by a very lengthy letter from the Defendant to the Second Claimant of 7 May 2014. The letter set out the Defendant's belief that he played a 'pivotal' role in the successful sale of the Minority Shareholders stake (and their more recent repayments of separate subordinated loans to FIB). The Defendant recorded that the Second Claimant had told him in 2012 that "*the investors would always be grateful for your actions in relation to FIB'* and in April 2014 that "*Jonathan did the right thing*". The Defendant set out what had been the devastating consequences of his last months in Sofia and stated:

> "Yet it has only just dawned upon me with the benefit of nearly six years of hindsight that the investors should have offered to remedy the matter comprehensively at the time. Despite the grave economic woes of late 2008, Euros 1.9 million would have represented less than 10% of gain even in a "double money" scenario and little more than a 'transactional cost given the size of the profit achieved less than two years earlier. Such an ex gratia payment can be formulated legally, properly and without conflict of interest. It would have been the 'right thing to do' just as my actions in 2006/2007 were the 'right thing to do'. Instead, I have relied upon bail-outs and hand-outs, albeit kindly given and gratefully received."

The Defendant attached a spreadsheet setting out calculations of what he wanted by way of *ex gratia* payment and stated:

> "...it is simply wrong that I should bear such a disproportionate burden and all the pain of events having contributed massively to the advisers and investors being able to navigate the waters to a financially rewarding exit from FIB. The successful exit by the investors did not benefit me in anyway. I was not the recipient of capital

[3] Subsequent correspondence suggests that the source for this analysis was in large measure the Defendant himself.

> gain or carried interest but I did suffer all the loss despite building the foundations of the successful outcome.
>
> ...
>
> Stefan, we need to come to a timely final 'ex gratia' solution so my situation does not deteriorate further."

kk) The Defendant's letter led to a breakdown in his relationship with the Second Claimant, however some three years later on 10 May 2017, the Second Claimant emailed the Defendant on his birthday. He stated:

> "It has taken me a long time to come to grips with how you could have abused me to such a huge extent, after I had supported you so consistently and for so long. In fact I would be shocked if anyone else in your life, apart from your parents, had ever supported you in the myriad ways I did. To be honest, what you did to me made me question deeply my instincts about people. And your actions caused major disruptions to my business, as they precipitated the departure from GML of my partner Ted.
>
> I have carried an enormous amount of anger inside of me but I have found a way to make peace with events.
>
> I would therefore welcome a renewal of communications, and perhaps when you are next in London we could meet for a meal."

69. There was no response to this final email from the Defendant. Instead on 10 July 2017 the Defendant's then solicitors sent the Second Claimant a Letter Before Claim seeking damages under the purported agreement reached at the Ritz in May 2006. This was the first time (over 11 years after the alleged agreement) that the Defendant had ever made mention in a single document of its existence. In the event the Defendant has not proceeded with his threatened claim nor has he counterclaimed in this claim.

Conclusions on Core Dispute

70. I unhesitatingly conclude that there was no agreement to compensate the Defendant, whether forged at the Ritz in May 2006, or at all.

71. In setting out my reasoning I start with the probative potency of the contemporaneous documentation including placing it in the context of the witness evidence, before turning to address - and reject - the specific arguments advanced on behalf of the Defendant as to why they should not be relied upon here.

72. At each turn the documents, some but not all of which are highlighted above, provide powerful evidence of payments being made at the request of the Defendant in terms in which his appreciation and understanding of indebtedness are clear and largely unequivocal. In particular:

i) Multiple emails, over many years, show the Defendant requesting money repeatedly from the Second Claimant;

ii) Those emails on occasion refer to loans, or at least an understanding of indebtedness;

iii) The Defendant's emails repeatedly express enormous gratitude to the Second Claimant for his generosity and acknowledgement that his survival was dependent upon them (i.e. they are consistent with loans and inconsistent with payment of compensation);

iv) Emails between the Second Claimant and third parties (such as his partner, his accountant and the administrators of the Third Claimant) refer to the payment of monies as loans;

v) The documentation, individually and in its totality is consistent with loans being generously made by the Second Claimant to the Defendant as a means of helping a friend who repeatedly expressed his requests in terms of desperation and were also made, as the Second Claimant made plain in evidence, to support efforts to recover monies from Cyprus and thus in turn repay the loans;

vi) The documents show some attempts at repayment by the Defendant. Repayments are obvious evidence consistent with a loan and inconsistent with the Ritz Agreement. The sums repaid were relatively small to the amounts owed but their size consistently reflects the penury that the Defendant was pleading throughout this period and the generosity of the Second Claimant. The Defendant provided an explanation for the repayments, indeed he relied upon them as evidence that supported him, and I deal with that below;

vii) By contrast there is nothing in the documentation, stretching over many years, that makes any reference to the agreement that the Defendant asserts gave rise to an entitlement to millions of pounds. Not only is there no express reference to any such agreement, I do not consider that its existence can be sensibly inferred from the documentation. Notably, even towards the end of the timeline following receipt of the KCS report, when clearly the Defendant was extremely agitated by his spiralling circumstances and plainly bitter that others had made a fortune at FIB whilst he was left with nothing but debt, his 7 May 2014 letter does not categorise the obligations owed to him as anything other than 'moral' obligations requiring an 'ex gratia' payment. Even here he writes that the position 'has only just dawned on me'. The language in this letter, as with so many emails that predate it, is wholly incompatible with the alleged compensation agreement which the Defendant later claimed had entitled him for years to millions of pounds[4].

[4] I reject the Defendant's attempt to explain away the plain wording of this document (whose contents are consistent with many previous communications) as deliberately avoiding mention of the Ritz Agreement because of the concerns of his mother with whom he said he jointly drafted the letter – there was no independent evidence for this, the nature of the letter is consistent in terms and tone with all that predated it and in any event for all the reasons given I find the Defendant a deeply unsatisfactory witness.

73. The documentation stands not only as evidence in itself but also as a forensic tool that is a helpful means of assessing the veracity of witness evidence.

74. The documentation is obviously consistent with the Second Claimant's written and oral evidence. The Second Claimant's description of the basis on which he gave money and his relationship with the Defendant ring true when assessed against the documents. It is true to observe that he could not give an explanation for some of the contents of his emails on which he was cross-examined but so many years after the event I would have found it somewhat suspicious if he could. I found him to be a credible witness.

75. The Second Claimant's case was also supported by his former business partner Mr Stohner. As I have already mentioned, I found Mr Stohner to be an impressive witness not least because he was at pains to point out that his memory was limited and at various points frankly conceded in answer to a question that he simply could not recall – that is an entirely credible response in a case of this vintage.

76. Where his memory was clear, and credibly so, was his recollection of the growing frustration he felt with the Second Claimant at what he perceived to be the excessive generosity and forbearance shown to the Defendant. There is an obvious reason why this would have stuck in his memory because the friction it generated was a contributing factor in his decision to leave the partnership. One other aspect on which he was clear was his specific recollection of discussions with the Defendant about his obligations to repay the loans and the clear acknowledgement that the Defendant conveyed about his responsibility to do so.

77. The Defendant's case was not based on documentation. His case was premised on purported recollection, taken with an impeachment of the Claimants' case, and an explanation as to why the documentation could not be taken as reflecting the real relationship between the parties. The Defendant claimed an astonishing recollection of the material events of the past fourteen years, from dates and contents of unrecorded meetings, some occurring over a decade ago, to where he was at the time he typed emails, even what the Second Claimant was said to be wearing at the meeting at the Ritz in May 2006[5]. There was very little on his account that he could not recall. In any case a Court should be cautious about the evidence of a witness who claims to recall minute details about multiple interactions occurring many years ago – in some of those cases such concerns can be allayed because those memories are corroborated by documentation (not least they might have acted as memory prompts) but this was decidedly not the case here.

78. The Defendant did call a witness to support his case. Mr Boyarkin was the Defendant's former civil partner during most of the years relevant to the claim. The important aspect of his evidence, from the Defendant's perspective, was that he recalled the Second Claimant referring to an agreement in a conversation at a family bonfire party. I found Mr Boyarkin a broadly credible witness doing his best to recollect events from many years ago, who repeatedly acknowledged the limits of what he could recall. The problem with his evidence was at least twofold. Firstly, his recollection of the bonfire

[5] At trial there was a dispute as to what the dress code was at the Ritz Hotel's Rivoli Bar in May 2006 and whether the Second Defendant was required (as alleged by the Defendant) to wear a tie provided by the Concierge. I have not found it necessary to resolve that discrete dispute – even if there was such a requirement it does not amount to me to anywhere close to sufficient evidence to conclude the meeting took place let alone that terms were agreed as alleged by the Defendant.

party was patently patchy. In his signed statement he said it took place in 2008 but just before giving evidence (having been provided with documentary evidence demonstrating the date could not possibly be correct) he amended the date to 2011. This is not a criticism of Mr Boyarkin but it is a reminder how often documents are more reliable than memory. Secondly, and more materially, a recollection of an informal conversation at a family party that was never recorded and was not, it appears, recalled until giving a statement until litigation in 2019 is simply insufficient to even begin to displace the weight of evidence that points the other way.

79. In so far as Mr Boyarkin gave evidence of being told contemporaneously by the Defendant of the existence of the Ritz Agreement I reject that evidence as being insufficiently reliable to adequately corroborate the Defendant's own account. The possibility of Mr Boyarkin being confused about when such conversations took place (and their contents) is highly likely to be contaminated by the passage of so many years and what may have been multiple conversations with the Defendant. There is nothing to suggest that he ever recorded his recollection prior to being asked to give evidence in this claim which would in any event simply be evidence of what the Defendant elected to tell him about his arrangements rather than directly proving the existence of any legally binding agreement with the Second Claimant.

80. Although he did not accept that all the documents were unfavourable to the Defendant, Mr Edey QC acknowledged in his opening submissions that '*they appear unfavourable in many instances*' and that '*there are documents in this case that are unhelpful on the face of them*'. That point having been acknowledged, Mr Edey's case is that the Court should '*step back*' and '*come away from the detail and look at the big picture*'.

81. In support of his client's case Mr Edey, with great skill and vim, advanced a number of arguments as to why the documents could be safely rejected in favour of the 'big picture'.

82. At the core of the Defendant's attempt to explain what he himself had written on multiple occasions to the Second Claimant, he repeatedly advanced two factors. Firstly, he said that it was a term of the Ritz Agreement, at the Second Claimant's insistence, that it would remain confidential between them and furthermore its existence should never be referred to in emails. Secondly, he asserts that throughout this period he was suffering from the effect of trauma (he said PTSD) and had developed a subservient relationship with the Second Claimant which (he states) had been diagnosed by his treating psychiatrist as a form of 'Stockholm Syndrome' whereby he was seeking to please and appease his tormentor.

83. I reject both these explanations as coming anywhere close to explaining away the documents or causing me to doubt the veracity of the Claimants' evidence.

84. Firstly, the emails that the Defendant was sending to the Second Claimant were predominately sent to and from private email addresses. It is obvious from the face of some of these documents that they were understood by both men to be sent and received in confidence. This is reflected not least in the fact the Defendant disclosed extremely sensitive personal information in some of the emails. The Defendant would have known that they were private and confidential (indeed at least one requested the same) and I find it inconceivable that if there was an outstanding obligation to pay the Defendant millions of pounds he would have felt compelled not simply to avoid

mentioning it (even implicitly) but to have not challenged the Claimants categorisation of the payments as loans and/or the Second Claimant's increasingly stern advice about profligate spending habits. It is equally impossible to reconcile the Defendant's explanations with the repeated expressions of gratitude. I conclude that the Defendant's evidence as to confidentiality is an untruthful means of trying to explain away the obvious meaning of the documents.

85. Secondly, there is no independent evidence at all to support the Defendant's explanation that he was caught in a 'Stockholm Syndrome' type relationship with the Second Claimant whereby he felt driven to express himself as a supplicant. The sole source of evidence on which those submissions were premised namely that repeated emails thanking the Second Claimant profusely for his generosity should be read as reflecting a polar opposite state of affairs, came from the Defendant himself. At one stage in the proceedings his solicitors had indicated they were going to apply for permission to rely upon expert psychiatric evidence but no application was ever pursued. Whilst the documents do disclose that the Defendant stated contemporaneously that he was suffering from mental health problems during the relevant period there is simply no evidence at all to substantiate a medical case that the plain face of the documents can be properly explained away on the basis of a psychiatric illness, let alone that the tenor and tone of the documents was governed by the existence of a 'Stockholm Syndrome'. The documents suggest that the Defendant was certainly exceedingly grateful for the monies he was receiving and that on occasion he was profusely apologetic for asking for additional sums. I do not read the documents nor the evidence as a whole as suggesting an alternative explanation (let alone a compelling one) sufficient to disregard their plain meaning.

86. I turn more briefly to explain why I dismiss the other arguments advanced by the Defendant in support of the existence of the Ritz Agreement in the absence of documentation.

(a) The Character of the Second Claimant

87. It was forcefully submitted that the Second Claimant had shown himself in business to be a man schooled in the 'dark arts' and was well used to 'papering over the cracks' – by which I understood it to be suggested that the years of email exchanges might have been a deliberate attempt by the Second Claimant to paint a false picture of loans in order to cover up the obligations under the Ritz Agreement.

88. The basis for these arguments was the evidence of the Defendant, who made a series of serious allegations against the Second Claimant, some of which were put to him in cross examination. It was suggested that the sale of the minority shares had been knowingly (and improperly) made to companies controlled by the Majority Shareholders, it was also alleged that there had been a nefarious scheme whereby loans owed by a Russian property developer were mysteriously forgiven in a transaction that facilitated a 'stealth' payment back to the FIB Majority Shareholders (it being said that the sale price paid to the Minority Shareholders was deliberately inflated). These very serious allegations were robustly rejected by the Second Claimant in his evidence.

89. I too reject them all. There was simply no documentation that came anywhere close to establishing the serious allegations made[6] and the fact that they were advanced with such vigour by the Defendant reflects not on the credibility of the accused but the accuser.

(b) The absence of written loan agreements

90. Mr Edey QC contends that it is simply incredible that if a whole series of loans were paid they were not recorded into loan agreements. The First Claimant is a financial services company and the first payment was for a very large sum and thereafter the Second Claimant, an experienced financier, made repeated payments of tens of thousands of pounds over a number of years without any significant repayments.

91. If these payments had been made by a commercial organisation in the business of granting loans to unconnected third parties and/or there had been no body of relevant contemporaneous documentation, this would have been powerful, very probably, decisive point. This is however not such a case.

92. It is certainly unfortunate that no loan agreements were made – it would no doubt have avoided the need for this trial, but I am not prepared to accept that their absence demonstrates that the payments were not loans let alone that it is probative of the existence of the compensation agreement contended for by the Defendant.

93. In respect of the loan by the First Claimant I accept the evidence (which I have generally found to be credible for the reasons given above) of the Second Claimant that it was not felt necessary to formalise because he was a colleague in a small firm with a 'family' spirit notwithstanding the more prudent approach of Mr Stohner. Thereafter I accept his evidence that he did not record loans because he considered each to be the last that would be requested by someone he considered a close friend and also because he believed the recovery of the Cypriot funds was just around the corner. This evidence was consistent with the content and tone of the documentation taken as a whole.

94. Indeed, the absence of written agreements only takes the Defendant so far in which on his own case he did not record his Ritz Agreement at any stage, not least when (on his account) it was becoming increasingly apparent that the Second Claimant might not honour it and he might be millions of pounds out of pocket.

95. I conclude that at worst, in not formalising loan agreements, the Second Claimant could be accused of letting his generosity and kindness spill over into naiveté about the Defendant.

(c) Repayments by the Defendant

96. As set out above, one of the points advanced by the Claimants was that some repayments had been made by the Defendant over the course of the years. The Defendant argued that this was in fact a scheme concocted by the Second Claimant and that immediately after the repayments by him, he would receive cash in return. Indeed

[6] In light of the all total absence of documentation capable of substantiating the serious allegations made by the Defendant it is not necessary to go into detail about the allegations. I do note however that the suggestion that the Second Defendant was in cahoots with the Majority Shareholders might be thought difficult to reconcile with the fact he had previously reported them to the Serious Organised Crime Agency.

the Defendant relied upon the cash payments made to him as being proof of part compliance with the Ritz Agreement.

97. The Defendant sought to prove the existence of the 'circular scheme' of payments of cash from the Second Claimant, following his own repayments, by reference to deposits into his bank accounts shown on statements disclosed late in the day. The statements did not prove what he claimed they did. In respect of one alleged transaction (i.e. purported repayment of a loan by him followed by cash from the Second Claimant) there is no corresponding bank entry at all. The Defendant sought to explain this by stating the Second Defendant told him (for entirely inexplicable reasons which I do not find credible) not to bank the cash. In respect of the remaining payments, there are entries in the statements showing that individual cash deposits were made but neither the amounts nor their timings fit with the narrative the Defendant urges I accept.

98. I found the Defendant's oral evidence on this point and his reliance on the documentation to be most unconvincing.

Summary of Conclusions on the central issue

99. I find that there were a series of loans made by the Claimants and that there was never an agreement to compensate as alleged by the Defendant. It is not strictly necessary to address why it is, on the basis of my findings, the Defendant has advanced a case that is in so many respects untrue. There are cases in which parties can provide honest but deeply mistaken recollections about events that occurred long ago. A teaching of Gestmin is that this may reflect the frailty of human memory. Here the Defendant's life undoubtedly spiralled downwards after his departure from FIB both in terms of finances and health, and thus his memory over time may have been mediated by his sense of injustice that others made so much money out of events that caused him only misery. It may be that over the many years of hardship these circumstances have worked to convince the Defendant not just of a moral case but to reconstruct a legal case in his own mind – albeit one that never actually existed. I make no findings in that respect but I do conclude that the Defendant's evidence in all key respects was entirely unreliable and that rather than repay the kindness shown to him he instead (through both his intimated claim and the defence in this case) elected to seek to avoid his debts and subject the Second Claimant to deeply hostile and expensive litigation, not least exposing him to over a day of expert cross examination in which his character was repeatedly sought to be impugned and unfounded allegations of the upmost seriousness repeatedly put to him in open court.

D: WERE ALL THE PAYMENTS LEGALLY BINDING LOANS?

100. It is not enough for the Claimants to demonstrate that the payments were not made pursuant to a compensation agreement. They must go on and demonstrate that each payment was a loan and the terms included repayment on demand.

101. The Defendant correctly points out that although there is no dispute that the documents demonstrate payments being made on the dates claimed, very few of them are recorded in the documentation as being loans. The burden is on the Claimants to show that they were loans as opposed say to gifts or ex gratia payments.

102. Having considered the relevant evidence surrounding each one of the payments (summarised in the attached schedule) I am entirely satisfied that notwithstanding the absence of documentation evidencing the precise status of each, they were all loans save for two specific payments made to third parties. In reaching this conclusion I have relied not least on:

    i) The evidence of the Second Claimant (and in addition, in respect of the First Claimant's payment, Mr Stohner) that all the payments were loans. As stated I have found him to be a reliable witness who was clear that the monies paid were always understood to be loans;

    ii) The clear course of dealing established in the documentation. I find that they reflect an established framework whereby the Defendant would either ask for money to tide him over in terms that were entirely consistent with further loans or were (save for two payments) advances under the agreed process of covering the costs of the attempt to recover the Cypriot monies. The documentation to my mind establishes a clear pattern of dealing and those advances made without an express reference to the term 'loan' are consistent with the same course of dealing with those that do (for example see email of 23 May 2010 excerpted above). Apart from the terminology used in the requests, the nature of the payments are also evidenced by the Second Claimant's growing frustration with the failure to progress the recovery proceedings as well as his irritation at the Defendant's enjoying a lifestyle beyond his means and the consequential impact on his own (e.g. "*I should not have to work myself to death so you can pay your bills*"). Neither the terminology nor the tone of the Second Claimant's communications were ever contemporaneously challenged by the Defendant.

103. The only payments that have given me pause for thought are two particular payments arising out of the investigations into the Cypriot funds. I am entirely satisfied that in general the payments to lawyers and investigators hired to help recover the sums were made by way of loans which is a structure wholly consistent with the terms of the Defendant's email of 16 June 2010, some of the relevant parts of which are excerpted above. At least initially, the Defendant was expressing great enthusiasm for seeking to recover the sums said to have been stolen from his accounts and was explicit in his acknowledgement that the Second Claimant's outlay would be repaid.

104. In the summer of 2013, at the urging of the Second Claimant, the firm of Sidley Austin was instructed to assist in the recovery of the Defendant's Cypriot funds. It is clear from an email exchange on 26 June 2013 that the Second Claimant was very keen that the Defendant progress matters with Sidley Austin following preliminary advice that legal action in Cyprus was a viable option. The Second Claimant wrote that in addition to providing a means of permitting the Defendant to "*repay the bailouts*" to the First and Second Claimants, it would also permit him to remedy a wrong – he wrote "*Don't lose your nerve, Jonathan. This is EUR 2 million that they STOLE from you, so they have it.*"

105. It is clear from his response, that the Defendant was expressing nervousness about proceeding because of what he described as fears of the consequences "*I am asking you to be supportive but I beg you not to exert too much pressure. I would rather not continue on this planet if there is two to three years of litigious nightmare ahead. EY would not tolerate such a major distraction easily and it is likely that I would have to*

leave the partnership." Indeed, the Defendant later decided not to proceed with any legal action.

106. Sidley Austin were retained and advice was also obtained from Cypriot Counsel. On 17 September 2013, the Second Claimant informed the relevant partner at Sidley Austin that he would cover fees (including obtaining advice from Cypriot counsel) in the event that the Defendant could not. The Defendant wrote to Sidley Austin to make plain that he was not in a financial position to incur any liabilities to the firm, as he wrote to the solicitor on 18 September 2013 "*I am unable (and because unable, I am also unwilling) to have any actual contingent liability in respect of your firm's fees in respect of the engagement letter under which you are now acting for me*". This explicit disavowal of liability for Sidley Austin's fees is a point relied upon by the Defendant for demonstrating that there was no agreement between him and the Second Claimant to repay the latter's outlay on lawyers' fees.

107. Whilst I do not doubt the sincerity of the Second Claimant's evidence that the payments were clearly made as loans on the same basis as all the others, I am unable to conclude that he has established this to the requisite standard. This is not because I accept the relevant parts of the evidence of the Defendant but rather because the contemporaneous documentation does not make out that a formal agreement for repayment on demand existed in respect of these specific payments. There would seem little doubt on the documentation that the Second Claimant was getting very concerned that a failure to recover the Cypriot funds was making the prospect of significant repayments look ever more remote. At the same time his business relationship with Mr Stohner was becoming ever more strained by the failure to recover the monies. It is also clear on the documentation that the Defendant was becoming increasingly reluctant to progress Cypriot proceedings (a point that the Claimants contend may reflect the fact that the theft was a deliberate concoction) and had made that plain in terms to the Second Claimant and Sidley Austin. The documentation, even taken with the course of dealing over the previous years, does not make out the Second Claimant's case that the payments were made on the explicit understanding with the Defendant that they would be repaid, not least because of the clear terms in which the Defendant was expressing (i) in clear terms his reluctance, at this particular juncture to proceed and (ii) his clear disavowal of liabilities for fees.

108. Notwithstanding my findings in respect of the Sidley Austin fees I do find that the subsequent payment to KCS were once again established under the course of dealings of paying third party disbursements under the loan agreements. Consistent with the pattern established in earlier years (and in contrast to the dealings with Sidley Austin), the Defendant was once again expressing himself as keen to proceed with recovery of the Cypriot funds. The Defendant introduced KCS to the Second Claimant and in an email of 28 February 2014 stated "*I am able to say to you, and under no pressure that I am now fully committed to a resolution of the matters saying (sic) back to 2006/7 and, for the first time feel we have the right support to achieve that resolution*". As it transpired the Defendant sought to use the engagement of KCS to press his moral case (which at that time had never been articulated to the Claimants) that he should be compensated by them for the events leading to his departure from FIB. I conclude that the fees were underwritten as part of the general pattern of loans.

E: TERMS FOR REPAYMENT

109. In respect of all the loans which I have found were entered into by the parties, I conclude that the terms for repayment was on demand. I have considered whether some, or all, were contingent on the Defendant securing his monies from Cyprus. That would be inconsistent with the clear majority of most requests which were requested in order to tide the Defendant over when desperate for funds. Even in respect of the payments made more directly for the return of the Cypriot monies, I conclude, taking the evidence as a whole, that whilst the Claimants hoped that the sums sought to be recovered would enable repayment of their loans, they were not dependent upon them.

F: CONSUMER CREDIT ACT 1974

110. The Defence asserted that the payments were loans governed by the Consumer Credit Act 2006, that the Claimants failed to comply with the statutory requirements governing loans and were therefore unenforceable. In fact, as the Defendant now accepts, the relevant Act is the Consumer Credit Act 1974 albeit he advances precisely the same points under it.

111. The key issue between the parties is whether or not the loans were non-commercial agreements and thus exempted from the statutory formalities of the Act by s.74(1). Non-commercial agreements are defined in s.189(2) as:

> "a consumer credit agreement or a consumer hire agreement not made by the creditor or owner in the course of a business carried out by him."

112. The test for considering whether the loans were made 'in the course of a business' carried out by the Claimants is a broad test that requires the court to look at the transactions between the parties and discern whether taken as a whole they are consistent, or inconsistent, with payment being made in the course of business; see for example, Wilson LJ (as he then was) in Al-Tamini v Khodari [2009] EWCA Civ 1109 at §§33-38[7]. That case concerned whether cash payments made by the Claimant to the Defendant to cover the purchase of chips from the Les Ambassadeurs Club Casino were loans regulated by the 1974 Act. Of course any consideration of whether particular loans are, or are not, governed by the Act will turn on their own particular facts but it is instructive to reflect on the factors that Wilson LJ considered relevant:

> "35. So the features of the transactions between the parties must be weighed in order to discern whether, taken as a whole, they entitled the judge to conclude that they were not made in the course of a business carried on by the claimant. In my view the balance sheet reads as follows.
>
> 36. Indicative of a business are the following features:
>
> (a) the claimant made numerous loans to the defendant;
>
> (b) they were made over a period of almost five years;

[7] See also Popplewell J (as he then was) in Bassano v Toft & Others [2014] EWHC 377 at §§29 to 37

> (c) they totalled in the region of £7,000,000; and
>
> (d) a substantial profit, reflected in the 10% fee, accrued to the claimant by virtue of them.
>
> 37. Contra-indicative of a business are the following features:
>
> (a) although occasionally he made loans to two others, almost all the claimant's loans were made to only one person, namely the defendant;
>
> (b) the loans were made *ad hoc*, in response to the defendant's sudden requests for immediate, temporary assistance;
>
> (c) the claimant acceded to the requests because he wanted to foster the goodwill of the defendant as an important client of his bank;
>
> (d) there is nothing to indicate that the claimant would have made loans to persons with whom he was unacquainted;
>
> (e) neither the loans nor the repayments were recorded in writing between the parties;
>
> (f) security for repayment was neither tendered nor sought;
>
> (g) the time for repayment of each loan was never identified;
>
> (h) the 10% fee was not related to the time for which each loan remained outstanding; and
>
> (i) the claimant had no business premises, kept no paraphernalia apt to a business and neither advertised nor otherwise published terms upon which he was prepared to make loans.
>
> 38. In my view a weighing of the rival features, in particular the necessary attribution of substantial weight to the informality surrounding the loans between the parties, fully entitled the judge to infer that the claimant did not make loans in the course of a business. The defence under s.40(1) of the Act of 1974 was rightly rejected."

113. Although the regularity and overall amounts of the loans can be said to be consistent with a commercial agreement, it is in my view abundantly clear from the evidence that they were no such thing. I find that the first loan was given by the First Claimant out of concern and kindness for a partner in their group of companies, consistent with the evidence of the 'family firm' ethos of the business and the generosity of spirit of the Second Claimant. The same points can be made in respect of the repeated payments made by the Second Claimant and (through him) the Third Claimant. These were payments motivated in large measure because of concerns for the predicament of a close friend. The loans were made on an ad hoc basis in response to requests for urgent assistance, they were not recorded in formal documents, security was not sought nor

was a rate of interest agreed, nor was the time for repayment ever recorded. It is abundantly clear that these were not loans made in the course of a business.

G: WHEN INTEREST RUNS FROM

114. I have concluded that it was an implied term of the loans that they became repayable on demand. As noted, the parties have agreed that the appropriate rate of interest under the Senior Courts Act 1981 is 2% above base. They have also agreed (subject to liability) that the earliest period from which interest should run is 23 February 2018. That is the date at which the obligation to repay accrued, i.e. the date one month after the Claimants' Letter Before Action.

115. Although this was the earliest date agreed to be appropriate it is the one that I consider should apply here. On my assessment of the evidence the Claimants showed considerable forbearance in pursuing their right to recover their loans and indeed did not do so until provoked by (as I have found) a wholly unjustified threat by the Defendant to sue the Second Claimant for millions of pounds. I consider that the earliest date for repayment is the appropriate one.

H: DECISION

116. For the reasons set out above I have concluded that the Claimants are entitled to recover the sums sought (save for Payments 34 and 35) plus interest under the Senior Courts Act. The relevant sums and interest payments are contained in the Order attached to this Judgment.

I: POSTSCRIPT - CONSEQUENTIAL ORDERS

117. A draft of this judgment was circulated to the parties and their legal representatives on 1 April 2020. Subsequently, on 7 April 2020 I received further submissions on the issues of (i) costs, (ii) time for payment and (iii) interim payment on account of costs. In light of the Covid-19 emergency it is sensible that I set out my decisions on these issues within the body of the judgment in order to reduce the administrative burden on the court system.

Costs

118. Unsurprisingly the parties are agreed that the Claimants should receive their costs. There is however a dispute as to whether the costs should be assessed on the standard basis or on the indemnity basis.

119. The parties are agreed that the Court enjoys a broad discretion on questions of costs under the regime provided by CPR 44.2 and 44.3. Indemnity costs can be awarded where the conduct of a party takes the case 'out of the norm'. The parties do not agree whether the findings I have reached in respect of the Defendant's conduct take this case 'out of the norm'.

120. I conclude that it is appropriate to award indemnity costs. I have set out in detail in the body of this judgment repeated findings about not simply the unsatisfactory nature of the Defendant's evidence but also the manner in which he conducted this litigation. As I have found, he was a wholly unsatisfactory witness, in very large measure untruthful

and mendacious. Taking into account all the circumstances of the case I conclude that these takes the claim 'out of the norm'.

121. In reaching this conclusion I have not, as promoted by the Claimants, taken into account the Defendant's decision to employ the firm 'Black Cube' to secretly record the Second Claimant. This evidence was excluded by separate order (and cost sanction) prior to the commencement of trial and I was therefore (rightly) not given much evidence or information about it.

Time for Payment

122. Payment shall be made within 14 days of this judgment. This is the standard term (CPR 40.11) and I see no reason to depart from it here. I accept that the Covid-19 emergency may make it more difficult for the Defendant to make the necessary arrangements to discharge his debt but (i) he would have had the advantage of a longer than usual between receipt of the draft judgment and formal hand-down and (ii) he should have been making such arrangements to repay the Claimants long before this judgment.

Interim Payment of Costs

123. This litigation has been subjected to the cost budgeting regime albeit the Claimants have indicated that they will seek to argue on assessment that their recovery should exceed the budgeted levels.

124. The existence of the budget does give the Court some reassurance that amounts sought by way of interim costs order do not exceed the amount ultimately found to be payable.

125. I order that the Defendant pay the sum of £250,000 by way of interim payment on account of costs which represents approximately 85% of their budgeted costs.

APPENDIX – AGREED SCHEDULE OF RELEVANT PAYMENTS

Payment Number	Date	Amount Paid	Net Amount Claimed by the Claimants	Which Claimant paid the sum?	Is it disputed that the sum was paid to D or to a third party?	Documents relating to payment
1	22.12.2008	£275,000	£263,524	C1 (Bank transfer)	N	[F1/85] [F1/86] [F1/87] [F1/88] [F1/89] [F1/92] [F1/98] [F3/310] [F3/311] [F3/312] [F3/313] [F3/314] [F3/316] [F3/317] [F3/323] [F3/329] [F3/330]
2	24.5.2010	£25,000	£0	C2 (Bank transfer)	N	[F1/103] [F1/104]
3	11.6.2010	£25,000	£25,000	C2 (Bank transfer)	N	[F1/106] [F1/107] [F1/108] [F1/113] [F1/117] [F1/118] [F1/132]
4	23.6.2010	£15,000	£15,000	C2 (Bank transfer)	N	[F1/119] [F1/120]
5	26.7.2010/ 28.7.2010	£20,000	£20,000	C2 (Cheque)	N	[F1/121] [F1123]
6	6.8.2010	£5,000	£5,000	C2 (Bank transfer)	N	[F1/125] [F1/126] [F1/127]

7	25.8.2010	£33,405	£33,405	C2 (Bank transfer)	N	[F1/128] [F1/129]
8	02.09.10/ 6.9.2010	£20,000	£20,000	C2 (Cheque)	N	[F1/130]
9	30.09.10/ 4.10.2010	£10,000	£10,000	C2 (Cheque)	N	[F1/136] [F2/138] [F2/139]
10	08.10.10/ 12.10.2010	£10,000	£10,000	C2 (Cheque)	N	[F2/139] [F2/140]
11	December2010	£10,000	£0	Alleged by D to be paid by C2 (Cash)	Claimant disputes	[F1/145] [F1/146] [F1/147]
12	06.12.2010/ 8.12.2010	£25,000	£25,000	C2 (Cheque)	N	[F2/154] [F2/155] [F2/156] [F2/157]
13	07.01.2011/ 11.1.2011	£12,500	£12,500	C2 (Cheque)	N	[F2/159] [F2/160] [F2/161] [F2162]
14	27.01.2011/ 31.1.2011	£31,555.81	£31,555.81	C2 (Cheque)	N	[F1/101] [F2/160] [F2/163] [F2/164] [F2/165] [F2/166] [F2/182]
15	22.02.2011 24.2.2011	£10,000	£10,000	C2 (Cheque)	N	[F2/160] [F2/170] [F2/171] [F2/182]
16	08.03.2011/ 10.3.2011	£10,000	£10,000	C2 (Cheque)	N	[F2/160] [F2/174] [F2/175] [F2/182]

17	07.04.2011/ 11.4.2011	£8,000	£8,000	C2 (Cheque)	N	[F2/160] [F2/182] [F2/184] [F2/185]
18	03.05.2011/ 5.5.2011	£10,000	£10,000	C2 (Cheque)	N	[F2/182] [F2/190] [F2/192] [F2/193]
19	20.09.2011/ 22.9.2011	£17,000	£17,000	C2 (Cheque)	N	[F2/205] [F2/206] [F2/207] [F2/208] [F2/209]
20	12.10.2011	£40,000	£40,000	C3 (Bank transfer)	N	[F2/213] [F2/217] [F2/219] [F3/270]
21	23.12.2011	£35,000	£35,000	C3 (Bank transfer)	N	[F2/227] [F2/228] [F3/270]
22	31.01.2012/ 2.2.2012	£5,000	£5,000	C2 (Cheque)	N	[F3/251] [F3252]
23	12.3.2012	£8,000	£8,000	C2 (Bank Transfer)	N	[F3/263] [F3/265] [F3/264] [F3/267] [F3/268]
24	08.03.2012 12.3.2012	£18,500	£18,500	C2 (Cheque)	N	[F3/262] [F3/264] [F3/268]
25	04.04.2012 11.4.2012	£20,000	£20,000	C2 (Cheque)	N	[F3/273] [F3/275]
26	24.04.2012/ 26.4.2012	£12,000	£12,000	C2 (Cheque)	N	[F3/281] [F3/282]
27	18.05.2012/ 22.5.2012	£15,000	£15,000	C2 (Cheque)	N	[F3/287] [F3/288] [F3/290]
28	18.05.2012/ 22.5.2012	£15,000	£15,000	C2 (Cheque)	N	[F3/287] [F3/288]

						[F3/290]
29	07.06.2012/ 11.6.2012	£3,500	£3,500	C2 (Cheque)	N	[F3/295] [F3/298]
30	18.06.2012/ 20.6.2012	£50,000	£50,000	C2 (Cheque)	N	[F3/296] [F3/298] [F3/299] [F3/301]
31	7.8.2012	£20,000	£20,000	C2 (Bank Transfer)	N	[F3/304] [F3/305] [F3/306] [F3/307]
32	9.10.2013	$11,000	$0	Alleged by D to be paid by C2 (Cash)	Claimant disputes	[F4/372A] [F4/372B] [F4/377]
33	28.10.2013	£15,000	£15,000	C2 (Bank Transfer)	N	[F4/377] [F4/380]
34	10.2.2014	£29,381.43 (Sidley Austin)	£29,381.43	GML Capital	C2 claims he reimbursed GML Capital. Defendant disputes that C2 reimbursed GML Capital.	[F3/344] [F4/352] [F4/353] [F4/354] [F4/356] [F4/363] [F4/369] [F4/394A] [F4/392] [F4/393] [F4/398]
35	15.2.2014	€5,414,50 (Cypriot lawyers)	€5,414,50	GML Capital.	C2 claims he reimbursed GML Capital. Defendant disputes (i) that the sum was paid; and (ii) that C2 reimburse	[F4/354] [F4/356] [F4/363] [F4/369] [F4/392] [F4/394]

					d GML Capital.	
36	6.3.2014	£30,000 (KCS)	£30,000	C2 (Bank Transfer)	N	[F4/396] [F4/397]
37	19.3.2014	$5,000	$0	Alleged by D to be paid by C2 (Cash)	Claimant disputes.	[F4/398A]
38	7.4.2014	£11,000	£11,000	C2 (Bank Transfer)	N	[F4/403] [F4/405] [F4/406] [F4/407] [F4/408]

PAYMENTS FROM MR HARFIELD TO THE CLAIMANTS

Payment Number	Date	Amount Paid	Which Claimant was the amount paid to	Is it disputed that the sum was paid by D	Documents relating to payment
39	22/11/2010	£10,000	C1 (Bank Transfer)	N	[F1/145] [F1/146] [F1/147] [F2/179] [F2/271] [F3/332] [F4/400]
39	6.12.2010/ 8.12.2010	£25,000	C2 (Bank Transfer)	N	[F2/154]
41	1.11.2012	£300	C1 (Bank Transfer)	N	[F3/311] [F3/312] [F3/313] [F3/314] [F3/320] [F3/332]
42	28.11.2012	£294	C1 (Bank Transfer)	N	[F3/311] [F3/312] [F3/313] [F3/321] [F3/332]
43	28.12.2012	£294	C1 (Bank Transfer)	N	[F3/311] [F3/312] [F3/313] [F3/323] [F3/327] [F3/332]
44	4.2.2013	£294	C1 (Bank Transfer)	N	[F3/311] [F3/312] [F3/313] [F3/329] [F3/332]
45	28.2.2013	£294	C1 (Bank Transfer)	N	[F3/311] [F3/312] [F3/313] [F3/330] [F3/332]