IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

Case No: LM-2019-000201

Skype Hearing

Rolls Building
Fetter Lane
London
EC4A 1NL

Friday, 31st July 2020

Before:
HIS HONOUR JUDGE PELLING QC

B E T W E E N:

ANTHONY PAUL BAMFORD & ELEA SOLUTIONS (UK) LTD

and

AUSTIN FRANCIS HUGHES & ORS

MR T SHERWIN appeared on behalf of the Claimants
MR D FEARON appeared on behalf of the Defendants

APPROVED JUDGMENT

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HHJ PELLING QC:

1. By an application notice dated 3 June 2020, the claimants in these proceedings seek permission to amend their reply and defence to counterclaim and seek judgment in respect of a claim pleaded as a loan for £70,000 this being a relatively minor part of a much larger claim which, it is common ground, must go to trial. In order to understand how this point arises and the nature of the point that must be determined, it is necessary for me to go through, in the first instance, the way in which this claim was pleaded.

2. The pleadings start with the particulars of claim which address this issue that I am now concerned with under a subheading saying, '*The Bardsley Loan Agreement'*. It is pleaded that, on 12 July 2017, a meeting took place between the claimants, the relevant defendants and other individuals in order to discuss the funding of the development of some land which the defendants owned. At paragraph 47 it was pleaded that the defendants did not have sufficient funds to meet a condition which was being imposed by other funders who were present at the meeting and it was in this context that it was said that a loan agreement was entered into between Mr Bamford, one of the claimants, and Mr and Mrs Bardsley, the relevant defendants.

3. The claim as originally pleaded was that:

> 'Mr Bamford and Mr and Mrs Bardsley entered into an oral agreement, the Bardsley Loan Agreement, at the said meeting. The Bardsley Loan Agreement had the following express terms: A, Mr Bamford would personally loan Mr and Mrs Bardsley the sum of £70,000 to enable them to procure JJBL would meet this condition precedent. B, the sum of £70,000 would be repayable on demand and, C, Mr Bamford would not demand repayment of the sum of £70,000 whilst he remained the project manager of the development project in respect of the... relevant land'.

At paragraph 49, it was pleaded that it was an implied term of the loan agreement that the sum of £70,000 would be repayable to Mr Bamford on demand, alternatively on demand after Mr Bamford had ceased to be the project manager. It is pleaded at paragraph 50 that pursuant to the loan agreement Mr Bamford transferred the sums concerned into the personal bank account of Mr and Mrs Bardsley.

4. The defence and counterclaim relevant to this issue is contained in paragraph 65 through to 73 of the defence. Particular reliance is placed on the way in which this case has been pleaded by the defendants today and therefore it is important that I set out precisely what it is that the defendants said in their original defence and counterclaim which insofar as is relevant provided as follows:

> 'The Bardsley Loan Agreement.
> 65, paragraph 46 is admitted.
> 66, paragraph 47 is denied, Mr and Mrs Bardsley did have the funds.
> 67, it is denied that the £70,000 that was the subject matter of the Bardsley Loan Agreement was required to meet the condition precedent. Mr and Mrs Bardsley wanted Mr Bamford to invest some money in the development project to incentivise him to have the works completed within a year, as he had promised.
> 68, the express terms pleaded in paragraph 48 are denied.

> 69, it was an express term of the Bardsley Loan Agreement that the repayment date for the loan was, -"on completion of the sale of the three houses to be built on the Woodfields field, a development on land owned by Mr and Mrs Bardsley with land registry number... or after 30 months from the date of loan, whichever comes sooner".
> 70, three houses had not been built, the loan dated is stated to be August 2017, accordingly the earliest the loan falls due for payment is February 2020.
> 71, as no monies are yet due, the claim should be struck out.
> 72, the implied terms pleaded at paragraph 49 are denied and paragraph 50 was admitted'.

5. The end result of all of this therefore is that the express terms asserted by the claimant were denied. The express terms relevant to the loan agreement on the defendants' case were those identified in paragraphs 69 and the events which were material were those identified in paragraph 70. The payment of the money was admitted by paragraph 73 and the key point, given the date of the counterclaim which was in 2019, was that the claim should be struck out because no money had become due and would not become due before February 2020. The reply and defence to counterclaim relevant to that particular issue was contained in paragraphs 42 to 46 of the current reply and defence to counterclaim. Insofar as is material, at paragraph 43, the current pleading by the claimant is: '*Paragraph 69 is denied. The express terms of the Bardsley Loan Agreement were those pleaded in paragraph 48 of the particulars of claim'*.

6. What then happened is best taken up by going to the statement of Mr Bamford in support of this application, made on 2 June 2020. The relevant parts of the witness statement for present purposes are paragraphs 14, 15 and 19 to 21. At paragraph 13 he refers to how with the help of a solicitor friend he drew up a loan agreement in writing and gave it to Mr and Mrs Bardsley and he says of that, '*I intended to ensure that there was written evidence of the agreement that we had already reached'*. The agreement that he says was reached was that asserted in paragraph 12 and was essentially that which is set out in the particulars of claim. At paragraph 14, he then rehearses that he set out in the written agreement the terms that he considered were terms of the agreement that had been reached but he added a nonstop date stating that '*… provided the completion of the development or February 2020 whichever was sooner to ensure I did not have to wait indefinitely for repayment'*. He then sets out at paragraphs 14.1 and 14.2 the provisions of the agreement relevant for present purposes and then says this at paragraph 15:

> 'I did not receive any response from Mr and Mrs Bardsley following delivery of the loan agreement. I did not chase them because I found that managing both the development of the Woodlands Fold land and the adjacent development on their neighbours' land... was time consuming. As time went by, I forgot about checking with Mr and Mrs Bardsley about the loan agreement. I always regarded Mr and Mrs Bardsley as honourable persons and I was not particularly concerned to chase up the signed agreement. I was far more concerned to progress the development of the land at Woodlands Fold'.

He then says at paragraph 19:

> 'It was only in the defence and counterclaim dated 16 December 2019

> that Mr and Mrs Bardley relied on the written agreement, specifically they relied in paragraphs 69 to 71 of the defence to counterclaim on the words of the written agreement set out in paragraph 14 above and "*written agreement*" in paragraph 69 of the defence and counterclaim. By that time I confess I had forgotten about the written version of the agreement, I did not recognise the words quoted, I therefore instructed Suttons that the words from the written agreement quoted in the defence and counterclaim were inaccurate since they did not correspond with the oral agreement we'd reached. It was on that basis I signed the statement of truth to the reply to defence and counterclaim'.

Suttons, that is to say:

> '… Mr Bamford's solicitors later requested a copy of the document in which the quotation at paragraph 69 was found. Under cover of Stevensons'[?] letter of 1 May 2020, Mr and Mrs Bardsley disclosed a copy of the written agreement which they had signed. This was the first I had seen of that document; I had not previously understood that Mr and Mrs Bardsley had accepted the typewritten agreement and that they relied upon it'.

7. The written agreement itself is very short, it has all the hallmarks of being a draft agreement but it carries on it the signature of both Mr and Mrs Bardsley, though not the lender Mr Bamford. The relevant revisions for present purposes is clause 7, which was follows:

> 'Payment. All payments made by the borrower to the lender under this agreement shall be made in full without setoff and paid on the due date for that payment in immediate cleared funds to the account of the lender or any other account as the lender may notify the borrower'.

The repayment date is identified in the schedule as being, '*On completion of the sale of the three houses to be built on the Woodlands Fold, a development on land owned by the borrowers with Land Registry number blank, or after 30 months from the date of the loan whichever comes sooner*'.

8. With this material to hand, a draft amended reply and defence to counterclaim has been prepared, it is that in respect of which permission is sought. The proposed amendment starts at paragraph 43 and is in these terms:

> 'Paragraph 69 is admitted, the express terms of the Bardsley Loan Agreement were those pleaded in paragraph 48 of the particulars of claim and those set out in the written copy of the Bardsley Loan Agreement signed by Mr and Mrs Bardsley which was first supplied to the claimants under cover of the defendant's letter of 23 April 2020 and on which Mr Bamford relies as a partial record of the Bardsley Loan Agreement. For the avoidance of doubt, Mr Bamford accepts that the express repayment terms set out in Clause 4.1 of and the schedule to the written copy of the Bardsley Loan Agreement signed by Mr and Mrs Bardsley and quoted from in the defence and counterclaim is binding...
>
> Paragraph 71 is denied for the reasons pleaded in paragraphs 46 to 50 and 69 to 71 in the particulars of the claim and because, as at the date of

> this amended reply and defence to counterclaim, the due date for repayment of the Bardsley loan was set out in clause 4.1 and the schedule to the written copy of Bardsley Loan Agreement signed by Mr and Mrs Bardsley in February 2020 which date has passed'.

The effect of the no setoff provision to which I referred earlier is set out in a proposed paragraph 103 of the draft amendment which is in these terms:

> 'Further and in any event, pursuant to clause 7 of the written copy of the Bardsley Loan Agreement, signed by Mr and Mrs Bardsley, referred to in paragraph 43 above and on which Mr Bamford relies, all payments made by Mrs and Mrs Bardsley to Mr Bamford under the Bardsley Loan Agreement are to be made in full and without setoff such that Mr and Mrs Bardsley are not entitled to set off any sums due to them made from Mr Bamford and it is denied that there are any such sums due to them against the repayment of the sums now due and owing to Mr Bamford pursuant to the Bardsley Loan Agreement'.

9. The application which, as I have already explained, is an application both to amend the reply and defence to counterclaim and for judgment was responded to by a witness statement from the first defendant. The issue which now arises was dealt with by Mr Bardsley in paragraphs 21 to 26 of his witness statement in answer to his application. He says at paragraph 21 that:

> 'Mr Bamford was present during the discussion and offered to put £70,000 of his own money into the project so we would only need to release £70,000 of our own money. We believed that if he had a personal interest in the project he would make sure that a good job was done. It was only on the basis that we agreed with PB that he would invest £70,000 of his own money and would meet that with our own funds of £70,000. We agreed with PB that at the end of the project he would get his £70,000 back'.

At paragraph 22, Mr Bardsley admits that the £70,000 was paid into Mr and Mrs Bardsley's personal bank account and at paragraph 23 he pleads that almost all of the £140,000, that is to say his £70,000 and the £70,000 he borrowed, was then transferred to Mr Bamford's company, the second claimant, to meet the costs and expenses of the project and then he says at paragraph 24:

> 'At no stage did we consider the £70,000 paid by PB to be a loan to us personally. We considered it an investment by PB, accepted that it would be repaid at the end of the project. PB did produce a written document which set out the £70,000 would be paid back and he gave it to us and left the document with us.
>
> Although we did sign it, we did not take any legal advice regarding this document, we did not have any input into the drafting of the document and did not go through it with PB. We did not consider that the use of the word, "loan", would create a personal liability on us. As PB had offered the £70,000 as what he described as his investment we relied on his words.
>
> We always thought that the money was his sign of commitment and it would give us some comfort that he would do the job well and on time.

> PB never asked for this document back and we had forgotten about it until after these proceedings were commenced and we went back through some of the papers we had relating to the project and PB's involvement.
> The whole of our relationship with PB was based on trust, at his insistence, he did not produce the document as an exemplar, we did sign it but we took no legal advice and had no input in drafting it. We did not exchange documents at the time, it was left in abeyance'.

10. A number of issues arise from this evidence, not the least of which is how, given the very simple terms of the agreement concerned, it could realistically be asserted that there was a reasonable basis for not understanding the use of the word '*loan'* in the document concerned. Furthermore, a loan is not inconsistent with the concept of an investment being made and all parties contemplated that the development would be completed well within the period of 30 months referred to in the agreement. Therefore, in that sense, there was an investment and the Bardsleys had the means of incentivising Mr Bamford by having a loan outstanding that it was contemplated would not be repaid until the development was completed, on the basis that the development would be completed long before the 30-month period concerned.

11. The position therefore and the submission which is made on behalf of the claimant is that, when one returns to the defence and counterclaim as it is currently drafted, the defendants have set out the express terms of a loan agreement in writing, have relied expressly on a provision concerning repayment with a long stop date of 30 months from the date of the loan and have pleaded, as is the case, that the earliest the loan falls due for payment is February 2020.

12. The point made on behalf of the claimants with great force is that if the position was, as is now suggested, that the loan agreement was not in truth a loan agreement or if it was a loan agreement it was only repayable on completion of the development and not otherwise, then what is pleaded is inconsistent with that because, whilst it is submitted on behalf of the defendants that the final sentence of paragraph 70 only pleads that the earliest the loan falls due for payment was February 2020, it does not set out a positive case to the effect that in truth it was not repayable then or at all because it was only repayable upon the completion of the development. The first time that that appears to have received any sort of formal support was in the witness statement in answer to the present application.

13. Some reliance was placed on a letter written by Mr Bardsley to Mr Bamford dated 21 March 2019 where in the first sentence he says this, '*Regarding repayment of the personal loan of £70,000 paid into our bank account, it is our understanding that we agreed this would be repaid when the project was complete and that is a commitment we intend to honour'*. The key point which emerges from this for present purposes is that Mr Bardsley himself referred to the payment as, '*the personal loan'*, which is entirely inconsistent with the notion that this was not a loan at all but was some form of equity investment into the project and whilst it is true to say that he says, '*-our understanding was that the money would be repaid when the project was complete and that is a commitment we intend to honour*', that was written in a letter dated 21 March 2019 and thus nearly a year before the nonstop date ever became a relevant consideration.

14. Against that background, it is then necessary to turn to two questions. The first question is whether or not permission to amend should be given and the second is whether or not judgment should be entered. I suggested in the course of the argument that it was infinitely more desirable if the issue that the claimant wishes to plead would be pleaded in the particulars of claim, rather than the reply and defence to counterclaim, because, assuming for the moment that judgment was not entered immediately, it would then be possible to give directions for the filing of an amended reply, which would then allow the issue that now arises to be addressed in a rather more satisfactory manner. Whereas, if permission is given to amend the reply, then it is not immediately clear how the defendants are meant to respond to this as a matter of pleading and so perhaps the real issue that all this turns upon is whether or not there should be summary judgment now or sometime in the future.

15. Against that background, it is useful to start with a summary of the principles relevant to a summary judgment application. Those principles were set out in Easyair v Opal Telecom [2009] EWHC 339 Ch Paragraph 15 by Lewison J as he then was and approved by the Court of Appeal subsequently in AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098, [2010] Lloyds Rep IR 301, paragraph 24. The principles distilled from those authorities come to this, as summarised in notes 24.2.3 in the current edition of *Civil Procedure Volume 1* in these terms:

> 'One, the court must consider whether the claimant has a realistic as opposed to a fanciful prospect of success...
> Two, a realistic claim is one that carries some degree of conviction; that means a claim that is more than merely arguable.
> Three, in reaching the conclusion the court must not conduct a "mini trial".
> Four, this does not mean the court must take at first value and without analysis everything that a claimant says in his statement before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents...
> Five, however in reaching its conclusion, the court must take into account not only evidence actually placed before it upon the application of summary judgment but also the evidence that can reasonably be expected to be available at trial...
> Six, although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the full investigation into the facts at trial than is possible or permissible on summary judgment. Thus, the court should hesitate about making a final decision without a trial. Even where there is no obvious conflict flagged at the time of the application where reasonable grounds exist for believing that a fuller investigation of the facts of the case would add to or alter the evidence available to the trial judge and so effect the outcome of the case...'

16. There is no issue of law that arises in relation to this summary judgment application. The point really becomes this, is the defence which has been trailed in the witness statement filed on behalf of the defendants one that I should reject because it is contrary to contemporaneous documentation and because resolving it at this stage would involve a mini trial?

17. It is perfectly true to say that in the letter of 21 March 2019, there was a reference to a personal loan of £70,000 which to my mind points very clearly to the arrangement being a loan. The only point that remains is whether the assertion in the final sentence of the first paragraph of that letter, namely the assertion by Mr Bardsley that it was his understanding that the loan would be repaid when the project was complete, is one that I should conclude gives rise to a realistically arguable defence. As far as that is concerned, as I have already said, that was written on 21 March 2019 and in response to what was a demand for payment contained in the letter of 11 March.

18. The evidence which Mr Bardsley has given in his own witness statement is not satisfactory from the point of view of a summary judgment application of this sort, tested by reference to reality, which is the test which I have to apply. Mr Bardsley says in paragraph 24 that at no stage did he or his wife consider the £70,000 paid by Mr Bamford to be a loan but that is flatly contradicted by his own letter referred to earlier. It is also flatly contradicted by the document that he and his wife signed and which they actually plead as part of their defence in this claim.

19. Mr Bardsley goes on to say that he considered the payment to be an investment by Mr Bamford and that it would be repaid at the end of the project. However Mr Bardsley goes on to say that Mr Bamford produced a written document which set out the £70,000 loan and he acknowledges that both he and his wife signed the document. His point concerning the taking of legal advice is neither here nor there for, as I have explained, the document was expressed in the simplest and most straightforward of terms and identified very clearly on its face the funds that were being provided and the terms on which it was provided, namely as a loan repayable on the earlier of either completion of the development or the expiry of the 30-month nonstop period.

20. Mr Bardsley then goes on to say, '*We did not consider the use of the word loan would create a personal liability on us*'. This is not a proposition that can sensibly be accepted in light of the material that I have identified earlier in this judgment. It is not a defence even if correct because it is not merely inconsistent with what he said in the letter I quoted from a moment ago but is inconsistent with the terms of the agreement which he and his wife signed and with the terms of the defence and counterclaim that he filed and served, the relevant provisions of which I have set out earlier in this judgment. Mr Bardsley said that, '*This was offered as an investment and we took that at face value'*, but this is not to the point given the terms of the agreement as set out in the document he and his wife signed.

21. It seems to me in those circumstances that this is a defence which is fanciful and lacks reality. Whilst I fully accept that there will be cases where additional evidence will emerge at trial that may not be available on the summary judgment application, it is unlikely that there will be any evidence which emerges which takes the issues which arise on this very small element of the claim any further. No mini trial is required in order to resolve these issues. Mr and Mrs Bardsley have no realistic defence. In those circumstances therefore, in principle it seems to me that the claimant would be entitled to summary judgment in respect of this element of the claim.

22. The question which then arises and which I go back to is whether or not I should give permission to amend so as to set this issue up in the reply and defence to counterclaim or whether I should insist on the amendment being carried out to the particulars of claim. Had

I thought an arguable defence had been identified, I might have been more troubled by the question of whether or not all of the claimant's case needed to be pleaded in the particulars of claim in relation to the loan agreement. However, the material is properly material that ought to appear in a reply and defence to the counterclaim because it admits an allegation that has been made. It refers to the effect of the document which was relied on for the first time by the defendants in their defence, which is the effect of paragraph 43 and paragraph 45, and paragraph 103 is a pure reply point because it seeks to rely upon the no setoff provision within the loan agreement, which it is not suggested on behalf of the defendant should not take effect in accordance with the terms, which is unsurprising having regard to the fact that these provisions have been consistently upheld for many years. In those circumstances, I have come to the conclusion that the appropriate course is to give permission to amend the reply and defence to counterclaim in the terms and sought and to enter judgment accordingly.

End of Judgment

Transcript from a recording by Ubiqus
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