Neutral Citation Number: [2024] EWHC 903 (Ch)

Case No: BL-2022-BRS-000024

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN BRISTOL

BUSINESS LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 22/04/2024

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS
(Sitting as a Judge of the High Court)

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Between:

(1) JOHN DILWORTH **(2) LINDA DILWORTH**	**Claimants**
- and -	
(1) WOSSKOW BROWN SOLICITORS LLP **(2) MICHAEL WOSSKOW** **(3) DAVID ERIC BROWN** **(4) IAN DAVID BROWN** **(5) SALLY MALLINSON**	**Defendants**

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- -

JAMES PEARCE-SMITH (instructed by **BARTONS SOLICITORS**) for the **Claimants**
STEVEN FENNELL (instructed by **WOSSKOW BROWN SOLICITORS**) for the **Defendants**

Hearing dates: 26, 27, 28 March 2024

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Approved Judgment

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

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE
(Sitting a Judge of the High Court Chancery Division)

This judgment was handed down remotely at 10.00am on 22 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS:

1. The question for the court is whether two loan facility agreements were discharged or partially discharged following an agreement that was to replace an obligation to repay.

2. The first loan agreement was entered into by Mrs Dilworth and the First Defendant on 18 June 2010 (the "First Loan"). The First Loan was supported by personal guarantees given by the Second to Fifth Defendants. The personal guarantees made them primary obligors in the event of the First Defendant's default which was specified in the First Loan instrument. The sum lent under the facility was £200,000.

3. A second loan agreement was entered into by Mr Dilworth in July 2010 on similar, but not the exact same, terms (the "Second Loan"). The facility provided was £300,000. Again the Second Loan was supported by personal guarantees given by the Second to Fifth Defendants. And the personal guarantees made them primary obligors in the event of the First Defendant's default which was specified in the loan instrument. Any distinctions between the terms of the First Loan and Second Loan (together the "Loans") are not relevant for the purpose of this matter.

4. The Claimants are married. They are not professional lenders. The First Defendant is a firm of solicitors, with limited liability registered as a limited liability partnership under registered number OC318985. The Second to Fifth Defendants were partners in the First Defendant at the time of the loans.

The Claim

5. It is common ground that Mrs Dilworth advanced the sum of £200,000 to the First Defendant by way of a payment of £200,000 in about July 2010.

6. The purpose of the loan facility was to provide working capital to the firm of solicitors and to provide money to pay the general expenses incurred in promoting the business.

7. It is also common ground that Mr Dilworth advanced the sum of £300,000 to the First Defendant by way of a payment of £200,000 on 22 July 2010 and four payments of £25,000 between about 26 and 30 July 2010. The purpose of the Second Loan mimicked the purpose of the First Loan.

8. Interest payments were initially made in the sum of £1,666.67 each month in respect of the First Loan.

9. As regards the Second Loan, the First Defendant made monthly payments of £2,500 until February 2020.

10. On 3 December 2020 Mrs Dilworth provided written notice under the clause 6.1 of the facility agreement which provides as follows:

> "Subject to clause 6.3 the Facility is repayable in tranches of not less than £25,000 subject to either party serving 3 months written notice on the other requesting or offering repayment as appropriate PROVIDED THAT no such notice shall be served within 12 months from the date hereof and the Borrower shall

> not be bound to make a repayment in excess of £25,000 in any 2 month period."

11. Clause 6.2 provided for a "Repayment Event" which included "any breach by the Borrower of any of its payment or other material obligations under this letter."

12. The First Defendant failed to make the repayments pursuant to clause 6.1. No payments of £25,000 have been made.

13. Consequently, on 1 April 2021 notice of a Repayment Event was served on the First Defendant in accordance with clause 6.3 and demand made for the whole sum due, namely £200,000 with the contractual interest.

14. The Second Loan made by Mr Dilworth included a clause 6.1 provision where 3 months written notice was to be served for the repayment of capital in tranches of £25,000.

15. As with the First Loan, the Second Loan included a "Repayment Event" for any breach of the First Defendant's obligations to pay. A "Repayment Event" entitled the lender to cancel the facility, declare all capital and interest under the agreement to be immediately due and payable, and make demand.

16. It is common ground that the First Defendant failed to make payments from 20 March to 20 July 2020. No repayments have been made since. In accordance with the loan facility written notice was served and demand for payment of all sums due was made on 22 July 2020 pursuant to clause 6.3 of the facility letter.

17. The sum demanded under the First Loan is £194,387.37.

18. Mrs Dilworth claims payment from the First Defendant alternatively the guarantors giving credit for any payments received since April 2021. Mr Dilworth makes the same claim.

The reason provided for non-payment following notice of a Repayment Event

19. The defence for non-payment of the sums demanded is that the due debt had been discharged or partially discharged in 2017 by agreement. As a result, the guarantors bear little or no liability.

20. Until closing submissions the pleaded case was that the 2017 agreement was made orally. I shall refer to this as the "2017 Agreement".

21. The defence states that there had been a long business relationship between Mr Dilworth and First Defendant, and that it was usual for agreements to be communicated in an informal manner by telephone [paragraph 10]. It is not said that Mrs Dilworth had any direct dealings with the First Defendant, but that Mr Dilworth acted with her actual authority.

22. The circumstances in which the 2017 Agreement is said to have been made are a little unusual.

23. The First Defendant was investigated by the Solicitor Regulation Authority and the Third Defendant says he was concerned that the integrity of the Loans may be compromised, due to the intervention. It is pleaded [12]:

> "During May and June 2017, a series of discussions by telephone and in person took place between the First Claimant and the Third Defendant, supplemented by e-mail correspondence. The Third Defendant no longer recalls the precise dates of such discussions, nor the precise contractual words used between the parties. *The outcome of the said discussions was an oral agreement*…between the Claimants (represented by the First Claimant) and the First Defendant (represented by the Third Defendant) as follows:
>
> The Claimants would release the First Defendant from its liability to each of them under the [Loans].
>
> In consideration of the said release, the First Defendant would procure that the Claimants receive 1,500 preference shares each in John Banner Centre Limited." (emphasis added)

24. The written evidence given in connection with the 2017 Agreement by the Third Defendant is as follows:

> "At the beginning of May 2017 I discussed with the First Claimant that the Personal Injury department of WBLLP would not be as profitable as it used to be and in order to safeguard his position it was agreed that he would convert £300,000 of the loans into preferential shares of the [John Banner Centre Limited] in the names of him and the Second Claimant in the sum of £150,000 each being 1,500 shares worth £100. On 3 May 2017, the First Claimant emailed me setting out the revised agreement on the basis that shares would be allocated in JBCL in place of his agreement with WB LLP. I responded on 3 May 2017 in confirmation. There was a further exchange of emails and on 22 May 2017 I emailed the First Claimant to advise that the shares had been issued and he responded by email on the same day that the shares should be split equally between himself and the Second Claimant. On 19 June 2017 I emailed the First Claimant with confirmation of the agreement that we had reached. In particular I advised the First Claimant that "the original loan was guaranteed by the then partners of WBLLP which consisted of Michael Wosskow, David Brown, Ian Brown and Sally Mallinson". I went on to say that "Sally Mallinson had left the practice some three years ago and the ongoing guarantee would be continued by Michael Wosskow, David Brown and Ian Brown. I also sent a copy of this email to his solicitor, PJ Albury of Bartons… I met with the First Claimant in January 2018 and he emailed me on 15 January 2018 acknowledging that the share capital had been placed in JBCL and also making reference to the dividend payment and

> the best way of managing it…am firmly of the opinion that the original loan to WBLLP which was guaranteed by the Second, Third, Fourth and Fifth Defendants, was discharged and in its place an arrangement was reached whereby the Claimants were issued with shares and dividend payments were made to them."

25. The pleaded case is that the holders of the preference shares in John Banner Centre Limited (the "Company") would receive an annual dividend of £6-00 per share. As I understand it the annual dividend was calculated to equate to the interest payments due under the Loans.

26. Each preference share would be purchased at a cost of £100. No money would change hands. The consideration was the forgiveness of £300,000 due under the Loans.

27. In summary the position of the Defendants is that pursuant to the alleged 2017 Agreement: i) the preference shares were allotted; ii) a confirmation statement was filed at Companies House on 23 October 2017; iii) the register of the Company was updated to include the Claimants as holders of the allotted non-voting preference shares; iv) dividends were subsequently paid to the Claimants by the Company, pursuant to the 2017 Agreement; and v) the Third Defendant intended that the Company would buy back the preference shares after the 2017 Agreement.

Contemporaneous correspondence

28. Despite the claim that agreements were communicated in an informal manner by telephone, the Loan instruments demonstrate that terms of agreements in the past had not only been reduced to writing but had been professionally drafted.

29. An e-mail dated 21 October 2016 sent by the Third Defendant, Mr Brown, provides evidence that he was concerned about repaying the sums due under the Loans before the intervention of the Solicitors Regulation Authority. The First Defendant was seeking to change the terms of the loan facilities by reducing the rate of interest or to:

> "restructure into a combination of loans and shares to take advantage of tax free income. Should you wish I will be happy to discuss with you buying a few of my main Shares [in the Company] at the current price from your loans. Over the last few years we have paid a £6 per share dividend but this is expected to increase over the next few years.
>
> This could give you growth potential as well as income which over a period could be set up to ensure you could take advantage of capital gains allowance."

30. The offer was rejected by telephone.

31. On 23 November 2016 the Third Defendant emailed Mr Dilworth:

> "I would suggest the following way forward.
>
> We will continue with the existing loan for a further period of at least 18 months ie continue to pay 10% of loan. The only

> thing we need to find out from you is whether you want interest only in which case the monthly interest payment will reduce pro rata or you wish the payment to stay the same in which case the balance of the loan will reduce.
>
> Your next payment is due on the 25th January when your total loan will be £450k. If you still receive the £50k per year your capital account will be reduced by £5k
>
> over the year. I still feel you may be better off with some of this money in Shares as £5k per year per person is tax free. We can leave this till we meet."

32. Mr Dilworth responded following an eye operation by e-mail dated 6 December 2016:

> "I am happy with your suggestion to continue as per our agreement and would be more than happy to continue with the £2500 per month which would include some loan repayment."

33. There was no further correspondence until April 2017 when the Third Defendant wrote with news that took the Claimants by surprise:

> "In sept 2015 we started a new practice Wosskow Brown Legal Services Ltd which took over all non-personal injury work. The LLP ceased trading but continued with its licence as solicitors with the new business working on the remaining injury files. We transferred your loan to the new practice who have continued to make interest payment to you."

34. It was surprising as first, the LLP with whom the Loan agreements had been made had stopped trading. This meant that the borrower was not making the repayments due nor could it, if it no longer traded. Mr Brown said in evidence that there was still run-off work to conclude. Secondly, the Loan agreements incorporated a non-assignment clause: "The Borrower may not assign any of its rights or benefits in relation to the Facility".

35. On 24 April 2017 the Third Defendant e-mailed the First Claimant:

> "The practice which you lent money to some 9 yrs ago Wosskow Brown solicitors LLP was heavily involved in personal injury claims. This was very profitable for many years but due to fraud in the claim industry began to be regulated. We made a decision 4 yrs ago to reinvent the practice as a private client specialist and invested heavily in publicity and marketing and replaced the falling injury claim income with general work such as probate conveyancing and commercial work. In sept 2015 we started a new practice Wosskow Brown Legal Services Ltd which took over all non personal injury work. The LLP ceased trading but continued with its licence as solicitors with the new business working on the remaining injury files. We transferred your loan to the new practice who have continued to make interest payment to you. It has now become

> clear that there is a substantial amount of fraud cases which we will have to write off. This could be as high as £500k.
>
> I am prepared to provide assets to cover the loss in LLP but if the control went out of my hand then the legal situation is that your loan is with LLP and this could be used to write off the shortfall. I accept that you could claim from myself and Michael but in this unlikely situation we would have little to offer.
>
> I propose that the bulk of your loan is used to buy new non-voting preferential shares in [the Company] so your money would no longer be available to write off any losses.
>
> Your return would be reduced to 6% after tax as the shares will guarantee a fixed dividend… The remaining money can remain as a loan and be repaid over a period to ensure that your overall income does not reduce too much over the next few years…
>
> I have sold some of my shares to LLP which it will sell on to them. 1will write off any money I would have received to clear the shortfall expected when all ongoing cases are settled If your money has been used to buy new shares their is no other alternative. I felt is essential that this is put in place during April. I will be closing down our accounts next Tuesday and Wednesday.
>
> I propose that you either buy 400 non voting shares at £100 each with a guaranteed dividend of £6 each. The remaining loan of just under £50k would be repaid over say 5 years to supplement your income. Or alternatively you buy 10% (1000)of the ordinary shares at £150 each the standard price which has been used in all recent transactions plus 250 new none voting shares @ £100 each. This would give you a less return but opportunity to sell in the short term to the people referred to above as well as voting interest."

36. On 2 May 2017 Mr Dilworth wrote:

> "I had not realised that you were in such financial trouble…on 24-4-17 you sent me the email which I have to say shocked me. You seem to be offering me either option 1 or option 2 or lose my money. The figures for the shares did not stack up to the value of the outstanding loans."

37. In his written evidence Mr Dilworth explains that he was so concerned that he called a firm of solicitors for guidance and later made a response to the Third Defendant's e-mail of 24 April. I continue with the e-mail sent on 2 May:

> "On 25-7-16 you received an email from me requesting drawdown of the loan as per the agreement with 3 months notice for £25,000 and a further three months notice for a further £25,000.
>
> On 21-10-16 you sent an email wanting to reduce the interest rate to 8%. You also offered shares which would produce a dividend of £6 or more per share. I responded by telephone that I would be happy to accept early repayment of the loan without penalty when you found someone who would provide loans at the new rate to replace mine.
>
> On 23-11-16 you sent me an email confirming payment of the drawdown loans and suggested continuing the payment to me of £2,500 per month which would include interest on my loan and an element of loan repayment. Lin's loan would be unaffected as she had not received any drawdown. You also confirmed that there would be a continuation of the original loan agreement for a minimum of 18 months.
>
> However if following along option ! (*sic*), I would need a guaranteed exit path which would provide full repayment of the shares at the purchase price paid from the loan. I would also need a defined schedule as I need to repay a mortgage from the monies originally loaned.
>
> Whilst on the issue of the ongoing loan, I request a £25,000 drawdown from both my loan facility and Lin's loan facility in three months time.
>
> I am sure you would also advise me to seek advice from a solicitor and when we reach a way forward will refer to Philip Albery who handled the original loan agreement and on the same terms.
>
> I hope that you will find a solution to the problem which provides a full repayment of the loans and gives you ongoing financial stability"

38. In cross examination the Third Defendant said that he did not mean the loan had been transferred from the First Defendant to Wosskow Brown Legal Services. He said that he intended to say that LLP was no longer taking on new personally injury work. The work in progress would continue. His recollection was that the standing order set up in the bank of the First Defendant, to make interest payments under the Loans, was not affected.

39. Mr Dilworth took further time to reflect on the 24 April 2017 proposals, and on 3 May 2017 wrote to the First Defendant following a statement that he would be prepared to alter the terms of the Loan agreements "subject to final agreement":

> "I would be looking for guarantees perhaps connected to the current personal guarantee

> 1-that the dividend is paid at 6% on each 12th [of the] month after the start date of the agreement
>
> 2-that the monthly payments are paid on the 20th of each month as per the agreement
>
> 3-that by giving three months' notice shares would be transferred from Linda or John Dilworth at the value of at least £100 per share and money is paid directly to the relevant bank account
>
> The shares would be allocated at £150,000 each to John and Linda Dilworth with the remaining part of the loan staying as a loan. I need to look at Linda's situation as this is her only source of income and as you can see she only just reaches the taxable threshold, so can she reclaim the tax paid on the shares?"

40. Mr Dilworth provided a spreadsheet within the e-mail response showing a predicted reducing of the sums owed to him and Mrs Dilworth.

41. Mr Brown responded on the same day saying that he will need to study the content of Mr Dilworth's e-mail and would be in touch. On 5 May 2017 Mr Brown responded more substantially:

> "I confirm that your calculations are acceptable and I have noted your request for 2 x £25k loan repayments. I think your idea of amending the original agreement is a good idea. The loan account would be covered in any event. As far as the shares are concerned we can come up with something that suits both parties".

42. Consistent with the e-mail sent on 2 May 2017 Mr Dilworth responded that he had passed the e-mail exchange to Mr Philip Albery of Bartons solicitors. Mr Albery was responsible for drafting the Loan instruments and facility letters. The purpose was to "complete the formalities of the agreement."

43. Mr Albery was about to leave for holiday. He informed Mr Dilworth by e-mail that he did not fully understand the proposal and suggested that he ask the Third Defendant "without prejudice" to "produce some documentation which I can then immediately consider at length on my return".

44. On 22 May Mr Dilworth asked the Third Defendant to make the "necessary alterations to the existing contract". This is more likely than not to have meant that the Loan instruments would be varied.

45. On the same date the Third Defendant informed Mr Dilworth by e-mail that the shares in the Company had been issued, were to be registered, and that he would produce draft documentation for Mr Albury. Mr and Mrs Dilworth did not ask for the preference shares to be issued at this time. Nevertheless as they had been issued Mr Dilworth responded that the "shares should be split equally between John Dilworth and Linda Dilworth."

46. On 19 June 2017 on the First Defendant's headed notepaper, the Third Defendant wrote that he had sent a copy of a "simplified form the basis of our agreement" to Mr Albury and that if any amendments are made he would look forward to considering them from either Mr Albury or Mr Dilworth. If no amendments were to be made then he asked for a copy of the agreement to be signed and returned. It is common ground that no signed agreement was returned to Mr Brown.

47. The "simplified" form is in a letter format (not an amendment of the Loan instruments), I set out in full:

> "I set out in this letter the terms that we have agreed relating to the balance outstanding and the loan facilities granted by you and Linda.
>
> Part of the original loan has been repaid and you and Linda have agreed to use part of your monies to purchase 1,500 shares in The John Banner Centre Limited. These shares are preferential, none voting shares each giving a fixed divided of £7 per year. The purchase price is £100 per share which means that each outstanding loan has been reduced by £150,000.
>
> Under the new arrangement a fixed amount will be paid each month which will consist of interest and a loan repayment.
>
> Attached to this letter is a document produced by you which sets out the opening balance of yours and Linda's account. From the loan account will be made a monthly payment as indicated in the schedule and this will consist of interest payments together with capital repayments.
>
> Dividends each year will be paid into the individual's loan account and the income and expenditure of the loan accounts as shown in the attached schedule.
>
> A further £25,000 will be repaid at the end of July and a further £25,000 will be repaid three months later. The original loan was guaranteed by the then Partners of the LLP which consisted of Michael Wosskow, David Brown. Ian Brown and Sally Mallinson.
>
> Sally Mallinson left the Practice some three years ago and the ongoing Guarantee will be continued by Michael Wosskow, David Brown and Ian Brown.
>
> It is agreed by the company and the Guarantors that the figures shown in your schedule are correct and accurate and payment will be made in accordance with this document."

48. Although the letter begins "we have agreed" it does not state when an agreement was reached, nor does it attach a draft written guarantee to secure repayments of interest of

capital. The letter fails to provide authority from the Company that it would issue shares and guarantee a dividend.

49. The letter is signed for and on behalf of "The Guarantors and Wosskow Brown Solicitors LLP."

50. On 21 June 2017 Mr Dilworth e-mailed Wendy Mills copying-in Mr Brown asking what "is the process to relinquish shares upon three months' notice and receive full value of the original payment made?"

51. On 29 June 2017 the Third Respondent responded:

> "just write to the company (in reality me or another director) saying you wished to sell shares and refer to the original letter. I or my family will buy these back at the rate agreed under the original document although with the future plans for the building there should be a lot more interest."

52. On 18 August 2017 the Third Defendant informed Mr Dilworth by e-mail that he had arranged a £10,000 payment "and will let you have the balance plus interest by the end of the month."

53. It is clear from an e-mail dated 6 October 2017 that the Third Defendant and Mr Dilworth had not met face to face for some time. This was to change in December 2017 when all parties agreed that they had met to discuss the Loans.

54. In this last e-mail correspondence of 2017, the Third Defendant acknowledges that £25,000 is due under the First Loan and asks that the payment be made by way instalments with the balance to be paid on 20 November 2017.

55. On 15 January 2018 Mr Dilworth wrote to the Third Defendant:

> "last year you wished to convert £300,000 of the loan liability to the asset of share capital, leaving the outstanding loan to be paid with 10% pa interest. The share capital has been placed in the John Banner Centre Ltd which is a property-owning development company raising revenue from rental of the property. The business would always have positive net asset value…any help from you in bringing forward payments would be greatly appreciated. To maximise the 6% dividend payment we would need to cash in shares at the agreed price just after the dividend is paid in April of each year. Could you agree to dividend be paid proportionately when shares are released, so that there is no pressure on April cashflow."

56. On 19 January 2018, the Third Defendant responded:

> "When we have cash available to make a capital repayment to you I will contact you. Remember we are still paying the 10% on the balance of your original loan which is generating income for you . Any loan repayments we make to you over the next few months must come from this balance . As far as the sale of

> shares in concerned we may if cash flow is ok at the relevant time arrange for the company to buy back and cancel the shares rather than finding a third party buyer. This is something for us to look at later this year."

57. On 25 October 2019 the Third Defendant informed Mr Dilworth that the loan repayments would need to be reduced and that the First Defendant would not be able to purchase the preference shares until the property held by the Company had been sold. He alluded to a prospect of a sale to a developer if further land was acquired first.

58. On 27 October 2019 Mr Dilworth wrote appearing to acknowledge that £300,000 of the combined loan facilities had been used to acquire shares in the Company and £41,500 of the loan remained outstanding.

59. On 6 February 2020 the Third Defendant wrote to Mr Dilworth stating:

> "We will not be in a position to make your loan repayments for the months January, February and March 2020…we will however continue to make loan repayments to Linda…"

60. On 23 March 2020 the Third Defendant wrote to say that offices were closing and that if the Company entered a voluntary arrangement he could expect a 5% return on the sums outstanding on the Loans: "Your money is in the John Banner Centre."

61. Mr Dilworth instructed Bartons solicitors to send a letter of claim. On 20 July 2020 a letter was sent stating that the claimant was Mr Dilworth. Having referred to the Second Loan made in July 2010 the solicitors wrote:

> "You have sought to vary the Agreement on various occasions but this has never been agreed by our client."

62. On 1 October 2020 Bartons wrote:

> "our client denies exchanging his loan for shares. For clarity there was a discussion over whether our client would give up the loan for a shareholding within a company. However such position was never finalised. You have provided one email dated 27 October 2017 without any context around it and without any other supporting documentation."

63. On 27 October 2020 the Third Defendant wrote direct to Mr Dilworth:

> "Agreements do not have to be in writing. I recall at least 1 telephone conversation when we agreed to go forward. We agreed that you would keep records of payment and dividends when due and you produced at least 2 schedules at different times showing dividend impact on loans."

Witness evidence

64. In his written evidence Mr Dilworth says [46]:

> "On 6 December 2017, I sent an email to the Third Defendant suggesting a meeting to iron out a way forwards. We had this meeting on 11 January 2018. The meeting was to discuss the way forward in order that full repayment of the loan would be fulfilled. I told the Third Defendant that I felt he was bullying me regarding changing the Loan Agreement. I did not feel that there had ever been a verbal agreement regarding the shares and we agreed that the monthly payments would continue. The Third Defendant was a solicitor, I was not."

65. He makes two further points about the purported 2017 Agreement. First, that the share certificates provided by the Company are dated 25 November 2022, long after the start of the dispute and second, the shares arrangement embodied in the 2017 Agreement would have had no benefit for the Company:

> "My loan was with the First Defendant and JBCL are not a party in any form to the loan agreements for either Linda or I. [The Company] or the Defendants have not explained this at any point."

66. He says that the payments received after the purported 2017 Agreement are consistent with the First and Second Loans and not consistent with a 6% return on preference shares. The money received between 2017 and 2020 came from the First Defendant and not the Company.

67. Two further points are made in his written evidence. First that neither Claimants received notification of dividend payments and second there was no agreement to swap a loan for equity in the Company as he had insisted on personal guarantees and no guarantees were agreed or executed.

68. In her witness evidence Mrs Dilworth states [14]:

> "At no point did I agree to transfer my loan to shares. Further, I would not have wanted to enter into such an agreement unless we had full security. The personal guarantees were key to this."

69. The key witness for the Defendants is the Third Defendant, Mr Brown, who is now aged 79. His written evidence is that he started discussions with Mr Dilworth about exchanging the loan for equity in the Company in early May 2017. He says that he accepted the terms proposed by Mr Dilworth sent by e-mail on 3 May 2017. His evidence is that the 2017 Agreement is supported by the e-mail exchanges [12].

70. His view (in his written evidence) is that the 2017 Agreement was concluded on 3 May or if later on 19 June 2017 [13-14].

71. Mr Brown says there was a meeting on 18 January 2018:

> "I met with the First Claimant in January 2018 and he emailed me on 15 January 2018 acknowledging that the share capital had been placed in [the Company] and also making reference to the dividend payment and the best way of managing it."

72. He relies on correspondence in October 2019 where an offer to purchase back the preference shares was made [20-21]:

> "The First Claimant replied by email on 27 October 2019 declining my suggestion and he suggested the following:- "the capital invested to you personally was at £500,000 and is now some £401,500 and with £3,000 worth of shares in The John Banner Centre"

73. As all the dealings in connection with the Loans were between David Brown and Mr Dilworth the other partners in Wosskow Brown Solicitors LLP are unable to give any direct evidence as to the 2017 Agreement. Michael Wosskow says that in June 2017 he was advised by David Brown that the Loans had been discharged on the basis that Mr and Mrs Dilworth had taken preferential shares in the Company. Ian Brown repeats.

74. Sally Mallison-Ayres provides different evidence. She resigned from the first Defendant on 28 September 2012 and says [11]:

> "After a period of negotiation, formal terms were agreed for my departure and me and other members signed a retirement deed on 20 December 2012 which provided form my release from any remaining guarantees…I was also given an indemnity against all personal claims that might be made against me by the creditors of the first Defendant…"

Oral evidence

75. Mr Dilworth was sworn in early on the morning of 26 March 2024. He gave careful evidence. It quickly became apparent that he had little recollection of events in 2017. His evidence was based on the documentary evidence that comprised the e-mail exchanges that I have largely set out above. He gave his evidence honestly.

76. At times his answers were unsurprisingly vague due to the distance in time of the events. He would sometimes answer a different question than asked. He would acknowledge he did not know the answer to questions, such as why he had taken a position of not denying he was the owner of shares in the Company in correspondence, and at the same time asserting that he did not purchase any shares. It was put to him that he was "having his cake and eating it". He responded: "I can see what you mean."

77. When he was cross-examined about his authority to act on behalf of his wife in relation to her outstanding loan, he acknowledged that the documentation contradicted his evidence but insisted that he would have to consult his wife. This evidence is not in his witness statement, nor did he mention taking instructions from the Mrs Dilworth in correspondence. His evidence on this issue was not reliable.

78. Mr Dilworth said that he had always said to the Third Defendant that the agreement had not been concluded. In cross-examination Mr Dilworth acknowledged that there was no contemporaneous document to support his assertion and he was not able to say that he had communicated the assertion to Mr Brown: "I don't know whether I ever said it orally." That was an honest and expected response.

79. Overall I assess his evidence as honest but not always reliable.

80. Mrs Dilworth was sworn in afternoon of the first day. She had no recollection of events other than that recorded in the correspondence. She acknowledged that she did not understand the spreadsheets that had been sent by Mr Dilworth to Mr Brown from time to time: "I don't have much financial competence when it comes to reading spread sheets."

81. She accepted that she knew and approved of the correspondence sent by Mr Dilworth in the period 2016 to 2019. She informed the court that although Mr Dilworth wrote and sent the e-mail correspondence, she would have the final say about her loan. She accepted that she knew about the correspondence and said that she did not feel the need to write separately to the First and Third Defendants about the First Loan. She did not need to limit Mr Dilworth's authority to act on her behalf.

82. When Mrs Dilworth was not sure how to answer a question she would say: "I can't answer that." Although not common this answer was also not infrequent.

83. I treat Mrs Dilworth's evidence with some caution owing to her lack of involvement with the First and Third Defendants, her absence at meetings and all negotiations in respect of the First Loan being conducted by Mr Dilworth with her approval.

84. Mr Wosskow gave evidence late in the afternoon. He was cross examined about the accounts of the Company. Mr Wosskow's evidence was that Mr David Brown was the person with financial control of Company and not him. He had transferred his shares to his wife at the time the First Respondent was no longer trading for personal reasons, he said. The answer was unsatisfactory, and later he hinted at the possibility of inheritance tax planning. It may well be, as Mr Pearce-Smith asked him, that the purpose for transferring shares to his wife was to safeguard assets he held in the event that Mr and Mrs Dilworth called in their guarantee. It is not part of the pleaded case and I therefore do not need, nor should I, decide the issue but in any event his evidence was corroborated by the evidence given on the second day by the Third Defendant.

85. Overall Mr Wosskow's evidence was credible but much of it was not relevant to the issue before the court.

86. The last witness was the Third Defendant, Mr Brown. He explained that he had had a heart attack and was recovering in Madeira when he slipped and hit his head. The bang to his head caused a brain bleed which had affected his recall. The fall was 12 years ago and there has been a slow recovery. He said: "I am not the man I once was". Despite his medical issues Mr Brown appeared to retain the power of recall as well as any of the witnesses called at trial.

87. Cross-examination exposed weaknesses in Mr Brown's evidence and he was forced to retract some of his written evidence. The fact that he did so deserves credit. The last question put to Mr Brown concerned his written evidence at paragraph 24 where he said that the Second, Fourth and Fifth Defendants maintain that the guarantees are no longer in force. When questioned he said that the statement was incorrect and that he meant that they remained in place. His pleaded case is that the 2017 Agreement discharged all debts owed by the First Defendant, and consequentially there is "no liability to the Claimants" under the guarantees.

88. The penultimate question put to Mr Brown assumed great importance. He was asked when, where and in what circumstances the 2017 Agreement was made? Mr Brown responded that there was no oral agreement and that it is likely that the 2017 Agreement had been agreed in writing as evinced by the correspondence. The response led to an application to amend the defence.

89. In general, both counsel cross examined the witnesses on their verifying statements and asked questions about who drafted the witness statements. Although a legitimate line of questioning given the age of the parties and the length of time that passed since the purported 2017 Agreement, I did not find the answers given to the questions helpful. No reference was made to the verifying statements in closing.

Legal principles

Authority

90. It has been said that actual authority and apparent authority are independent of one another. Generally, they coexist and coincide but either may exist without the other and their respective scope may be different: Diplock LJ, *Freeman Lockyer v Buckhurst Park Properties* [1964] 2 QB 480. Apparent authority looks at the authority of the agent from the perspective of the third party.

91. There was little argument in closing on the principles following the evidence of Mrs Dilworth who acknowledged in cross-examination that Mr Dilworth had authority to correspond with the First and Third Defendants and that she had given him authority to write in the terms he wrote.

Memory

92. I was taken to several authorities on the issue of memory and witness evidence. I need not set out the well-known passages in *Blue v Ashley* [2007] EWHC 1928. It is sufficient to say that the approach for a judge to adopt is to place little, if any, reliance on witnesses' recollections of what was said and base factual findings on inferences drawn from documentary evidence and known or probable facts. It is the approach I shall adopt in this case.

Contract

93. It is common ground that an agreement will not form a binding contract if it lacks certainty because it is either too vague or obviously incomplete. It is not for the court to make an agreement for the parties. This case is not so much about vagueness but rests on whether the agreement was complete, perhaps more accurately did the parties intend not to be bound until all essential terms were agreed.

94. On the issue of incomplete contracts Lord Clarke in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Company KG (UK Production)* [2010] UKSC 14 said [47]:

> "The court should not impose binding contracts on parties which they have not reached. All will depend upon the circumstances."

95. Referring to *Pagnan SPA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 Lord Clarke said:

> "In the *Pagnan* case it was held that, although certain terms of economic significance to the parties were not agreed, neither party intended agreement of those terms to be a precondition to a concluded agreement. The parties regarded them as relatively minor details which could be sorted out without difficulty once a bargain was struck. The parties agreed to bind themselves to agreed terms, leaving certain subsidiary and legally inessential terms to be decided later."

96. Whether a term is essential is fact specific: *Foley v Classique Coaches Ltd* [1943] 2 KB 1. Lord Clarke agreed with the analysis of what constitutes an essential term given by the Court of Appeal in *Pagnan* [49]:

> "(1)In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole . . . (2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary subject to contract case. (3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed . . . (4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled. . . (5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty. (6) It is sometimes said that the parties must agree on the essential terms and it is only matters of detail which can be left over. This may be misleading, since the word essential in that context is ambiguous. If by essential one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by essential one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by essential one means only a term which the court regards as important as opposed to a term which the court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the judge [at p 611] the masters of their contractual fate. Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in

> the way of the parties agreeing to be bound now while deferring important matters to be agreed later."

97. I was taken to *British Steel Corp v Cleveland Bridge Engineering Co Ltd* [1984] 1 All ER 504 which concerned a letter of intent. On the facts it was held that the parties had expected a formal contract to be concluded. The absence of a formal agreement and the failure to reach agreement on some essential terms rendered the contract unenforceable.

98. I was also taken to *Haden v Young Limited* [2008] EWHC 1016 which concerned a JCT contract but no sub-contract for the design and installation of mechanical and electrical works. Unsurprisingly the Judge found that the subjective views of whether the witnesses thought there was a sub-contract did not assist the court.

99. *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189 was relied on for the proposition that a contract will not be binding if negotiations are still afoot, and if a contract would not have been entered into if important terms such as those relating to standard of performance were still under negotiation, and where there had been some expenditure or loss in the interim, a restitutionary remedy would be suitable to the extent that one party had been unjustly enriched at the expense of the other.

100. Finally I was taken to *Barbudev v Eurocom Cable Management Bulgaria EOOD and others* [2012] EWCA Civ 548 for the proposition that an agreement to agree was not an enforceable contract.

Late amendment

101. In closing Mr Fennell, acting for all Defendants, sought an amendment to the defence. In many ways he was forced into the application due to the evidence given by Mr Brown, that it was unlikely that the 2017 Agreement was made orally. The amendment was unopposed and given the evidence I gave permission to amend.

102. The amendment uses the term "LD Loan" to mean the First Loan and JD Loan to mean the Second Loan. The amendment reads:

> "12A. During May and June 2017, a series of discussions by telephone and in person took place between the First Claimant and the Fourth Defendant, supplemented by e-mail correspondence. The Fourth Defendant no longer recalls the precise dates of such discussions nor the precise contractual words used between the parties. The outcome of the said discussions was an oral agreement ("the 2017 Agreement") between the Claimants (represented by the First Claimant) and the First Defendant (represented by the Fourth Defendant) as follows.
>
> a. The Claimants would partially release the First Defendant from £150,000 of its liability to each of them under the JD Loan Agreement and the LD Loan Agreement (i.e. a release of £300,000 in total).

b. In consideration for the said release, the First Defendant would procure that the Claimants receive 1,500 preference shares each (total 3,000 shares) ("the Preference Shares") in The John Banner Centre Limited, a company incorporated in England and Wales with registered number 03454079 ("JBCL"). JBCL owned and continues to own valuable freehold properties, including the First Defendant's business premises. The First and Fourth Defendants, and persons connected to them, were and are the other shareholders in JBCL.

c. The Preference Shares would be entitled to an annual dividend of £6.00 per share. ~~The said annual dividend equated roughly to the interest payable under the JD Loan Agreement and the LD Loan Agreement~~.

d. The Preference Shares would each have the right to payment of a fixed value of £100 per share on the winding up of JBCL. The total value of the Preference Shares would thus be £300,000, being approximately the amount then owed by the First Defendant to the Claimants.

e. The balances remaining due under the JD Loan Agreement of £98,125.00 and under the LD Loan Agreement of £50,000 and the payment of dividends by JBCL would be made to the Claimants on the terms of a schedule of payments set out in an email sent by the First Claimant to the Third Defendant on 2 May 2017.

12B. Alternatively, a contract in writing to the same effect was created by the following exchange of emails passing between the Third Defendant (acting for the First Defendant) and the First Claimant:

a. An email dated 24 April 2017 from the Third Defendant to the First Claimant, in which the Third Defendant made two alternative offers to the Claimant to convert all or part of the aggregate balance due under the JD Loan Agreement and the LD Loan Agreement to preference shares in JBCL;

b. An email dated 3 May 2017 from the First Claimant to the Third Defendant, in which the First Claimant made a counter-offer on the terms set out at paragraphs 12A(a) to 12A(e) above; and

c. An email dated 5 May 2017 from the Third Defendant to the First Claimant in which the Third Defendant accepted the First Claimant's counter-offer."

103. Having given permission to amend, it was fair, just and proportionate to permit the Claimants to respond in closing on issues raised by the amendment even where those

issues were not formally pleaded in the Reply. Mr Pearce-Smith, with some agility, veered his focus away (but did not abandon) from submissions based on vagueness of terms to a failure to conclude the 2017 Agreement. No objection was taken to this course.

Decision

Oral Agreement

104. It is common ground that there were conversations on the telephone and on one occasion a meeting in Cheltenham. The reply to the defence admits "from about October 2016 onwards the First Claimant and the Third Defendant had discussions about changing the terms of the Loan Agreements." The terms of the 2017 Agreement were concluded in May or June 2017.

105. Given the evidence of Mr Brown I have little hesitation in finding that there was no oral agreement reached in May or June 2017.

106. This finding is supported by the five objective facts. First, the absence of any mention of an oral agreement in the contemporaneous e-mail exchanges of references in the two month period. Second the absence in the exchanges to telephone calls made between the parties.

107. In an e-mail dated 2 May 2017 Mr Dilworth says that he would find it difficult to travel to Sheffield to meet with Mr Brown and would prefer to discuss the situation over the telephone. The e-mail exchanges on 3, 5, 9, and 22 May do not refer to a telephone conversation when it would be obvious to have done so given that an agreement is said to have been concluded.

108. Thirdly, there is an absence of any attendance note produced by Mr Brown acting for the First Respondent. This is not a case where Mr Brown was acting merely on behalf of himself but was acting for a firm of solicitors. It is reasonable to infer that a solicitor acting for a firm of solicitors and for the guarantors would have made a note of an agreement reached.

109. Fourthly, the e-mail exchanges on 3 May and subsequently demonstrate on going negotiations. On 3 May 2017 Mr Dilworth wrote that he would be prepared to change the terms of the loan agreement subject to final agreement. On 5 May 2017 Mr Brown responded that it would be a good idea to amend the "original agreement". And by 22 May 2017 Mr Brown had informed Mr Dilworth that he had caused the Company to issue shares. The contemporaneous documents written in the month of June take the matter no further forward.

110. Lastly, the Third Defendant acted as if there was no agreement after May 2017. In October he acknowledges that £25,000 was due under the First Loan and asked that the payment be made by way instalments with the balance to be paid on 20 November 2017.

Alternatively a contract in writing

111. The permitted amendment firmly nails the defence colours to the mast. Following the evidence of Mr Brown it is said that the 2017 Agreement was concluded by 5 May 2017.

112. Mr Dilworth claims that key terms were not either considered or agreed. These include:

112.1. Whether the expected dividend to be paid by the Company pursuant was automatic or depended on a declaration under the Company law provisions. It seems to me that this was not an essential term since the directors of the Company must have been understood to declare dividends in accordance with the law of the land.

112.2. Whether the dividends were cumulative. The intention was to pay dividends and that intention would have been based on an operating profit being made by the Company.

112.3. It was argued that it was essential term that the Claimants receive £100 per share on an insolvent winding up. Mr Dilworth never asked for such a provision, there is no evidence he instructed his solicitors to include such a provision, and in any event any contract about payments on winding up may not have survived scrutiny: priority of payments on winding up is governed by the Insolvency Rules (England and Wales) 2016.

112.4. If the Company enters a solvent liquidation whether the Claimants would be guaranteed £100 per share on a members voluntary winding up. No such term was suggested by Mr Dilworth. Neither Mr or Mrs Dilworth have said that this was an essential term and there is no correspondence to support such a condition.

113. The pleaded e-mail of 24 April 2017 is evidence that Wosskow Brown could not continue to make the payments under the Loans. The options for the Claimants were to enforce against the First Defendant, enforce against the Second to Third Defendants under the guarantees or to explore the alternative arrangement suggested by Mr Brown, the Third Defendant. The e-mail sent by Mr Brown in April made an offer: "I propose you either buy…"

114. The immediate response from Mr Dilworth, with Mrs Dilworth's consent in relation to the First Loan, did not accept the offer:

> "You seem to be offering me either option 1 or option 2 or lose my money."

115. Mr Dilworth said that if option 1 was pursued a guaranteed exit path would be required which would see the return of the Loans. Maintaining that the Loans were not compromised he requested a drawndown of £25,000 from the First and Second Loans in three months. He ended the e-mail:

> "I am sure you would also advise me to seek advice from a solicitor and when we reach a way forward will refer to Philip Albery who handled the original loan agreement and on the same terms."

116. I conclude that no agreement had been reached by 2 May 2017.

117. On 3 May 2017 Mr Dilworth wrote "subject to final agreement" that he would be looking for guarantees "perhaps connected with the current personal guarantees". There was some discussion about the meaning of these words. In my judgment an objective observer would understand that if the Claimants were to agree to accepting preference shares from the Company in exchange for part of due loans made to the First Defendant,

they would require personal guarantees in a similar form to those obtained to secure the Loans. Mr Dilworth, who I took to be a thoughtful and intelligent man, recognised that there was a value in the personal guarantees despite Mr Brown stating that enforcement against his or Michael's may not be profitable.

118. The previous day Mr Dilworth had explained that he wanted a formal agreement and that he would consult Mr Albury of Bartons Solicitors. That was not altered by the e-mail of 3 May.

119. In addition Mr Dilworth wanted to investigate the tax position of Mrs Dilworth. He prepared a cashflow prediction for both he and Mrs Dilworth that repeated the payments, by and large, that were expected under the Loans but added the 6% coupon offered by Mr Brown, who was presumably (nothing is said about his authority) acting on behalf of the Company at that time.

120. The response from Mr Brown was that he needed to "study this tomorrow but at first glance [it] looks ok."

121. On 5 May 2017 David Brown wrote:

> "Sorry not been back to you but *I confirm that your calculations* are acceptable and I have noted your request for 2 x £25 k loan repayments. *I think your idea of amending the original agreement is a good idea*." (emphasis added)

122. The pleaded case is that by this e-mail the Third Defendant accepted the First Claimant's counter-offer made in the e-mail of 3 May 2017. In my judgment it does not. I say this for 5 reasons.

123. First the e-mail of sent by Mr Dilworth on 3 May 2017 is exploratory in nature. Mr Dilworth is setting out his minimum requirements.

124. Secondly Mr and Mrs Dilworth had stated that they wanted a guaranteed exit strategy. Mr Dilworth expressed this more fully in his e-mail on 3 May 2017. It was, in my judgment an essential term that the preference shares would be repurchased at £100 per share on three months' notice. It was an essential term because without it Mr and Mrs Dilworth would have no ability to recover £300,000 invested in the Company other than seeking to sell the preference shares in accordance with the articles of association in a closed company over which they had no control. They would not be able to insist on a price that would enable them to recover the capital originally lent to the First Respondent. Neither would they have a right to receive their capital within a short period following the service of a notice. Mr Dilworth, I infer, had in mind that a term be incorporated into an agreement that would provide equal rights to the "Repayment Event" provisions in the Loan instruments.

125. Thirdly, given that the Loans were secured by 4 practising solicitors it was an essential term that Mr and Mrs Dilworth would not be more exposed to risk having entered into an agreement to accept preference shares in place of the Loans than before.

126. Fourthly, the purported acceptance of the "counter offer", objectively viewed was an acceptance that the schedule of payments was agreed. Nothing else.

127. Fifthly, Mr Dilworth made clear that any agreement needed to be formalised by Mr Albury. This is consistent with past dealings between the parties: the Loan facility letters had been professionally drafted by Mr Albury.

128. I find that the correspondence sufficiently evinces a common intention that an agreement would not be concluded until a formal document containing all the terms had been signed by the parties: see the e-mail of Mr Brown dated 5 May 2017.

129. Unlike the *Pagnan* case where it was found that the parties did not intend to impose a precondition to a concluded agreement, the clear common intention in this case is that a formalised document, whether that be by amending the Loan instruments or by way of a new documented agreement was a precondition to a concluded agreement: *British Steel Corp* p511b-f *Supra*.

130. This finding is not only evinced by the contemporaneous documents but accords with common sense. Mr and Mrs Dilworth were placed into a difficult and unexpected position when they received the e-mail on 24 April 2017. In a short period they sought to make sense of the situation and weigh their options. Their benchmark was the protections they had bargained for when obtaining the Loans. The protections included:

130.1. personal guarantees provided by the partners of the First Defendant;

130.2. a mechanism to trigger repayment of lump sums of capital;

130.3. an obligation to pay interest on a standard rate and default rate; and

130.4. an obligation to return all outstanding capital together with accrued interest on written notice following an event of default.

131. No formal contract was of course executed as was clearly contemplated by all parties.

Authority

132. As I was addressed on the issue of Mr Dilworth's authority to act on behalf or Mrs Dilworth I shall, given my findings on the 2017 Agreement, deal with it in brief.

133. In my judgment it is more likely than not that Mr Dilworth had Mrs Dilworth's authority to act for her in relation to all negotiations with the First Defendant. Mrs Dilworth was represented by solicitors in respect of the First Loan. I find it more likely than not that she would rely on solicitors again in respect of any variation of the First Loan facility. In my judgment the limit of Mr Dilworth's authority was the negotiation and agreement in principle, but not the final sign off which would be provided by her following advice from her solicitor. This is consistent with the history of the relationship between Mrs Dilworth, Mr Dilworth and the First Defendant. It is also consistent with my finding that Mr and Mrs Dilworth and the Third Defendant anticipated and expected a professional drawn agreement to be signed by the parties.

Conclusion

134. In conclusion the Claimants are entitled to payments of the sums due under the First and Second Loans as against the First Defendant and pursuant to clause 31.1 of the

guarantees provided by the Second to Fifth Defendants as primary obligors the same sums. The Claimants are to give credit for any sums received under the Loans.

135. I invite the parties to agree the sums due and agree an order.

136. If there is no agreement on the sums, I shall hear further submissions.