



Neutral Citation Number: [2024] EWHC 1661 (KB)

Case No: KB-2021-004325

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 01/07/2024

**Before :**

**MR DEXTER DIAS KC**  
**(sitting as a Deputy High Court Judge)**

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**Between :**

**THOMAS BARRY, CATHERINE BARRY**

**Claimants**

**- and -**

**DENIS BARRY**

**Defendant**

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**D Sawtell** (instructed by **CDS Mayfair**) for the **Claimants**  
**R Laville** (instructed by **Direct Access**) for the **Defendant**

Hearing dates: 4-6, 9-13 October, 10 November 2023  
22 January and 19 February 2024  
(*Judgment circulated to counsel 17 June 2024*)

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**Approved Judgment**

This judgment was handed down remotely at 10.30am on 1 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

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1. This is the judgment of the court.
2. The judgment is arranged in the following way to assist the parties and the public follow the court’s line of reasoning. The text is divided into 15 sections, as set out in the table below.

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## **§I. INTRODUCTION**

3. For a contract to be legally binding, there must be an intention to create legal relations. It is a doctrine of great antiquity, succinctly put while the Napoleonic Wars were raging as contracts not being “mere matters of pleasantry and badinage” (*Dalrymple v Dalrymple* (1811) 161 E.R. 665, a husband and wife dispute). Often whether the contract is intended by the parties to be legally enforceable is not in doubt, certainly not in most commercial settings, where there is a presumption, often said to be a strong or “heavy” one, that such an intention is built into the situation (*Edwards v Skyways* [1964] 1 WLR 349, 355). In other words, a commercial relationship creates a strong presumption of an intention to be legally binding. The context of the case before the court today is different. It is about arrangements (to use a neutral term for now) when parents loan money – here substantial sums - to one of their children. In such cases, given that our experience of the world that matters within a family are often sorted out without an intention of strict enforcement through the courts, the legal presumption operates in the opposite direction: it is presumed that

there is no intention to create legal relations (*Jones v Padavatton* (1969) 1 WLR 328, 331, per Salmon LJ). However, that presumption can be rebutted by evidence of contrary intention (ibid. at 332-33). This is because contract law retains a flexibility to reflect the true intentions of the parties and the seriousness of the situation. If it is proved that they did intend for the loan arrangements to be legally binding in a sufficiently serious situation, and if the other necessary elements of a valid contract (including offer, acceptance and consideration) exist, then the courts may step in to enforce the contract against a recalcitrant debtor – even if the defaulting person is a son or daughter and the persons insisting on legal enforcement are their parents. The claimants say this is precisely the situation in this case. The defendant, their son, disputes it. This is the first issue they ask the court to decide as they cannot. There are others.

4. Therefore, this is a claim for the recovery of over £600,000 allegedly loaned by the two claimants to the defendant, their son. The claimants Thomas Barry Snr. and Catherine Barry (“Mrs Barry”, sometimes referred to as Kathleen) are parents of a family of six children – three sons and three daughters – and are represented by Mr Sawtell of counsel. The defendant Denis Barry (“Denis”) is their youngest son and is represented by Mr Laville of counsel. The court is grateful to counsel for their invaluable assistance and conspicuous professionalism throughout.
5. The simple headline description of the claim already provided cannot begin to reveal the depth of the bad feeling, hostility and heartache this case has generated. This is a family dispute between member of a previously close-knit and devoted Irish family in northwest London. More precisely, it has become a deeply acrimonious and bitterly contested family falling out, replete with claims and counterclaims of serious misconduct, and fundamental disputes about large sums of money and allegations of ill motivations. The fact that the Barry family was formerly a loving and mutually supportive family operates in two ways. It adds to the tragedy of the case, but also contributes to the complexity of the evidence advanced at trial that it is now the duty of the court to unravel.
6. Before the deterioration in relationships, Mrs Barry emailed her children deploying her characteristic use of capitals:

“I THANK GOD EVERY DAY FOR OUR 6 WONDERFULL CHILDREN I  
KNOW WE WILL NEVER BE LEFT SHORT.”
7. The defendant’s wife Annette told the court on oath that she “could not speak highly enough” of the help and support that her mother-in-law Mrs Barry had given her and her husband Denis. The claimants’ eldest son Kieran said about his parents at one point:

“You’re the most selfless people I have ever known I promise there will be no  
fighting.”
8. There was. A chasm opened up within the family with all the surviving siblings on the side of their parents, except for Denis, who was on the other side. Precisely when that rift developed, and its connection to this claim, are further matters that are hotly disputed between the parties. Mrs Barry described her case in this way while giving evidence:

“We’re here because our son [Denis] borrowed all this money and never paid it back ... it was the biggest shock we ever got – you trust your family, every one of them that they would repay what we loaned them.”

9. The case of Mr and Mrs Barry is that their son Denis has failed to repay £643,055.90 they loaned him and that he still owes for property transactions he made for his own benefit. His parents are elderly people well into their seventies. They say they need the money back to pay off the mortgage on their home, but also simply to live in their advanced years. Denis Barry denies all this. His case is that the transfer of funds was an internal family affair without any intention to create legal relations, never intended to be enforceable through the courts, but to be sorted out if necessary within the family. Although he agrees that his parents loaned monies for three properties (at two different sites), he says that subsequently his parents agreed that he could write off the bulk of the money (£500,000). Therefore, the loans made to him personally were forgiven. But the loan to a company he controlled with his wife remains outstanding, and he accepts that, but says they are suing the wrong party – it should be the company not him. To explain his parents’ conduct bringing a claim to court against him, he says that they are manufacturing a false case because of a falling out in the family. In their false claim, his parents are being aided and abetted by all his other siblings, who stand to benefit from the recouping of the money given to him. Relationships deteriorated to the extent that on 28 November 2019, a telephone conversation between the defendant and his mother was covertly recorded by his sisters Fiona and Siobhan. As the defendant’s wife Annette puts it, if it wasn’t for the falling out, “we might not be here now”. In other words, this litigation is vindictive and nothing to do with the true nature of the money transactions and what is owed or not owed.

10. While the defendant says that this was and always remained a deeply private family matter and nothing to do with the law, his parents say that there were loan contracts. What this means is set out with simplicity in a leading legal text *Chitty on Contracts* (“*Chitty*”) (34<sup>th</sup> edn). At Vol. II, §41-262, the editors state:

“A contract of loan of money is a contract whereby one person lends or agrees to lend a sum of money to another, in consideration of a promise express or implied to repay that sum on demand, or at a fixed or determinable future time, or conditionally upon an event which is bound to happen, with or without interest.”

11. Did Mr Barry Snr. and Mrs Barry loan money to their son Denis with an intention that should he not repay it, the loan would be enforceable in court? He denies this absolutely. He says that any such dispute would be sorted out within the Barry family and the courts have nothing to do with it. Such are the forensic battlelines in this case. It is the duty of the court to determine where the truth lies in the focused and very specific forensic sense, using the recognised legal yardsticks of the burden and standard of proof. The standard of proof is a balance of probabilities. Nothing less will do. Let me be clear about my approach to the evidence for the purposes of this judgment. It is heavily informed by the approach of the Court of Appeal in *Re B (A Child)* (*Adequacy of Reasons*) [2022] EWCA Civ. 407. The court stated at para.58:

"(4) ... a judgment is not a summing-up in which every possible relevant piece of evidence must be mentioned."

12. Therefore, I focus on what has been essential to my determinations in this case. Numerous side issues were thrown up during the trial. I make it clear that I do not need to resolve them all. The critical issues are clear. I focus on those and make such findings of fact as are necessary to determine those prime identified issues. While I do not set out all the evidence the court received, and it is extensive, I emphasise that as part of my review I have carefully considered, and for certain parts of it reconsidered, it all. I reserved judgment for precisely that reason. I provide an assessment of each of the key witnesses, and refer to the vital evidence that informed the court's decision on any specific issue within the section of the text devoted to each principal issue.
13. I should add that I have adopted the practice used during the trial for names. Generally, the children of the claimants are referred to by their first names. No disrespect is intended to anyone, and having confirmed the situation with the parties, everyone has been and remains comfortable with such a course.

## **§II. BRIEF FACTS**

14. While certain critical facts are heavily disputed, there is nevertheless a solid body of common ground. These facts anchor the disputes and give them their true historical and familial context.
15. The claimants were born in Kerry, Ireland and came to England as teenagers and wed here at the age of 17. They are both devout church-going Roman Catholics and Mrs Barry's brother Robert was a priest in the Church. The ages and age-order of the children are relevant and are as follows (date of birth in brackets):
  - Deirdre (1971; marries Michael Angland 1997; Deirdre dies of leukaemia July 2014)
  - Kieran (1973)
  - Thomas (Junior) (1976)
  - Denis (1978; marries Annette O'Donoghue, whose brother is Michael O'Donoghue, a defence witness)
  - Fiona (1985)
  - Siobhan (1986)
16. A number of key dates present themselves, and an acquaintance with these events will aid an understanding of the unfolding narrative. In 1973, the claimants purchased what is now the Barrys Garage as a going concern from Mr Barry's cousin. What is admirable is that from this modest start, Mr and Mrs Barry built a business and property portfolio and were consistently able to assist various of their children getting set up in life with homes and jobs. While all the children would at times work for the business, from around 2011, with Mr Barry Snr.'s health failing, the defendant and Thomas Jnr. were the people principally engaged in the running of the garage.

17. In 1997, a property known in the trial as “Honeypot Lane” was purchased in the name of the two claimants and the three “boys”. Only the claimants contributed to the purchase, so this would develop into a valuable asset for each of their three sons. Honeypot Lane is a large block of flats, which were rented out.
18. In 1998, properties were acquired at 369a and 369b High Road; in 1999, at 81-83 Wembley Hill Road. In 2011, the High Road was registered in the name of Thomas Jnr. and the defendant. There is a dispute about this property that this trial is not tasked to resolve. As the children grew into adulthood, the claimants assisted with the purchase of homes, either by way of deposits, acting as guarantors, with renovations, or a combination of these. While it is unnecessary to detail all the many transactions, those affecting the defendant are as follows:
  - In 1997, the defendant purchased 149 Everton Drive, Stanmore. The claimants assisted him through refurbishing the property and sourcing tenants.
  - In 2000, the defendant and his wife Annette acquired the leasehold interest in 37 Reeves Avenue. The claimants and Annette’s father provided the deposit by way of a gift of £11,000 each.
  - In 2002, the defendant and his wife were registered as the proprietors of 74 Vista Way, Harrow. The claimants and Annette’s father assisted them by each gifting £40,000 towards the deposit.
19. Another property that has featured in proceedings and must be examined in the judgment has come to be known as “Littlehampton”. In January 2002, the claimants purchased 73 Milton Avenue, Rustington (“Littlehampton”) together with a minor contribution from Mrs Barry’s brother Robert, a Catholic priest. The property had a dual function, being used by her brother and being used by the family more generally as a holiday home.
20. In 2008, Crawford House (later renamed Catherine House in honour of Mrs Barry) at 616 High Road, Wembley was purchased. The purchase was funded through the sons raising funds (a loan from Allied Irish Bank) and equity release by remortgaging Honeypot Lane.
21. From about 2008, given that the sons and not the daughters were registered on the title Honeypot Lane, the claimants were thinking how to make the distribution of assets fairer for their daughters. In 2011, the claimants emailed their children to tell them that they intended to step away from the businesses and rearrange the assets. Importantly, they said that having taken advice, it would not be practical to introduce the daughters onto Honeypot Lane, but they would seek other solutions to equalise the situation for “the girls”. As Mrs Barry wrote in an email dated 4 October 2011 (B643):

“not to forget we don't just have 3 sons we have 3 daughters too to get them sorted from our wills and it is our intention to treat everyone evenly.”
22. Tragically, their eldest daughter Deirdre, having been diagnosed with leukaemia in 2013, died from cancer in July 2014. This was a terrible blow to all, and the impact on Mrs Barry was clear when she testified at court almost a decade later. Deirdre had

five children with Mikey Angland, and the claimants were intent to ensuring these grandchildren would be provided for as well in Deirdre's place.

23. At the end of 2014, the claimants took advice about how to rearrange Honeypot Lane. The plan in short was for the three sons to raise funds against the property and "buy out" their parents (who had a 40 per cent share). The three brothers raised £770,000. However, the professional advice about how to effect the removal of the parents was conflicting. One consequence of all this was that there was a reserve of funds available; other funds would also become available through the sale of Littlehampton. Substantial funds were then transferred from the claimants for the purchase of 295 Salmon Street and two property interests at 37 Reeves Avenue. These critical and disputed transactions must now be examined.
24. However, it is necessary to know that Littlehampton was sold at the beginning of 2016. Exchange was on 18 January and completion on 28 January. In between these two dates, on 22 January, there was the incorporation of Bardon Limited, a company in which the defendant and his wife are the only shareholders.

### **§III. SALMON STRET AND REEVES AVENUE**

25. The central dispute between the parties is about sums loaned by the claimants for the purchase of properties at 295 Salmon Street ("Salmon Street") and Reeves Avenue ("Reeves Avenue"). As indicated, the defendant already had the leasehold interest at 37 Reeves Avenue, the ground floor flat. The proposed acquisition was of the first floor flat at 37a and the overall freehold.

#### **295 Salmon Street**

26. The house at 295 Salmon Street is located in a road in which, as of 2015, a number of members of the family lived, save for Siobhan, who lived nearby, and the defendant, who lived with his wife at 74 Vista Way. In 2015, 295 Salmon Street came on the market and so presented the defendant with the opportunity to purchase a family home in the same street as other members of his family. The claimants loaned the defendant £350,000 in a series of smaller transfers. Each of these smaller sums was marked in the claimant's Santander Bank statements as "Loan D Barry", that is, Denis Barry the defendant.

#### **Reeves Avenue**

27. The site referred to as Reeves Avenue consists of three properties: two self-contained flats and the freehold. In July 2000, the defendant and his wife Annette acquired a leasehold interest in the ground floor flat. The other flat, 37a Reeves Avenue, is a first floor flat, and belonged to "Con" or "Coln", a man of Irish descent. In or around 2014, Coln indicated that he intended to return to Ireland, and thus was open to selling the first floor flat. The freehold was owned by Schulem B Association Limited. On 12 June 2015, Mrs Barry paid £1800 on her credit card to Chestertons for them to inspect and survey Reeves Avenue and advise their client, the freeholder, about the value of the freeholding.

28. On 29 March 2016, £157,651.90 was transferred from the claimants' Santander account to the account of Herbert Reeves and Co, the solicitors acting on behalf of the defendant in the purchase of the leasehold interest in 37a Reeves Avenue. The defendant accepts (statement 1/§69.2) that this sum was to be treated as a loan to the defendant in a personal capacity to purchase the 37a leasehold interest.
29. At the end of March 2016, the claimants made a further series of money transfers to the defendant's bank account, totalling £145,104 (it is disputed to whom the loans were ultimately for the benefit of, the defendant claiming it was for his company Bardon Limited). The transactions were:
- March 2016: £80,000 (four payments of £20,000 marked as "Loan D Barry")
  - March 2016: £65,104 (three payments of £20,000 and one of £5,104, all marked "Loan D Barry")
30. The defendant's case is that the £145,104 was for the purchase of the freehold of the Reeves Avenue site. On 12 December 2016, Bardon Limited purchased the freehold of 37 Reeves Avenue for £145,354. On 15 December 2016 Bardon Limited entered into a lease for a term of 125 years with the defendant and his wife for 37 Reeves Avenue (ground floor flat). On the same day, Bardon Limited entered into a lease for 37a Reeves Avenue for a term of 125 years with the defendant and his wife.

### **Bardon Limited**

31. Bardon Limited is a company that was incorporated on 22 January 2016. The defendant and his wife Annette are the sole shareholders and directors. This company will feature more prominently in the narrative shortly, since it is said by the defendant to be the true recipient of the Reeves Avenue freehold loan, and therefore the claimants have sued the wrong party in respect of this head of claim.

### **Four other events**

32. While the narrative is complex, it will assist in shaping it to know that there are four other significant events:
- a) **June 2017: the "shed" meeting.** This is a family meeting in the shed (garden room) of Kieran's home. Its significance for the defendant's case is that he alleges Fiona said that the loan for 37a Reeves Avenue (first floor flat) would be written off. This is disputed by the claimants.
  - b) **28 November 2019: the recorded telephone call.** The defendant spoke to his mother by telephone on this date. Fiona recorded the call. The transcript is in the trial bundle and relied upon by each side for different reasons.
  - c) **New Year's Eve 2020: family confrontation.** At the defendant's brother-in-law's house at Shaftesbury Avenue, Kenton, Harrow. Events hotly disputed.



- d) **4 March 2021: first written repayment demand.** Mrs Barry writes to her son Denis on behalf of both claimants demanding repayment.

#### **Total sum allegedly owed**

33. The claimants' case is that before deducting the repayments the defendant has made (said to be a "small number"), he owes his parents £650,555.90. This figure is made up, on the claimants' case, in this way:
- Salmon Street: £350,000
  - 37a Reeves Avenue: £155,451.90
  - Reeves Avenue freehold: £145,104
34. The claim against the defendant is that, taking into account the repaid sums, what remains owing to the claimants is £643,055.90. Interest is claimed at a "modest" 3 per cent, from 4 September 2021, which the claimants submit is a reasonable time following the repayment demand for Denis Barry to have begun to reimburse his parents. The defendant denies that he personally owes the claimants any sums.

#### **§IV. PROCEDURAL HISTORY**

35. Following Mrs Barry's email to the defendant on 4 March 2021 asking for repayment, the defendant replied by email on 29 March 2021. He denied that he owed anything personally, and stated that Bardon Limited owed the sum for the Reeves Avenue freehold. The claimants followed up by serving on the defendant a letter of demand on 23 July 2021, a letter of claim on 6 August, reservice of the letter of demand on 20 August and of the letter of claim on 21 August. There was no response to their satisfaction. They issued their claim on 23 November 2021.
36. The defence is dated 24 December 2021 and the reply 25 February 2022. Following the claimants' Part 18 request for further information and clarification, the defendant responded on 3 March 2022, rejecting the validity of the enquiries. On 8 April 2022, the claimants provided a detailed response to the defendant's Part 18 request. There was a costs and case management conference before Deputy Master Bard on 14 July 2022 (order sealed 22 August 2022). The amended particulars of claim are dated 8 October 2022. The notice for trial dated 12 October 2022 set the case down for trial on 2 October 2023. It should be noted that following closing submissions, there were two further hearings in early 2024.
37. On 22 January 2024, the case was relisted on the defendant's application. He submitted that there were important evidential developments that post-dated the conclusion of the trial. This involved new information previously unavailable that went to an important issue in his defence, the date when the family dispute started and concern about another family feud (the "Kennedy situation", as it was referred to). An important issue in the trial was whether the family's falling out began in 2020 (claimants' case) or in 2019 (defendant's case). The genesis of the defendant's post-trial application was a statement filed by Thomas Barry Jnr. in proceedings in the Family Court about when there was conflict with his brother Denis. On 22 January

2024, the court ruled that it was proportionate to grant the permission sought by the defendant because of the centrality of the question to a vital plank of Denis Barry's case. The date of the dispute's onset in turn affected the significance of the recorded call on 28 November 2019. Was it an attempt by Mrs Barry to have clarity about the reasons her son was refusing to repay sums loaned to him by the claimants, or was it an attempt, the feud already having begun, to "entrap" him into inadvertently damaging admissions against his interests?

38. On 19 February 2024, the court received evidence from several witnesses, having granted "exceptional" permission to have them recalled. They were Thomas Barry Jnr., Mrs Barry and Fiona Feeley. The relevant evidence will be dealt with in due course. Given Mrs Barry's vulnerability and ill health, the court ensured that questioning would be strictly confined to the scope of permission granted and not amount to a reopening of broader challenges. The court permitted her to give evidence remotely, supported by an independent person to assist her with the electronic bundles. The questions the defendant intended to ask were sent to the court only, for the court to assess their relevance and proportionality. Mr Laville, as one might expect, scrupulously adhered to the court's directions. Court intervention proved unnecessary, save for one small adjustment.

## **§V. LAW**

39. The parties provided an "Agreed Note of the Law", for which the court is grateful. However, applicable legal principles are fleshed out throughout the text where necessary.

### **Intention to create legal relations**

40. It is presumed that in domestic arrangements and family affairs, that there is not an intention to create legal relations (*Balfour v Balfour* [1919] 2 KB 571). As said in *Balfour* at 579, arrangements such as those between husband and wife:

"are not contracts because the parties did not intend that they should be attended by legal consequences."

41. This principle extends to arrangements between parents and children (*Jones v Padavatton* [1969] 1 WLR 328 at 332). However, this factual presumption is rebuttable (*Padavatton*, at 332H – 333C, per Salmon LJ). The party asserting the existence of an intention to create legal relations must prove it (*ibid.*). This involves a multi-factorial analysis, as set out by Leggatt J (as he then was) in *Blue v Ashley* [2017] EWHC 1928 at [56 ("*Blue v Ashley*")]. Such an approach was adopted more recently by this court in a case involving a dispute between two brothers (*Johal v Johal* [2021] EWHC 1315 (Ch) at [40]–[45]). However, first instance cases are not binding on this court in the way that a Court of Appeal decision would be, but are persuasive if sufficiently relevant.

### **Intention**

42. The intention of parties is judged objectively and in the light of the relevant factual background known to both parties. As Jackson LJ stated in *Hamid v Francis Bradshaw Partnership* [2013] EWCA Civ 470 at [57](ii) (“*Hamid*”):

“The question is what a reasonable person, furnished with the relevant information, would conclude. The private thoughts of the protagonists concerning who was contracting with whom are irrelevant and inadmissible.”

43. However, there may be a residual role for subjective belief in assessing the objective situation, identified by Leggatt J in *Blue v Ashley* at [64]:

“There is, at least arguably, a limitation on the objective nature of the test where one party’s subjective intention is actually known to the other: see *Novus Aviation Ltd v Alubaf Arab International Bank BSC(c)* [2016] EWHC 1575 (Comm); [2017] 1 BCLC 414, para 56.”

44. This will be further developed in due course at the relevant passage of the judgment.

### **Write off or waiver**

45. The defendant will need to prove that (1) there was a clear and unequivocal waiver, and that (2) he altered his position in reliance upon it. In *Woodhouse AC Israel Cocoa v Nigerian Produce Marketing* [1972] AC 741 (“*Woodhouse*”), Lord Hailsham LC gave the leading speech, which was concurred in by Viscount Dilhorne and Lord Pearson. Lord Hailsham LC reiterated the proposition derived from *Low v Bouverie* (1891) 3 Ch 82 (per Bowen LJ) that in order to give rise to an estoppel, “a representation should be clear and unequivocal”. An agreement that payment can be instalments which is then acted upon may amount to a sufficient change of position (*Collier v P & MJ Wright (Holdings) Ltd* [2008] 1 WLR 643 at [29] – [40]).

### **Assessing evidence**

46. The parties agreed that “much of the preceding case law and general approach to assessing witness credibility was set out by HHJ Richard Williams (sitting as a Deputy in this court) in *Rancom Security Ltd v Girling* [2023] EWHC 1115 (Ch) at [67] – [73].” The judge stated that:

- a) Witnesses’ accounts need to be tested against objective facts proved independently of their testimony, particularly by reference to the documented history;
- b) It is also necessary to pay particular regard to their motives and to the overall probabilities;
- c) Where there is a conflict of evidence, reference to the objective facts and documents, to the witnesses’ motives, and to the overall probabilities, can be of very great assistance.

47. I take “documented history” to be a reference to contemporaneous records. This factor I judge to be of particular significance, particularly where there are fundamental disputes months or years later. What was said and intended at the time, as reflected in or inferred from the contemporaneous record, can be a vital significance. This is

because contemporaneous documents are “always of the utmost importance” (*Onassis v Vergottis* [1968] 2 Lloyd’s Rep. 403 at 431, per Lord Pearce), but in their absence, greater weight will be placed on inherent probability or improbability of witness’s accounts:

“It is necessary to bear in mind, however, that this is not one of those cases in which the accounts given by the witnesses can be tested by reference to a body of contemporaneous documents. As a result the judge was forced to rely heavily on his assessment of the witnesses and the inherent plausibility or implausibility of their accounts.” (*Jafari-Fini v Skillglass Ltd* [2007] EWCA Civ 261 at [80], per Moore-Bick LJ);

And to the same effect:

“Faced with documentary lacunae of this nature, the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence” (*Natwest Markets Plc v Bilta (UK) Ltd* [2021] EWCA Civ 680 at [49]-[50], per Asplin, Andrews and Birss LJ).

48. The court “takes account of any inherent probability or improbability of an event having occurred as part of the natural process of reasoning” (*Re BR (Proof of Facts)* [2015] EWFC 41 at [7], per Peter Jackson J); “Common sense, not law, requires that ... regard should be had, to whatever extent appropriate, to inherent probabilities” (*In re B* at [15], per Lord Hoffmann).
49. However, the court must be vigilant to avoid the fallacy that adverse credibility conclusions/findings on one issue are determinative of another and/or render the witness’s evidence worthless. They are simply relevant:
  - a) “If a court concludes that a witness has lied about a matter, it does not follow that he has lied about everything.” (*R v Lucas* [1981] QB 720, per Lord Lane CJ);

Similarly, Charles J:

“a conclusion that a person is lying or telling the truth about point A does not mean that he is lying or telling the truth about point B...” (*A Local Authority v K, D and L* [2005] EWHC 144 (Fam) at [28]).

50. What is necessary is (a) a self-direction about possible “innocent” reasons/explanations for the lies (if that they be); and (b) a recognition that a witness may lie about some things and yet be truthful “on the essentials ... the underlying realities” (*Re A (A Child) (No.2)* [2011] EWCA Civ 12 at [104], per Munby LJ).
51. Decisions should not be based “solely” on demeanour (*Re M (Children)* [2013] EWCA Civ 1147 at [12], per Macur LJ); but demeanour, fairly assessed in context, retains a place in the overall evaluation of credibility: see *Re B-M (Children: Findings of Fact)* [2021] EWCA Civ 1371, per Ryder LJ:

“a witness’s demeanour may offer important information to the court about what sort of a person the witness truly is, and consequently whether an account of past

events or future intentions is likely to be reliable’ (at [23]); so long as ‘due allowance [is] made for the pressures that may arise from the process of giving evidence’ (at [25]).

52. Ultimately, demeanour alone is rarely likely to be decisive. Atkin LJ said it almost 100 years ago (*Societe d’Avances Commerciales (SA Egyptienne) v Merchants’ Marine Insurance Co (The “Palitana”*) (1924) 20 Ll. L. Rep. 140 at 152):

“... an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour.”

## **§VI. ISSUES**

53. To the four issues that the parties had identified, the defendant sought to add a fifth on the first day of the trial. Denis Barry wished to argue that there was no intention to create legal relations. His argument was that this dispute was one exclusively confined to the family and never intended to be enforced by the court. The court heard full argument about the proposed additional line of defence. Mr Sawtell submitted that this introduced unnecessary complexity to an already complex case and caused great distress to his lay clients. The application would necessitate further witness statements as the doors to the trial opened. He objected strongly to the application. The court had to weigh several factors. Of importance was that there did not appear to be any particularly good reason for the late application. This court is placing increased emphasis on procedural rigour. There was a lack of rigour here. But that is not the end of the matter. The court must also examine whether the amendment sought would cause prejudice to any other party or otherwise be detrimental to the administration of public justice. I judged that the issue raised was an important one. It provided the defendant with a complete defence. It was also confined. It would not require any substantial additional evidence, but was in truth an interpretation of the existing evidence about which submissions could be made. All the relevant witnesses could be asked about the topic, but I anticipated that the additional cross-examination would be limited. Therefore, despite the procedural irregularity, I found that there was no or no significant or substantial prejudice that would accrue to any party. Further, the potentially decisive impact of the defence in favour of the defendant meant that I judged that the application should be granted. Thus, a fifth issue was added.

54. It made good sense to deal with the new issue first because if it succeeded, it provided the defendant with a complete defence. I consider the issues for determination in this order:

**(1) Did the parties intend to create legal relations?**

**(2) What were the repayment terms of the loans to the defendant?**

**(3) Did the claimants lend any sums to Bardon Limited?**

**(4) Did the claimants write off any lending to the defendant, such that those sums are not owing to the claimants?**

**(5) What sums (if any) are now owed by the defendant to the claimants?**

55. **Burden of proof.** On Issue 1, once the defendant raises the issue of a lack of intention to create legal relations, a factual presumption against being legally binding exists. It is then for the party asserting that there was an intention to create legal relations to (a) rebut the presumption and (b) prove overall that an intention to create legal relations existed (*Jones v Padavatton*). Issues 2 and 3 also must be proved by the claimants. As to Issue 4, the defendant's case is that the claimants wrote off the loans. Therefore, the defendant must prove the Issue 4 waiver. Issue 5 must overall be proved by the claimants, but is a natural consequence of the court's decisions on the preceding issues. All issues must be proved on a balance of probabilities.

## **§VII. RIVAL CASES**

56. **Claimants' case.** Although these were arrangements within the family, there was also an intention to create legal relations because these were very significant sums of money, the absence of which would (and has) caused hardship to the claimants as the move towards the end of their life. The sums given to their son Denis were described in the claimants' bank statements as loans and not gifts for that very reason, reflecting the seriousness and formality of the arrangements. The loans were temporary loans. The arrangement was for the defendant to pay them back within months. The monies that the claimants loaned were to their son Denis, not to any company. While Mrs Barry did correspond with her son about his possibly using a corporate vehicle, she was at all times lending money to her son. It was then up to him how he structured the transaction that would benefit him, and his parents not at all. There is no indication in any contemporaneous documentation that the claimants agreed to write off the loans. The legal test of a clear and unequivocal representation is not met. Consequently, the defendant owes the sums loaned, £643,055.90 and interest from the date of the formal demand of 4 September 2021 at a reasonable rate of 3 per cent.
57. **Defendant's case.** There was never an intention to create legal relations. This was a private family matter never transacted as a formal contract enforceable in law. This is not how this close-knit family has ever worked. The repayment terms were never clearly identified, another factor that supports the lack of intention to create legal relations. The defendant's mother suggested to him that he use a company to acquire the freehold of Reeves Avenue. She knew that the loan was to a corporation not to him personally. The corporation was Bardon Limited. Although the sums were initially loaned to the defendant, the situation changed over the years and there came a point when his mother said that she and Mr Barry Snr. had agreed to write off £500,000 of the loans, that is all the sums not loaned to Bardon Limited. In that way, the sums loaned to him would become part of his inheritance. Therefore, the defendant owes nothing to his parents.

## **§VIII. EVIDENCE AND MATERIALS**

58. There were extensive materials before the court. To provide an order of magnitude of the material filed, the evidence included, but was not confined to:
- a) Core bundle (amended): 1525pp;

- b) Documents bundle: 4241pp;
  - c) Correspondence bundle: 696pp.
  - d) Claimants' supplemental bundle (19 February 2024): 83pp.
  - e) Defendant's supplemental bundle (19 February 2024): 26pp.
59. Video footage was also provided of contentious incidents. As the trial developed, further materials were adduced. A significant proportion of this material was put to the various witnesses who gave oral evidence. These witnesses were:
- a) Mrs Catherine Barry (second claimant)
  - b) Fiona Feeley (claimants' daughter)
  - c) Thomas Barry (claimants' son)
  - d) Kieran Barry (claimants' eldest son)
  - e) Siobhan Scully (claimants' youngest daughter)
  - f) Denis Barry (defendant and claimants' youngest son)
  - g) Annette Barry (defendant's wife)
  - h) Michael O'Donoghue (defendant's brother-in-law; Annette's brother)
60. As has been explained, there needed to be a further hearing on 19 February 2024. At this hearing, further oral evidence was received from Thomas Barry Jr., Catherine Barry and Fiona Feeley.

## **§IX. ASSESSMENT OF WITNESSES**

61. Although the witnesses were all related, they were very different characters indeed and presented in markedly different ways. These “ties of loyalties” as courts have previously called them, are of significance for the process of civil litigation subjects the memory to “powerful biases”, particularly where a witness has a “tie of loyalty” to a party (*Gestmin SCPS S.A. v Credit Suisse (UK) Ltd* EWHC 3560 (Comm) at [15]-[22], per Leggatt J (as he then was)); and the court should be wary of “story-creep”, as memory fades and accounts are repeated over steadily elapsing time (*Lancashire County Council v C, M and F (Children – Fact-finding)* [2014] EWFC 3 at [9], per Peter Jackson J. The focus of the court remained strictly on the substance of their evidence rather than surface presentational matters which it deemed of far less importance. This is not to say that demeanour was discarded altogether. That would be contrary to authority. However, I took fully into account that this was a bitter dispute between members of a very close family that stirred deep emotions and it was inevitable that people felt strongly and expressed themselves in passionate and emotive ways, and from time to time became upset. The court made due allowance for these familial pressures and dynamics and its task was to see past surface effects to

the substance of the evidence. This task was significantly assisted by different interlocking forms of contemporaneous evidence and the chronological sequence most of which was beyond dispute.

62. The thumbnail assessments that follow in this section are simply that: very short overviews and summaries. I emphasise that the court does not assess witnesses or their credibility in surgically separated silos. I have made a holistic assessment, gauging the evidence of the witness against all the other evidence, oral and documentary. It is neither necessary nor desirable to recite every particle of evidence considered, but the chief features are mentioned in this judgment, with the clear proviso that the court reserved judgment specifically so it could reflect carefully upon the totality of evidence after it had all been given and the submissions of counsel received.
63. I provide a more detailed overview of the two chief witnesses in the trial, the second claimant Mrs Barry and the defendant Denis Barry. I also touch upon the others, but their evidence was far shorter. It must be underlined that this has become an irresolvably acrimonious dispute, and the witnesses called aligned themselves on either side of the claimants-defendant divide. I took into account at all points that witnesses therefore felt strong affiliation for one side or other, both sides claiming to be aggrieved and wronged. Naturally, this is far from a novel turn of events for the court to contend with. It elevated, although it scarcely needed it, the vital importance of contemporaneous accounts and records. It is with that important evaluative qualification that an assessment of the witnesses is provided. While none of them were immune from “team loyalty”, the strength of that factor influenced their evidence to different extents, and the court, carefully observing and measuring their evidence against all the other evidence, was able to reach clear conclusions about the value of each witness.

### **Mrs Barry**

64. Mrs Barry is well into her seventies and has suffered from health problems over a number of years, including kidney cancer (regrettably, she has lost one kidney as a result) and hypertension. The court was astute to her possible vulnerabilities and asked what adjustments to its conventional arrangements could be made to support Mrs Barry give her best evidence. I judged that there was no necessity for her to climb the steps to the witness box and a chair was provided for her to sit in the well of the court. Further, each court session was broken up so she could rest. She was offered the opportunity of further breaks, should she need them. Occasionally, she took up the offer, particularly when she became emotional speaking about the death of her daughter Deirdre. Mrs Barry began her evidence by being quietly spoken and nervous. However, she soon got into her stride, and it was clear how and why she is a strong matriarchal presence at the head of her family, taking the lead role in many of the financial transactions, by arranging money transfers (latterly with the assistance of her daughter Fiona on the computer), going to lenders to secure mortgages and speaking to potential vendors, especially in the Irish community. I found her to be a strong and confident person.
65. At times in cross-examination, she was not able to recollect the fine details of some of the numerous property transactions the family had been involved in over the decades. For example, she was asked about the loan in 2011 on 1 Glebe Road (the premises of



the garage), and could not recollect the detail “without sitting down to go through the documents”, as she put it. She experienced similar difficulties about the details of the 2008 purchase of Crawford House. I did not find this to be deliberate evasion, given this was a property transaction from a decade and a half previously. There is a vast amount of material in these numerous transactions. As she said, “There are so many transactions, it is easy to get them mixed up.” That was a reasonable observation.

66. She repeatedly said that she could not recall precise details without the paperwork as the details were sorted out by the accountant, so she could not explain the way she dealt with the particular transaction without the accountant’s assistance. When she was asked about the structure of a particular deal or the figures on a sheet, she would say, “That’s not my field” and it was “unfair to ask me about all these figures from a long time ago at my age.” She said that she would “depend on everything the accountant said” by way of advice. She would hope that what the accountant did was in her interests, and put her store in professionals.
67. However, there was a marked distinction when she spoke about the sums that were transferred to Denis for Salmon Street and Reeves Avenue. Then she spoke with animation and indeed, at times, anger. She spoke fluently and with conviction about the fact that her son had borrowed money as a loan and had never paid it back even though that was the expectation. The distinction is that she was able to recall what she directly agreed with her son in their face-to-face encounters without the intervention of a professional. She was clear what she discussed in his presence and agreed with him. This was very different to her inability to explain, for example, the notional beneficial share in the goodwill of Tiger Tours in 2011 for accounting purposes, or the details of an equity release loan in 2002 of a property that was not her home, or what was provided as a deposit to her son for a property purchase in 1994. She said that a lot has happened: she lost a daughter to leukaemia, Mrs Barry herself has had two cancers, her husband has had a heart attack, and there has been all the bad feeling with the dispute with Denis. This was a lot for her to contend with and has exacted a physical and psychological toll.
68. At first in cross-examination, she did not accept that she and her husband had sought to avoid inheritance tax. My clear impression was that she was eager to avoid admitting that she had done anything wrong, because she did not believe that she had. The court asked her whether she and her husband had sought to reduce the amount their children would have to pay by way of inheritance tax. She agreed that they did. I did not consider her answers were an attempted deceit, but her emphasising that they had sought professional accountancy advice and acted within that advice and the law as the professionals had explained it to them. But as to the question of inheritance tax, it is clear that a prime ambition was indeed to reduce the inheritance tax burden on their children. This is a point that supports the defendant’s case, as Denis Barry states that the loans were converted into his inheritance or part of it.
69. Another theme that emerged strongly was that the claimants felt from a relatively early stage – that is, before the disputed transactions for Salmon Street and Reeves Avenue – that they wished to provide more for their daughters and grandchildren. I accept Mrs Barry’s evidence that although they did not aim to provide exact parity between their children, they nevertheless wanted broad fairness, and felt that their daughters were at risk of losing out compared to their sons. The earlier adding of the sons to the Honeypot Lane title had resulted in a very valuable asset, possibly the

most valuable within the Barry family's portfolio, being shared by the three sons. It made sense, given the aim of broad fairness, to focus more on their daughters. Her evidence was that "the boys had had enough" and it was then her intention to treat the girls fairly, but not "to the pound". This conclusion is supported by the 2017 will, the substance of which moves the overall financial arrangements in the direction of greater parity between siblings (and grandchildren, with emphasis on ensuring Deirdre's children would be supported).

70. Her oral evidence was consistent with her written evidence about the most essential matters: the sums she said were lent to Denis as loans; the agreement was for him to repay them as soon as Denis was able to secure the funds; the loans were not written off; the lending at all points was to Denis and not any company, and although he might have used a company for the Reeves Avenue freehold, the loan was nevertheless to him and then it was up to him if he used a company as a vehicle for the transaction. She was aware that Denis might use a limited company since this was on the accountant's advice due to some change in tax law (she was unclear what). However, she was adamant that she was lending the money to her son and not some corporation she knew nothing about. Overall, she said "We did not sit down and write a written agreement. ... we gave Denis the money like other children over the years, but it was a loan", meaning just as she had loaned the other children money, the expectation was that it would be repaid to their parents.

#### **Conclusion: Mrs Barry**

71. I found Mrs Barry's evidence on the details of the numerous historic property transactions to be vague and of little assistance to the court. She became emotional at times, especially when she had to speak about Deirdre's serious illness and death. But Catherine Barry is not a pushover by any means and could hold her own. She had an inner steel that belied her external frailty, and that is probably not surprising given her prominent and active involvement in numerous property and business arrangements over the years. It is easy to conceive that she is a formidable person in life.
72. The evidence I found most unconvincing was when she denied that she and her husband were seeking to avoid inheritance tax. I attribute this to a misunderstanding about whether such a course was unlawful. When it was explained to her that it was not, she accepted that she was intent on reducing the inheritance burden on the children and relied on professional advice in good faith. By vivid contrast, I found that she testified about the key property transactions involving Salmon Street and Reeves Avenue and the loans to Denis fluently, consistently and with conviction. There were no significant contradictions in her account of these key transactions. The essence of her narrative shone through with clarity. The question is whether her filed and oral evidence to this effect is true, and Mrs Barry's core consistency supports her reliability and truthfulness without determining them. However, the ultimate decision rests inevitably on a systematic analysis of the totality of the evidence, with particular importance placed on contemporaneous documentation to the extent it exists, all measured against canons probability and improbability.
73. No one could or did doubt the exceptional generosity Mr and Mrs Barry have shown towards their children - and all of them - along with the financial support they have selflessly provided. As Mrs Barry stated in her witness statement (B110):

“15. Every one of our children have had help from Tom and I with their first purchase of their properties. ... All the assistance we have given our children was for them to get on the property ladder or to assist with their property portfolio as and when they needed or were in a position to purchase.

16. All our children lived at home with us until they got married and we never demanded a penny from them for anything while they lived at home. Many parents would charge for their upkeep or a contribution especially when they were working.

17. We have helped every one of our children if they needed it. I would help any of my children if they came to us for help.”

74. On the key transactions, I found Mrs Barry to be a convincing witness. I sensed less malice towards her son Denis rather than a loving mother’s profound sadness that matters had reached this stage, and she appeared visibly shaken at several times in her evidence contemplating the nature of the loss this case had produced, that far exceeded quantification in monetary terms (B109):

“12. We are a close family and not one day has gone by where we don’t talk to each other. It has always been this way. However, I do not speak to Denis and his family anymore.”

**Mr Barry Snr.**

75. The first claimant Thomas Barry Snr. did not give oral evidence at trial. A hearsay application was made to receive his evidence due to his various medical problems. The application was grounded upon medical evidence filed on his behalf. It stated:

“Thomas Barry suffered from a heart-attack in 1998 and was fitted with a pacemaker. Thomas Barry has been advised by his doctor that giving oral evidence at a trial could induce angina or an episode of atrial fibrillation. His doctor has advised against giving oral evidence in the trial unless it was absolutely necessary to do so.”

76. Against this, the defendant invited the court to draw an adverse against him for his failure to testify at trial (*Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882). The basis of the submission is that the absence of Mr Barry prevents the defendant from challenging important aspects of the claimants’ overall case. Against this, it is submitted on behalf of the first claimant that the application is misconceived. In the lead up to the trial, medical evidence was served under the cover of a letter dated 29 September 2023. It stated that Dr Bethell had advised Mr Barry Snr. not to give oral evidence at trial. Mr Barry also relied upon the report of Dr Bethell (B2848). It states:

“Even though his cardiac tests are satisfactory he has underlying ischaemic heart disease and paroxysmal atrial fibrillation. In my experience giving evidence in court is an extremely powerful emotional stimulus. It cannot be considered as similar to the stimulus of an elective stress test. In my opinion such stress could be powerful enough to induce angina or an episode of atrial fibrillation. In view

of this I would advise against giving oral evidence in the trial unless it was absolutely necessary to do so.”

77. The pressures of a trial on potential witnesses are not uniform. They are case- and context-specific. This is a case where intense emotions and heightened feelings exist on all sides. Further, the case that the defendant’s counsel was obliged to put to the opposing witnesses was stark: that Denis Barry’s parents and his siblings were lying and had invented a false account due to a family grudge or falling out. I vividly saw how distressed Mrs Barry became when pressed about certain features of the defendant’s case. I have no doubt that since Mr Barry Snr.’s case was entirely aligned with his wife’s that a similar fundamental attack on his credibility must have followed. While such medical matters cannot be predicted with fine precision, there was a real risk that stress along with the powerful emotions that inevitably would have been stirred could have induced angina or atrial fibrillation. In such circumstances, I judge that the safe and prudent course for Mr Barry Snr. was not to have given evidence. I decline to draw an adverse inference from it. I find, as the claimants submit, that the explanation for Mr Barry Snr.’s absence is “straightforward and wholly satisfactory.” That said, a couple of further observations are necessary.
78. First, there is a distinction between no adverse inference and the impact of Mr Barry Snr. not giving evidence on his filed evidence. I judge that there were several questions that would have been quite properly asked on behalf of the defendant that he lost the opportunity to ask. This has led me to significantly reduce the weight I place on Mr Barry Snr. written evidence. I have adopted this course in fairness to the defendant and so that his case was not unfairly prejudiced due to his father’s medical condition. Moreover, the evidence of the father is of limited value about certain important disputed incidents (the recorded telephone call, the meeting in the shed, the discussion outside Reeves Avenue) since Mr Barry Snr. was not present. It is not suggested that there were conversations between the defendant and Mr Barry Snr. about writing off the loans. No one relies on any email or messaging from Mr Barry Snr.. Nobody disputes that Mrs Barry played a far more prominent role in the loans than her husband did. The defendant has had the opportunity to challenge her evidence fully. He took that opportunity and the court has been able to assess the value of her evidence with little difficulty.
79. Second, I do not accept the submission made on behalf of the claimants that the fact that Denis Barry sought an adverse inference against his father is evidence of his desperation or bad faith. This was a legitimate legal application to make. He made it. That it failed was a reflection of the judgment made by the court, being sensitive to the medical condition of Mr Barry Snr. and the particular pressures of this bitterly disputed case. It comes to this: no adverse inference; the failure of the application is not held in any way against the defendant.
80. While I note that Mr Barry Snr.’s evidence is broadly consistent with that of his wife, I place little weight on it in the circumstances of this case. The defendant simply has not had the opportunity to challenge it directly and I am conscious of the prejudice to his case that would otherwise produce. Therefore, I put the evidence of Mr Barry Snr. to one side, except where it is not controversial between parties, and decide the case on the rest of the evidence. To that extent, the court accedes to the defendant’s application, made at the outset of the trial, that “little weight” should be accorded to Mr Barry Snr.’s evidence. In any event, I cannot think there is any significant

prejudice to the claimants as they accept that Mrs Barry “took the lead” in making arrangements with the defendant and the role of Mr Barry Snr. was “minimal”.

### **Denis Barry**

81. Denis Barry was a quietly spoken witness who remained throughout extended and taxing questioning both respectful and courteous. He can be charming and this reflects his mother’s comment in her first witness statement that “he is a people pleaser and always has been” (B126, §93).
82. His evidence was that while he was expected to repay the loans, that changed. His parents agreed for the loans to be written off and to be treated in effect as part of his inheritance. In respect of Reeves Avenue, sums were loaned not to him but to the company Bardon, and his mother both knew that this was the arrangement and approved it, but expressly communicated with him about it. He accepted that his parents assisted him to purchase his first home, the flat at 149 Everton Road, Stanmore. He benefitted again from them by being named on the title register as one of the proprietors of Honeypot Lane, despite not having contributed money to the property’s acquisition. He agreed that by the age of 24 his parents had “set him up for life” through the assistance with property purchase and a job.
83. His position was that he could not “confirm or deny” that certain payments that Kieran and Fiona made to their parents as loan repayments. I examine the contemporaneous evidence later to indicate what is revealed. But he did accept that he was not aware of his siblings paying his parents tens of thousands of pounds to support them, and so if his siblings paid over significant sums, they were likely to be loan repayments. He said in evidence about Fiona, “She would have said Mum and Dad have helped me buy a flat and I will be paying them back.” He agreed that if Kieran had borrowed tens of thousands of pounds from their parents then he would expect his brother to pay it back as it would be a “serious amount”. The sums of £650,000 loaned for 295 Salmon Street and Reeves Avenue are “the biggest” he knew his parents to have loaned out. He did not know of any sums loaned to the children’s companies, and thus the loans were made personally to his siblings.
84. In around November 2014, he became aware of his parents turning their attention to distributing their remaining assets among Siobhan and Fiona (the girls) and the Deirdre’s children (the grandchildren). He was asked in terms about this by Mr Sawtell:

Q: In Nov 2014, you did not think that this provision to leave their remaining assets for the three daughters was unfair?

A: I did not think it was unfair to me at the time.
85. This strikes me as being of significance. There were reservations about getting “the girls” involved in Honeypot Lane due to their partners (spouses) also getting involved, so the preferred option – certainly the simplest – appeared to be to divide the claimants’ remaining available assets among the “three girls” (Deirdre standing for her children in discussions). The defendant accepted this in cross-examination when directly asked.

86. This takes us to the loans for 295 Salmon Street and Reeves Avenue. The defendant said in evidence that Salmon Street was a “nice road and area” and was “a couple of doors down from Deirdre’s house ... We were all trying to help out” (after her death). His explanation for the assistance he received from his parents is that he had tried to raise funds on his existing properties but could not get the advance, so there was “a shortfall”. At that time, he was aware that his parents were using funds they received to pay the mortgage on their Brockley Avenue home. He knew that they had planned to use the money they were to receive from being bought out of Honeypot Lane (in exchange for their 40 per cent stake) to discharge their mortgage on Brockley. He said in evidence, “They said the mortgage was large and they wanted to pay it down.” This answer tallies with the email that Fiona sent to the family email group on 14 January 2015, that “once it’s done” (Honeypot Lane monies raised to buy out the parents) she would “clear down mums and dads larger part of mortgage”. The defendant’s “Barrys Garage” email was included in this message. With this background, he agreed in cross-examination that £350,000 (the loan amount for 295 Salmon Street) was a large amount to his parents, given their circumstances, and it was money that “they would want back”. At the time in June 2015 he regarded it as a serious agreement. It was a firm agreement. At another point in his oral evidence, he accepted that he knew within his family that loans of hundred thousands of pounds would be “a serious matter” and he “would not treat it informally”.
87. As to Reeves Avenue, he said he was interested in purchasing the upstairs leasehold. He asked Coln upstairs if he could get first refusal if he retired and sold up. In 2015 Coln spoke to Mrs Barry as he had tried to get hold of Denis without success. She spoke to Denis and said it would be a good investment. It was something the defendant would like to do. It came at the time when they were negotiating Salmon Street. He spoke to Mike Gaffney, the broker. Of the two properties, he and his wife preferred to buy Salmon Street as it would be their new family home. He said, “I did not think at the time what would have happened if I did not repay. I would have thought we would have sat down and sorted something out.” But he was clear that he was the purchaser of the leasehold at 37a Reeves Avenue, whereas Bardon Ltd purchased the freehold. It was company owned by him and his wife Annette. He said Bardon had not started at this time and did not have a bank account, so the loan had to “go through me”.
88. He stated that his mother said that her and his father’s intention was to structure things so everyone got equal shares and it would be structuring the inheritance as a gift. He was there with his wife “definitely one time” and maybe a couple of times on his own. Some of these discussions may have been face-to-face or on the phone, which would mean there were no records. Speaking of the March 2021 “demand” email from his parents, he said:
- “They sent me the email because they were looking for repayment. I don’t know why they were looking for repayment of an outstanding loan. I never was expecting to receive it as the loan was no longer a loan and was restructured as a gift ... It came out of the blue and I was shocked because it had been restructured as a gift.”
89. He stated in re-examination that while loan agreements were “serious”, they were different from borrowing from a bank. With a bank there are “set terms” and a bank “would enforce”. In a family, by contrast, he did not “think they would do anything

else”, that is, enforce. He believed people would sit down together and sort it out as a family. He was challenged about the account he gave in his first witness statement, dated 27 March 2023 (B269, §45) about the discussion he claimed to have had with his mother after having visited the owner of 37a Reeves Avenue in “late March 2015”. He states:

“Claimant 2 explained that my other siblings had already been given help, including cash gifts and property gifts and that the Claimants wanted to do something for all of their grandchildren. She explained that each of my siblings would get something from them for the grandchildren and it would all even itself out eventually. At no time did me or my wife approach the Claimants and ask them for a loan to purchase either 37A Reeves Avenue, the Reeves Freehold and/or Salmon Street – the Claimants did however offer to help with those purchases.”

90. This was an important part of his case, that Mrs Barry discussed inheritance arrangements with him and the sums loaned to him would effectively be part of that. However, when he was challenged about this in cross-examination, he accepted that there was no discussion of inheritance arrangements at that meeting. This is an important change of account, given the importance of the alleged inheritance discussion he had previously claimed to have taken place. It dents the court’s confidence in the accuracy and reliability of his evidence on this important point. He was further challenged about his account and conceded about Reeves Avenue that he “knew the loan was going to be temporary until he could regularise the freehold and get a mortgage”, this was so he could then “restructure both mortgages and pay back the temporary loan”. The defendant’s concession about the temporary nature of the loan is supported by Mrs Barry’s email to the mortgage broker Mike Gaffney on 18 February 2016 (B916) when she says that she is “trying to help out one of the gang”, meaning the children, then identifies the recipient of their assistance being her son Denis. She continues that, “the funding is in place by means of a temporary loan from Tom [Mr Barry Snr.] and I”. Mr Gaffney replies on the same day (B915) that “Once all completed I will be arranging to get both 37 and 37A remortgage and equity released in order that Denis can repay loan to you.”

### **Conclusion: Denis Barry**

91. I emphasise that where I have found that Denis Barry’s evidence is weak or unreliable or not in accordance with the truth, I have not assumed that those defects in his credibility can be read across and infect his credibility on other issues. I have looked at each topic as clearly and distinctly as the evidence permitted, while always assessing the totality of evidence, and have not dismissed the evidence of a witness whose evidence is not accepted on Point A when it comes to Point B. This has been a principle applicable to all witnesses.
92. There were parts of Mr Barry’s evidence that I found unimpressive and unconvincing. This was because the evidence did not accord with the contemporaneous documentation, the established behavioural patterns in this family, or suffered from significant improbabilities. For example, it is his case that his parents effectively gifted him over half a million pounds (if one accepts his case that the Reeves Avenue freehold loan was to Bardon – disputed by the claimants). Nevertheless, there is nothing anywhere in the extensive papers to document that. He says that he does not

recall at any point writing even a short note to thank his parents for their generosity. This is particularly puzzling given that he accepts he knew that his parents needed money to pay off the mortgage on their home in retirement. He said his father had a mobile phone, but did not send him a message to thank him, then he on reflection added, “I may have probably rung him”. When challenged that he had never previously mentioned speaking to his father to say thank you, he said he that he could not recall a specific conversation with his father and he said he only said he may have spoken to him about it. It is also curious that if the plan was for the defendant to have received the loan amounts or most of them as part of his inheritance (therefore as a non-returnable gift), his brother Kieran was asking as late as November 2019, “where did £630,000 go and most importantly what for?” (B1454). It is hard to understand why it is, given that the claimants wished to equalise arrangements for “the girls”, the defendant, who had already significantly benefitted through his share of Honeypot Lane, should benefit again to such a substantial and asymmetrical degree. Further, there were material and important inconsistencies. They will be detailed as the court analyses the evidence on the disputed issues. That, of course, is not the end of the matter: the court must examine the evidence in the round.

93. Just before the start of the trial, he sought to add a new and fundamental plank to his defence, asserting that there was no intention to create legal relations in the sums transferred in respect of 295 Salmon Street and Reeves Avenue (Issue 1). It was striking that despite the importance to his case of this very late amendment, his evidence on detail was not convincing and in parts contradictory. This was similar to problems with his evidence about the question of waiver (Issue 4). At times, he embellished and embroidered his evidence, reframing it in light of the documentation put to him in cross-examination. He often appeared to be reciting a script rather than fluently narrating events. When fundamental problems with his account were put to him, he showed a facility to think on his feet and adapt his answers in order to cling onto his case. In this, his conduct in the witness box reflected the assessment his mother made of him in her first witness statement that “Denis has always been the talkative one. He has the gift of the gab” (B126, §93). It is stressed that this does not and cannot provide a complete diagnosis of Denis Barry’s evidence or anything remotely like it, but it contains an important grain of truth about the way he strategically sought to shift his position to support his case.
94. Overall, the court found significant problems with the defendant’s accuracy, reliability, and at times, adherence to the truth. He claims that the case has been brought against him “to punish him”. He was unable to say “why they would want to punish me”.

### **Other witnesses**

95. For all the following witnesses, the court was particularly alive to the risk that their evidence would be coloured by partisanship and ties of loyalty in the *Gestmin* sense, and made due allowance for that fact, looking for independent and especially contemporaneous support wherever possible.
96. **Fiona Feeley.** Fiona became deeply involved in assisting her mother and both appreciated and admired her parents. For example, she said that from her mother, “I was learning from the best.” At B641 she writes, “you go mummy, alleluhia! U r 100% right and always are. love you.” She was not neutral in this family dispute, but



aligned firmly with her parents. This factor has to be taken into account in considering the partiality of her evidence. She is a very hard worker and had many properties to manage and administer under the family umbrella. As she put it, "I am the PA to everyone." Her central role in the mass of family communications supports what she says. She says that she kept a spreadsheet of the sums borrowed from her parents and the repayments (B751), which tallied broadly with her bank statements, often labelling the transfers back as "paying loan" or similar. The attack on her credibility comes from the defendant's claim that she is motivated to misrepresent the true situation by the financial advantage that would accrue to her if the defendant were compelled to return of the sums transferred. This is because those monies would in turn assist their parents pay off Brockley Avenue, and that would benefit her.

97. Against this, I found Fiona Feeley to be a composed, calm and persuasive witness, clear about detail and able to answer questions directly and fluently. This was important because, given her role assisting her mother, she worked closely with her mother during the financial transactions for the disputed loans. Her account supported her mother's, and she was working daily very closely with Mrs Barry at the time and therefore had a clear understanding of what had been happening, unless one accepts the defendant's case that Mrs Barry wished to conceal things from the other siblings, a suggestion that, as will be further discussed, appears implausible in this family. I found Fiona Feeley to be an impressive witness who was trying to assist the court.
98. **Thomas Barry Jnr.** Thomas Jnr. came across as a timid and nervous but always affable character. He was someone who likes to work with his hands and was not on top of the detail or figures. He said he was a "hands person" and "as you probably guessed, maths is not my strong point." He appeared genuinely embarrassed that he still owed his parents approximately £34,500 on the purchase of 105 Salmon Street that he had made with their assistance in 2011. He said that he "never intended to rip off his parents". That said, he had nevertheless paid off approximately 80 per cent of the sums he had borrowed from his parents, which reflected, as he put it, "The intention to pay back his parents" and he never knew of "any other loan to have been written off." He was asked why if loans had to be repaid, his parents only made a formal demand to his brother Denis in March 2021. His answer was telling, "My parents are patient people, what can I say?" He has been particularly affected by the breakdown in the relationship with Denis, with whom he had worked closely on a daily basis in the garage business. He said that the start of the problems was in early 2020 when the "nephew" knocked on the front door as a prank and it "did not go down well". But at that point the relationship with Denis was "okay", and they worked together daily. It was during 2020 that their relationship deteriorated. It is clear from the defendant's email to his parents in March 2021 that he knew about Thomas's efforts to make regular repayments by "standing order" of the loans his parents had made to him (B32-33). There were no serious contradictions in his evidence, and no reason to doubt his honesty or accuracy, save for his alignment with his parents, for which due allowance had to be made.
99. **Kieran Barry.** Kieran Barry said that there was "lots of lending" from their parents to the children (siblings). In 2017 he was buying a house in Ireland. It was around Brexit and the exchange rate went up and down. So his mother said to use her money in Ireland as there would be no exchange rate as it was already lodged in Ireland. His parents loaned him the money. He said, "We arranged that when the exchange rate

settled down, I would pay it back. There might be a tiny bit left, but I believed it had been paid off.” He believed he had borrowed Euros 40,000 and had paid his parents back around Euros 36,500, hence the small residue. However, the schedule of loans provided to the court had to be changed as the records indicate that in fact Kieran borrowed Euros 50,000 in 2017 and therefore about Euros 13,500 remains outstanding. He produced bank records that showed that the repayments were described as “KNBarryloan”, which reflects the loan that he and his wife Natalie took from his parents. He accepted in cross-examination that he knew his parents had a big mortgage on their Brockley Avenue home in 2017, but the sums he borrowed were already in Ireland and his parents were thinking of doing an extension in Ireland. It was put to him on behalf of the defendant that the reason the Euros 10,000 had “slipped his mind” was that repaying his parents “was not that important”. He strongly refuted the suggestion. He said he would “treat it as seriously as borrowing money from a bank.” He explained that the reason he missed this additional Euros 10,000 was that he had marked it as “Kat Loan” while the others were all “KNBarryloan”, meaning he missed it going through his records.

100. He expressed concern about how the defendant was conducting his financial affairs (B252, §57):

“Mum and Dad were funding the purchases for Reeves Ave. I was shocked to hear and remember thinking this is an easy borrow, sort the mess out, re mortgage and repay Mum so why was it taking so long? In the meantime, Denis was living a very high life he bought a boat, a Land Rover and went on expensive holidays. In hindsight it was crazy. When I found out mum had also lent money for the freehold I was absolutely flabbergasted. When Denis was planning his extension in 2019, I remember thinking Mum had put around £300,000 into Reeves Ave and he was now planning an extension on his house.”

101. In fairness to the defendant, Kieran was challenged about the fact that he owned boats as well. It turned out that he owned a “rib” worth £3000 and an old fishing boat he bought about 20 years ago and would use to go out into the Atlantic to fish for mackerel and cod. He was plainly aggrieved at the defendant’s lifestyle when, as Kieran Barry believed, their parents were labouring in retirement with a high mortgage. It was put to him that the defendant’s Land Rover was a decade old. The witness refuted this and said that it was worth around £60,000. “If I was in that much debt, I would not purchase a 60k car if I owed my parents that amount of money.” A similar concern about the extravagance of the Land Rover was expressed by Thomas Jnr. in his first witness statement (13 March 2023) when he said that when he saw Denis “turn up” in a Land Rover, “I called my mum afterwards to find out if he had paid her back the money he owed her” (B216, §57). As for Kieran, the clear impression was that this sibling, markedly different to the presentation of Thomas Jnr. or Fiona, was intensely aggrieved as opposed to just being concerned by how his parents who are elderly and vulnerable had been made to struggle while the defendant refused to repay the money he owed them. This appeared the clear source of his grievance towards the defendant. His account on oath was:

“The Salmon Street loan was a temporary loan until Denis using Mike Gaffney would sort out his mortgage and if he couldn’t Denis would sell his residence as that would be the tax free one to sell. Denis told me this.

As for Reeves Avenue, I understood that my parents were buying the freehold so he could get a decent mortgage on the property. I was quite amazed when I found out that he was buying the other leasehold. He could remortgage the property and pay the money back. It was quite a simple thing and it was like what I did with Everton Drive. If you increase the lease then everyone is interested.

Over the time Denis would tell my mum that the repayment ‘is taking the time and I will sort it out.’ I would have been told that by my mother. She 100% wanted the money back because she needed it and she wanted to look after Deirdre’s children and she talked about her mortgage. She was around 70 and she had a high mortgage and it was a worry to her.

In respect of any of the loans to the children, none of them have been written off as far as I know.”

102. When challenged that he had not mentioned in his statement that Mrs Barry had said Denis was sorting out the loans, he instantly replied without hesitation that he had overheard a telephone conversation which was not in depth. His evidence had importance as he was involved in the transfer of funds to the defendant for the 295 Salmon Street purchase. Given what he said about this central transaction, it was important for the defendant to impugn Kieran Barry’s credibility. Kieran’s account was:

“Thomas, Denis and I had refinanced Honeypot Lane and Crawford House. The excess money was around £750,000. We thought we’d use to buy parents out of property. We did not know that you can’t raise money on asset to buy out a partner. So the money sat in an account for maybe up to two years. Then suddenly I was asked by Denis and possibly Mum also, I’m not sure, to transfer the money for Denis to buy 295 Salmon Street. Denis said he did not have access as the money raised was in a Lloyds bank account and so I was asked to transfer it. I can’t remember speaking to Thomas. It was a last-minute thing that had to be done equally. I was the only person who had authorisation. Denis told me it was a temporary thing to get Salmon Street. Denis said was a ‘temporary thing’ as Mike Gaffney was sorting it out and we’d get the money back or he would sell his house.”

103. This account runs contrary to the defendant’s. It materially supports the accounts of both Mrs Barry and Fiona and constitutes important additional evidence in support of the claimants’ case. Overall, I found Kieran Barry’s account fluently delivered and convincing. He never appeared to be reaching to find a narrative, but recalling and communicating what had happened. That I judged to be of more significance in weighing his evidence than the obvious grievance he felt towards his brother Denis, which in any event he never sought to conceal, but explain, because of the distressing impact Denis’s actions had had on their ageing parents.
104. **Siobhan Scully.** Ms Scully was on the margin of things. She did not live in Salmon Street; she borrowed the least amount from her parents (£20,000) and had repaid it in its entirety. The defendant makes a similar accusation against her about an incentive to misrepresent the position about loans due to future advantage from Brockley Avenue. This accusation against someone so tangentially involved made the court cautious about the weight that could be placed on it.

105. **Annette Barry.** The defendant's wife Annette Barry gave evidence about 295 Salmon Street. She said that it was a "lovely house" and became their main home, being close to Deirdre's children. She said that she "could not speak highly enough of Kathleen [Mrs Barry] and her support" and that the claimants "had helped them a great deal".
106. Her evidence about the "write off" was that Denis had had a previous conversation with his mother and when Denis and Annette were in the sitting room of their house he told her that, "Mum said don't worry about the 500,000." Annette said this meant the sums for the Reeves Avenue freehold had to be repaid as Mr and Mrs Barry Snr. had a mortgage on Brockley Avenue, but not the half million pounds for the rest. The witness claims that Mrs Barry had told Denis that they should not tell anyone about the write off. Standing back from this, it seems improbable that this were true. Given that Fiona worked so closely with Mrs Barry, and given that Kieran, for example, had transferred the £350,000 for Salmon Street, it is hard to conceive how it was ever going to be feasible to keep a £500,000 gift quiet in the Barry family. Annette Barry's first statement, dated 27 March 2023, has virtually no content save for her comment that she had read her husband's and her brother Michael's statements and "agree[s] with them". I found this unimpressive, particularly since in her oral evidence she sought to give evidence about the conversation with her husband about the write off. It meant that the first time she gave an account that the conversation was in their sitting room at home was on oath in the witness box. This was a very significant moment because instead of being under an obligation of half a million pounds, the debt had vanished. Such a significant moment, if true, would most likely have featured in her original witness statement. She made a second witness statement on 7 July 2023. She also failed to mention the conversation then. This alleged sudden debt relief must have been a great weight off her mind as she told the court that she was concerned about taking on all this debt "because it was a lot of money that would have to be repaid at some point." She was concerned about being in debt because "someone giving you money is hanging over you." She said of the £650,000 sums transferred for Salmon Street and Reeves Avenue, that "I had no idea how the £650,000 was going to be paid back." If all this was the case, it is remarkable that the episode when she found out that half a million pounds of the indebtedness would be wiped off is not recorded in her statements, save for an indirect reference to her husband's statement. When she says she found that that there was the £500,000 write off, she did not contact Mrs Barry or Mr Barry to thank them. Instead, she said "I would thank her when I saw her and I did." Once more, this is not recorded in her statements and the first account of it was given in the witness box, another puzzling omission if true.
107. She also gave evidence about the crucial conversation "in the car" following the visit to 37a Reeves Avenue. She said that she and Denis got in the front and Mrs Barry got into the back. She was asked whether during that conversation there was any discussion about "inheritance and gifts". She said that there was not. This materially contradicts the evidence filed by her husband (B268, §44). It is a significant contradiction that undermines his original account, which he later resiles from.
108. Annette also gave evidence about the New Year's Eve family confrontation at Michael O'Donoghue's house, a matter that will be examined later. She said that she called Siobhan "a tramp", but if "they" had all "not landed" at their home, "we might not be here now". Therefore, she supported her husband's account that the litigation

was provoked not by money that was genuinely owed by Denis to his parents, but because of a family feud. I found that parts of Annette Barry's evidence to be marred by similar improbabilities as her husband's evidence. Understandably, she is fiercely loyal to him, having been together with him since she was aged 17. I found parts of her evidence unsatisfactory and not presented fluently or convincingly, but in a way that suggested that she was trying to recall what she should be saying. This is unimpressive.

109. **Michael O'Donoghue.** Mr O'Donoghue is Annette Barry's brother, and lives in Shaftesbury Avenue, the scene of the New Year's Eve 2020 incident. He and Annette are very close and he also has a close relationship with the defendant, speaking to them "on a daily basis" (B308, §5). Mr O'Donoghue is a senior solicitor, being a senior associate in a prominent firm, with a specialism in commercial litigation, among other areas. He qualified in 2013. He filed three witness statements.
110. He confirmed that the £650,000 that was "given" to his sister and her husband was "a lot of money" for them and his sister "felt uneasy about it because it is a large sum of money". He provided hearsay evidence (admissibly) about what was called the "write off". His evidence was that Annette told him that "they did not have to worry about £500,000, but had to pay back £150,000." This tallies with his sister's evidence. He was challenged that there was no evidence of messaging between him and his sister that such large sums were written off, especially surprising because he and his sister were so close. He said counsel's suggestion was "incorrect". He was taken to text messaging between him and Annette from 5 June 2017. On the defendant's case this would post-date the conversations Annette and the defendant had had with Mrs Barry in which she had said that £500,000 was written off. This can be seen from the defendant's evidence in his first witness statement (B276, §79):

"In the period between December 2016 and May 2017, Claimant 2, me and my wife had a number of conversations regarding the Salmon Street Loan and the Reeves Avenue Loan. Claimant 2 explained that I did not need to worry about paying it back, as the Claimants were in the process of sorting out their affairs and were taking advice on the best way to gift over their estate to their children to ensure that there was something left to each of the grandchildren."

111. Therefore, on the defendant's case the conversations with Mrs Barry about the write off had already taken place. The contents of the texting exchange between Mr O'Donoghue and his sister then become problematic. He messages her that they should be able to "get £200k" from "37" (that is Reeves Avenue). It is what he says his sister can do with such sums that is significant:

"I know a fair bit goes to tax and dad [Mr O'Donoghue Snr.] but that should cover new car or money back to Kathleen."

112. If the sums owed by Annette Barry and the defendant had been written off by her mother-in-law, and Annette had spoken to her brother Michael about the write off, it is unclear what money would need to be sent "back to Kathleen" (Mrs Barry).
113. He also gave evidence about the New Year's Eve events at his home. He was keen to tell the court about his discussions with the police that vindicated his sister in New Year's Eve incident, even though he was not asked about the police. He made a long

and complex speech about the incident when counsel asked a direct and focused question capable of simple answer. He embellished what had happened and claimed that Mrs Barry “stormed into porch” of his house: he had not said that in his witness statement and referred to her “walking” (B319-20). His answer when challenged about this contradiction was not persuasive. He claimed that “walk or stormed are the same thing.” Evidently in the context of those events they were not. When being asked about New Year’s Eve, he went out of his way to mention what Mrs Barry had said on 19 March even though he was not being asked about it.

114. What came across unmistakably was that Mr O'Donoghue was heavily involved in assisting Denis Barry at many important stages of proceedings. Mr O'Donoghue is very close to his sister, as he put it “intertwined” with her. Their profound connection was strengthened by their mother dying early and their taking over their father’s business together. He also has a very close relationship with Mr Barry. He agreed it was only natural that he wanted to help and support them and he spent two weeks sitting behind counsel in the High Court trial. My assessment is that Michael O'Donoghue has plainly taken sides very firmly in favour of his sister and her husband. I must bear this firmly in mind in assessing the weight of his evidence. I judge that it is not independent. He gave evidence in a way that demonstrated that in answer to narrow and precise questions from counsel, he wanted to advance his sister’s case and emphasise the hostility and pattern of family problems.
115. He was not a direct witness to the conversations with Mrs Barry and so relates what he says his sister told him, and in other key parts of his narration veered from being a pure witness of fact, which was his role, and instead trespassing into advocacy on behalf of his sister. While this is understandable in the family dispute, it resulted in the court having to be cautious about the reliance that could be placed on his evidence. He said he had “helped Denis through these proceedings” and had assisted Denis with a lot of the litigation correspondence. I found that he was a partial witness and lacked the necessary balance. He spoke with animation and a measure of sublimated anger about events.

#### **Conclusion: witness assessments**

116. I have carefully read the evidence and have had the undoubted benefit of the extended opportunity to view and scrutinise the witnesses during this lengthy trial. I have no hesitation in concluding that on the question of the legally binding nature of the loans, the evidence of Mrs Barry and the witnesses called on behalf of the claimants, to the extent that they testified about the issue, particularly about the pattern of parental loans and repayment by their children, is significantly more plausible, cogent and convincing than the evidence of the defendant and his witnesses, and likely to be true. On this question, the evidence Mrs Barry is likely to be true, reliable and accurate, and likely to assist the reasonable observer to assess objectively the intention of the parties (*Blue v Ashley* at [56]-[64], per Leggatt J). The evidence of Denis Barry is, I found, unsatisfactory in several critical respects and does not conform to principles of probability and is frequently at odds with the contemporaneous evidence, such as it exists.
117. I emphasise that I do not reject everything that the defendant says, just as I do not accept everything that Mrs Barry says. Such binary forensic bifurcations do no justice to the nuances of evidence in this case, and Mrs Barry was weak on the fine detail of

other historic transactions that she principally left to professional advisers. However, on most of the factual disputes between Mrs Barry and the defendant about the disputed loan arrangements, I found it significantly more likely that Mrs Barry was truthful and accurate compared to her son, whose evidence I found unimpressive and unreliable.

## **§X. ISSUE 1**

### ***Intention to create legal relations***

#### **Submissions**

118. The issue of intention to create legal relations was raised late in proceedings by an application dated 28 September 2023, and thus very close to the trial starting on 4 October 2023. Since the arguments and counterarguments are so wide-ranging, it will help to parse out the strands of submission.
119. **Defendant's submissions.** This topic became, once permission was granted by the court, a fundamental plank of Denis Barry's defence. Indeed, well over one half of the defendant's written closing submissions was taken up by the issue. The defendant submits, inter alia, that:
- a) The oral loan agreements lack many of the features typically expected if the arrangement was intended to create legal relations;
  - b) The terms were not recorded in writing;
  - c) The claimants did not seek security for the debt;
  - d) The beneficial ownership of funds advanced by the claimants from the proceeds of the Honeypot Lane sale remains unclear;
  - e) The arrangement remained flexible, dependent on changing circumstances, and especially the defendant's ability to raise money;
  - f) The conduct of the parties is inconsistent with creating legal relations, with the comments of Mrs Barry during the telephone conversation of 28 November 2021 being revealing, when she said "I'm not putting pressure on you at the moment";
  - g) Evidence supports the motivation for the lending to be natural love and affection rather than a commercial transaction;
  - h) The size of the transactions was not unusually large compared to others within the family, comparable to the Honeypot Lane arrangements;
  - i) Other monies have been given or loaned to the other siblings that supports the funds to Denis having been an arrangement without any intention to create legal relations:

- i) The Honeypot Lane transaction involving Thomas Jnr., Kieran and Denis;
  - ii) The Crawford House (becoming Catherine House) arrangement, whereby the claimants benefitted from the rental money;
  - iii) The High Road transaction involving Thomas Jnr. and Denis;
  - iv) The transactions with Thomas Jnr. in relation to 40 Vista Way and 105 Salmon Street;
  - v) The transactions with Kieran in respect of 2 Park Place and the property in Ireland;
  - vi) The transactions with Fiona involving Littlehampton, 55 Springfield Mount and 5a Haydon Close;
- j) The second loan being to Bardon (on the defendant's case) makes no material difference;
  - k) The suggestion that the claimants were desperate for money runs contrary to the second claimant's comment that they were "OK at the moment" and the fact that the first £92,000 of the Honeypot Lane monies was not used to pay down the claimants' mortgage.

120. **Claimants' submissions.** It must be remembered that the claimants strongly opposed this issue being litigated at trial at all. The submissions made included:

- a) This was a last-minute issue raised in desperation by the defendant, and its lateness points to its obvious lack of merit;
- b) The court "indulged" the defendant by permitting him to outline in a witness statement all the facts he relied upon, yet he produced a poorly evidenced document, heavily reliant on subjective belief;
- c) The defendant's case on creating legal relations is inconsistent, with his asserting different intentions with regard to the 295 Salmon Street (personal) arrangement and the loan that was (on the defendant's case) made to Bardon on 37a Reeves Avenue; whereas, and inconsistently, he otherwise claims the intention to create legal relations was the same for all sums advanced;
- d) In cross-examination, the defendant admitted that the sums loaned were "serious" and the arrangements "firm";
- e) There was a common pattern to loans from the parents to the other siblings, which involved substantial sums being borrowed and then repaid or mostly repaid;
- f) These sibling loan transactions were attended by a degree of formality: Fiona kept a contemporaneous spreadsheet, as did Thomas Jnr.;



- g) The loan to Kieran was documented as “KB LOAN”, and that to Thomas Jnr. as “TJB LOAN”; similar to the way the sums loaned to the defendant were documented;
- h) The clear gift to Deirdre’s husband was documented “GIFT DEE”;
- i) There is no instance of sums loaned to siblings being written off, and certainly not in sums of hundreds of thousands of pounds, as the defendant claims has happened with him;
- j) Honeypot Lane:
  - i) The Honeypot Lane sums involved sums of comparable magnitude to the disputed sums loaned to the defendant and the evidence shows that the parents and their sons treated the Honeypot Lane transaction with great seriousness.
  - ii) In cross-examination, the defendant accepted that the Honeypot Lane transaction was a matter of great seriousness;
  - iii) A significant difference exists between the complexity involved in the Honeypot Lane transaction (a partnership arrangement) and the comparatively “straightforward” loans to Denis Barry;
- k) Littlehampton: is in fact a clear case of the family following professional advice.

## Discussion

121. **Principles.** I judge that the fact that this line of defence was, as Mr Sawtell puts it, “very lately pleaded”, has made very little material difference. The court granted permission for the issue to be tried. After that, it must be fully and fairly considered and I propose to do that. The proper approach is:
- a) There is often a factual presumption against an intention to create legal relations in many internal family arrangements, what *Chitty* numbers among “Agreements in the Private Domain” (*Chitty* (35<sup>th</sup> edn) at §4-248);
  - b) This extends to arrangements between parents and children (*Jones v Padavatton*);
  - c) That presumption is rebuttable (*ibid.*);
  - d) The burden of proof rests on the party seeking to prove that no intention to create legal relations existed (*ibid.*);
  - e) The court should adopt a context-specific multifactorial approach to assess whether the intention to be legally binding has been proved or not (*Blue v Ashley*);

- f) The court will use the yardstick of the impartial reasonable observer to determine objectively from the totality of the evidence what the parties intended (*Chitty* (34<sup>th</sup> edn), vol. 1, §15-004.);
- g) The subjective beliefs of the parties may nevertheless be relevant to establish objective intention, if known to the other relevant parties (*Blue v Ashley*).

122. I have found the observations of the editors of *Chitty* about the nature of legal or other relations between children and parents to be of value:

“There is unlikely to be direct evidence of the parties’ actual intention since the context will generally preclude reference to legal enforcement. Rather, the parties’ intention to be bound is imputed from the relevant circumstances to determine what type of legal arrangement, if any, is most appropriate.” (*Chitty* (34<sup>th</sup> edn), §4-247)

123. I examine the totality of circumstances to determine the objective situation and particularly ask what a reasonable and impartial observer would have concluded about the intention of the parties, should she or he have been privy to all the relevant matters before the court.

124. **Formality.** These agreements, whatever their legal enforceability, were not documented in writing. The defendant points to this fact as a strong indicator that they were not intended to be legally binding. While it is true that the terms of the loans were not reduced to writing, it is clear that when transfers were made from the claimants’ Santander account to the defendant, they were marked “Loan to DB”. The defendant emphasises the fact that very often familial money arrangements are not intended to be legally binding. However, I find that it is precisely because the claimants trusted their son and up to that point had no reason to doubt him, or indeed any other of their children, that explains the loans not being reduced to a formal written contract. This is not the same thing as this not being a sufficiently serious situation which contributes to the suggestion of legal enforceability if necessary. I can accept the defendant’s submission that merely documenting the transfer for banking purposes as a loan is “not enough”, as Mr Laville puts it, to determine their legal enforceability. However, being documented contemporaneously, it does strongly support the idea that these transfers were loans and not gifts. The question of whether there was an expectation of repayment will be examined shortly. The adaptability of the terms, with Mrs Barry agreeing that “we will deal with that later”, is not so much a signpost pointing towards a lack of intention to create legal relations, as parents being sympathetic and responsive to the changing situation and difficulties of their son. Equally, the delay in formally demanding repayment speaks, in my judgment, far more powerfully to the claimants displaying understanding and tolerance, what Thomas Jnr. called his parents’ “patience”. This delay, which was to the defendant’s benefit, is then strategically used by the defendant to support his case on enforceability. In similar vein is his argument seeking to equate a banking letter offering a grant of facility that is capriciously withdrawn with these transactions. The submission is that if the parents had not loaned him the sums needed, he would not have sued them. I regard this as a false analogy and of little assistance in determining where the truth lies. The fact is that his parents are making a claim against him in the High Court. I also find of little value the defendant’s submission that in none of the

statements by the siblings does the witness say that if they did not repay, their parents would sue. The fact is that all the witnesses providing evidence supportive of the claimants have stated that there was a clear intention that sums loaned by their parents were accompanied by an obligation to repay them and were treated seriously.

125. **Size of loans.** Each of the three loans was substantial and well in excess of £100,000: (rounded figures) £350,000 (Salmon Street), £155,000 (Reeves first floor flat leasehold) and £145,000 (Reeves freehold, whether to the defendant or his company Bardon Limited). I cannot accept the defendant's submission that these transactions were "commensurate in size" with the loan to Fiona for £183,000. Taken together, the sums exceeding £650,000 far outstripped what was loaned to his sister. To support this argument, the defendant submits that each of the loans (and one might by such analysis subdivide Reeves Avenue into freehold and leasehold components) is a "separate transaction". This is a somewhat artificial analysis and seeks to avoid the powerful force of the global picture. There has been nothing approaching £650,000 that has been loaned to any one of the claimants' children. The defendant submits that the loans to him were not "extraordinary transactions". They do not have to be. I remain unpersuaded by the argument that Mr Barry Snr. appeared to know little about the details, and this supports the lack of legal enforceability. The true position is that Tom Barry had been suffering with his health and thus I do not accept the submission that "you would have expected him to have been more involved if this was legally enforceable". Mr Barry Snr. has featured very little in this case precisely because his wife has taken the lead, and thus it is entirely consistent for him not to have been directly or prominently involved and says nothing about intention about legal relations. This point is reinforced by how Fiona speaks vividly of how she effectively became "apprenticed" to her mother, who was a fount of acquired experience and know-how in such matters. Property transactions were Mrs Barry's "thing". For example, she spoke to the owner of the first floor flat at Reeves Avenue; she drafted an email for Denis about possible transaction structures; she regularly liaised with mortgage brokers and solicitors. While there was no security for these substantial loans, Mr Laville realistically submits that that the lack of security is more akin to "a neutral factor". Once more, the fact that this was a loan within the family explains the absence of security, not the absence of legal enforceability.
126. The scale of this lending must be viewed in the context of the parents' assets and life circumstances when the sums were transferred, and this lends weight to the argument that an intention to create legal relations existed, examining the seriousness of consequence. One way to test that proposition is to ask what would be the effect if Denis simply refused to pay. Would his parents, when they had loaned over £640,000, have no protection in law at all? That includes Bardon, but even removing it, the same question arises in respect of around half a million pounds. It seems inconceivable that where there has been such extensively serious levels of lending by two elderly people who still had a sizeable mortgage on their home, that they should be entirely without legal protection or recourse. Examining the situation like that adds weight to the suggestion that these very substantial loans were intended to be legally enforceable, albeit with reluctance and only if necessary. Naturally, within a family, one would have hoped that such legal formality would never prove necessary. Regrettably for all, that has not proved to be the case.

127. **Subjective beliefs.** The test of intention is ultimately an objective one. In fairness to the defendant, the court – exceptionally – granted him permission on the first day of the trial to file further evidence about the intention to create legal relations question. This provided the defendant with an additional opportunity to set out the matters he relied upon factually. That, of course, did not preclude his counsel from making legal submissions about the inferences from the evidence and matters of presumption. A significant focus of Denis Barry’s further statement was an account of his subjective belief: that if he had considered the point, he would not have thought that his parents would resort to court to enforce any failure to repay. He believed matters would have been “sorted out” within the family. At the same time, the defendant accepts in his third witness statement that:

“To the extent that my parents lent money to Bardon, that was different from the money that they lent to me personally. In the case of the Bardon Loan, I would have expected my parents to be able to assert their rights in court if necessary as creditors of the company.” (§9, 1472)

128. Focusing for a moment exclusively on Reeves Avenue, why would there be a difference between the loan for the benefit of the defendant for the leasehold of the second Reeves Avenue leasehold and the loan for the benefit of defendant to acquire the freehold Reeves Avenue through a company, which he (along with his wife) owned and involved no one else? When Denis Barry was challenged about this, he accepted that the money (on his case) loaned to Bardon was a serious matter, and that the monies loaned for the other properties were also “serious”. He stated in terms:

“The loan of hundreds of thousands of pounds was a serious matter, with serious consequences.”

He further stated:

“Both aspects of Reeves Avenue were equally serious loans.”

And again:

“I agree the loan agreements were serious agreements.”

129. He was asked about this topic on several occasions by Mr Sawtell. He agreed that “£350,000 was a large amount to his parents” and it was money that they would want back. At the time in June 2015, he regarded it as a serious agreement and that “It was a firm agreement”. But the question is what objective circumstances reveal. It is conceivable in some families and some contexts that the loan of such “serious” sums with “serious consequences” on non-repayment could lack an intention to create legal relations. However, I judge that the scale of these sums for this family and the likely serious consequences for the life of Mrs Barry and her husband point far more clearly in favour of an intention to create legal relations. The defendant relies upon evidence from the claimants suggestive of the non-legal nature of the agreement. Mr Barry Snr:

“Never did I think it would come to this and I would have to go to court to get back the money we lent.” (B1475)

Mrs Barry:

“The children all knew they had to pay it back. If they didn’t pay, then we would have had to sit them down to get this sorted and get our money back.” (witness statement 2)

130. I am not persuaded that this greatly assists the defendant. What Mr Barry is stating is that he never believed that his son would refuse to repay the loans which would necessitate resorting to the court. Mrs Barry is stating that in the first instance upon non-repayment, the family would sit down and get the problem “sorted” together. This is no more than seeking to resolve matters by other means than court proceedings, a form of informal alternative dispute resolution, which is always encouraged by the court, reserving litigation as a last resort. It also true that the other siblings have confirmed that the parent-child lending was based “on trust” (see Thomas Jr., Siobhan and Fiona variously). But that is the basis of loaning the money within the family in the first place. That is not inconsistent with an intention of legal enforceability should there be flat refusal to repay.
131. **Honeypot Lane.** The three brothers, trading as Barry Brothers, raised significant sums to acquire their parents’ interest in Honeypot Lane. In opening the case, the defendant took the court to an email from mortgage broker Mike Gaffney dated 7 July 2014 (B767). Mr Gaffney appends documentation for a “commercial” for a loan facility from Lloyds Bank for £2,200,000 in respect of the “refinancing” of both Honeypot Lane and Catherine House. The email states that “at a future date” the claimants would “transfer their interest” to their sons. The defendant’s case is that this shows the lack of intent to create legal relations. However, here was the involvement of professionals in the transactions, both a mortgage broker and solicitors (Herbert Reeves). Against this, the defendant points out that in cross-examination, Mrs Barry insisted that the “buy out” was yet to take effect almost a decade later, and this undermines the claimants’ case that the Salmon Street loan came from their own funds.
132. In order of the magnitude, the Honeypot Lane sums raised were broadly equivalent to the disputed sums in this claim. The funds paid over to their parents were used for the Salmon Street loan to the defendant. Of importance in understanding the true status of the transaction are WhatsApp exchanges within the family in June 2015 about the fact that the transaction had not yet gone through. Fiona stated that without the formalities being completed, the brothers were simply giving the money “for the Craic”. The concern about not completing the transaction was echoed two years later by Kieran in an email dated 15 May 2017 about Honeypot Lane (and Catherine House) marked “URGENT!”. Kieran expresses his concern about the delay, and that “Sanjeev” was “very keen” to start a management company to progress matters. Kieran asks the brothers for suggestions for names for the management company. When the defendant was taken to this material in cross-examination, he accepted that the Honeypot Lane transaction was a “serious” transaction, the contrast being with something informal and discretionary. The objective position appears to be that the intention was always to ensure that the sums raised by the brothers and paid to their parents were intended to “buy out” the claimants’ interest in Honeypot Lane, but for numerous reasons the transaction was not completed. I find little evidence in the history of the Honeypot Lane transaction to support the defendant’s suggestion that the disputed loans to him were made without an intention to create legal relations. If

Honeypot Lane was not a “serious” transaction, the repeated concerns about the failure to complete the transaction formalities make little sense. I accept the claimants’ submission that the Honeypot Lane situation was complex and attended by legal difficulties as there had been a partnership involving the claimants and they were selling their interest to other partners to be paid for by sums raised against the partnership property. Indeed, in his 2017 email, Kieran expresses concern about the “tax” position and whether they could defer the tax “into a trust fund that is pushed into the never never”, but that Lloyds Bank might “wake up” to the prevailing situation and might “force us or change the mortgage position”.

133. While I can concur with the defendant’s submission that Honeypot Lane was a “tangled web of transactions”, this complexity is the most likely explanation for the arrangements remaining incomplete, rather than these very substantial transactions “never being treated as legally binding”, as the defendant contends.
134. **Crawford House/Catherine House.** Crawford House was renamed Catherine House in honour of Mrs Barry. Kieran’s evidence is that this, surprisingly to him, upset Denis, because it left him without a legacy (something in his own name, or of his own). Putting such personal vanities aside, the defendant’s case on this property is that it shows the confusing and informal approach the Barry family took towards property ownership. The property was purchased by the sons through a loan in their name and their share of the drawdown of the Honeypot Lane refinancing. However, the rent was paid into a family account from which the claimants drew income. I cannot think that this arrangement much assists the defendant in his claim of a lack of intention to create legal relations. In the wider scheme of this issue, it is of little significance.
135. **Littlehampton.** Littlehampton has particular importance for the defendant’s case. It is submitted that the “ownership history” is “unclear and contradictory”. This supports the contention that there was no intention to create legal relations with the disputed loans because Littlehampton shows how the Barry family engaged in property transactions that fail to comply with truly commercial arrangements. It is submitted that the various properties under the Barry family umbrella were “essentially family assets and disposed between them as a whole”.
136. What is clear is that Littlehampton was purchased in the name of trustees. Mrs Barry’s brother is Father Robert Barry (“Uncle Bob”), a priest in the Catholic Church, lived in the Littlehampton property at various times. Mrs Barry’s evidence is that her brother had intended to become a monk but due to ill health he was unable to complete the process. The property in Littlehampton was purchased jointly by the claimants and Father Barry as it was close to the monastic community, and it also was used from time to time as a holiday home for the family, being near to the sea. The claimants’ position is that no trust deed was executed by the parties. It appears that the legal title in the property was vested in the names of Deirdre (Angland) and Michael Kennedy, solicitor (details from the note by Kerri Blake to Fiona dated 1 November 2011 (B650)). When the time came to sell the property, Mr Kennedy explains his understanding in an email to Fiona dated 27 April 2015 (B813):

“As you are aware, the property was purchased on the 4th January 2002 in the joint names of Deidre [sic] and myself for the sum of £136,000.

The funds for the purchase were provided as to £10,519.97 by Father Robert Barry with the balance coming from Tom and Catherine Barry. No Trust Deed was executed by the parties in 2002 and, on the face of it, the property is held by me (as the surviving Trustee) for the benefit of the parties in the proportions in which they contributed towards the purchase price.”

137. The claimants submit that there is indeed the creation of a resulting trust with the property being held by the surviving trustee (Michael Kennedy, the solicitor) for the benefit of the parties in the proportions in which they contributed. The claimants cite s.53(1)(b) of the Law of Property Act 1925, that:

“a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will.”

138. The claimants further rely on the leading case of *Rochefoucauld v Boustead* [1897] 1 Ch 196. I accept the claimants’ submission that these “fine points of equity” have little relevance to the issues in this trial. There are two significant features. First, the claimants throughout took and relied on professional advice. Second, they accounted for capital gains tax, again on professional advice, with the calculation being sent to Fiona by the accountant Charlie Brett of Schiavi Pole Brett Limited on 3 June 2015. As Mr Brett put it, the figures “are based on your mum and dad owning 45% each and Uncle Bob 10%” (B835). This apportionment reflects precisely the proportional contributions by the claimants and Father Barry in the original purchase. Once more, I cannot detect anything of material assistance to the defendant in the transactional history of Littlehampton.

139. **Labels.** I find that there is a marked distinction between those sums given by the claimants as gifts and those that were loans. The claimants gifted Mikey Angland £20,000 to assist him with care and upkeep of their grandchildren following the tragic death of their daughter Deirdre. It was marked in the bank statements as “GIFT DEE”. By contrast, when monies were provided to Thomas Jr. for 50 Dagmar Avenue, it was marked as “LOAN TJB”. It was repaid. When money was loaned to Kieran, it was recorded as “KB LOAN”. It was substantially repaid. The loans made to the defendant were recorded in the claimants’ Santander Bank account statements as “Loan to DB”. The fact that the money transfers were formally recorded as loans in the bank statements provides support - and makes it materially more likely - that a degree of seriousness and formality existed. The sums just could have been marked with the recipient’s name, that would have identified the transfer sufficiently. But the fact that contemporaneously the transfers were marked as loans lends weight to the formality of the arrangement and increases the likelihood that there was an intention to create legal relations.

140. **Loans to other siblings.** There has been a very extensive history of loans from the claimants to the other siblings. There is a solid and powerful consistency of evidence from the claimants and their other surviving children aside from Denis that everyone understood that the loans must be repaid. I accept that evidence. Fiona kept a spreadsheet (B495). Thomas Jr. also kept a record of his regular repayments (B627) and the defendant knew of Thomas Jr.’s pattern of repayments.

141. But one must be clear that the fact such repayment expectation existed does not inexorably mean that the loans each were accompanied by an intention to create legal relations. Further, it has emerged during the course of the litigation that in fact not all the loans have been repaid. The court invited the parties to agree a schedule of the amounts loaned and the amount remaining outstanding. The central dispute remained, of course, that the loan in respect of the Reeves Avenue freehold was to Bardon and not the defendant. While the defendant was able to agree most of the transactions on the schedule that the claimants produced, some of the entries were marked by him “neither confirm or deny”. Further, some figures were subject to error in relatively minor details and needed to be corrected. That said, the entries that the defendant did not confirm made overall only little difference to the big picture and related chiefly to a £25,000 repayment by Fiona in 2010 and several of the repayments by Kieran amounting to a similar sum (Euros 27,000). I provide approximate figures including those that are not denied by the defendant, rounding as necessary. This is all about providing a sense of the orders of magnitude, as the court indicated to the parties.

| <b>Name</b>  | <b>Loans</b>                         | <b>Repayments</b>     | <b>Outstanding</b>   |
|--------------|--------------------------------------|-----------------------|----------------------|
| Fiona        | 342k<br>(190 + 50 + 30 + 8 + 8 + 56) | 274k                  | 68k                  |
| Thomas       | 173k<br>(123 + 50)                   | 138.5k                | 34.5k                |
| Kieran       | 50k (Euros)<br>£45.5k                | 37k (Euros)<br>£33.6k | 13k (Euros)<br>£11.8 |
| Siobhan      | 20k                                  | 20k                   | 0                    |
| <b>Total</b> | <b>£580.5k</b>                       | <b>£466.1k</b>        | <b>£114.3k</b>       |

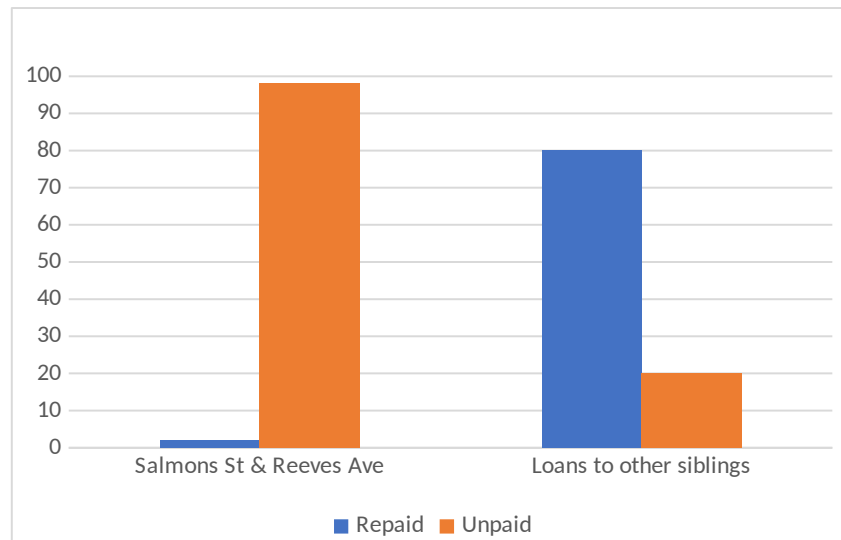
*\* (It should be noted that the Sterling-Euro exchange rate was volatile in September 2017 due to Brexit. Therefore, the figures are approximations. A figure of £1 to Euro 1.1 is used.)*

142. Since there is a dispute between the parties about whether the Reeves Avenue freehold loan was to the defendant or to Bardon, I combine the figures for now, pending the court’s decision on the issue. In total, on Salmon Street and Reeves Avenue, the claimants loaned just over £650,000. Of that sum, as of the filing of proceedings at the end of November 2021, £11,000 had been repaid. By the time of



the start of the trial in November 2023, that figure had risen to £17,500. As a result of these figures, some calculations are possible.

143. The earliest loan to the other siblings was that to Fiona in 2007. The last was to Kieran at the end of 2017. Therefore, the sums loaned to the other siblings were spread over a decade. The results are (in approximate terms):
- Outstanding loans to other siblings:  $114.3/580.5k =$  **approximately 20% outstanding; 80% repaid.**
  - Outstanding loans in respect of 295 Salmon Street and 37a Reeves Avenue (to the defendant) and Reeves Avenue freehold (whether to defendant or Bardon):  $11/650k =$  **approximately 98% outstanding; 2% repaid.**
144. Even if one disallows the approximately £50,000 repayments from Fiona and Kieran not confirmed by the defendant, the other sibling figures become: 28% outstanding; 72% repaid. However, the defendant does not deny that Fiona and Kieran made these repayments, and this is their evidence, which the court is prepared to accept. It is difficult to see how the defendant could credibly have denied, for example, Fiona's evidence that she repaid her parents £25,000 on the loan they made to her for the 55 Springfield Mount purchase. In the trial bundle (B514) is an extract from Fiona's Santander Bank statement for June 2010. There are three payments out (two of £10,000 and one of £5000) on 3 June. The transactions are described as "BILL PAYMENT to Part Repay Loan REFERENCE Part Repay Loan". This contemporaneous record strongly supports Fiona's evidence that she was repaying her parents for the Springfield loan, made to her in July 2009.
145. Seen in these terms, and it must be emphasised that the figures remain approximations, the character of the loan repayments in respect of 295 Salmon Street and Reeves Avenue lies in stark contrast to the loans to the other siblings. Here was money loaned in respect of the Salmon Street and Reeves Avenue over a period of 6 months that exceeded the totality of the lending to the other siblings over a decade. Although the loans to the other siblings have been around 80% repaid, by the time of issuing the claim form, 2% of the loans for Salmon Street and Reeves Avenue had been repaid. These figures may be broadly (I emphasise broadly) represented visually in this way:



*Percentage sums repaid/unpaid*

*(Note 1: based on agreed figures save for approximately £50k sibling repayments neither confirmed nor denied by the defendant – but see in-text commentary. Note 2: “unpaid” does not assume that the sum is properly owed – a separate issue.)*

146. This pattern of repayment by the other siblings is unsurprising given the seriousness with which they treated the receipt of substantial sums from their parents, evidence the court has accepted. My judgment is that on the weight and balance of evidence from the family witnesses save for the defendant, and the pattern of repayments outlined above, there was a clear expectation that loans would be repaid and the repayment schedules and pattern of periodic repayments strengthen the suggestion that these matters were taken very seriously within the Barry family. This is what an impartial and reasonable observer who was privy to these events would unquestionably have concluded. These were not gifts that were repayable at the election of each child. The expectation of repayment is reflected in the pattern of repayments. Objectively viewed, that was the clear intention. The fact that some sums loaned to the other siblings remain outstanding does not negate the general principle. I cannot accept that the loans, especially when they relate to such substantial amounts, were consequence-free loans or effectively gifts with the option to repay at the discretion of the child. That runs entirely contrary to the great weight of evidence I received and the pattern of repayments make this clear. This is because the children appreciated that these were serious matters, and they respected and honoured the trust their parents placed in them in lending them substantial sums without security. While I concur with the defendant’s submission that “seriousness” is not the sole test, seriousness remains an important factor, and the evidence filed before court and the patterns of repayments indicate that these substantial loans were treated with seriousness by both lending parents and receiving children. A reasonable impartial person would be bound to reach such a conclusion if acquainted with the facts. The claimants in their selfless generosity – never doubted by anyone in this trial - sought to help their children get on the property ladder and improve their lot by the loan of money. The children in an overwhelmingly extensive way did repay. The assistance I glean from previous loan and repayment patterns is that within the Barry family these arrangements were treated with great seriousness and the repayments were not regarded as optional at the whim of one of the recipients. All this

unquestionably to my mind lends weight to the suggestion that there was in respect of very significantly sized loans to Denis Barry a clear and obvious intention to create legal relations. However, the nature of the loan arrangements with other siblings, while of real significance in support of the claimants' case, does not finally determine the question of the loans to the defendant. Other factors that must be considered.

147. **Purpose of loans.** The defendant already had a home (74 Vista Way) when he sought assistance from his parents in respect of Salmon Street and Reeves Avenue. It seems he wanted Salmon Street, which was a substantial family home near to where much of the rest of the family lives, to be his new home. Indeed, he did go to live at 295 Salmon Street, which is the address given in his witness statements. That would mean that 74 Vista Way could either become an investment property or he could sell it to repay the loan. The defendant already owned the leasehold on one flat at Reeves Avenue (number 37). He was seeking to buy the second leasehold and the freehold for the whole site. This would provide him with an enhanced property portfolio. At this point in his life, the defendant was married with children and owned his own home and had investment property. The loans were not akin to those which the claimants had made to the siblings to get them onto the property ladder. The defendant was already on it, thanks in part to previous assistance from the claimants. By 2015, the defendant was looking to secure a better home and broaden his property investment portfolio. These facts lend some weight to these loans being different in nature to the "start-up" funds they had given their children. Certainly, in respect of Reeves Avenue, these were commercial acquisitions the defendant wished to make.
148. **Consequences.** I accept the evidence of Mrs Barry that the non-repayment of the loans to her son has had an adverse effect on her and her husband. The mortgage on their home at Brockley Avenue remains. The plan had been to pay off the mortgage and use the balance of the funds for living expenses if necessary. Mrs Barry makes this point to Denis in the recorded telephone conversation, when she tells him that if she can "get the money back" she can "pay off our mortgage" (initially she mentions Honeypot Lane, but quickly corrects herself to Brockley Avenue) because "we are paying the mortgage at the moment" (B1126). She adds, "that money should have all come to us."
149. In absence of the sums loaned on Salmon Street and Reeves Avenue being repaid, the claimants have not been able to pay down their mortgage. This has caused both Mrs Barry and Mr Barry Snr. great worry and distress. It is difficult to explain why that should be if they agreed to change plan and give Denis this money as an outright non-returnable gift. They would have factored the consequences of the loss of approximately £650,000 to them into that gifting. Yet the consequences, I accept on the evidence, have been seriously detrimental to both claimants, who now live well into retirement with a mortgage on their home. Contrast this with the benefit to the defendant: he has used the funds to purchase a second leasehold in Reeves Avenue, the freehold to the whole building (whether loaned directly to him or to Bardon Limited his company: to be determined in Issue 3) and a very substantial property at Salmon Street. He was able to expand his property portfolio through the commercial exploitation of the first floor flat at Reeves Avenue, bolstered by gaining control of the site's freehold. His existing home at 74 Vista Way could either be sold or commercially exploited in the rental market. These facts produce a gross imbalance of outcome and inexplicable asymmetry, very substantially benefitting the son and

harming the parents. I find that such obvious consequences of loan retention shed light on the true nature of these transactions. The serious consequences strengthen, but do not determine, the argument that these were loans with intended legal force if defaulted upon.

### Conclusion Issue 1

150. I am not persuaded by the claimants' submission that due to the "infinite" variability of familial arrangements and the absence of a "single Procrustean rule for them all", the presumption of fact in such cases may be "diminished". In my judgment, the proper approach is to ask whether the circumstances give rise to the presumption. On the totality of evidence, I have no hesitation in finding in the defendant's favour that they have. I rule that there is a presumption of fact that operates in this case, that presumption being against an intention for agreements within the Barry family to be legally binding and enforceable. I recognise Mr Laville's explanation of the purpose behind the presumption, that very often family financial arrangements do not have the force of law and instead rely on, as counsel succinctly put it, "shame, social pressure, good faith, mutual trust and affection". But the fact that the presumption is rebuttable indicates that this is not always the case. While the parties put authorities before the court involving other family disputes, it seems to me that each case is acutely fact-specific. The answer in this case lies in the evidence in this case, and the relations between and history of the Barry family, and their acts, arrangements and intentions about parental loans to the children. I derive next to no adjudicative assistance from unrelated cases involving people unknown to the Barrys in very different circumstances.
151. I also accept the defendant's submission about *Blue v Ashley*, that the court takes an objective approach, but the subjective understandings of the parties in oral contracts may have relevance, albeit limited, to the question of objective intention. Leggatt J said at [64]:
- "What is accepted by counsel on both sides is that where, as here, the court is concerned with an oral agreement, the test remains objective but evidence of the subjective understanding of the parties is admissible in so far as it tends to show whether, objectively, an agreement was reached and, if so, what its terms were and whether it was intended to be legally binding. Evidence of subsequent conduct is admissible on the same basis. In the case of an oral agreement, unless a recording was made, the court cannot know the exact words spoken nor the tone in which they were spoken, nor the facial expressions and body language of those involved. In these circumstances, the parties' subjective understanding may be a good guide to how, in their context, the words used would reasonably have been understood. It is for that reason that the House of Lords in *Carmichael v National Power Plc* [1999] 1 WLR 2042 held that evidence of the subjective understanding of the parties is admissible in deciding what obligations were established by an oral agreement."
152. In this case, the subjective understanding of Mrs Barry about the "temporary" nature of the loan (see the "Ask Charlie" January 2016 email discussed in the next section) points away from it being an unenforceable gift (see similarly her February 2016 email to Mike Gaffney) and towards the seriousness of the arrangement. Mrs Barry's understanding was not a "private thought" (in the *Hamid* sense articulated by Jackson

LJ) confined to Mrs Barry's head, but obvious and clear parts of the discussions about the loans and repayments, contemporaneously documented in the early 2016 email sent by Mrs Barry to her son. Subsequently, the subjective understanding of Mrs Barry during the crucial November 2019 recorded telephone conversation with the defendant makes it absolutely clear that she and her husband expected repayment of the sums and needed it. The defendant did not dispute this during this conversation. It is a logical and reasonable inference that the "subsequent" conduct of the parties as expressed by the detail of the recorded conversation accurately reflects the subjective understandings of the parties at the time when the loans were agreed. The court will shortly examine in greater detail November 2019 conversation. Nevertheless, the legal significance of subjective understandings and subsequent conduct must be clearly understood. It is to assist in the objective assessment of the legal enforceability of the loan. In my judgment, an impartial observer, supplied with all the material before the court, would conclude from the scale of the loans the claimants provided to their son Denis in the specific context of the value and structure of his parents' assets, the stage reached in their life, their ambitions for retirement and the next phase of their life together, from the subjective understanding of Mrs Barry and the subsequent conduct of the claimants and their son Denis, that there was a clear and obvious intention to create legal relations in respect of their loans to him for both Salmon Street and Reeves Avenue. The defendant could not deny that these were "serious" amounts of money. His wife Annette agreed. These substantial sums were particularly important to the claimants given their time of life. In combination, the figure loaned to the defendant in excess of £650,000 amounted to the biggest amount that the claimants loaned by a significant margin. I find the notion that repayment of such life-affecting amounts would be unenforceable at law, and could just be retained by a recalcitrant child no matter the harmful impact on the life of his parents, is, objectively viewed, unsustainable on the evidence before me, particularly in the context of how diligently the other siblings repaid the sums that their parents loaned to them to assist them with property purchases. It is not a question of whether all the loans from the claimants to their various children over many years, indeed decades, were intended to create "rigid legal relationships", as Mr Laville puts it. No doubt within a family the terms and fine detail of such an arrangement may be adjusted sympathetically and without officious rigidity, without removing the obligation to repay. The question is whether the loans to the defendant that he has not repaid were of a kind such that the requisite legal intent emerges clearly to a reasonable observer is informed of the relevant facts. Of all the other loans made to the other children, none of them has been "written off". The discrepancies in what has been repaid amount to, as Mr Sawtell submitted, "in the order of tens of thousands, and not hundreds of thousands of pounds". When one totals the amount loaned (not gifted) by the claimants to their children, the amount that remains outstanding pales in significance. Indeed, the fact that the great preponderance of the sums that the claimants have loaned to their children have been repaid materially supports their case.

153. The lack of written documentation does have the effect that the time for repayment remains unclear, and terms will be examined carefully in a subsequent section. However, the subjective understanding of Mrs Barry manifest in the early 2016 emails points away from the loans having no legal force. Mrs Barry was communicating the temporary nature of the loans with both her son Denis and with Mike Gaffney the mortgage broker. Such communications with the other party and a professional adviser lend support for an intention to create legal relations.

154. It is submitted by the claimants, and this was the effect of Mrs Barry's evidence, that there was an expectation of repayment within 6 months, with the loans operating as a form of "bridging loan", short-term lending to facilitate property purchase. However, one must contrast this assertion with the email that Mrs Barry sent to the defendant on 4 March 2021 (B1210) that states that they "did not set a strict schedule of the repayment of the loan." Further, in an email to the claimants dated 29 March 2021 (B32), the defendant replies:

"You both offered to loan us the money to purchase the freehold of Reeves Avenue and said that we could repay it once we had the funds."

155. I am not persuaded that the lack of certainty about precisely when the loans would be repaid either undermines the validity of the contract for uncertainty as the clear expectation was that the monies would be repaid as soon as it was realistically feasible to do so, with the parents once more affording one of their children a degree of flexibility and understanding, as reflected in Mrs Barry's March 2021 email, that the sums were loaned to Denis on the basis that "they would be repaid to us in the short term; we had several conversations with you to this effect". This seems to me to be likely to reflect the true situation and does not negate the most important feature: that these loans had to be repaid and were sufficiently serious and came with an intention to be legally binding.
156. I conclude that rather than the disputed loans being "motivated by love and affection", as the defendant contends, the true position is that it was due to the undoubted love and affection the claimants had for the defendant that they were prepared to trust him and rely on his to honour his debt to them, holding in reserve, and only in extreme circumstances, resort to courts of law. As Mr Sawtell puts it, a commercial lender, just like the claimants, does not expect to have to go to court to enforce the obligation; it expects the contract to be honoured. The claimants also did. I have no doubt whatsoever that having to resort to the High Court has been a terrible sadness for Mr and Mrs Barry. I have seen the distressing effect on Mrs Barry. It is submitted on behalf of the defendant that Mrs Barry was enthusiastic about the Reeves Avenue transaction or transactions because, as Mr Laville puts it, "she saw the commercial advantage of Reeves Avenue". This is an interesting submission, because it moves closer to accepting that Mrs Barry had her "commercial" head on when thinking about the opportunity that Reeves Avenue offered, and this is different from helping her youngest son first get on the property ladder, on which he already found himself. I accept the claimants' submissions that by 2015-16, Denis Barry was a mature adult with a home of his own, a wife, children and a property portfolio. I reject the suggestion that describing him as "an adult", as the claimants do, is a "huge simplification", because that status points to an important distinction between the position he found himself in when he sought his parents' assistance on these acquisitions and when he was first starting out in adult life and was recipient of his parents' support and largesse. The defendant's position on the Reeves Avenue freehold loan (alleged by him to be to Bardon), undermines rather than strengthens his case. In his third witness statement, he states that he would have "expected my parents to be able to assert their rights in court" (B1472). Yet he also had maintained that the position in respect of intention to create legal relations was the same for all the loans. Then again in cross-examination he accepted that all the loans were of

comparable seriousness. His case on the intention to create legal relations issue is inconsistent and incoherent because it is misconceived.

157. I examined the totality of evidence, identifying and weighing relevant factors side by side and in combination – what I have approached as a multifactorial and holistic analysis. Having done so, I am completely satisfied that the claimants have rebutted the factual presumption that undoubtedly arises in this case. I find that the claimants have proved Issue 1 on a balance of probabilities. Concretely, that it is more likely than not that there was an intention to create legal relations and this is precisely what an impartial and reasonable observer would have concluded was objectively the position. Therefore, I reject this line of defence and proceed to consider the rest of the disputed issues. I emphasise that the fact of the defendant losing this issue does not mean that his other arguments fail. They do not stand or fall together, and indeed a fortnight before the trial, the defendant was contesting the case without the issue. The other issues are discrete and capable of materially affecting the overall outcome irrespective of the decision on Issue 1.

## **§XI. ISSUE 2**

### ***Repayment terms***

158. As the court pointed out to counsel, this issue could be taken first as the nature of repayment terms, if any, may impact the question of intention to create legal relations. However, counsel broadly wished to retain the order of issues and the court was content to do so. I indicated that I would revisit my conclusion on Issue 1, however, in light of my conclusions about Issue 2, and indeed the others, to conduct a holistic analysis.
159. On Issue 2, then, the question is what repayment terms, if any, were agreed between parties for the loans made by Mr and Mrs Barry to their son Denis. Whether the loan for the Reeves Avenue freehold was to Bardon Limited or the defendant will be considered in Issue 3. On Issue 2, the dispute between parties is whether the repayment terms were agreed with sufficient clarity, and if so what they were.
160. **Claimants’ submissions.** The claimants submit that their case has been clear and consistent. The £350,000 loan for Salmon Street was funded from the sums raised on Honeypot Lane. The purpose of this money was to buy the claimants out of Honeypot Lane so they could pay off the mortgage on their home at Brockley Avenue and have funds to live off in retirement. Thus it was obvious that the loans must be temporary to achieve these objectives. It was the defendant who said that he would repay the loan within six months by re-mortgaging Salmon Street or selling 74 Vista Way. As for the Reeves Avenue loans, Mrs Barry’s email dated 19 January 2016 makes it plain in terms that this was a “temporary loan”. This was thus akin to a very short-term bridging loan. The advantage to the defendant was that he was guaranteed in receiving the funds, coming as they did from his parents, and there would be no interest as against the expensive interest charges on bridging loans.
161. **Defendant’s submissions.** The defendant argues that the only evidence about terms comes from Mrs Barry and the defendant. The evidence is insufficient to amount to

enforceable contractual terms for repayment. In any event, the claimants would have known that Salmon Street could not have been re-mortgaged within six months of purchase. The claimants made a further loan despite the defendant allegedly having not repaid the first. The claimants would have known that the defendant would need to renovate the new Reeves Avenue flat before re-mortgaging it. The claimants knew that 74 Vista Way was tenanted and so could not be readily sold. In any event, such a sale would run contrary to the Barry family philosophy of buying and retaining property and expanding the portfolio. Thus, the evidence is consistent with the defendant's case that no repayment terms were agreed.

## Discussion

162. The claimants must prove this issue, and specifically the intention of parties, to the requisite civil standard. In this area of contract law, the circumstances of each case must be individually considered to ascertain the intention of the parties. The authorities identify a number of indicative factors, but they provide no definitive tests as a matter of law. This is an acutely fact-specific analysis, to reach an objective evaluation of intention. This approach was made clear in *Heilbut, Symons & Co. v Buckleton* [1913] A.C. 30, 51 where the court stated:

“The intention of the parties can only be deduced from the totality of the evidence, and no secondary principles of such a kind can be universally true.”

163. Both parties rely upon what has come to be called the “Ask Charlie” email. It was sent by Mrs Barry to her son on 19 January 2016. In that email, Mrs Barry is suggesting what her son should tell the accountant. Its significance to both parties is that it is a contemporaneous document. The defendant points out that in the email there is no mention of a 6-month repayment term. Against this, the claimants rely on Mrs Barry writing explicitly that this is “a temporary loan from my parents”. Mrs Barry concludes the email by writing:

“THEN TO RESTRUCTURE BOTH MORTGAGES AND PAY BACK THE TEMPORARY LOAN

HOPE THIS IS EXPLAINED PROPERLY”

164. Thus she repeats that this, to her mind, is a temporary loan (contemporaneous subjective understanding). This understanding is repeated in an email from Mrs Barry to the family's mortgage broker Mike Gaffney approximately one month later, on 18 February 2016 (B915-16). She writes:

“the funding is in place by means of a temporary loan from Tom and I but if the freehold purchase can go hand in hand would this avoid any unnecessary further legal and stamp duty costs please let me know your opinion”.

165. Once more, she is emphasising the temporary nature of the loan arrangements. Mr Gaffney replies (B915):

“Once all completed I will be arranging to get both 37 and 37A re-mortgage and equity released in order that Dens can repay loan to you.”



166. This understanding was shared by other members of the family. Kieran stated in his witness statement (B250, §49):

“I knew that Denis had asked our parents to borrow the money for Salmon Street. I transferred the money over as he said he did not have a card set up with Lloyds Bank. I asked him why I don’t just transfer directly to you but he said no and that it must go to mum first then to him. He did say that as soon as he could re-mortgage he would have the money right back.”

167. Kieran repeated this evidence on oath. Here was the defendant confirming that he would repay his parents the Salmon Street loans “as soon as he could”. Kieran’s witness statement (§50) states that he was “suspicious” of Denis as a result of all this because the Salmon Street house was costing twice what Kieran had paid for his. Therefore, he “wrote down all the transactions” and exhibited them to his statement as KB1. Mr Sawtell makes the point that Kieran was right to be wary or “suspicious” about what his brother Denis was doing. Counsel points out that when the ground floor flat at Reeves Avenue is mortgaged to Axis Bank UK in December 2016, the £181,297 is paid into the defendant’s and Annette’s Barclays Bank account (B980, email from Kerri Blake, conveyancing executive at Reeves Law). The general situation in the family about loans in the 2016-17 period can be gauged from Kieran’s request to his brothers in August of 2017. Kieran sought the agreement of the defendant and Thomas Jnr. to borrow money from the HoneyPot Lane funds for a temporary bridging loan. The WhatsApp messaging begins (B1447):

“[25/08/2017, 18:48:54] KIERAN: I wondered what you would both think about me borrowing a £100,000 out of that Lloyds account for about 6 weeks?

...

[25/08/2017, 18:49:56] KIERAN: Please let mw know honestly what you think so if its a no i can approach other people or sort out a bridging loan or something.”

168. When Thomas says no on 28 August, Kieran replies:

“[28/08/2017, 14:37:23] KIERAN: Fair enough, i do not remember you ever asking to borrow money before, all i am asking is exactly what Denis has done in Reeves Ave, i feel its harsh i would lend my last penny if needed and if Denis says no as well it will cost me a lot of money on a bridging loan but at least i know where i stand ...”

169. Kieran then asks Denis “where he stands”. Denis’ reply is:

“[28/08/2017, 21:39:13] Denis: Sorry didn't t get a chance to reply was out. For someone who is asking his brothers for a considerable amount of money U have gone about it the wrong way bringing what I have arranged separately with mums money and has nothing to do with u into it. My answer is the same as Thomas.”

170. There is no indication from Denis that the funds transferred to him were different from what Kieran was seeking, akin to temporary loans. It is also telling, confirming the question of seriousness, that he calls £100,000 “a considerable amount of money.”

While the court can accept Mr Sawtell's assessment of the defendant's evidence about terms as "vague, unconvincing and nebulous", it is not for the defendant to prove this issue. It seems to me that Mr Laville is correct that nowhere is there any contemporaneous evidence that the agreement was repayment within six months. I accept that there may have been practical difficulties in any event in repaying the loans within six months, and thus while it was clear between Denis Barry and his mother that the loans were "temporary" loans, I am not persuaded by the claimants to the requisite standard that a term of six months was agreed. Indeed, in her witness statement Mrs Barry put her understanding about the Salmon Street loan this way (B132, §122):

"[Denis] said it would only be a temporary loan and he would hopefully get it paid back within six months he said he would be able to re-mortgage or sell 74 Vista Way and possibly re-adjust Salmon Street, which Mike Gaffney was already dealing with. I agreed to lend him the money on this basis."

171. Her evidence is that her son "hopefully" would repay within six months. However, it seems to me that this was far from clear. At trial, when asked about the Reeves Avenue leasehold loan, she stated that Mike Gaffney would "sort it out" and that "it would take about six months". Again, it seems to me that there is a measure of vagueness about the six-month figure. I judge that six months was an aspiration and not a contractual term.

## Conclusion Issue 2

172. I find that parties agreed that the loans would be "temporary". However, what temporary meant was not agreed between parties with any sufficient clarity and I cannot accept that six months was agreed as a contractual term. We are thus in the situation that Mr Sawtell envisaged and submitted about. *Chitty* (34<sup>th</sup> edn) states at §41-272:

"Where money is lent without any stipulation as to the time of repayment, a present debt is created which is generally repayable at once without any previous demand." (*Norton v Ellam* (1837) 2 M. & W. 461; *Atterbury v Jarvie* (1857) 2 H. & N. 114, 120; *Re George* (1890) 44 Ch. D. 627.)

173. The claimants have proved to the civil standard that this was very far from an open-ended loan arrangement. The defendant could not extend the period he kept the sums indefinitely. The expectation was that he would repay his parents as soon as he was realistically feasible. They would be understanding and, as Thomas Jnr. stated, patient. But they had no intention of allowing themselves to be exploited or, again as Thomas Jnr. pithily put it, "ripped off". The tone of the references to the "temporary" nature of the loans in the early 2016 emails suggests that the evidence that Mrs Barry gave the court on oath, without being artificially precise, was about right in terms of order of magnitude, and the expectation was that the loans would be repaid in months rather than years. Mike Gaffney would need to arrange the mortgages and thereby restructure for the defendant. But these kinds of facilities are highly unlikely to take years to sort out. This is the type of arrangement that it can be objectively deduced from the totality of evidence that the parties intended. The claimants have proved this to a civil standard. I cannot think that the loan contracts fail for want of certainty as a result.

174. There are numerous disputes between parties about forgiveness and non-forgiveness of the loans. However, they agree that by an email dated 4 March 2021 and by a letter dated 23 July 2021 (B37) from Charles Douglas, trading as CDS Mayfair Solicitors, acting on behalf of Mr and Mrs Barry the claimants made formal demands for repayment. Indeed, the date from which they seek interest in the claim is the date specified in this demand letter, 4 September 2021. Should any sums be found to be owed to the claimants by the defendant, interest will not run from before this date. However, the court must yet determine whether any of the funds were loaned to Bardon Limited and whether any loans were written off by the claimants and payment forgiven. It is to these questions that the court turns in the next two sections.
175. I add that I have reviewed my conclusion on Issue 1 in light of the conclusion on Issue 2. I have not altered my view. This is because I have found that parties were treating the loans as a serious matter about substantial sums of money. They were made on a temporary basis and had to be repaid. What remained uncertain is what “temporary” means, but it was plainly an order of magnitude of months rather than years. That does nothing to affect the intention to create legal relations. Indeed, without a definitively agreed repayment term, the loans fell to be repaid on demand, even though the claimants, being sensitive to the situation and needs of their children, invariably adopted a sympathetic and flexible approach.

## **§XII. ISSUE 3**

### ***Bardon Limited***

176. The simple question is whether the claimants loaned money for the Reeves Avenue freehold to their son Denis or to Bardon Limited. The defendant states that his mother knew perfectly well that the money for the freehold was loaned to Bardon. Indeed, in an email to the defendant, Mrs Barry specifically mentions that he should use a corporate vehicle. The precise name of that corporate entity does not matter, the defendant submits. By contrast, the claimants argue that the loan was always to their son and that is confirmed by “a substantial body of evidence”. How he subsequently chose to treat the money and structure the transaction was up to him.

### **Discussion**

177. This is classically a question of intent and must be judged objectively. The claimants have the onus of proving the issue, it being their case that the loan was to their son Denis personally and not Bardon Limited.
178. The starting-point is that parties agree that everyone knew that the Reeves Avenue freehold had to be purchased by someone different from the defendant, due to his ownership of the leasehold of the ground floor flat and his intention to purchase the other leasehold. Thus, it is clear that the freehold would not be purchased by Denis Barry. Mr Laville submits that “the most likely thing is that you lend money to the entity purchasing the property.” However, as to the occasion upon which the claimants agreed to loan money to a company rather than their son, the defendant’s witness statement provided the court with little detail (B272-73, §61). His account was that the Bardon loan was discussed “in the following weeks”. He does not

specify when, where or the clear terms of what was agreed. In his oral evidence, he suggested that he discussed the terms of a solicitors letter from Herbert Reeves dated 23 March 2016 (B296) with his mother. I will come to that letter, but note that the defendant also relies upon an email sent to him by his mother on 19 January 2016.

179. In this, her “Ask Charlie” email (B893), Mrs Barry writes to her son, once more in her characteristic capitals:

“ASK CHARLIE

WE ARE GOING TO PURCHASE THE FREEHOLD OF THE PROPERTY  
UNDER THE LIMITED COMPANY AND IN ORDER TO DO THIS WE ARE  
GETTING A TEMPORARY LOAN FROM MY PARENTS UNTIL I  
REGULARISE THE FREEHOLD AND NEW MORTGAGE”

180. Here, it is submitted, that there is clear indication of Mrs Barry knowing that the purchaser would be a limited company and thus the loan would be to the company and not the defendant personally. The defendant further relies on the letter from Kerri Blake of solicitors Herbert Reeves & Co. dated 23 March 2016 (B926). In the letter, the solicitors state that they have incorporated into the Section 13 notice to the freeholder offering the sum of £145,104 that the nominee purchaser of the freehold interest will be Bardon Limited. I am satisfied that this letter was read at least in part by Mrs Barry as her handwriting annotates it, making calculations. Her evidence is that she thought the company had another name, made from the initials of the defendant’s children. However, I agree with Mr Laville that this is “irrelevant”. Taking the Ask Charlie letter together with the Herbert Reeves one satisfies me that Mrs Barry knew that her son may well use a corporate vehicle to purchase the freehold. But one must be clear about what the Herbert Reeves letter does and does not say. It does not say that the money for the purchase has been loaned to Bardon. It is silent on the point. The detailed discussion about the Herbert Reeves letter that the defendant claims took place, was not previously mentioned in his filed evidence, unless the unspecific detail of meetings “in the following weeks” is supposed to encompass this discussion. If it were true that the defendant took his mother carefully through the solicitors’ letter, why is there no reference to this exercise in his statement? This was, as Mr Sawtell correctly characterised it, “striking new evidence”. I have doubts about its reliability.
181. It is agreed that the sums used to purchase the freehold were transferred into the defendant’s account and marked “D BARRY LOAN” (B929-30). While it was Fiona who entered the name, it was on the instructions of Mrs Barry. On this, Fiona stated that her clear understanding that the loan was for her brother and not for a company. Thus she supports Mrs Barry’s evidence on this. It is not disputed that at this time Fiona was acting as Mrs Barry’s personal assistant. As Fiona stated in her statement (B1485), she started in that capacity in around 2008 and it progressed to become a full-time job for her. Thus, Fiona worked very closely with her mother and when she entered the details that the loan was to her brother Denis, her explanation of this entry carries weight. As she said in oral evidence, what she did “was always under Mum’s instructions”.
182. What Mrs Barry suggests that her son should tell the accountant continues as follows:

“IT LOOKS LIKE THE COST OF THE FREEHOLD IS GOING TO BE APPROX £140,000. IS IT EASY TO GET THAT MONEY BACK FROM THE COMPANY”

183. The defendant relies on this as evidence that the repayment to her would be from Bardon and thus, by necessary implication, she knew that she had loaned the money to Bardon. I am not persuaded by this argument, advanced with force though it was by Mr Laville. It is submitted that her answer in cross-examination showed that Mrs Barry accepted that “the repayment would be made by Bardon”. This paints only part of the picture. What she in fact said in answer to the suggestion that she was asking about getting the money back from Bardon as she had loaned it to the company, was this:

“No, this is for any property given under a limited company - in general how difficult would it be to get the money back later?”

184. She never accepted in evidence that she loaned money to a corporation. It must be remembered that the text of the letter is a suggestion from Mrs Barry for what her son should ask the accountant on his behalf, as is evident from the preceding paragraph which reads “I am purchasing the freehold of both flats”, “I already own” (the leasehold of the ground floor flat). Thus, she is suggesting that her son asks his accountant how easy it will be for the son to get the money back from the company. This is more consistent with Mrs Barry’s oral evidence that she was lending the money to her son. Indeed, the email ends with this:

“THEN TO RESTRUCTURE BOTH MORTGAGES AND PAY BACK THE TEMPORARY LOAN HOPE THIS IS EXPLAINED PROPERLY” (B893f)

185. The paying back of the temporary loan does not distinguish between a loan to her son for the leasehold and a loan to Bardon for the freehold. What this suggests is that once the mortgages were restructured, the defendant would repay his parents the sums they had loaned him on a “temporary” basis. On 29 January 2016, ten days after the Ask Charlie email, Mrs Barry emails her son (M672):

“Good all ready to go I was thinking since may be not necessary to do a limited company just say trading as c r r estates it may be cheaper tax wise after”

186. The letters “c r r” are the initials of the defendant’s children. This message was found late in a folder on a device. Thus, in Mrs Barry’s mind there remained uncertainty about what vehicle or structure her son would use to purchase the freehold. This is far from confirmation that she was lending money to a company rather than him. By the end of March 2016, she was emailing her daughter to ask her to transfer funds to the defendant. Thus in Mrs Barry’s email to Fiona dated 28 March 2016 (B928), she writes:

“hI fIONA

do you think you could transfer to sort code XX XX XX a/c no XXXXXXXX the amount of the sum of £145,104.00 for the freehold (THIS IS HIS [that is Denis’] OWN ACCOOUNT) of 37A AND 37B REEVES AVENUE NW9 8LN the reason is he says thats the way, he then has to transfer it to a limited company

account to then transfer to Herbert Reeves I must check that again tomorrow as he only thinks that has to be done that way.”

187. This confirms that at the point of transfer Mrs Barry believed that the money was being transferred to her son. She believed that he would then transfer it on to “a limited company account”. It is submitted on behalf of the defendant that the monies were transferred into the defendant’s account as Bardon did not have a bank account at that point. That misses the point. Mrs Barry believed that Bardon *did* have an account and once her son received the funds, he would transfer it to the company (“a limited company account”). With that belief, if this was a loan to Bardon and not her son, why did she not ask for the money to be sent directly to the “limited company” account? This is consistent with Mrs Barry loaning the money to her son. I reject the submission made on behalf of the defendant that “the flow of funds is of marginal relevance”. It is a submission forced on the defendant because the route the funds travelled points strongly against him. The transfer of funds supports the claimants’ case that the monies were transferred to their son. Mrs Barry believed they would then be transferred by him to a company account, and believed she was loaning the money to him. I judge all this is vital in assessing the objective situation about intention and what an impartial and reasonable observer would conclude.
188. One must next examine what the statutory accounting record reveals. In this, I exempt Annette Barry from responsibility. I am prepared to accept her evidence that she was simply presented with the accounts as a co-director and signed them without reading them. It is an unwise thing to have done, but she trusted her husband, just as his parents had. I judge the position of Denis Barry to be different. He was at the forefront of getting these transactions completed. He had been liaising repeatedly with the solicitors and accountants. He must take responsibility for the accounts. When he made the solemn declaration that these public accounts are true, he was attesting that they reflected the true financial picture. That picture is clear from the accounts.
189. At no point in the accounts are the defendant’s parents listed as creditors of the company. If the true picture was that Mr and Mrs Barry had loaned Bardon this very substantial sum of money, then it is puzzling that they are not listed as creditors at any point. By contrast, the accounts show that the creditors of the debt that was incurred to purchase the company’s only asset, the Reeves Avenue freehold, were the company directors – Denis and Annette Barry. This supports the filed and sworn evidence of Mrs Barry that the claimants loaned the money to Denis. Eventually, some sums began to be repaid to the claimants for the loan that resulted in the purchase of the freehold. The repayments came personally from the defendant (approximately £500 per month). They never came from Bardon Limited. This is supportive of the fact that it was Denis Barry who was loaned the money.
190. I reject the submission made on behalf of the defendant such accounts are things that in the real world “people don’t take seriously”. These are public documents. When he signed these accounts as true, Denis Barry was a mature man with a job, a family, who had long been involved in property transactions, who owned his own home and had separate investment property. Statutory accounts are vital public documents that enable members of the public who may wish to deal with or give credit to the company assess its value and viability. Indeed, the defendant relied on the public significance of the accounts in his witness statement (B275). He stated at §76:

“The Bardon Loan was recorded in Bardon Limited’s financial accounts as a liability for the relevant financial year, which are in the public domain and have been since the Bardon Loan was entered into. The Claimants have neither raised issue with the nature in which the Bardon Loan was entered into nor disputed its existence until I responded to the Claimants’ email of 04 March 2021...”

191. Thus, his case in respect of the public accounts points in two opposite directions: their significance as against the claimants; their insignificance when contrary to his claims. I find that in this latter exercise, the defendant’s attempt to distance himself from the accounts is because they show in detached black and white and contemporaneously what the true position is: it was Denis Barry who loaned money to the company. The loan to Bardon did not come from his parents. I concur with Mr Sawtell that in cross-examination the defendant came “completely unstuck” as he tried to explain the objective record in the accounts. On the other hand, I have no hesitation in finding that Mrs Barry was aware that her son may use a corporate vehicle to purchase the Reeves Avenue leasehold. However, awareness of such possibility is not the same as lending the money to that company. Having examined all the evidence that touches on this issue, I find that it is improbable that the claimants would loan such a significant sum to a company they knew nothing about, that had never traded, had no assets, and which, on the defendant’s case, did not even have a bank account. It is far more probable, as the email exchanges, the statutory accounts and the description of the transfer in the bank account show, that the claimants loaned their son the sum. They were never listed as Bardon’s creditors; Bardon never repaid them a penny; Bardon did not owe them any money, the defendant did.
192. Therefore, I find that claimants have proved that they loaned the Reeves Avenue freehold money to their son Denis and the statutory accounts reveal the true picture, precisely as they are meant to. This was not an erroneous “assumption” by the accountants, but a contemporaneous record reflecting the true situation. While it is for the claimants to prove this issue, I note that there is no evidence from the accountants to confirm that they had made an error and had drafted the accounts contrary to the defendant’s instructions. The entry of the directors as creditors of the loan to Bardon Limited was not a single aberrant entry on one set of accounts. The 2017 accounts showed that the directors were owed £140,730. By the 2018 accounts, the figure owed to the directors had come down by approximately £20,000 at £120,688. Both sets of accounts have been signed by the defendant as true. Nowhere is any suggestion that the loan was owed to the defendant’s parents. The Bardon Limited bank accounts have not been disclosed as part of the defendant’s case. When asked about this in cross-examination, the defendant stated that the Bardon accounts were “either at home or online”. It is perfectly plain that should he have wished to deploy them to support his case, he could have done so. He did not. That does not displace the burden of proof, but it means that the court has not been able to see what was happening with money movements within Bardon. I do not accept the defendant’s submission that the claimants have “place[d] too much reliance” on the accounts. The picture of the creditors of the freehold loan as being the defendant and his wife is not documented in just one set of accounts but in all of them.
193. Viewed globally, I find that there is a core consistency between the contemporaneous documents and Mrs Barry’s evidence. Her trial evidence was clear and convincing:

“But under no circumstances did I loan the money to Bardon. I transferred the money into his bank account to do what he wanted with it.”

194. The intention was always that her son Denis would be the beneficiary of the loan. It appears that the defendant’s plan for Reeves Avenue worked. In January 2017 there was a new charge on the title in favour of Godiva Mortgages (Coventry). The defendant therefore obtained a mortgage against the two Reeves Avenue flats and extended both leases to 125-year terms. However, he did not repay any monies to his parents in respect of the leaseholds. Tellingly, in the 28 November 2019 recorded telephone call, the defendant never suggests once to his mother that part of the money was loaned by her and his father to Bardon. That is because it was not.

### **Conclusion Issue 3**

195. I find that the claimants have proved on a balance of probabilities that they loaned the money for the Reeves Avenue freehold to their son Denis. The defendant Denis Barry incurred the debt not Bardon Limited.

## **§XIII. ISSUE 4**

### ***Loan forgiveness***

196. For there to be an effective promissory estoppel in law, there is a two-part test. First, the defendant must prove a clear and unequivocal waiver (*Chitty* (34<sup>th</sup> edn.) §24-046; and see *Closegate Hotel Development (Durham) Ltd and another v Mclean* [2013] EWHC 3237 (Ch) (“*Closegate*”), citing *Woodhouse*). As this court noted in *Closegate*, it is conceivable that the waiver may arise by “implication”, or through a series of statements or comments ([60]). However, the court should approach such a claim with “particular caution” ([61]). Second, if the waiver is proved by the defendant, and the onus is on the defendant, he will have to demonstrate that he altered his position to his detriment in reliance on the waiver.
197. **Defendant’s submissions.** The defendant argued that there might be criticism that he could not remember the date of the conversations with his mother during which she waived the debt, but that is an indication of his honesty. He could have invented numerous false details. Nevertheless, he and his wife Annette are clear that there was an unequivocal waiver in early 2017. He has altered his position to his detriment as a result of the unequivocal waiver by his mother.
198. **Claimants’ submissions.** The claimants submit that the defendant’s evidence on this issue has been “poor and changeable”. The most basic point is if a person had written off a very substantial amount that you owed and then demanded its repayment, the first thing one would do is challenge the demand. In the November 2019 telephone call, the defendant never says that the amount was written off. His credibility is further undermined in his March 2021 email (B32) where he “changes tack” and claims that the sums were given to him as part of his “inheritance”.

### **Discussion**



199. I accept the force of Mr Laville’s submission that on this issue the “rival cases are stark – someone is not telling the truth.” There is no room for mistake or confusion about this question. This was particularly reinforced by Annette Barry’s witness box account of £500,000 of the loaned sums being written off. It is impossible to conceive how Annette could have been mistaken about that. Either what she and her husband say about the waiver is true or it is not. It is strenuously denied by Mrs Barry.

200. It is important to track the evolution of the defendant’s case. In his Defence he pleaded his case in this way (B50):

“38. During the period between December 2016 and May 2017, the Second Claimant, the Defendant and his wife had a number of conversations regarding the Bardon Loan and the monies loaned to the Defendant in his personal capacity. The Second Claimant explained that the Defendant did not need to worry about paying them back for anything other than the Bardon Loan, as the Claimants were in the process of rearranging their affairs and were taking advice on the best way to gift over their estate to their children. The Second Claimant explained that each of the siblings would be given something, that would be discussed and confirmed at a later date, but the Defendant was warned not to tell his siblings what he had been given as the Claimants were concerned that it would create arguments among the siblings.”

201. In his statement dated 27 March 2023 (B276), the defendant says:

“Claimant 2, me and my wife had a number of conversations regarding the Salmon Street Loan and the Reeves Avenue Loan. Claimant 2 explained that I did not need to worry about paying it back”. (§79)

202. In his evidence, Denis Barry stated that there were a number of conversations with his mother. He could not recollect how many. On one occasion, his wife was there. All of this was before the meeting with the siblings in Kieran’s shed in June 2017. In the recorded telephone call of November 2019 (B1121-75), Mrs Barry asks for her money back in unmistakable terms. Mrs Barry told Denis (B1128), “All I want is what we gave you”, by which she means the loans. To this simple request, her son does not suggest that the sums were written off. He says, “Yeah.” Later in the conversation, she says (B1133):

“But going forward from here now, how ... how much did we give you in total? That’s what I want.”

203. The defendant does not state that the sums have been written off. He says, “Yeah, I don’t know.” She had said that she wanted to “get the money back” so “we”, she and her husband, “could get off the mortgage”, meaning on their Brockley Avenue home (B1127). The purpose of recording the call was testified to by both Fiona and Mrs Barry. Mrs Barry said that she wanted to listen back to what Denis was saying as what he said about not repaying could confuse her. When Fiona was asked whether the call was recorded to trap Denis into a damaging admission, she said:

“No, it was recorded because Mum came into a fluster because Denis still had not paid the money for the property back and he was clearing out his property to do

an extension and [my Mum] was worried he was extending and he had not paid back.”

204. The most obvious thing that the defendant would have done would have been to tell his mother that she had written off the loans (at least £500,000 of it) in 2017, two years previously. If that write off had taken place, it would make no sense to conduct and continue the conversation on the basis that there had been no loan forgiveness. Instead, during the telephone call the defendant provides his mother with explanations why the money had not been repaid. For example, he relates his “struggle[s]” with Mike Gaffney to progress the plan (B1130) and problems with “buy-to-let value” (ibid.). When he mentioned restructuring to Mike Gaffney, Mr Gaffney is said to have replied that “they don’t like freehold flats” (ibid.). The defendant added that he was told that the monthly rental he was now receiving on the two Reeves Avenue flats (£900 upstairs, £1250 downstairs) was “not high enough to pull out much more” (B1131). These comments by the defendant are consistent with the debt obligation still existing and consistently point away from a write off.

205. On 29 March 2021, the defendant wrote an email to his parents in response to their email of 4 March and their letters dated 13 and 22 March 2021, as he puts it, “threatening legal action”. He states (B32):

“In regards to the two loans, you know that there was only one loan and this has been documented as such by Sanjeev. You both offered to loan us the money to purchase the freehold of Reeves Avenue and said that we could repay it once we had the funds. In February 2020, we discussed repayment of the loan and mum said that we had to start paying something back and asked how much we could afford. We said that we could afford to pay back £500 per month, which you were happy with.”

206. He then continues:

“In regards to the balance of the money (or as Fiona has referred to it as "Loan 1"), that was money that was given to us as inheritance and has been treated as such for tax purposes. If it was a loan, then it would have been recorded as one and documented, which it was not (by any of us or Sanjeev). You will recall that there was a meeting where Fiona showed us a video message from mum saying that we would all be given inheritance, e.g., Kieran was given Park Place, Thomas was given Vista Way, the girls were given Brockley Avenue and I would get help with, as mum said, “Reeves Ave”. This money was always treated that way and if it was a loan it would have been treated differently for tax purposes, which Sanjeev has confirmed it was not. If it is now your intention to ask for the inheritance back, I presume that you are also asking the other children in the family for theirs back too?”

207. He states that the conversations with his mother were supported by and consistent with the meeting in Kieran’s shed in June 2017. At that meeting, a video of his mother was played, he says. Neither Mrs Barry nor her husband attended the meeting. In his witness statement (from B277) he provides a detailed account of the arrangements that Fiona explained on behalf of her parents. He states that she outlined the various gifts by way of inheritance that the siblings would receive. When it came to the defendant:

“I was told that he would be given ‘help with Reeves Avenue’. My siblings were aware that I had purchased 37A Reeves Avenue (a flat) which they knew had cost £155,000. As a result, my Brothers joked that I had been screwed over, as I had ‘only been given a flat’.” (§81.6)

208. On oath, he put it this way, “At the time she [his mother] said ‘I am also helping Denis with Reeves Avenue’.” When he was challenged about this in cross-examination, the defendant accepted that Fiona did not provide a detailed account of the gifts as he stated in his witness statement. Further, on behalf of the defendant it is accepted in closing written submissions that while Fiona’s witness statement (B196, §118-21) supports the fact that there was a meeting in the shed, her evidence disputes fundamentally that there was any indication that the defendant’s debts to his parents would be written off.

### **Other factors**

209. The parties now agree that originally there were three loans (the court concluded on Issue 3 that all three loans were to the defendant). With the alleged write off, £500,000 became a gift. Yet there is no contemporaneous documentary or digital evidence whatsoever to support a gift of half a million pounds. This is very surprising generally, but more so given the communication patterns of this family. It makes this level of gifting less likely to be true. Annette Barry states that she would not have sent her mother-in-law a message to thank her for such an exceptional act of generosity. She was not at the “first meeting” between Denis and Mrs Barry when the write off was first announced. Yet once she learned of the very substantial gift, she did not contact Mrs Barry at all. She said that she would wait to thank her in person. I find this puzzling, especially since the evidence shows that Annette is not averse to contacting her parents-in-law on her own initiative and without consulting her husband. This is precisely what she did on New Year’s Eve 2020 to set up the meeting with Mr Barry Snr. at her brother Michael’s home. In addition, Annette’s evidence is that she was reluctant and worried about taking loans amounting to almost £650,000 as it was such a significant sum to be indebted to someone else for. At a stroke, with a few words, Mrs Barry had wiped out three quarters of the indebtedness. It would have been a huge relief to Annette Barry. She did nothing to thank her parents-in-law until, she claims, she next saw Mrs Barry. This appears puzzling. Mr Laville submits that there is no evidence of any other sibling thanking their parents for gifts. The difficulty with that submission is that we do not have an exhaustive messaging record of all the other transactions which stretch back many years. It would have disproportionate, and probably impractical, to have done so.

210. The defendant also relies on the other gifts were made to the siblings around 2015. However, the picture was not as simple as the defendant asserts. Indeed, in the November 2019 recorded call, Mrs Barry disputes the suggestion. She states in terms to her son at 2.13:

“No, no, no, listen to me now. Thomas never got Vista Way, Denis ...”

211. She could not have been clearer. It is submitted on behalf of the defendant that Mrs Barry was suggesting adding Kieran and Denis to 40 Vista Way. However, a proper reading of the email from Fiona dated 4 December 2014 shows that while it is signed

electronically “Mum” (B774), the suggestion about adding the brothers comes from Fiona. She writes in terms on the same page:

“40 Vista Way

I have made a suggestion to Mum that would it be possible to add Kieran and Denis name onto Vista Way to make things a bit more clean cut. So that the 3 boys together could raise money on it to pay Mum and Dad back.”

#### Summary Issue 4

212. The first question is whether the words used on the defendant’s case do constitute the write off by being clear and unequivocal. If they do not, then even on the defendant’s case, this line of defence fails. The claimants argue that the defendant “cannot point to the words used that could give rise to a waiver of this kind”. I find that the words claimed to have been used in the shed by Mrs Barry that “I am helping Denis with Reeves Avenue” cannot amount to a clear and unequivocal waiver. But I am quite satisfied that if (I emphasise if) Mrs Barry said to her son and daughter-in-law that they “need not worry” about paying them back the non-Bardon monies that this is *capable* of being sufficiently clear and unequivocal to amount to a waiver. This is reinforced by the fact that on the defendant’s case this intention to write off the loans was repeated, not being an isolated comment. Therefore, I find that the words relied upon by the defendant are capable of meeting the legal test, if communicated to the defendant. On this sub-issue, I find for the defendant. The next question is whether the words asserted were in fact said.
213. It will be noted that in his March 2021 email to his mother, the defendant claims that there only ever was one loan - for the freehold on Reeves Avenue. He states in terms that if the rest of the money (half a million pounds) were a loan, “it would have been treated differently for tax purposes”. Yet his case now is that there were three loans. The Salmon Street money was a loan. The Reeves Avenue leasehold money was a loan. The Reeves Avenue freehold money was a loan (albeit he has claimed to the company, a claim the court has rejected). Indeed, in his witness statement (B276), he stated in terms that both Salmon Street and Reeves Avenue were “loans”, which his mother then wrote off. How is it possible to reconcile that with what he wrote in detail and at length to his mother in response to the formal demand letter? His wife Annette gave evidence about how she was very anxious and troubled about the scale of the three loans. She was “very uncomfortable” at both the fact and the scale of the indebtedness. She had “no idea how the £650,000 would be paid back”. But if £500,000 was never a loan (there was “only ever one”), if as her husband wrote it was “always treated that way” (as not requiring repayment), she could never have told the court that there were three loans that amounted to £650,000. She did. This indicates strongly that what the defendant wrote to his mother in his March 2021 email is factually unreliable and inaccurate. As his counsel submitted to the court, there cannot be a middle ground; the choice is “stark”. Someone is not telling the truth.
214. I had no difficulty in concluding that the various versions given by the defendant reveal the untruthfulness of his position. He could never have written to his mother in that email that the non-Bardon monies were “always treated” as not being a loan. It seems from the March 2021 email that he claimed they were part of his inheritance. One only has to consider the pleading in his Defence document. At paragraph 19, the

defendant admits that the £350,000 for Salmon Street was a loan. Leaving aside the freehold monies, the defendant admits at paragraphs 33-34 of his Defence that the £150,000 (approximately) for the Reeves Avenue leasehold was also a loan. His position is internally inconsistent and certain versions are contradictory to his wife's evidence. He has said different things at different times because his account of the write off is not true. He has remained vague about the number of meetings and discussions and even the mode they took place, "some may be face-to-face or on the phone", because these alleged write off discussions simply did not take place. One only has to look, to take one example, at the contemporaneous comment by Mrs Barry to her son in the recorded conversation from November 2019. At 3.32 in the recording (B1124), she says to her son:

"you never raised any money at all on the Reeves Avenue upstairs for ... to pay back the money, you know? That was the whole point of Reeves Avenue."

215. The defendant does not immediately retort that this was never a loan but part of my inheritance. Instead, he provides an account of how attempts were being made to raise funds without success. He said that Mike Gaffney was still working on it and "the last bit hasn't been done yet on that" (B1123). Mrs Barry emphasised that they had to think of the "Angland children", that is, Deirdre's children, and they had to think about Fiona and Siobhan (B1125). This was her ambition: to equalise the situation. Mrs Barry's evidence is that the defendant's non-repayment of the loan money jeopardised this intention. She emphasises that "they", the parents, are now aged 71 and they have to do something for the grandchildren and Fiona and Siobhan (B1126). She asks again for the "money back" to pay off the mortgage on Brockley Avenue. She states that the money they gave to Denis was "our money" (the parents') and no one else's and she was "waiting for you" (Denis) to pay it back, but she did not want "to put any pressure on you". The defendant did not dissent from this. She asked him what he had done with the money "that should've all come to us" (B1126). She asks him when she will "get the money back" so they can get "off the mortgage" (Brockley Avenue). When Denis Barry asks his mother what she wants back, she says, "All I want is what I gave you." To this her son said, "Yeah". Denis did not say that the money was given as inheritance. He did not say that any loans had been written off. Mrs Barry tells her son that to repay his parents he should "sell one of the flats or something" (B1139).
216. Equally, in the WhatsApp exchanges between the brothers in August 2017 when Kieran sought a bridging loan and compared it to Denis' loans on Reeves Avenue, the defendant never suggested that the sums lent, certainly in respect of Reeves Avenue leasehold for upstairs flat, were to be part of his inheritance. That is because, I find, they were not. None of the sums provided by the claimants in respect of the three properties were ever to be part of the defendant's inheritance.
217. I also reject the evidence of Annette Barry about the write off. I have no hesitation in concluding that she has strongly aligned herself with her husband and not the truth. She is far from impartial. Having to repay these very significant sums of money will greatly affect her life and that of her family. This provides her with every incentive to go along with her husband's false account. She has. Equally, I found the evidence of Michael O'Donoghue partial and unconvincing, aligning himself with his sister and her husband in this bitter dispute. As he states in terms in his first witness statement (B308) at §5, his relationship with the defendant and his sister (Annette) is "very

close”. I accept Mr Sawtell’s submission that in this feud, Michael O’Donoghue has “lost his objectivity and helped the defendant out greatly.”

218. It is clear that in the run-up to the making of new wills, there was discussion about how to go about the division of assets. The claimants had been taking professional advice. However, as to the meeting in the shed, I find the defendant’s account that it was publicly stated that Denis would receive help with Reeves Avenue to be false. I strongly prefer the evidence of the other siblings who attended the meeting that there was no suggestion that Denis would receive such assistance. Further, on the defendant’s case, he was not going to simply receive “help” (loan forgiveness) in respect of the leasehold of Reeves Avenue, but also help with respect to the writing off the entire far greater loan for Salmon Street, £350,000. That was the alleged arrangement with his mother. But none of that was mentioned. If it is suggested that Mrs Barry wanted to “keep it quiet”, the difficulty is that by her announcements at the shed meeting, she was openly stating that Denis would receive money from his parents. Having made such an announcement, it makes little sense that she would confine herself to Reeves Avenue. The only possible counter-argument would be that she did not want to mention the vast extent of the gifting that she and Mr Barry Snr. intended to give Denis. That, however, indicates again a weakness of the defendant’s case: why he was being so preferentially treated. This is part of what the claimants call the “inherent implausibility” of the defendant’s case. By 2017 when it is alleged that there was loan forgiveness to the extent of £500,000, he had a home (74 Vista Way), investment property, a job, a wife and children. It is also clear that the claimants reached the conclusion that the “boys” had done very well from their generosity and they wanted to even things out for their daughters, the “girls”, and to ensure that Deirdre’s children would be looked after as well. This was a project that can be traced back to 2008 (B428). Indeed, in the 2017 wills, the claimants’ assets were to be divided three-ways, essentially, between their three daughters or their children in Deirdre’s case. The gifting of £500,000 to Denis through forgiveness of the Salmon Street and Reeves Avenue leasehold loans seriously threatened the ambition to provide greater parity for the daughters and their deceased daughter’s children. What remains unexplained on the defendant’s case is why this very significant deviation from plans that were being formulated over years, including with professional advice, should take place.
219. The defendant’s attempt at such an explanation is through a falling out within the family. This must be examined carefully because the defendant places very great weight on this as being what is behind the denial of a write off he has the legal onus of proving. The defendant’s case is that Mrs Barry’s false denial of the write off has been provoked by a severe falling out within the family. This topic took up a significant amount of time during the trial. I was prepared to grant the defendant every opportunity to explore this issue as it was so fundamental to his defence. Indeed, the court permitted the defendant to take what on the authorities is an exceptional or “rare” course and recall witnesses following closing submissions and while the court was reserving judgment. The additional evidence was given at the 19 February 2024 hearing for the defendant to further his case.
220. I find that the evidence adduced from the witness box on that date advanced matters very little. Mrs Barry was asked about what a “Kennedy situation” meant, since that was a term she mentioned in the messaging. This was around the meeting between

the brothers in a public house in early November 2019. She said that she does not know if the Kennedys, relatives of hers, who were in dispute amongst themselves in fact ended up in court, nor whether it was a longstanding or serious dispute. Fiona confirmed that the Kennedys were first cousins of her mother's. When Mrs Barry mentioned a Kennedy situation to her daughter Fiona, she was simply relating that she was happy that the brothers were close and getting on and the difficulties that the Kennedys had experienced would not occur in her family. Fiona also did not know what the Kennedy dispute was about. Fiona said that the dispute in the Barry family started when her nephew came to the front door and made a noise disturbing the household unnecessarily. By this she meant that this was different from the demand for the repayment of Denis's debt to her parents; these were different things. Her parents were "definitely not trying to punish Denis by getting him to repay." This echoed what Mrs Barry said in her first witness statement (B154, §221) that "Denis and Annette had a big fall out with Mikey in January 2020 so things were very difficult. Denis felt we all sided with Mikey on the argument." Mrs Barry explained that Annette had just had an operation so Mikey's son waking her with the prank "is part of the reason Denis and Mikey fell out."

221. Thomas Jnr. also knew very little about what caused the Kennedy dispute. He was challenged about his statement to the Family Court dated 7 December 2023 in which at §7 he says that Denis sent him abusive emails "throughout 2019". However, he made a second clarifying statement, since that date should have been 2020, he said on oath to this court. He stated in the second statement at §3:

"our relationship began to change in 2020 when the [defendant] began to fall out after the disagreement with the brother in law in 2020."

222. Thomas Jnr. stated that he saw Professor David McLoughlin about his dyslexia. He provided a report dated 28 January 2021, noting that Thomas's "proof reading and spelling is inconsistent" and he "seeks assurance with proof reading." Mr Barry stated on oath that this diagnosed problem "has a lot do with his [error]" about the date. It was suggested to him that he obtained the report in 2023 and "backdated it". This seemed to the court to be a misconceived attempt to impugn Thomas Barry Jnr. It is an extremely serious allegation, that he was attempting to deceive and mislead the court. To support the suggestion, the metadata from the electronic invoice was put to the witness. It is in the supplementary bundle at B85. The contention is that there is something suspicious about the invoice because the metadata shows it being created in 2015 and modified in 2017. This clearly misunderstands the nature of metadata. The invoice has every appearance of a legitimate invoice from the office of Professional McLoughlin. It is dated 2 February 2021, which would tally with being issued shortly after his assessment of Thomas Jnr. on 28 January that year. Given that the invoice has all the hallmarks of a standard professional invoice, the metadata is completely consistent with the proforma having been created in 2015 and modified in 2017, with the invoice for Thomas's assessment being issued in February 2021 after the assessment in January. It must be emphasised that no expert evidence was adduced by either side about this data, but the court is entitled to exercise common sense and decide what reasonable interpretations the evidence presented is capable of. The defendant had every opportunity to make good the suggestion and failed to do so. I spell out this passage in the forensic exchanges in some detail because it

demonstrates how serious allegations that ultimately are highly likely to be baseless have been made by Denis Barry.

223. The background to all this should be Thomas Jnr.'s evidence about the origins of the dispute, which was touched upon earlier. He testified when he first gave evidence that:

“There was a family fall out about the nephew when he knocked on the door. It didn't go down well with them as their dog started barking. It was the beginning of all this trouble. That was in January 2020. In November 2019 the relationship with Denis was that we worked together and lived in the same street. I would say that the situation between me and Denis was okay.

224. The “nephew” incident was a reference to the same originating source of the problems that both Mrs Barry and Fiona had mentioned. As to the visit to the public house in early November 2019. He said:

“I found a selfie in my phone in my phone the other day of the three brothers and everything was all right. It made my mum cry.”

225. No objection was taken to Thomas Jnr. adducing the selfie photograph in court. It shows the three brothers happily together, with Thomas only half shown as he is taking a selfie inexpertly. The date is 5 November 2019 at 11.18pm, walking along Salmon Street. It is this photograph that Fiona and Mrs Barry have commented upon.

226. Mr Laville submitted that the fall out came about in 2019 when the defendant wished to leave the family business. This decision by the defendant came at a very sensitive time for the family as there were attempts at refinancing, including Honeypot Lane and Catherine House, seeking to move them to the “Barry Commercial” company. Therefore, the defendant's argument runs, the family “did not want anyone to rock the boat at the time.” Pressure was being applied to Denis Barry to get him to “come back in line”. This line of argument is said to be supported by what Thomas Barry Jnr. said in his witness statement to the Family Court that the dispute began in 2019. He is thus either unreliable or inconsistent. This claimed “error” cannot be explained away by his dyslexia. His attempted correction is because “someone in the family has seen his witness statement and said ‘you've dropped us in hot water and admitted the dispute was in 2019’”. Therefore, the dispute was about the falling out between the defendant and his brother Thomas. It was only then that his parents sought to exert pressure on him to comply by making loan repayment demands that were unjustified and ultimately untrue.

227. Against this, Mr Sawtell submits that there is no or no sufficient evidence to support the defendant's suggestion that the falling out was in 2019 and the claimants and their supporters were trying to “bring the defendant back in line”. The rest of the evidence, such as comments in the evidence by Kieran (B245) that their father “begged them” to avoid infighting underscore the “premium this family puts on no fighting”, especially due to their close involvement in the family business. It is clear that when the brothers met in a Wembley public house, it was to discuss a number of matters, and there is no evidence of any attempt to punish or coerce Denis. This is contrasted with the contemporaneous messages in the family WhatsApp record that shows between 24 and 27 November 2019 discussions about family arrangements for Christmas (B4200-



01). Counsel submits that this makes no sense if there had been a falling out already with Denis, who participates in the discussion on the morning of 27 November with humorous messages and emojis. This shows that the Family Court statement of Thomas Jnr. was a simple mistake about the date and the defendant is “clutching at straws”. The truth is that when it became known that the defendant was seeking to extend his home, there was anxiety because he was prioritising his personal interests over repaying his very significant debt to his parents. Mrs Barry emphasised this evidence on oath. What caused her to ask for the repayment from Denis, which was always owed by him to his parents, was his home renovation plans: “it was the extension that made me ask for the repayment”, she says. It seems to me that this was a reasonable and plausible answer and explains why it was that there was not immediate enforcement of her son’s debt. The trigger event was his intention to extend his home while not having repaid his parents the very substantial sum he owed them. There is no doubt that there are severely drawn battlelines within this family now. One only had to look at the arrangement of people on either side of the courtroom: the defendant, his wife and her brother on one side; all the other siblings and their mother on the other – Mr Barry Snr being unwell. So without question, bad feeling exists. Three questions arise: what produced it, when did that occur and what is its connection to these proceedings. There was much examination of events on New Year’s Eve 2020.

228. I find that the events on that day were unpleasant in the extreme. Many of the participants in this street haranguing came across very badly. It is clear that on both sides of this argument the bad feeling remains and witnesses are deeply entrenched in their narratives about what happened. To take one example, Michael O’Donoghue’s stated on oath that Mrs Barry “stormed” to his porch. In his witness statement, he said that she walked. I found that Mr O’Donoghue was not an impartial witness to events, but strongly supported his sister, and in this important respect exaggerated his account in her favour, attempting to tarnish the conduct of Mrs Barry. It may be correct that if the vehicles of other family members had not arrived at the O’Donoghue house matters would not have “kicked off”, as some put it. But ultimately it was accepted that however the younger generation behaved (Annette Barry admitted calling Siobhan “a tramp”, for example), there is no evidence that Mrs Barry used violence or threats towards anyone.

229. Further, no one has criticised the behaviour of Mr Barry Snr. during the incident. Mr Sawtell described him as a “fair arbiter”, and that he was called over to the O’Donoghue house as such. What might be closer to the truth is that he was a concerned parent who was willing to try to ease a problem between two of his children. He went over to speak with his daughter-in-law and the point was to discuss the difficulties that his sons Thomas and Denis were experiencing with each other. This point is of significance in assessing the overall nature of family relationships. One of the chief difficulties the defendant faces is the November 2019 call. This precedes the New Year’s Eve incident by over a year. If it is true that the fall-out between the defendant and his parents had begun much earlier and indeed in 2019, how is it that the defendant’s father goes to his home to try to help him at the end of 2020? During the November 2019 call, Mr Barry Snr.’s wife is asking for the money back on behalf of both parents. Yet, the defendant’s case is that over two years before the call his parents had agreed to write off the loans or at least, on the defendant’s case, the bulk of the monies owed (December 2016-May 2017, allegedly confirmed

by the shed message in June 2017). The defendant has to try to situate the falling out and the motive for inventing a false claim against him back at least to before the recorded November 2019 call. However, there are difficulties with such an exercise. The subsequent conduct and assistance of Mr Barry Snr. on New Year's Eve 2020 is an obvious one, when on Annette's request, he went to her brother Michael O'Donoghue's home to discuss problems in the family. The argument advanced on behalf of the defendant is that "it took time for the 2019 falling out to infect the defendant's relationship with the claimants". With the conduct of Mr Barry Snr on the very last day of 2020, we see that the defendant's father was still willing to lend himself to help the defendant in his problems with Thomas Jnr., which Thomas Jnr. says developed during 2020 itself. Mr Laville suggests that it "took some time for the [parental] relationship to fray". On the doorstep of 2021, Mr Barry Snr. was still trying to assist. The problem with the "taking time" submission is that back in November 2019 Mrs Barry was asking her son for the money back on behalf of both parents, and thus if the motivation for demanding the money is the falling out, that deterioration must have predated the 28 November 2019 telephone call. Yet one has to examine Mrs Barry's conduct around this call carefully to understand the true situation.

230. On 27 November 2019, Kieran messaged the brothers' WhatsApp group about what he termed "the missing £630,000" (this refers to the three loans). Denis Barry took a screenshot of a selected part of the exchanges and sent it to his mother. Her response is telling. She says to her son, "That's a full [sic] I will talk to him tomorrow what is wrong with that man" (B1166). When he was cross-examined about this exchange, the defendant accepted that at this time his mother was not estranged from him or was looking to punish him – yet the next day she is asking for the money given to him to be returned. The tone of the words used by Mrs Barry towards her son in the recorded conversation is very far from vindictive retribution or punishment. Indeed, his mother stresses that she does not want to "put pressure" on him. What she tells him is what I find to be the truth: she wanted the money that she and her husband had given her son as loans back so they could pay off the mortgage on their home and help out their daughters and Deirdre's children.

231. I am quite satisfied that there were difficulties between the defendant and his brother Thomas. But the question is whether this resulted in a hostility between the claimants and the defendant. Evidence such as Mr Barry Snr's actions on New Year's Eve when trying to help with the Thomas-Denis difficulties, and Mrs Barry's message to Denis on Wednesday 27 November 2019 points away from such a connection. One has to consider how in the defendant's email of March 2021, he spoke of the difficulties in the previous 12 months, which dates the difficulties in 2020 and after the November 2019 recorded call. Thus the defendant must try to push the fall out back into 2019 to explain why it is that his mother was asking for the money back in that telephone call, yet on oath he accepted that Mrs Barry was not estranged from him at the time of the call. I reject the submission that there is a "lot of confusion" in the recorded call about what Mrs Barry is asking of her son. She wants the money she and her husband have given him back. That is clear. I reject the further submission that when he uses the words "helping out" that is a reference to the claimants having written off any loans. They had not. They had unquestionably "helped" him by loaning him money so that he could make property acquisitions that would have been beyond his reach. They did not "help him" by writing off the loans. They needed the money back. In the

recorded conversation, Mrs Barry tells her son that in terms. As Mr Laville realistically accepts, the defendant's March 2021 email to his mother does not mention the alleged conversations from late 2016 to around May 2017. The explanation for that omission is simple: these conversations did not happen. This element of the defence had not yet been devised by the defendant. I find the submission made on behalf of the defendant that "the fall out in 2019" was what "motivated the demand for repayment" in the first place and then is what lies behind this claim, to be entirely unmeritorious. I emphasise, as explained earlier in the judgment, that I have directed myself on *Lucas* throughout. I do not dismiss all of the defendant's evidence because of difficulties with certain key parts of it. His case is not a house of cards that collapses with one untruth.

232. On Issue 4, the defendant has the persuasive burden of proving that there was a clear and unequivocal write off. He has failed. Indeed, on the totality of evidence I would have found, should it have been necessary, that there was no write off given by the claimants or either of them. I have considered the observation in *Colegate* that the waiver be established through a series of statements or representations, but find nothing that comes close to being sufficient on this basis. Mr Laville, in an ultimately forlorn attempt to salvage the situation, states that the defendant's recollection of the circumstances of the write off discussions is "admittedly poor". I have found it is beyond that: I find that his explanation of the motivations of his parents for inventing a false story against him to be without merit, and is exposed by measurement against the canons of probability and improbability as an attempt by the defendant himself to devise a false story. His case suffers from fundamental incoherence. It cannot survive the contemporaneous evidence and sequence of events.
233. That finding having been made, the question of detriment becomes redundant. On this sub-issue, I would have found that by taking out a loan for the Salmon Street development, for example, the defendant acted to his detriment. However, the question of detriment does not arise as there was no clear and unequivocal write off, the first necessary stage. At various points in evidence and submissions, the defendant relied upon his comments to his mother in the recorded November 2019 telephone conversation that "you've helped me out". The fact is unarguably that she and her husband had "helped" the defendant very significantly by transferring very substantial sums without which he was unable to purchase the Salmon Street and the Reeves Avenue properties. That is very different from writing off these very large sums and not requiring their repayment. It is a very powerful point in the claimants' favour that there is no documentary evidence whatsoever to confirm unmistakably that the defendant had been "gifted" around half a million pounds. Given the constant communications the Barry family engaged in, as evidenced by the thousands of pages of trial documents, it is astonishing. Such absence points to the truth. On the defendant's case (or one formulation of it), this was not about Denis Barry asking his parents for more time, but the gifting to him of approximately £500,000 (taking the Reeves Avenue freehold out for a moment). For this family, this is a waiver on a massive scale. The lack of contemporaneous documentation suggests very strongly that it did not happen.

#### **Conclusion Issue 4**

234. The defendant has failed to prove on a balance of probabilities that the Salmon Street and Reeves Avenue loans were written off. Indeed, on the totality of evidence, the

court is able to find with little difficulty, and to the requisite civil standard, that there was no waiver. On this, Mrs Barry was telling the truth; the defendant was not.

#### **§XIV. ISSUE 5**

##### ***Defendant's indebtedness to claimants***

235. The inexorable consequence of my decisions on Issues 1-4 is that the sums owing to the claimants are as pleaded by them.

#### **§XV. DISPOSAL**

236. It follows from the court's analysis that judgment must be entered for the claimants. The defendant made a number of repayments to the claimants before the start of this claim and these must be deducted. Therefore, the remaining terms are as follows:

(1) Judgment sum: £643,055.90, plus

(2) Interest from 4 September 2021 at 3 per cent.

237. As noted by the claimants in their closing submissions, any further payments that the defendant has made after the start of the claim must also be deducted. The precise figures must be agreed between the parties, given the terms of the court's judgment. If they remain disputed, the court will rule. I direct parties to agree an order to reflect the terms of this judgment and will hear argument about consequential applications.

238. The court noted at the outset of the judgment the distress that has been caused by this litigation amongst a previously close-knit family. The court has viewed with growing dismay the private grief aired in public at hearings necessarily spread over a period of months. Mrs Barry puts it this way (B126-27):

“I do not know Denis anymore and haven't seen him or his wife and children over the last three years unless from a distance. I am shattered from the lies he has told ... He is someone we don't know any more and a very changed man.”

239. The court cannot but hear in Mrs Barry's comments a distant echo of the observations of Danckwerts LJ in *Jones v Padavatton*, where he said (329D):

“it is distressing that [mother and daughter] could not settle their differences amicably and avoid the bitterness and expense which is involved in this dispute carried as far as this court.”

240. I find that Denis Barry's parents loaned him money to help him purchase 295 Salmon Street and both the leasehold interest at 37a Reeves Avenue and the freehold at the site for both flats with the clear intention, agreed on both sides, that he would repay the sums. Mr and Mrs Barry loaned their son substantial sums in excess of £650,000 in good faith, because they trusted that he would repay them, as they trusted, and had every reason to trust, all their children in other loan arrangements that everyone treated historically with the requisite seriousness attending a legally binding situation. The claimants had no reason to doubt that their son Denis would respect their trust

and pay them back as soon as he was able. He did not. Instead, he has devised a series of elaborate, unreliable and untrue accounts to seek to evade the debt he owes his parents. His refusal to repay the claimants the money he unquestionably owes them - because this is a very serious amount of money loaned in contracts all parties intended to be legally enforceable - has caused his ageing parents both hardship and, I have no doubt more painfully, profound heartache.