All England Official Transcripts (1997-2008)

SCI Azure Estates Ltd v Mullen

Money – Loan – Loan agreement – Claimant suing on purported loan agreement – Loan agreement said to be in respect of moneys appropriated by defendant from claimant – Whether defendant liable under loan agreement

[2007] EWHC 263 (QB)

HQ05X03550, (Transcript)

QUEEN'S BENCH DIVISION

JOHN LEIGHTON WILLIAMS QC

7 FEBRUARY 2007

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A Laney for the Claimant

M Watson-Gandy for the Defendant

Edwin Coe; MTC Law Ltd

JOHN LEIGHTON WILLIAMS QC:

[1] This a claim for £1,455,592.44, the earlier sterling equivalent of $ 2,500,000 plus accrued interest, alleged to be due under an oral agreement evidenced by a letter dated 24 May 2005. The agreement is described as a loan agreement by the Claimant and a loan facility by the Defendant. The Defence alleges that the proceedings have been brought without the Claimant's authority, that there was no intention to enter legal relations, duress, and that the agreement/facility was a sham. The parties put forward very different versions of the background to the claim and each party alleges the other has been dishonest.

[2] The case has had a somewhat chequered procedural history in its relatively short life. Proceedings were issued on 1 December 2005. Judgement was obtained in default of a defence. In January 2006 the Defendant served an application to set aside the judgement supported by his first witness statement and exhibiting a draft defence and counterclaim, verified by a statement of truth. Judgement was set aside on 16 May 2006 and a defence, but no counterclaim, was served on 30 May 2006. The procedural story thereafter is of the Defendant's failure to comply with court orders and seeking to put the Claimant under pressure. In July 2006 the action was allocated a trial window of 1 December 2006 – 28 February **2007**. Disclosure did not take place until 1 December 2006 and then only after the Claimant had sought an unless order. On 16 January, with the action down for hearing on 23 January the Defendant issued, without notice, applications to adjourn the trial and for specific disclosure and further answers to Pt 18 replies served the previous October. On 17 January Goldring J adjourned the application for specific disclosure to the trial judge and ordered the Defendant to serve witness evidence by 5pm on 19 January (the Friday before the week of trial) and to pay outstanding costs of £691.39 by 4pm on 22 January. There was no sanction for failure to comply. Despite this order the Defendant's final witness statement was not produced until after the trial had commenced on 26 January. By the time the trial ended in the afternoon of 30 January, the costs and other costs I had ordered to be paid on dismissing applications before me, still had not been paid, despite assurances from the Defendant that the monies were on their way.

[3] On the first day of the trial I was handed a letter from the Defendant stating ill health prevented him travelling to London. In the result he gave evidence from Monaco by video link.

[4] The Claimant puts the Defendant forwards as someone who has not been frank with the court, who works to his own agenda and whose efforts have been directed to avoiding having to face this trial. There is in my judgement considerable weight in each of those assertions. When the Defendant was cross-examined he stated he did whatever he was told unless it damaged him. When asked where he obtained the information to provide some of his answers he stated he had a computer archive and kept a journal: he had disclosed neither and gave as his excuse that his solicitors had never told him he had to. He claimed his solicitors had relevant documents: they told the court they had not. He claimed he would forward relevant documents: he has not.

[5] The Claimant's case has been advanced by Mr Elphick, its sole director, supported by Dr Mahtani, an industrialist and investor who is based in Zambia, and to a lesser extent by Guiseppe Ragusi, a former employee of the Defendant or one or more of his companies. The Defendant has relied on his own evidence. A statement by his “in-house” lawyer, Marty Arnoldini, had been disclosed but was removed from the trial bundle. No application was made to put in his statement, which I have not read. A statement had also been disclosed from a M Folques but it has not been relied on. The Defendant said his wife had made a witness statement: no application has been made with regard to her evidence.

THE BACKGROUND TO THE CLAIM

[6] The Defendant, who stated his speciality is trading in options, is the moving force behind **Mullen**

Corporation. It is unclear to what extent **Mullen** Corporation ever became a corporation with any or significant assets in its own name but, as I find, the Defendant put it forward as such. It appears to have come into existence when the Defendant was seeking to profit from a venture or ventures in the Ukraine. At the same time, as I also find, the Defendant put himself forward as a businessman with the ability to make substantial returns for investors prepared to place monies with or through him. In 2004/2005 he owned 99.9% of the shares in **SCI Azure Estate** ("Monaco"), a Monaco company bearing a similar name to the present Claimants, the essential difference being that the Monaco company's name has "**Estate**" in the singular whereas the UK company's name has "**Estates**".

[7] In 2004/early 2005 the Defendant was seeking investors to back the funding of options, which if taken up, could, he claimed, produce very substantial returns. One such investor was Dr Mahtani, who, it turned out, was willing to and did advance $2 million dollars from a Swiss account, apparently in his own name, and E2 million from Zambesi Portland Cement **Ltd** ("Zambesi"), a company in which he said he had a 50% shareholding. What these monies were intended to be applied to is a matter of dispute between the parties.

[8] In 2003 the Defendant and Mr Elphick had met in Barcelona. It is common ground that at the time Mr Elphick, who is a director of Michael Elphick and Associates which he says specialises in providing due diligence services and research on companies and individuals, was pursuing a Michael Summers, who the Defendant accepts is now serving a five year sentence of imprisonment for fraud. Apparently Summers introduced them.

[9] In 2004 they were in touch again although each says the other initiated contact. According to Mr Elphick he was asked by the Defendant to provide, amongst other things, due diligence services in connection with a proposed acquisition of the London Metal Exchange and he was instructed to set up a number of companies for this venture, one of which was the Claimant. Mr Elphick said he was told that the function of the Claimant company was to receive funds by way of working capital for the proposed acquisition and to set up the new structure. It appears that, formally, Mr Elphick's services were obtained as a result of Monaco entering into a contract with Michel Elphick Associates dated 20 October 2004 and signed by Mr Elphick for his company and a M Folques for Monaco, although this is not entirely clear since Trial Bundle 3 also includes a contract between Monaco and the Bronson Corporation (another of Mr Elphick's companies) dated 24 January 2005 for the provision of services. This latter contract is signed by Mr Elphick for Bronson and the Defendant for Monaco.

[10] The Defendant's case is that Mr Elphick advised him that Monaco could not operate a bank account in the UK and recommended the formation of the Claimant in the UK. Otherwise, he said there would have been no need for the Claimant. But the first sentence of the Defendant's first statement supports Mr Elphick's account. It reads "I caused the Claimant to be formed at Companies House, for the purpose of establishing an investment fund". The statement goes on to say that monies provided to the Claimant were to be used to meet the Defendant's expenses in the UK and the expenses of the Claimant.

[11] In the result Mr Elphick arranged for Bloomsbury Management Services **Ltd** to set up the Claimant which was registered in the UK on 17 January 2005. There was one shareholder, the Defendant, and one director, Mr Elphick. Mr Elphick also set up 2 bank accounts for the Claimant at the Maidenhead branch of the HSBC bank; a sterling account and a euro account. Mr Elphick said in his first statement that when he was instructed that the name of the UK company was to be that of the Claimant he had not heard of Monaco. If so that is not a little surprising since he had signed Michael Elphick Associates' contract with Monaco on 20 October 2004.

[12] On 2 February 2005 Dr Mahtani's $2 million, converted into sterling, was paid into the sterling account from Dr Mahtani's Swiss account and on 11 February E2 million was paid into the euro account by Zambesi.

There is no dispute that Dr Mahtani was responsible for arranging the provision of these monies.

[13] Mr Elphick says that after the accounts were credited he received instructions from the Defendant to make various payments from the accounts. The bank statements show that monies were withdrawn from these accounts very shortly after the $2 million and the E2 million were paid in. On 4 February 2005 a total of £169,675 was paid out of the sterling account, £60,000 of which was for Michael Elphick Associates, £20,000 for M Beasley (a name used by Mr Elphick) and £20,000 for St Georges's School, the latter being for school fees for the Defendant's daughter. On 25 February 2005 E1,449,000 were paid out of the euro account of which E1,380,000 was for services provided by Michael Elphick Associates. Mr Elphick said in evidence that the payments to him and his company were authorised by the Defendant, that the £60,000 had been paid pending payment of the equivalent sum in euros and that after the E1,380,000 was paid he repaid the £60,000. The bank statement records a payment in of £60,000 on 16 May 2005 just before or when matters between Mr Elphick and the Defendant had come to a head. The Defendant denies authorising Mr Elphick to pay sums to himself or his companies.

[14] Sums, some substantial, continued to be withdrawn from the accounts including sums for the Defendant and his wife. The Claimant's Reply to the Defendant's Pt 18 Request for full details of payments made at the Defendant's request sets out in two separate schedules payments from the sterling and euro accounts respectively. Such payments from the sterling account total £957,691.16 and from the euro account E1,982,208.81. The Claimant alleges that, ignoring sums paid to Mr Elphick and his companies and office expenses, £1,176,760.34 was paid out on the Defendant's instructions. In his first witness statement the Defendant admitted that as much as £100,000 of the monies withdrawn had been expended on his personal expenses. The Defendant exhibited to his fourth statement “MKM5” which contains his comments on the payments from the sterling and euro bank accounts. I gave the Defendant leave to amend his defence admit the sums drawn down which he accepted were paid on his authority. I am told they total approximately £700,000. In evidence the Defendant identified further sums paid on his authority.

[15] Mr Elphick said he became concerned about the monies being paid out, since the monies were supposed to be for working capital and set up costs, but he trusted the Defendant. On or about 23 February 2005, not long after the accounts had been opened he wrote to the Defendant seeking documentation to cover specified listed expenditure. The letter is exhibited to the Defendant's first statement. It referred to monies paid for leases on three properties and various payments including the payment to St George's School, E 50,000 to “M **Mullen**” and £20,000 to “D **Mullen**”. The Defendant's wife is Deborah **Mullen**. The letter made no complaint about the payments and suggested issuing the authorisations and requests at the same time to save time.

[16] In April/early May 2005 it seems Dr Mahtani was involved in High Court proceedings as a Defendant. Mr Elphick says that he discovered this and was concerned lest it had any import for the Claimants. In his first witness statement Mr Elphick said that when he saw the Claimant's bank statements (the $2 million payment was recorded as coming from Dr Mahtani's account) he recognised the name Mahtani, having earlier met Dr Mahtani, and he assumed Dr Mahtani was one of the investors. However, in evidence he said he was told in advance by the Defendant that monies would be coming from Dr Mahtani and Zambesi and that he needed and was given these particulars by the Defendant to supply to the receiving bank. The discrepancy is surprising.

[17] Mr Elphick said he was unable to get in touch with Dr Mahtani for an explanation and the Defendant told him he need not be concerned about it. He said he was not satisfied with this and arranged to meet Dr Mahtani at Heathrow. Mr Elphick says Dr Mahtani told him he had entered into agreements with Monaco under which in return for the advances he/Zambesi were to receive a return of 100% per month on their investment for a period of four months plus a return of capital but that he had received no return on these investments and had concluded the scheme had been a scam. He said Dr Mahtani provided him with copies

of those agreements, which are now before the court which support Dr Mahtani's assertions. These agreements have not been disputed.

[18] Mr Elphick said he was concerned because it appeared the funds the company had received were not being used for their intended purpose. At the same time it was arranged that Dr Mahtani would retain Michael Elphick Associates to investigate the recovery of any misapplied monies. Mr Elphick says the engagement was on a retainer plus a commission on monies recovered but he was unable to remember in evidence what the terms of his agreement were.

[19] He appears not to have been concerned with possible conflicts of interest. He said in evidence that whilst there may appear to be such conflict on the outside, that was not so on the inside, whatever the latter might mean. He said that should the Claimant recover then the monies recovered will be passed on to Dr Mahtani and he accepted that what has happened in this case is that instead of Dr Mahtani suing the Defendant direct for his losses, the Claimant is doing so and at the same time he, Mr Elphick, is profiting from the retainer and any commission due from Dr Mahtani. One has to ask what possible advantage exists in this action for the Claimant, which Mr Elphick says remains dormant, has never traded, and has been an innocent participant in receiving Dr Mahtani's monies.

[20] Mr Elphick says he put Dr Mahtani's version of events first to Mr Arnoldini, and was told he would have to talk to the Defendant. When he talked to the Defendant and accused him of using monies for his own purposes he says the Defendant hung up the telephone. He then took legal advice from the firm of solicitors who now represent the Claimant in this action and says he was advised to treat the payments made on the Defendants' instructions as a loan. A Mr Graham of the solicitors drafted a letter which was then sent to the Defendant. That letter, which is headed “Personal Loan Facility” and dated 24 May 2005 is the document upon which the Claimants rely.

[21] Mr Elphick says that the Defendant had gone back to Monaco and he was unable to contact him but arranged via Mr Arnoldini, for the situation to be regularised by way of the loan agreement. This account is supported by an admission in the Defence although in evidence the Defendant says he also talked to Mr Elphick about it. I reject the Defendant's account that he discussed the letter with Mr Elphick: at that stage I am satisfied the Defendant was distancing himself from Mr Elphick and his accusations. He states Mr Arnoldini responded to the suggestion by telephoning saying there would be no difficulty with the Defendant signing the loan agreement. This is borne out by the fact that the Defendant signed his copy of the letter in the presence of a notary, as Mr Elphick on legal advice, had insisted. In evidence the Defendant said he had sought legal advice from his UK solicitors and they advised him to sign it.

[22] The letter refers to the sum of $2,500,000. Mr Elphick says this was an approximation of the amount paid over to the Defendant or on his behalf. It is now said it is significantly less than the sums paid on the Defendant's authority and that was one reason why the Defendant was willing to sign it. Once the agreement was signed Mr Elphick says he decided no further payments should be made. In fact he did make further payments but, he says, only for outstanding liabilities. Those payments included £41,872.00 to M Beasley on 23 May 2005, £55,053.95 to Bronson Corporation on 23 May 2005 and £55,766.23 to Bronson Corporation on 1 June 2005. Mr Elphick says he cleared these payments with Dr Mahtani before making them but Dr Mahtani was not asked about this. Why Dr Mahtani, who is already substantially out of pocket, should have agreed to almost £153,000 being paid from monies which had been wrongly applied is baffling.

[23] Mr Elphick says he was then asked to supply the Defendant with the Claimant's company documents and became concerned that the Defendant acting by Arnoldini and a Mr Guyette would take steps to remove him as director. As a result he arranged for 6000 shares in the Claimant to be issued to a Mr Pettit, his partner in a French wine bar venture, and 1 share to be issued/transferred to himself to prevent the

Defendant achieving this. The Defendant says that this demonstrates that Mr Elphick was highjacking and has highjacked the Claimant company for his own purposes.

[24] Mr Elphick remains as director of the Claimant. He is the main protagonist on their behalf in this action. But for reasons best known to himself the Defendant has taken no steps to challenge Mr Elphick's authority in the Companies Court, even though it is apparent that in issuing the 6000 shares to Mr Pettit and in issuing/transferring the one share to himself, Mr Elphick failed to give first option to the Defendant, as was the Defendant's right. The Defendant has chosen to challenge Mr Elphick's authority and actions only by way of defence in this action. On this point authority is against him: see *Airways **Ltd** v Bowen and another* [1985] BCLC 355. No application has been made in this trial to enable such a challenge to be made although this authority was drawn to the Defendant's attention at an early stage.

[25] Further, the Defendant has not sought any relief by way of Counterclaim despite the draft counterclaim exhibited when he successfully set aside judgement obtained in default. Miss Laney for the Claimant suggests this is because it was pointed out at the hearing to set aside that bringing a counterclaim would render him vulnerable to an order for security for costs. Whatever the reason, there is no counterclaim.

[26] Nor has the Defendant relied on any witness in support. That is a little surprising since he has had many employees around him who ought to be in a position to deal with some at least of the matters in issue. His explanation for not relying on any such witnesses was that he does not want to trouble them – “I don't think I need to upset people . . . I'm not going to destroy them”. I find his explanations difficult to accept. At the same time I should make clear that the court must decide the case on the evidence not on the absence of evidence.

[27] I think I may have said enough already to indicate that I am by no means satisfied that I have heard the full background to these proceedings. Mr Elphick may well have an ulterior motive for bringing this case. I am satisfied that the case is not being brought out of moral fervour or for the Claimant's benefit. Who will profit if the claim succeeds and to what extent is, to say the least, a little clouded. But a party's motive for bringing a case is neither here nor there if in the final analysis the evidence and merits are in his favour.

THE PART PLAYED BY DR MAHTANI

[28] Dr Mahtani has on any view been naïve. He has been willing to invest substantial sums on his and other's behalf apparently in reliance on the Defendant's word. Having heard the Defendant give evidence it is not too difficult to see how Dr Mahtani may have found him persuasive. But whilst I am prepared to accept Dr Mahtani's version of events in preference to the Defendant's about the substance of his dealings with the Defendant, again I am far from satisfied that I have heard the full story.

[29] The conflict between Dr Mahtani and the Defendant is this. Dr Mahtani says he was putting his and Zambesi's money in as an investment, not a loan to Monaco and was only prepared to do so on the basis that he was the sole signatory to the account. He knowingly arranged for the funds to be paid into the HSBC accounts and was comforted that the monies would be in a UK bank. He said he made the investment after an earlier investment seemed to be going well (although a yet earlier investment had failed) and after an exchange of emails with the Defendant. Emails produced in evidence confirmed that there had been dealings between the two prior to this venture and that when the advances of $2 million and E2 million were being discussed Dr Mahtani was anxious to have security and the Defendant was prepared to offer it. On 18 January the Defendant emailed Dr Mahtani stating “Please remember that I sent you the share collateral on the entire 99& (sic) of **Azure**” ie Monaco. In his third witness statement the Defendant stated he issued a personal guarantee to Dr Mahtani to repay the principal sum of monies advanced. Dr Mahtani signed the first

agreement with Monaco dated 25 January 2005 under which he agreed to advance the $2 million to Monaco and on 24 February 2006 signed the second agreement under which he agreed to advance the E2 million.

[30] These agreements expressly refer to the monies as being “loaned” by Dr Mahtani who is described as the “placer of funds”. Dr Mahtani was adamant in cross-examination that these two agreements with Monaco were agreements to invest, not loans to Monaco. Paradoxically the Defendant when cross-examined described the monies advanced as being an investment not a loan.

[31] The Defendant's case as expressed in his first statement, which predated Dr Mahtani's first statement exhibiting the two agreements, was that the monies were derived from the Comino partnership between himself and Dr Mahtani, that the monies were lent to him and that he in turn lent the monies to the Claimant. In his third statement he said Dr Mahtani was well aware of the purpose for which he advanced the money to Monaco and knew very well that the request to send funds to the UK was for the purpose of developing the UK management company so that it could create the necessary fund companies to transfer options acquired. He maintained this argument in oral evidence and denied that the Comino partnership had been a separate venture, as Dr Mahtani alleged.

[32] The Defence pleads that Monaco lent the $2 million and E2 million to the Claimant and that it was an express term of these alleged loans that the Claimant would repay the same, if requested by Monaco, by the Claimant making payments for disbursements and expenses specified by the Defendant.

[33] In response to the Claimants Pt 18 request for further information about these alleged loans the Defendant said the agreements were oral but evidenced in writing but the Claimant alone had the documents. He said the agreements were concluded in a three-way conversation between Mr Elphick acting for the Claimant, the Defendant acting for Monaco and Dr Mahtani as the ultimate source of the funding and also that the loans were to enable the Claimant to develop investment and registered fund companies in the Isle of Man as well as exchange companies in the UK. Mr Elphick said he had no knowledge of the Isle of Man companies. When the Defendant gave evidence he at first denied there had been any such three-way conversation. When confronted with his Pt 18 response he prevaricated stating he “was going to have to study this” and that he had to check his journal – he kept a note of this sort of thing, then said the three-way conversation was about where the funds were going to be sent, the loan was not part of the conversation and then “I do not think the loan was discussed”.

[34] When Dr Mahtani did not receive his promised return he pursued the Defendant. On 19 June 2005 Sakellarios & Associates, a New Hampshire firm of attorneys emailed Dr Mahtani stating they had been retained by the Defendant “to establish and verify the existence of the appropriate funds required to repay *your investment*” and stating they had “seen evidence of funds well in excess of the capital needed to refund *your investment*, and those of your investors” (my underlining) but wished to be certain of their accessibility and availability. But no monies were forthcoming.

[35] In an email to the Defendant dated 6 March 2006 Dr Mahtani sought payment of $35 million. On 14 March 2006 the Defendant signed a second statement claiming that Dr Mahtani had told him he would not sign a witness statement prepared by the Claimant's solicitors if he was paid the $35 million. Dr Mahtani responded to this allegation by saying he was owed $35 million, that lawyers acting for him had unsuccessfully attempted to recover monies from the Defendant in late 2005 and in 2006 and that he had been advised to contact the serious Fraud Office, did so and had an appointment to see them on 13 February 2006 but had cancelled and he instead met the Defendant in Monaco on 13 February 2006. At that meeting had expressed concern that his so called “funders” might be instituting proceedings against him for fraud and he sought payment from the Defendant of the sums he claimed he was owed under the Defendant's guarantees. The Defendant said an option he was about to realise would enable him to pay.

Having heard nothing further from the Defendant he sent him the email of 6 March. He accepted that he had spoken to the Defendant shortly prior to 6 March stating that payment from the Defendant would mean that his involvement would be “no longer necessary” but he denied he had threatened the Defendant. In evidence he said that he informed the Defendant that if he was paid the $35 million the case would go away. Dr Mahtani has not been paid his claimed $35 million.

[36] In cross-examination Dr Mahtani denied that the Defendant had told him that he had arranged for a UK company to be formed under the name of **SCI Azure Estates Ltd** and that Mr Elphick operated the company in the UK. This was directly opposite to what he had said in para 21 of his first witness statement. Mr Watson-Gandy for the Defendant relied on these answers as demonstrating Dr Mahtani's unreliability as a witness

[37] I am satisfied the venture was sold to Dr Mahtani as an investment not a loan and that is what he perceived it to be. I am satisfied that he arranged for the transfer of the $2 million and E2 million on the basis that they were to be invested to bring the promised return. I am satisfied that Dr Mahtani was not handing these monies over so that they could be used for setting up the venture as the Defendant claims. Dr Mahtani clearly knew that he was paying the monies into the Claimant's accounts but I accept his answer that he thought that the Claimant and Monaco were the same company and did not notice the difference between “**Estate**” and “**Estates**”.

[38] I am also quite satisfied that there was no question of a loan being made by Monaco to the Claimant, let alone on the terms alleged by the Defendant. No documentation has been disclosed confirming this loan. In particular nothing from Monaco, which the Defendant clearly controlled, has been disclosed evidencing the loan. Mr Elphick denies there was a loan and denies the three-way conversation relied on initially by the Defendant but which he later denied. Nor can I see any good reason for there to be such a loan insofar as it was to repay the Defendant's expenses. If he needed the money why not be paid directly by Monaco?

[39] It is difficult to conclude that Dr Mahtani was not seeking to put pressure on the Defendant in 2006 when he was chasing the $35 million. I am sure he regarded it as a legitimate tactic against a person whom he felt had cheated him out of the monies invested, the promised return and caused so much trouble for him with others. Nevertheless I accept the substance of Dr Mahtani's evidence concerning his dealings with the Defendant so far as payment of the $2 million and E 2million are concerned.

[40] Mr Ragusa's part in the story is a minor one. He told me he worked for the Defendant between January 2004 and some time in May 2005. He dealt generally with the Defendant's various companies and family finance matters. He was supposed to be paid E5000 a month. For part of the time he was also provided with accommodation at West Acre House, a property leased by the Claimant for the Defendant's use. He said he came into this case when he received a call from Mr Elphick and was told it was being alleged that Mr Elphick had evicted him from West Acre House. He said this was not true.

[41] Mr Ragusa's command of English was limited and he was sometimes difficult to follow. I would accept the Defendant's description of him as not being a strong man, which I understood to mean not having a forceful personality, but I have no reason to think he has been coerced into giving untrue evidence. In my judgement he was an honest witness concerned to get things right. But he was not very reliable on dates. At the outset he was anxious to correct that part of his statement where he had said that he had travelled to the Isle of Man but that no bank account was set up: having seen the papers in this case he accepted an account had been set up.

[42] He described the Defendant a man of grand ideas forever talking of what he described as “enormous

transactions” but which he said all came to nought. One of the deals which collapsed had been the purchase of a villa in Nice. That had been in late Spring 2004 and the deal fell through because although the Defendant had put down a deposit of E400,000 he did not have the money to complete the deal. He had received a call from Dr Mahtani giving details of a Swiss transfer which he did not know about. When he mentioned it to the Defendant the Defendant said he would take care of it at which he had asked what was the point of his being financial controller or similar if he was not given access to such information: the Defendant's response had been to appoint him Personal Assistant to the President. He said he was given many titles. He left the Defendant's employment because his salary and expenses were not being paid as they should. He said he was still owed E35000 – 45000 and said he had received threats.

[43] He gave two pieces of evidence on detail. First, he said he had never been locked out of West Acre House, as the Defendant had alleged. Mr Watson – Gandy suggested he had already left the country to go to Vienna by the time the locks had been changed and it was here that he was uncertain about dates. But he was clear that he had never been locked out, contrary to the Defendant's assertion. Second, in cross-examination he said the laptop with which he had been provided was not password protected thereby contradicting Mr Elphick who said that all the computers used by others in the Claimant's organisation had been so protected and he could not therefore access their contents when he recovered possession of the computers. This evidence casts doubt on the integrity of Mr Elphick's assertions that he had provided full discovery.

[44] I accept the picture Mr Ragusa painted of the Defendant's character.

THE DEFENDANT'S CASE

[45] (i) No authority to bring the claim

For the reasons given in para 23 above, this submission fails. Mr Watson-Gandy did not pursue it.

[46] (ii) The validity of the agreement – no intention to create legal relations and duress.

In his statement Mr Elphick said the loan agreement set out in the letter dated 24 May 2005 was drafted for him by Mr Graham of the Claimant's solicitors and that, armed with the letter, he met Mr Arnoldini at West Acre House, gave him the letter and told Arnoldini that the agreement was needed to protect the Claimant's position in the event that steps were taken to recover the monies paid to the Claimant under the investment agreements. Later the same day Mr Arnoldini telephoned to say he had spoken to the Defendant and there was no difficulty about his signing the loan agreement. It appears that at this time the Defendant was in Monaco.

[47] The agreement was faxed to the Defendant who signed it in the presence of a notary and the signed copy was faxed back. Mr Elphick said there was no precise calculation of the monies due. The Defendant had been “caught out” and $2.5 million was fixed as the principal sum due. This was agreed to regularise the situation.

[48] In his first statement dated 6 March 2006 Mr Elphick said (Para 28) “I certainly did not make any threats regarding closing down the company if Mr **Mullen** did not agree to signing the loan agreement”. In the Defence it was pleaded in para 17(f) as particulars of the allegation of duress that Mr Elphick had:

> ". . . threatened the Defendant that he would liquidate or shut down the Claimant company, freeze its bank accounts, cause its leased properties to be repossessed and evict all the Claimant's staff from their homes and offices unless the Defendant signed the facility letter."

[49] In his third statement commenting on this plea Mr Elphick denied making such threats but said it was no more than a natural consequence of any refusal to sign the letter that it would have been necessary to shut the company down and appoint a liquidator but it was an exaggeration to describe this as a threat and that a fair representation would be to say that he explained to the Defendant that if he did not agree to the payments to him being treated as a loan he simply could not allow the company to continue.

[50] In his first witness statement the Defendant said that Mr Elphick approached him and said that unless he agreed to sign a loan note for all the Company's expenditure to that time he would take steps to appoint a liquidator and that Mr Elphick further advised him that he was concerned as to his position as a director and wanted the loan agreement for accounting purposes only.

[51] On 30 May 2005, after the Defendant had signed the letter of 24 May, Mr Elphick sent a fax to the Defendant referring to a letter, which he said was a letter from Delta Banking asking for £98,000 they were owed by the Claimant, stating that unless the letter was dealt with by tomorrow he proposed to place the company in the hands of the liquidators and lawyers and that the Defendant's cavalier position had placed him, Mr Elphick, in a vulnerable position as the only director.

[52] I do not regard the above as constituting any improper threats and I am satisfied that if there was any conversation between Mr Elphick and the Defendant nothing was said that could fairly be described as an improper threat. Nor, having seen the Defendant, do I consider him to be someone who would easily be threatened.

[53] In support of his plea of duress the Defendant also relies on allegations that on or about 18 May 2005 Mr Elphick or his agent changed the locks at Robert Moxon's (all together with Arnoldini and Ragusa were employees of the Claimant and/or the) apartment, Rodney Skeet's (Defendant or one or more of his companies living in accommodation leased by the.) apartment and West Acre House where the Claimant and his family and Guiseppe Ragusa lived and refused each access. No evidence has been called in support and Ragusa's evidence is to the contrary so far as West Acre House is concerned: certainly he was never locked out. It appears from the Defendant's evidence that he was in Monaco at this time. Mr Elphick's evidence that he met Mr Arnoldini at West Acre has not been challenged and it seems likely that that would have been after 18th. Mr Elphick's evidence was that he did in due course change the locks at West Acre but that was after Mrs **Mullen** collected belongings there, was not challenged and that Moxon, Skeet, Arnoldini and Guyette (Claimant.) ran away overnight leaving the apartments wide open, the doors unlocked some time in May, early June. As Mr Watson-Gandy pointed out this was inconsistent with his first witness statement in which he had stated that he did take steps to close down the various company activities and removed tenants from company leased premises. Nevertheless I am not satisfied that Mr Elphick behaved as high handedly as alleged. I am not satisfied he intimidated the Claimant's staff as is being suggested. There is no evidence supporting the allegation that any threats the staff may have received, and Mr Ragusa gave evidence of having received threats, were in any way connected with Mr Elphick, as by implication is being suggested.

[54] The Defendant entered into this agreement having taken legal advice. It is headed "Personal Loan Facility". I am sure he did so with his eyes wide open and not as a result of any unfair pressure.

[55] On the facts it cannot be argued that there was not an intention to create legal relations.

[56] The Defence also alleges the agreement was a sham. It is said not merely that there was no intention to create legal relations but that there never was any intention that the Defendant should be provided with any facility. For the reasons which follow I reject the argument that there is no claim under the agreement.

NO DRAWDOWN UNDER THE AGREEMENT

[57] The Defendant's argument in a nutshell is that if there was an agreement it was for a loan facility, that that facility was never drawn on, and therefore there can be no liability under the agreement. The letter referred to a "Personal loan facility" and I accept that no advances were made to the Defendant after he signed his copy of it on 25 May 2005.

[58] The letter addressed to the Defendant is headed "$2,500,000 Personal Loan Facility." Paragraph 1 states:

> "We are pleased to make available to you a loan in the principal sum of $2,500,000 on the terms and conditions of this letter ('the Loan'). Subject as provided below you may draw down the Loan in one or more amounts on not less than 3 business days' written request to us, but that so that no drawdown may be made after 1 July 2005."

Paragraph 2 states:

> "The Loan has been made available to you since 1 March 2005 and this letter documents the terms and conditions for such amount of the Loan as you have already drawn down as well as the terms and conditions of future draw downs."

[59] The Claimant's case is that the letter was, in effect, a compromise between the parties, that the agreement was intended to cover the period starting 1 March 2005, that no further loan was intended, and that polite terms were employed to ensure recovery of monies dishonestly taken, the total sum being fixed at $2,500,000.

[60] The Claimant's argument raises the question of whether a contract can operate retrospectively. The parties are agreed on the law: the short answer is yes. Both counsel have referred me to *Northern and Shell v John Laing Construction **Ltd*** [2003] EWCA Civ 1035, 90 ConLR 26. CA where Nelson J, giving a judgement with which both Hale LJ and Judge LJ agreed, set out the position as follows:

> "51 Whether or not a clause in a contract is capable of having a retrospective effect, depends upon the express or implied intention of the parties: *Trolloppe & Colls **Ltd**, The Atomic Power Constructions **Ltd*** [1963] 1 WLR at 340, 341. In relation to the implication of such a term Megaw J, as he then was, said:
>
> 'Terms can only be implied where, to use the common phrase, they are necessary in order to give 'business efficacy' to the contract On the other hand I do not think that a term such as this can be implied for the purpose of upholding the existence of a contract, unless it can clearly be seen that it conforms with what the parties truly intended and with what they both would have accepted as a matter of course had the question been raised in the course of negotiations or at the making of the supposed contract.'"

[61] This is a case about money. Where money matters, principle frequently takes second place. Neither Mr Elphick nor Dr Mahtani nor the Defendant comes over as an impressive witness concerned to give the court the truth, the whole truth and nothing but the truth, but I am satisfied that far more truth lies in Mr Elphick's and Dr Mahtani's accounts than in the Defendant's. The Defendant when giving evidence puts over an air of assured confidence but backed with words which on closer questioning are conjured up for the moment. He

was not an impressive witness. And when against the wall, his resort was to allege dishonesty or failure by others. By way of example I mention the following:

> (i) At the outset of cross-examination he accepted there was a distinction between his own money and money invested by others so that money invested in one of his companies did not become his money and there was a need to keep the two separate. Later he said “Me and my company are the same”, “I'm liable for both” “I am a creditor of the company”, and that in the USA nothing was hidden by the corporate veil and if that was not true in the UK he was not aware of it.
>
> (ii) When asked about his failure to pay the costs of £691.39 ordered by Goldring J he said he did not know about it. Yet his counsel had been informing the court that he had said that the money was on its way.
>
> (iii) He denied that he had requested an adjournment even though that application had been before Goldring J, and that he knew of Goldring J's order with regard to witness evidence even though his fourth witness statement had been in preparation in the days before the trial started and possibly even on the first day.
>
> (iv) He alleged that Mr Elphick had all his email passwords so he could not access his emails but later said he kept a computer archive, which he had not disclosed because he had not been told he had to.
>
> (v) He claimed his solicitors had either the originals or copies of option agreements. His solicitors when asked whether they had them through counsel said they did not. In evidence he said he would send copies: he never did.
>
> (vi) When asked why he had not issued proceedings to prevent the alleged highjacking of the Claimant he said his solicitors, Seddons, had wanted £20,000 to do so and told him it would not do any good.
>
> (vii) Although in his third statement he said he had given Dr Mahtani a personal guarantee, in evidence he denied doing so but then said he did not have a guarantee in writing that he could find.
>
> (viii) As mentioned he had stated in his reply to the Claimant's Pt 18 request that there had been a three-way conversation between him, Mr Elphick and Dr Mahtani about the alleged loan from Monaco to the Claimant, he at first denied this in evidence, then prevaricated, then said the conversation had been about where the money was to be sent.
>
> (ix) When confronted with Dr Mahtani's version of their dealings he accused Dr Mahtani of lying and said everything that Dr Mahtani brought forward was fraudulent or fake or dirty money.

In short, the Defendant was not a credible witness.

[62] In the present case I am satisfied that the parties' intention was to achieve an agreement under which

the Defendant was to repay monies which he had appropriated in the past from the Claimant and that the sum was fixed at $2.5 million. There is no evidence why the date of 1 March was chosen but it was of advantage to the Defendant insofar as he had appropriated monies prior to that date. The figure of $2.5 million put forward by the Claimant was accepted without demur by the Defendant. Although the document was described as a loan facility I am satisfied that neither party regarded it as such.

[63] It follows that there will be judgement for the Claimant.

[64] I will hear counsel on the questions of interest and costs.

Judgment accordingly.