



Neutral Citation Number: [2022] EWHC 780 (Ch)

Case No: BL-2019-MAN-000080

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

08/04/2022

Before :

MR JUSTICE FAN COURT
Vice-Chancellor of the County Palatine of Lancaster

Between :

(1) ROY HARRY COLE
(2) BURY VAN HIRE LIMITED
(3) BURY VEHICLE LEASING LIMITED
(4) H&A HOLDINGS LIMITED

Claimants

- and -

(1) ANDREW HOWARTH
(2) MAX HENRY KAY
(3) JOSEPH TYRRELL

Defendants

Mr Jonathan Dale (through Public Access) for the **First Claimant**
The Second to Fourth Claimants not represented
The First Defendant and the Second Defendant in person
The Third Defendant not present or represented

Hearing dates: 14-16 March 2022

Approved Judgment

The Vice-Chancellor :

Introduction

1. This trial is concerned with a loan of £200,000 that was made in 2015. There is no dispute between the First Claimant and the First Defendant that a loan of £200,000 was made, or that the money was transferred from the Third Claimant's bank account to the First Defendant's bank account on 3 July 2015. Only £30,000 of the capital advanced was repaid by the First Defendant. The dispute is about who was the lender, who was the borrower and what were the terms of the loan that were agreed on 2 or 3 July 2015.
2. The First Claimant, Mr Cole, who is the director and sole shareholder of the Second and Third Claimants, contends that the loan was made by him personally to the First Claimant, Mr Howarth, on terms that a fee (or fixed interest) of £10,000 was chargeable for a loan for 10 days, and with any delay in repayment attracting an extra £1,000 per day in interest. The fee was not payable up front. Mr Cole says that those terms were negotiated on 2 July 2015, agreed with Mr Howarth and the Second Defendant, Mr Kay, on 3 July 2015 and the funds transferred to Mr Howarth accordingly.
3. Mr Howarth contends that Mr Kay and not he was the borrower. He also contends that a fee of £5,000 was agreed on 3 July. There is no dispute about the interest that would be payable, namely £1,000 per day. Mr Howarth accepts that he was intending personally to borrow the money on 2 July but that terms could not be agreed with Mr Cole then, with the consequence that he walked away, and Mr Kay agreed terms on 3 July and borrowed the money. This money was transferred to Mr Howarth's bank account so that he could transfer it on to a Mr Bernard Carl in the United States of America, which he did on the same day.
4. The Claimants obtained summary judgment against Mr Kay on 26 February 2020 on the basis of a written guarantee signed by him and the Third Defendant dated 15 October 2015. At a previous hearing before HHJ Cawson QC, the First Claimant accepted that he was the proper claimant in this action and that the Second and Third Claimants did not intend to pursue a claim.
5. Mr Kay attended the trial on day 2 and applied to set aside the summary judgment application. I dismissed that application. The Third Defendant was never served with the claim form. On day 2 of the trial, Mr Howarth indicated an intention to apply for permission to call Mr Kay as a witness, out of time, but on day 3 he said that he was not pursuing that application. Mr Kay was not present after the lunch adjournment on day 2.
6. Accordingly, the only witnesses from whom I heard evidence were Mr Cole, Mr Connaughton and Mr Carl on behalf of the Claimants and Mr Howarth as a litigant in person. Mr Jonathan Dale of Counsel acted for Mr Cole.
7. The central person in the background to the events of July 2015 is Mr Carl. Mr Carl is a wealthy American who owns three residences (in Palm Beach, Washington D.C. and New York City) and who invests in very high value classic

sports cars in a partnership or business relationship of some kind with a Mr Richard Edwards. Mr Howarth is a dealer in such cars. Mr Howarth said that he has known and worked with Mr Edwards for upwards of 25 years.

8. In about June 2015, Mr Carl found himself with a liquidity problem. He needed large sums of cash with which to pay for his daughter's wedding. An email dated 12 June 2015 from him to Mr Edwards' wife, Lorna, shows that he had tried to borrow over \$1,000,000 dollars from car dealers, though the funds had not yet arrived in his bank account. It also shows that Mrs Edwards had assisted Mr Carl with a short-term loan. Mr Carl told me, however, that he was owed over £200,000 by Mrs Edwards. What further dealings there might have been between Mr Carl and Mr and Mrs Edwards between 12 June and 1 July 2015 was not explored in evidence.
9. Mr Carl said that he sought to have the debt from Mrs Edwards repaid but she was unable to repay at that time. Accordingly, the Edwardses agreed to help him source a loan from one of the dealers with whom Mr Carl and Mr Edwards dealt on occasions. It seems that Mr Edwards, on behalf of himself and Mr Carl, was storing eight valuable cars at the time with a specialist dealer in Malton, North Yorkshire.
10. Mr Howarth explained that Mr Edwards approached him for a loan, but Mr Howarth was unable to assist personally. Mr Howarth said that he was owed about £180,000 by Mr Kay, but Mr Kay was at that time unable to repay it. Mr Kay set about trying to find a possible lender and, through Mr Tyrrell or a Mr Fizzgibbons, made contact with Mr Cole.
11. Mr Cole said that he did not know Mr Howarth, Mr Edwards, Mr Kay or Mr Carl but he had had some dealings with Mr Tyrrell and knew Mr Fizzgibbons well. Mr Cole's principal business was plant and vehicle hire – these businesses were run through the Second and Third Claimant companies. But Mr Cole also evidently had a significant business of lending money relatively informally on the security of assets, as he accepted, and he was also involved in some property developments. He had never previously lent money on the security of a high value sports car, he said.

Overview of the main factual dispute

12. There is a dispute of evidence about Mr Cole's reaction to the unsolicited approach about a secured loan of £200,000 for a short period of time. Mr Cole said in his witness statement dated 9 August 2021 that he refused to consider the loan, but in his oral evidence in chief, describing his recollection of the events of 1-3 July 2015, he said that he told Mr Tyrrell that he would consider it. Mr Howarth says that he understood from Mr Kay that Mr Cole was willing in principle to lend money, and that accordingly the delivery of a 1973 orange Porsche was arranged from Malton to Mr Cole's companies' premises in Bury, where it arrived on a transporter on 2 July 2015.
13. On this particular point, I prefer the second thoughts of Mr Cole and the evidence of Mr Howarth, albeit hearsay evidence through Mr Kay. I am satisfied, having seen Mr Cole and heard about his business interests, that he would not have turned

down the opportunity to consider earning a substantial fee for a short-term secured loan. Mr Cole is an astute and experienced businessman. It also makes no sense that Mr Edwards and Mr Howarth would have arranged the transport of the Porsche without some encouragement, given that Mr Cole was not a sports car dealer or in the habit of lending money on the security of cars. I find that Mr Cole told Mr Tyrrell that he was willing to consider such a loan. What exactly Mr Cole had been told or said about the terms of the loan at that stage is unclear, but Mr Howarth had understood that it would involve interest of £10,000 for the first month and so would only be about half that for a 14-day loan, which is what he was seeking.

14. On 2 July 2015, as the orange Porsche arrived in Bury and was taken off the transporter, Mr Howarth and Mr Kay arrived in Bury. Mr Howarth arrived with his passport – he said this was at the suggestion of Mr Kay – which Mr Cole copied as evidence of his identity. Mr Howarth readily accepted that he arrived in Bury that day intending to borrow £200,000 from Mr Cole on the security of the Porsche.
15. It is common ground that Mr Howarth showed Mr Cole some documents relating to the car. This included some kind of registration document, though Mr Howarth said that the car was not at that stage registered in England. Where the parties differ is on whether the documents that Mr Howarth showed Mr Cole showed that he was the owner of the Porsche. Mr Cole and Mr Connaughton believe that there was something that had Mr Howarth's name on it; Mr Howarth said not, and that the car was registered in Italy. He suggested that it was an Italian registration document that Mr Cole was shown, but which did not have his name on it. Mr Howarth did not tell the court whose name was on that document, but he said that he told Mr Cole that the car belonged to the Carl/Edwards partnership. Mr Cole disputes that.
16. The true ownership of the Porsche is not clearly established, though Mr Carl subsequently behaved as if it were his alone. On any view, since Mr Howarth did not own it, it must have been through the offices of Mr Edwards that the Porsche was released by the garage in Malton, to be able to be used as security. In effect, Mr Edwards and Mr Howarth were therefore making use of property owned at least in part by Mr Carl to act as security for a loan. Mr Carl said that he knew nothing about this, and when the money came into his and his wife's US bank account, as it did on 6 July 2015, he believed that it had come from Mr Edwards, in discharge of his wife's debt. Mr Cole said that Mr Howarth told him that he owned the car and showed him a V5 registration document in his name.
17. It is common ground between Mr Cole and Mr Howarth that terms of a loan were discussed between them in Bury on 2 July 2015 but that nothing was agreed. It seems that there was a difference between the terms that Mr Howarth had been given to understand that Mr Cole was prepared to offer and Mr Cole's own terms, which were that there was a fee of £10,000 for 10 days' loan and then interest at £1,000 per day thereafter. Mr Howarth was not willing to accept those terms.
18. There is a difference between Mr Cole's recollection and Mr Howarth's recollection of how matters were left on 2 July 2015. Mr Howarth says that there was no agreement and that he agreed with Mr Cole on leaving the premises that

the Porsche would be stored there safely overnight and that he (Mr Howarth) would arrange a transporter to collect it the following day. In other words, any loan agreement was dead. Mr Howarth said that he left first in his car and does not know what happened between Mr Cole and Mr Kay thereafter.

19. Mr Cole clearly did not consider that the deal was off, as he said that he first researched the website of the garage in Malton, to check that the Porsche was for sale for £595,000, as Mr Howarth had told him, and then rang the owner of the garage, a Mr Hawkins, who confirmed that he knew Mr Howarth and that Mr Howarth owned the Porsche. This, Mr Cole said, satisfied him that the car was good security and he was therefore willing to make the loan on the terms that he had indicated.
20. He said that he phoned Mr Howarth on the morning of 3 July 2015 to tell him that he was happy with the car as good security for the loan, but he conceded that the terms of the loan were not further negotiated between them. Mr Howarth said that he did not speak to Mr Cole again until in August, and that it was Mr Kay who contacted him on 3 July about the loan.
21. Mr Cole said that on 3 July 2015, Mr Kay sent him an email setting out terms for a loan, and that he then transferred the money into a bank account, the details for which had previously been given to him. Mr Kay, he said, had been introduced by Mr Howarth the previous day as his business partner, who would look after his interests for him as he lived abroad, in Switzerland. Mr Cole therefore dealt with Mr Kay on that basis. The funds were transferred by the Third Claimant, but Mr Howarth did not suggest that the Third Claimant had been mentioned at any stage in the negotiations between him and Mr Cole.

The documentary evidence

22. There are relatively few documents that relate to the matters that I have just described, but they do assist in resolving the dispute of oral evidence about what happened on 3 July 2015. Neither party suggested that any of these documents were not genuine.
23. On 3 July 2015 at 11:46, Mr Kay sent Mr Cole an email from his iPhone:

“Roy,
As per our conversation I agree to the loan of £200,000, on the basis that this figure is to be re paid in full plus £5000 interest within a 14 day period.
If the loan is not redeemed as of 14 days from today, I acknowledge a default rate of £1000 daily until the loan has been redeemed.
I hope this clarifies things?
You have the bank details for the payment, would you be so kind too inform me when the funds have been sent. Many thanks. Max”

That email was forwarded to Mr Howarth without comment at 12:31 on the same day.

24. At 11:57 on the same day, Mr Cole had emailed his bank asking for immediate transfer of £200,000 into an identified account of Mr Andrew Howarth. The monies were transferred and on 6 July 2015, as shown by a funds payment confirmation sent by Monex by email at 15:05 that day, \$306,523.80 was transferred by SWIFT by Mr Howarth to an account of Bernard and Joan Carl. Mr Howarth's bank statement is debited on the same day with £198,020. Mr Howarth said that this was £200,000 less a fee of £2,000 that Mr Edwards had agreed he could deduct, plus £20 for the cost of the transfer.
25. There is no doubt therefore that Mr Howarth received the loan monies, deducted a fee for his services, and paid to transfer the remaining £198,000 in US dollars to Mr and Mrs Carl.
26. An email from Mr Kay to Mr Cole dated 24 July 2015 reads as follows:

“Hi Roy,
Spoke to Andrew.
He is sat on £140,000 and awaiting the balance which will be on Monday.
Once the balance is recieved one payment will be sent too redeem the Porsche.
Sorry for all the extra delays but this will happen but not until Monday.
Many thanks,
Max”

As regards this email, Mr Howarth accepted that “Andrew” was a reference to him and that, although he did not remember it, there must have been a conversation between him and Mr Kay because it was correct that he had received at that time £140,000 from the sale of a car. He denied, however, that the £140,000 was to be used to repay the loan.

27. There is a further email from Mr Kay to Mr Cole dated 27 July 2015 asking “What is the figure to redeem the car up until today please?” which elicited a prompt response stating “£220,000”. Asked how that sum related to the terms that he said had been agreed on 3 July, Mr Cole said that it was a round figure that he was prepared to accept at that time for repayment.
28. An expanded transaction narrative from Mr Howarth's bank shows that on 28 July 2015 Mr Howarth transferred £30,000 to the account from which the loan monies had originated. Mr Howarth produced some additional documents on day 3 of the trial, one of which showed a number of cheques drawn by Mr Kay in favour of Mr Cole for large sums of money over the period 2015 to 2017. One of them, stamped “Payment Stopped”, was drawn for £180,000 on 20 August 2015.
29. Mr Howarth's explanation for this was that in late July 2015 Mr Kay had agreed to pay to Mr Cole the £180,000 that he owed Mr Howarth, and Mr Howarth would pay the balance of the loan and the fee, namely £30,000, to redeem the car and discharge the loan. The total to be paid does not marry with the £220,000 that Mr Cole was expecting to receive, however. Mr Howarth paid his £30,000 and it

appears that, belatedly, Mr Kay attempted to pay £180,000 on 20 August 2015, but then countermanded the cheque.

30. There was agreement between Mr Cole and Mr Howarth that they spoke in August 2015, when Mr Cole said that he wanted the log book for the Porsche so that he could sell it, to repay the loan. Mr Howarth says that that was the only time that they spoke on the telephone.
31. On September 2015, Mr Howarth sent Mr Kay a notification dated 28 August 2015 of transfer of funds, €1.4 million, in relation to the purchase by a Mr Hamann of two Porsches. Conclusion of that transaction was dependent on satisfactory inspection of the cars by Mr Hamann. Mr Kay promptly sent this on to Mr Cole without comment. Mr Cole says that this was sent to him to provide reassurance that the money would soon be available to repay the loan.
32. By mid-October 2015, Mr Carl had discovered that his eight cars stored in Malton had been removed from there by Mr Edwards, allegedly using threats of force. Mr Carl obtained an interim injunction requiring Mr Edwards to surrender the cars. On 14 October 2015, Mr Carl emailed Mr Howarth suggesting that the cars were in his care and enclosing a copy of the court order. Mr Howarth replied to Mr Carl:

“I do not have your cars. I am aware of your dispute with Richard Edwards and John Hawkins but I am not a party to it. I did assist Richard in arranging transport of said cars as he requested assistance, but that is where my help ended. That was Sunday afternoon if I recall correctly.”

Nothing was said by Mr Howarth about the Porsche in Mr Cole’s premises but at about the same time Mr Kay negotiated the release of the car. Mr Cole was told about the injunction and did not want to become embroiled in court proceedings.

33. At the same time, Mr Cole prevailed on Mr Kay and Mr Tyrrell to sign a guarantee of the debt. Mr Howarth was not a party to it. This was executed as a deed on 15 October 2015 and appears to have been adapted from a professionally drawn guarantee and indemnity. It names Mr Cole as the lender and Mr Howarth as the debtor. The recitals are:

“(i) The lender loaned the sum of £200,000 (the loan) to the guarantors’ business associate Andrew Howarth of [address] (the debtor) by transferring the loan to him on 3 July 2015 bank to bank. The guarantors have conducted business with the debtor, had the benefit of the loan and note that the debtor failed to repay it when FALLING due and thus has incurred additional interest and charges of £100,000.

(ii) The guarantors agree that the lender is not in the business of money lending, rather he is the CEO of a group of vehicle and plant hire companies.

(iii) The Guarantors have agreed to guarantee and indemnify the lender for the due performance of the debtor’s agreement to repay the

loan and interest and additional charges of £100,000 that have now incurred.

(iii) In consideration of the lender forbearing to sue the debtor and the guarantors under the Misrepresentation Act for fraud and or misrepresentation of the debtor's financial position when the loan was made and extending the repayment date to the 31 January 2016, (the due date) the parties have agreed as follows:”

and there follows a guarantee of Mr Howarth's obligation to repay £300,000 by the due date and an agreement to indemnify Mr Cole and to pay interest at the rate of 3% per month from the due date, compounded monthly.

34. On 8 June 2017, Mr Cole sent Mr Howarth, Mr Kay and Mr Carl an email to remind them that the Porsche was “pledged to my leasing company as collateral for the £200,000 loan Bury Vehicle Leasing Ltd made to Andrew Howarth” and said that the loan and resulting fees and interest charges “was a personal obligation of Andrew Howarth and or Max Kay”. Mr Cole stresses in the email that by accepting the £30,000 paid by Mr Howarth and obtaining the guarantee of Mr Kay, he was not releasing Mr Howarth or compromising his company's right to collect the entire debt from him.
35. A month later, on 7 July 2017, Mr Cole sent Mr Carl an email, replying to a previous email from Mr Carl and bemoaning that Mr Kay had made previous promises to repay the debt and failed to do so. The email then states:

“Now that you have regained possession of the Orange Porsche is it not possible for you to return the 200k, which I know was paid to you although Richard Edwards maintained that the monies came from his wife, when we all know it was my monies sent direct to Andrew Howarth who then diverted it to Mrs Edwards.

For the record Max Kay borrowed the 200k to give to Andrew Howarth purely to get the Orange Porsche cleared so that it could be handed back to you, at least that is what I found out after the event. In addition as you know I then loaned Max via the other guys over 50k in respect of the Red Ferrari and a further 50k in respect of another loan which again we were lead to believe was tied up with the release of either the Red Ferrari or another one of your cars.”

36. Mr Carl replied stating that Mr Howarth had claimed that the £200,000 was a loan from him to Lorna Edwards secured by the Porsche, and that Lorna Edwards claimed that the £200,000 was repayment of the monies that she owed him. Mr Carl resisted the suggestion that he should pay Mr Cole £200,000 and said that they should let matters play out – which was probably a reference to the court proceedings in London.
37. The documents assembled in the bundles do not otherwise assist in resolving the central issue in this case.

Evaluation of the witnesses

38. Both Mr Cole and Mr Howarth professed to have a good (in Mr Howarth's case, "excellent") memory of events in July 2015. Both appeared to have a reasonably good memory of events – each was able to recall small but inconsequential details of what happened – but I am satisfied that their recollections have been considerably affected by a combination of, first, the passage of time (no one can have as certain a memory of what actually happened almost 7 years ago as they claimed to have) and, second, the exigencies of preparing to fight this case. In preparing for this trial, Mr Cole and Mr Howarth will both have worked out how their cases can be put to best advantage, and this will inevitably have influenced their memory. Neither of them struck me as totally reliable or painfully honest, such that I can accept what they say without evaluating the reliability of the recollection.
39. I do not consider that either party was a reliable witness. Some of what each of them said appeared credible, but other parts were not persuasive. I am also satisfied that I am not being given by either side the full story about the background to this particular matter and what has happened since 2015. The court file is replete with allegations of witness intimidation, threats, loan sharking and criminal conduct on both sides. None of these matters was aired in court, except briefly by Mr Howarth in questioning Mr Cole about his lending business and by Mr Kay in making his application to set aside the judgment against him, but there has clearly been a lot more happening than I have been told about.
40. I will not decide this case on the basis of a general preference of the evidence of one over the other, for the reasons that I have given. I will accept as likely to be true what was undisputed, those matters that in context are inherently probable, and those that are supported by contemporaneous documentary evidence.
41. Mr Connaughton, who I am satisfied was an honest witness doing his best to recall truthfully the events in question, unfortunately suffered a serious brain illness before he signed his witness statement, which he accepted had affected his memory to some extent. I mean him no disrespect when I say that in light of that I must be cautious about accepting his evidence, though it was of limited materiality in any event beyond the recollection that he had seen Mr Howarth's name on the Porsche's documents as owner of it.
42. Mr Carl, although not directly interested in this claim, brought a claim in the Chancery Division in London in 2015 against numerous individuals who are alleged to have wrongly interfered with valuable sports cars from his collection. One of the defendants to that claim is Mr Howarth. Mr Cole and his companies are not involved in it except that Mr Cole will be a witness called by Mr Carl. For whatever reason, the claim has yet to come to trial.
43. Mr Carl is therefore not a disinterested person in this claim. However, his evidence seemed credible and he answered in an appropriate way the questions that Mr Howarth asked him. Mr Carl said that Mr Howarth had no authority to deal with the Porsche. He explained, in answer to an invitation from me to explain how the litigation had all come about, that he told Mr Edwards that he wanted his wife to repay her debt of £221,000 and that Mr Edwards said that his wife had an

inheritance coming and that he would provide £198,000 as an offset to her debts. That is why he believed that the £198,000 came from Mrs Edwards and did not need to be repaid. Mr Howarth then appeared on the scene and claimed that the £198,000 had been from him.

44. A good deal of Mr Carl's witness statement comprises hearsay evidence of what Mr Kay told him after the event that Mr Howarth had done or said. Mr Carl characterised Messrs Howarth and Kay as dishonest rogues. I do not feel able to rely on evidence that emanates in undocumented form from Mr Kay. Mr Carl said that he did not become aware of the £200,000 loan or its terms until 2017. I accept that evidence. Mr Carl admitted that he was using his cars to raise money from others, including a Mr Pattinson and a Mr Hamann, as Mr Howarth had suggested.

Evaluation of evidence and Decision

45. The central question is whether either Mr Howarth, or Mr Kay on his behalf, agreed terms with Mr Cole on 3 July 2015 for a loan of £200,000 to Mr Howarth, or whether Mr Kay agreed a loan as principal. There is no other plausible possibility. What is pleaded in the Particulars of Claim is that an oral contract was made on 3 July 2015 between Mr Cole and Mr Howarth on terms that the loan would be repaid within 10 days together with fixed interest of £10,000 and a further £1,000 per day thereafter until repayment; that the Porsche, to which Mr Howarth had good title, was to be held by Mr Cole as security; and that the loan and interest would not in any circumstances be outstanding for more than 6 months.
46. Although Mr Howarth contends that the true lender was the Third Claimant rather than Mr Cole, there is no evidence sufficient to support that case. It is true that Mr Cole caused the Third Claimant to advance the £200,000 from its bank account, and there is the June 2017 email from Mr Cole to Mr Howarth and others that states that Bury Vehicle Leasing Limited made the loan. But that email was not addressing the question of who was the lender; it was merely reminding Mr Howarth and others that he remained liable to repay the loan. The loan monies having been taken from the Third Claimant's bank account, it is not surprising that Mr Cole (who doubtless had not restored the company's funds in the meantime) regarded the money two years later as being "due" in a loose sense to his company.
47. More significantly, there is no contemporaneous evidence that Mr Cole said that the loan would be made by, or was being agreed on behalf of, the Third Claimant. Mr Cole was the sole beneficial owner of the Third Claimant and simply made use of the money in its bank account, without regard to the niceties of company law, in a way that it is not uncommon. The true position between Mr Cole and the Third Claimant is a matter for them, but the provenance of the £200,000 does not mean that the Third Claimant was the lender. Mr Howarth was constrained to accept that Mr Cole had not mentioned the Third Claimant's name in connection with the loan. Neither Mr Cole nor the Third Claimant asserts that the company was an undisclosed principal. In those circumstances, I reject Mr Howarth's case that the true lender was the Third Claimant.

48. As far as repayment is concerned, Mr Kay's application to set aside judgment suggested that he had repaid the loan by means of other chattels and business interests having been given to Mr Cole subsequently. Mr Cole said in cross-examination that the subsequent dealings between him and Mr Kay were completely separate and related to other monies changing hands, and he disputed that there was any repayment of the loan apart from the £30,000 paid by Mr Howarth on 28 July 2015. Mr Kay's evidence was in the event not called by Mr Howarth, so the evidence establishes that only £30,000 of the loan has been repaid. £170,000 remains unpaid.
49. As to the identity of the borrower, I find that at the meeting in Bury on 2 July 2015 Mr Cole was told that Mr Howarth would be the borrower: that is why his passport was provided and copied. Terms were not agreed on that day but Mr Cole made clear what his terms were: £10,000 fee for 10 days and £1,000 per day thereafter. Mr Howarth was not happy and left, but not on the basis that all dealings were off. Mr Howarth had taken on himself, for whatever reason to do with Mr Edwards or Mr Carl, or both, responsibility for sourcing a loan for Mr Carl. Mr Howarth sought to give the impression, in his evidence and in his Amended Defence, that he was only an agent for the true borrower, Mr Carl, and that he was dealing with Mr Edwards in relation to the terms of the loan. If that was how Mr Howarth saw it, it is inherently likely that he would have gone back to Mr Edwards following the meeting with Mr Cole to discuss the terms offered. I reject his account that he left on 2 July making clear that it was an end of the matter.
50. I accept that Mr Cole did not understand that the proposed loan was going no further and that he checked the website of the Malton dealer and spoke to Mr Hawkins to confirm that Mr Howarth was the owner of the Porsche. That is what one would expect someone in Mr Cole's position to do. I consider that Mr Cole's evidence that Mr Howarth gave him to understand that he was the owner of the Porsche is inherently likely to be correct, and that Mr Howarth did show Mr Cole a document that appeared to show that Mr Howarth was the owner. It is most improbable that a smart operator like Mr Cole, who was used to lending on the security of chattels, would have lent £200,000 to a stranger without being satisfied that the security was of value to him. I reject Mr Howarth's oral evidence that he told Mr Cole that the Carl/Edwards partnership was the owner of the car. This was not stated in his witness statement or in his Amended Defence.
51. It is unnecessary and would be wrong for me to speculate about the circumstances in which the Porsche was released to Mr Howarth and he was able to pass himself off as the owner of it, but I am satisfied that that is what he did.
52. I consider that Mr Cole is mistaken in suggesting that he spoke to Mr Howarth on 3 July 2015. He did not seem confident in his recollection of that. If he had spoken to Mr Howarth, as he said, to confirm that the security was satisfactory, there would inevitably have been a discussion with Mr Howarth about the terms of the loan, but Mr Cole accepted that there was no such discussion. In my judgment, Mr Cole spoke to Mr Kay on the morning of 3 July 2015, doubtless because Mr Howarth had identified Mr Kay the previous day as looking after his interests in the matter. Mr Howarth accepted that he told Mr Cole that Mr Kay was acting in this capacity on the previous day. Since Mr Kay was indebted and beholden to

Mr Howarth, and Mr Howarth was going to be the borrower, I find that he sought to negotiate better terms for a loan. The terms that were agreed that morning were set out in Mr Kay's email to Mr Cole.

53. That email was forwarded to Mr Howarth shortly afterwards, and Mr Howarth accepted that he spoke to Mr Kay about 1pm. He said first, in his evidence in chief, that Mr Kay said that he had managed to sort the loan and that he had agreed terms with Mr Cole, and Mr Howarth should look in his inbox. Mr Howarth did not say that he said anything then to Mr Kay about his not being involved in the loan any further, or that Mr Kay should receive the funds because he was the borrower. He said that Mr Kay must have given his (Mr Howarth's) bank details to Mr Cole. So Mr Howarth, on receiving this email, was expecting the monies to be paid into his bank account. He said that he had already booked a transaction with Monex for a flat fee, and that when the monies arrived in his account after 2pm that day he processed the transfer to Mr Carl and paid the £20 fee to Monex. That is not the conduct of someone who believed that he had walked away from the transaction the previous day and had arranged a transporter to remove the car.
54. When cross-examined about the events of 3 July 2015, Mr Howarth said that Mr Kay said to him on the telephone "I've sorted the loan for you, check your inbox". He then suggested, for the first time, that Mr Kay said "Roy will lend the money to me". I reject that evidence if it was intended to mean that Mr Kay was borrowing the money in his own right. This was not stated in Mr Howarth's witness statement and it is inconsistent with his Amended Defence (for which permission was give at the trial) dated 12 January 2022, paragraph 27 of which reads:

"Paragraph 10 is denied. [Mr Howarth] was informed by [Mr Kay] that terms had been agreed between [Mr Kay] and [Mr Cole] for the lending of the Loan Sum to [Mr Kay] as agent for [Mr Howarth] acting for Mr Carl."

55. Nothing happened between 2 and 3 July 2015 to change the intention that Mr Howarth was to borrow £200,000 from Mr Cole, except that the terms fell into line with what Mr Howarth was seeking. Mr Howarth accepted that on 2 July 2015 he intended to be the borrower of £200,000. Mr Kay acted on behalf of Mr Howarth, with his agreement, in negotiating those terms. In paragraph 14 of his own witness statement, Mr Howarth says:

"It was agreed that I would repay Mr. Cole the loan sum, since Mr. Cole had no access to, and knew nothing of, BC [Mr Carl] at the time. RE [Mr Edwards] agreed to transfer the monies to me, from BC, at the appropriate time."

56. Mr Howarth sought to argue that the meaning of this passage was "a matter of interpretation". I presume that by that he meant that it could be read as simply explaining the route that the repayment monies would take to reach Mr Cole. But even read in that way, it is consistent with there being an agreement of loan between Mr Howarth as borrower and Mr Cole as lender. The new suggestion in the Amended Defence that Mr Carl was an undisclosed principal is fanciful. Mr

Howarth is simply confusing the reason for borrowing money – namely to accommodate some other person – with the question of who was the borrower.

57. What happened after 3 July 2015 is generally consistent with Mr Howarth being the borrower.
- i) The conversation with Mr Kay on or about 24 July 2015, which Mr Howarth accepts must have taken place, is meaningless unless the £140,000 was being identified by Mr Howarth for the purpose of repaying the loan. Mr Howarth suggested that he was not prepared to use that money and was waiting for Mr Carl to repay the loan, but Mr Carl had not done so within the originally envisaged timescale, and by 24 July additional interest was starting to accumulate rapidly. Mr Howarth did not identify a different reason why he would have told Mr Kay about receipt of £140,000 and a balance being due the following Monday.
 - ii) The part repayment of £30,000 together with the debt of £180,000 that Mr Kay owed Mr Howarth and was going to pay to Mr Cole would (approximately) have repaid the loan. Mr Howarth accepted that the £30,000 that he paid was made up of the balance of the loan (after £180,000 had been paid by Mr Kay) and £10,000 for fees or interest. He said that Mr Kay had told him that £210,000 was then owing.
 - iii) Mr Howarth gave a number of explanations for this part payment. He said that he paid the £30,000 in an attempt to keep the peace, and to keep everything on an even keel. He was aware of a problem brewing between Mr Carl and Mr Edwards, but no document supports this before Mr Carl sought an interim injunction in October 2015. He said that he wanted to make it his problem and make sure that the car was returned “because of Mr Cole’s call to me”. But as Mr Howarth himself emphasised, Mr Cole only called him in August 2015. The payment was therefore not triggered by any threat by Mr Cole to sell the car. What Mr Howarth intended in July was to use his money (including a debt of £180,000 that Mr Kay owed him) to repay the loan. He was unable to explain satisfactorily why he wanted to do this if Mr Kay was the borrower, not him.
 - iv) The countermanded cheque for £180,000 is consistent with the debt being that of Mr Howarth because it was accepted that Mr Kay owed Mr Howarth £180,000.
 - v) The terms of the deed of guarantee and indemnity are consistent with Mr Howarth being the borrower, indeed it states that he is the debtor. Although Mr Howarth was not a party to that document, Mr Cole was. Mr Cole had leverage over Mr Kay because of the countermanded cheque for £180,000 and Mr Kay’s and his further business dealings.
 - vi) The email of 28 August 2015 that Mr Howarth sent Mr Kay in September 2015, and which was then forwarded to Mr Cole, is only really explicable on the basis that Mr Howarth was demonstrating to Mr Cole that he would shortly have the means of paying off the loan.

- vii) The email of 8 June 2017 that Mr Cole sent to Mr Howarth and others, stating that the loan was made to Mr Howarth, supports Mr Cole's case and was not, as far as I have been told, the subject of a corrective response from Mr Howarth at the time.
58. The one document that might be said to be consistent with Mr Howarth's case is Mr Cole's email to Mr Carl of 7 July 2017 (see para 35 above). It states that Mr Kay borrowed the £200,000 to give to Mr Howarth. However, Mr Cole's explanation in the same paragraph is clearly wrong because the loan was made well before Mr Carl made his claim to the Porsche. Mr Cole knew of (and refers in the same email to) Mr Kay's liability under the deed of guarantee. The email is also wrong in suggesting that Mr Howarth provided the loan funds to Mrs Edwards. In the email, Mr Cole is trying to persuade Mr Carl to repay him £200,000 and for that reason may be trying to give the impression that the loan was made to benefit Mr Carl by releasing the Porsche that was otherwise being held. The improperly held cars were the subject of Mr Carl's litigation in London, which had been started by that time. Whatever the explanation is, I do not consider that an email written by Mr Cole to Mr Carl for a particular purpose two years after the critical events is a reliable source of evidence on the question of what was agreed in July 2015.
59. I therefore conclude that a loan was agreed orally on 3 July 2015 between Mr Cole as lender and Mr Kay acting on behalf of Mr Howarth as borrower, the fact and terms of which are evidenced by the email from Mr Kay to Mr Cole as forwarded by Mr Kay to Mr Howarth and the payment that day of £200,000 into the bank account of Mr Howarth. The terms were, as stated in the email sent to Mr Cole, that a fee of £5,000 was payable as interest for 14 days and that £205,000 was therefore to be repaid by 17 July 2015. Thereafter, if the loan was not repaid, further interest at the rate of £1,000 per day was payable.
60. This was a binding contract. There is no doubt that Mr Cole and Mr Howarth intended to create legal relations between them. This was no favour between friends: there was substantial consideration given by Mr Howarth for the loan, and the provision of the Porsche as security was intended to secure Mr Howarth's obligation to repay the loan. The only sensible interpretation of what happened on 2 July 2015 and what I have found happened on 3 July 2015 is that Mr Howarth intended to make a legally binding agreement to receive and repay a loan of £200,000 on the terms that were eventually agreed and Mr Cole and Mr Kay on behalf of Mr Howarth agreed terms. The terms were either agreed by Mr Cole speaking to Mr Kay before the email was sent, or the email was an offer and confirmation of terms, which Mr Cole accepted by sending the loan monies to Mr Howarth's bank account, the details of which had been provided to him by Mr Kay for that purpose.
61. Mr Cole has limited his claim for interest at the rate of £1,000 per day to a period of 6 months from the repayment date, which is consistent with his understanding that the loan was not to have been outstanding for more than 6 months.
62. Mr Howarth is therefore liable to pay to Mr Cole £170,000 principal, £5,000 interest for the period up to 17 July 2015 and further interest at the rate of £1,000 per day from 18 July 2015 to 17 January 2016. Mr Cole claims interest thereafter

at the judgment rate of 8% but I decline to award interest at that rate over a period when interest rates have been exceptionally low. I will award interest on the sum of £175,000 from 18 January 2016 to the date of judgment, at the rate of 2% above bank base rate from time to time. There was no agreed term for compounding of interest or payment of interest on interest. Further interest post-judgment date will of course accrue on the total judgment debt at the judgment rate.

63. The parties are requested to agree a calculation of interest payable up to 8 April 2022 in accordance with this judgment.
64. The approved version of the judgment, following corrections, will be handed down electronically, without a hearing. The parties are to liaise and attempt to agree the terms of the order and any consequential matters, such as costs and permission to appeal, by 16:00 on 7 April 2022. Failing agreement, short written submissions on any disputed matters (maximum 3 pages each side) must be CE-filed by 16:00 on 8 April 2022 and will be determined on paper, without a further hearing.