Neutral Citation Number: [2009] EWHC 3264 (QB)

Case No: 08X02347

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 December 2009

Before :

MR. G. LEGGATT Q.C.

Sitting as a Deputy Judge of the Queen's Bench Division

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Between :

UPENDRA RASIKLAL PATEL **Claimant**

- and –

VITHALBHAI BIKABHAI PATEL **Defendant**

- -
- -

Jonathan Adkin (instructed by **Premier Solicitors LLP** for the Claimant
Andrew Davies (instructed by **Morrison & Masters Ltd**) for the Defendant

Hearing dates: 25 – 26 November 2009

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JUDGMENT

Mr G. Leggatt Q.C.:

1. If money is compounded at a high rate of interest with frequent rests over many years, the initial sum can snowball to a staggering amount. In this case the claimant, Mr Upendra Patel, advanced sums totalling £56,450 to the defendant, Mr V.B. Patel, between 1979 and 1983. Between 1982 and 2001 the defendant made repayments totalling £72,336 (i.e. some £14,000 more than the sums received). But, according to the claimant, interest has continued to accrue at 20% per annum with monthly rests such that the amount claimed in the Particulars of Claim dated 17 June 2008 is £4,556,181. By the start of the trial some 18 months later, the amount claimed had grown on my calculation to over £6 million.

2. The principal issues in dispute are: (1) whether legally binding loan agreements were concluded between the parties on the terms alleged by the claimant; and (2) if so, whether the court can and should make an order under s.140B of the Consumer Credit Act 1974 to discharge or reduce the sum payable on the ground that the relationship between the parties is unfair to the defendant.

The Parties

3. The claimant and the defendant have known each other for over 50 years as close family friends. The original relationship was between the defendant and the claimant's father, Rasikbhai, both of whom emigrated from India to Northern Rhodesia (as it then was) in the early 1950s and became friends through working as assistants in the same shop in Lusaka. Their families also became close. For a period of two or three years in the late 1950s, when the claimant was aged about 14 to 16, the claimant's father returned to India and the claimant lived with the defendant and his family while he finished school. The claimant agreed that during this period the defendant brought him up as if he were his own son.

4. Since 1976, when the defendant emigrated to the UK, the claimant and the defendant have been living in different countries but they have remained close. A sign of how their relationship has been akin to a family one (although they are

not in fact relatives) is that the claimant calls the defendant "Mamajee", which means maternal uncle.

5. The defendant is now 81 years old. Until he recently retired, he has worked all his life as a shop-keeper. When he first arrived in the UK, he worked at a branch of W.H. Smith and then ran a news agent's shop in London for a year. As described below, in 1980, with financial assistance from the claimant, he purchased a news agent's business in Swindon. In 1983, with further financial assistance from the claimant, he purchased a small supermarket business in Swindon which he ran with his son. The supermarket in particular flourished and in the late 1990s appears to have been making profits before any money withdrawn by the defendant and his family in the region of £150,000 to £200,000 a year. As a result of this success, the defendant and his family have been able to buy their own home as well as several other properties in Swindon which are rented out.

6. The claimant, who now lives in Australia, is a much more educated man than the defendant, is professionally qualified as an accountant and has become a successful businessman on a considerably larger scale. It was my impression that the defendant regards the claimant with some deference, which has probably increased with time. When it was put to him in cross-examination that he and the claimant are both businessmen, the defendant replied: "I am a businessman. He is a Chartered Accountant". That answer seemed to me to encapsulate the defendant's perception of the claimant's status and accomplishments.

Witnesses

7. At the trial I heard evidence from the claimant, his son Amar, and Mr Kirit Patel (a longstanding friend of the claimant, who is not related to either of the parties); and from the defendant and his son Daksesh. I also read witness statements from Dayabhai Patel and Suryakant Chauhan on which the claimant and defendant relied respectively as hearsay evidence – though I did not consider that any weight should be given to either statement. In addition, the claimant relied on the report of a jointly appointed handwriting expert.

The Factual History

8. The debt claimed by the claimant arises under a series of alleged loan agreements, all of which were oral. According to the claimant, the last of these agreements was made in 1992 and replaced the earlier agreements. There is no dispute about the amounts transferred but the defendant denies that any terms were agreed as to repayment or the payment of interest. The history of the transactions is as follows.

The West Loan

9. In about 1979 the claimant visited the UK and stayed with the defendant and his family. At that time the defendant was looking to buy a news agent's business in Swindon, where he and his family were living in council accommodation. The claimant agreed to provide funds to assist the defendant in purchasing a suitable business. Between December 1979 and January 1981 the claimant transferred funds totalling £11,953 to the defendant which the defendant used to finance the purchase of a news agent's business called "West". In July and August 1982 further payments totalling £4,497 were made. The funds were transferred in various small amounts, some in the form of remittances from Zambia and some from third parties who owed money to the claimant.

10. The defendant does not dispute that he received sums totalling £16,450 from the claimant in order to assist in purchasing the West business, but there is a dispute as to the basis on which the claimant provided this money. According to the claimant, it was orally agreed that he would lend the money to the defendant on terms that interest would be payable at a rate of 15% per annum compounded monthly, and that the loan would be repayable no later than June 1985. According to the defendant, the money was provided "with no strings attached" and with no agreement as to when or whether the money would be repaid nor as to the payment of any interest. I shall refer to the provision of these funds as the "West loan" (without intending by this description to prejudge whether there was a legally binding agreement or only a moral obligation on the defendant to repay the money).

11. Accounts were prepared for the defendant and his wife trading as "Wests News Agents" for each of its first three years of trading. The accounts for the first period from 27 December 1980 (when trading began) to 31 December 1981 show a figure on the balance sheet under "Current Liabilities" of £16,866 described as "creditors and accruals". It seems clear, and I did not understand the defendant to dispute, that this figure includes funds received from the claimant. The 1982 accounts show "creditors and accruals" of £22,140 and in the 1983 accounts the figure is £21,829 (with a separate entry of £3,367 for "bank overdraft"). I infer that these figures also included the West loan.

Loan to Kirit Patel

12. Kirit Patel, a longstanding friend of the claimant, gave evidence that in 1978 the claimant had made a loan of approximately £6,000 to him and his brother to assist them in purchasing a supermarket in Birmingham. Interest was payable on the loan at a rate equivalent to the bank overdraft rate which was equivalent to the bank base rate plus 3.5%, calculated on a monthly basis. The loan was to be repaid within 4-5 years. Mr Patel said that he and his brother repaid the loan together with interest to the claimant as agreed. I regard this evidence as of some relevance in assessing both the likelihood that the loans made to the defendant were on the terms alleged by the claimant and the fairness of those terms.

Mandamus Limited

13. Because of the difficulties for the claimant caused by Zambian exchange control regulations of remitting and holding money abroad and his trust in the defendant, the claimant would sometimes ask the defendant to hold money for him in the defendant's own deposit account at Barclays Bank in Swindon.

14. In September 1981 the claimant set up a company in Jersey called Mandamus Limited to avoid the effect of Zambian exchange control regulations. The registered shareholders of Mandamus were the claimant's parents but the company was controlled by the claimant. A bank account in the name of

Mandamus was opened at the branch of Barclays Bank in Swindon at which the defendant held his own deposit account and a power of attorney was executed to enable the defendant operate the account. He did so at all times on the instructions of the claimant. The account was used to receive and make various payments. It appears that Mandamus was later dissolved but that the bank account in its name continued in existence although the account has effectively been dormant since 2001.

The Joint Venture Proposal

15. The claimant has disclosed a set of handwritten notes which describe a detailed structure for a joint business venture between Mandamus, the defendant and Mr Dayabhai F Patel, a close family friend of the claimant who had also emigrated from Zambia and lived in Leicester. The claimant says that these notes formed the basis of discussions between himself, the defendant and Dayabhai Patel in 1982. The concept was that the defendant and Dayabhai Patel would each find a suitable business to run, he (the claimant) would provide most of the finance required (through Mandamus), and the profits of the businesses would be shared. The proposal was not taken forward. The defendant denied (improbably in my view) that it was ever discussed with him.

The Londis Loan

16. What is clear is that in 1983 the claimant provided funds to the defendant to enable the defendant to purchase a supermarket in Swindon (at that time trading as "Londis") which his son, Daksesh, would manage. It is agreed that the total amount provided by the claimant was £40,000, although the disclosed documents only evidence two payments totalling £39,075. The first payment was of £5,000 and a second payment of £34,075 was made to the defendant in November 1983 from the Mandamus account.

17. Again, there is a dispute as to the basis on which the claimant advanced this money. According to him, it was orally agreed that the money was a loan on terms that he was to receive a return equivalent to 20% of the profits of the

Londis business together with interest at the Barclays Bank base rate plus 3.5% compounded monthly on all outstanding amounts. According to the defendant, these funds were provided to help set up his son in business, again "with no strings attached" and with no agreement as to when or whether the money would be repaid nor as to the payment of any interest. I shall refer to this transaction as the "Londis loan".

18. The claimant has disclosed a sheet of handwritten notes and calculations which he says he made during a telephone conversation with the defendant to discuss the purchase of the Londis business and the terms of the claimant's investment in it. These notes show estimates of gross profit and expenses for the business which the claimant said were given to him by the defendant and (amongst other figures) a calculation of one third of a net profit figure. Other percentages (20%, 30% and 42%) are written in the margin. As explained by the claimant, this reflected a discussion in which he initially proposed that he should receive a third of the net profits of the business, which was then negotiated by the defendant to result in an agreed figure of 20%.

19. The claimant visited the UK in June 1984. He had arranged for a solicitor to prepare a draft agreement described as a "partnership agreement" between Mandamus Ltd, the defendant and Daksesh. The draft agreement provided for a supermarket business to be carried on as a partnership on terms similar to those which the claimant says he had already agreed orally with the defendant, save that the sum of money to be provided by Mandamus (as 80% of the partnership capital) was left blank. The claimant's explanation of this document is that it was intended to involve Daksesh in the "joint venture" which was already in existence between himself and the defendant. It is common ground that the claimant brought the draft agreement with him when he came to Swindon and stayed the night with the defendant and his family, but that Daksesh refused to sign the agreement which was not then taken further.

Extension of the West Loan

20. The claimant says that at about this time he discussed with the defendant the fact that the West loan was due to be repaid; however, the defendant said that he still needed these funds for a few more years as he was buying both his council house and the premises from which the "West" news agency was operating. The claimant says that he agreed orally with the defendant for the loan to continue for another six years with interest now payable at Barclays' base rate plus 3.5%, compounded monthly. The defendant denies that any such discussion and agreement took place.

Requests for Financial Information

21. It was the claimant's evidence that over the period from 1985 onwards he pressed the defendant from time to time for financial information showing the results of the Londis supermarket business so as to enable him to calculate his 20% share of the profits. The claimant was provided at some point with (unsigned) accounts dated 3 December 1986 for the defendant and his son trading as 'Londis' for their first period of trading from 21 November 1983 to 30 November 1984. The balance sheet shows the business as financed by a "loan account" with a balance of £44,936. In addition, the profit and loss account shows as an item of expenses "loan interest" of £5,861. Subtracting £5,861 from £44,936 gives a figure of £39,075 – which corresponds to the total amount provided by the claimant for which there is documentary evidence. The claimant's representatives prepared a calculation of interest on the amount of £39,075 at Barclays' base rate plus 3.5% compounded with monthly rests for the period of the accounts, which produced a figure for interest of £5,914 – very close to the figure in fact shown in the accounts. It was submitted on behalf of the claimant that this indicates that the defendant recognised when the accounts were prepared, first, that he had a legal liability to repay the West loan and, second, that interest was payable on the loan at the rate which the claimant says was the agreed rate. The defendant's evidence was that he told his accountant that no interest was payable on the loan but his accountant nevertheless decided

to include a figure for loan interest in the accounts so as to reduce the taxable profits reported for the business.

22. In 1987 the claimant emigrated from Zambia to Australia. At his request, the defendant transferred a total of £35,000 to him at that time.

The "1992 Agreement"

23. Apart from the 1984 accounts, the claimant was not provided with any further financial information showing the results of the Londis business, although it was his evidence that he continued to ask the defendant for such information from time to time over the period from 1986 to 1992 so that he could calculate his 20% share of the profits. He says that he was met with various excuses about the failure of the defendant's accountant to prepare the accounts. In 1992 the claimant was in the UK and visited the defendant. They went together to meet the defendant's accountant, Mr Chauhan, at his offices. The claimant says that he asked Mr Chauhan why the accounts had not been prepared and was told that the defendant had not provided all the necessary information.

24. After he had returned to Australia the claimant prepared calculations of the amounts that he believed were owing to him in respect of each of the two loans as at 30 June 1992. In the case of the West loan, the claimant calculated that there was an outstanding balance of £54,365; and in the case of the Londis loan, he calculated that there was an outstanding balance of £153,100. For the purpose of the latter calculation in the absence of financial information the claimant made assumptions as to what the profits of the supermarket business had been. He appears to have assumed that the net profit of the business for its first year corresponded to the forecast given to him in his telephone conversation with the defendant before the business was purchased; and that the figure had increased by 10% each year after that. In fact, the accounts for the Londis business for 1983/84 indicate that the relevant profits for that year may have been less than the amount assumed by the claimant (depending on whether the figure in the accounts for wages includes any payments to family members); but the accounts for 1992/93 indicate that the relevant profits for that year (and the

previous year) were more than the claimant assumed. Overall, based on the limited evidence, I consider that the claimant's assumptions were reasonable.

25. The claimant's calculation of interest also appears to have been an approximation. It seems that the claimant did not have any figures for the Barclays base rate before 1987 and simply applied his 1987 figure to earlier periods. Further, for each year the claimant took a single figure as the Barclays base rate even though, according to a table of rates produced by the claimant's solicitors, the rate often changed several times during the year. For example, for 1988 the claimant used a rate of 13% which was the rate at the end of the year, although the table shows that the rate in May was 7.5% and it only reached 13% on 25 November 1988.

26. On 23 July 1992 the claimant faxed his calculations to Mr Chauhan and says that he also sent a copy by post to the defendant. The defendant denied receiving or seeing the calculations. The claimant sent a follow up fax to Mr Chauhan on 2 September 1992 asking him to "advise by return fax or phone as to any progress on the matters so I can pursue and finalise with Mr V.B. Patel". On 25 November 1992 the claimant sent a further fax asking for a reply. It is apparent that no reply was forthcoming.

27. According to the claimant, at some time in the latter part of 1992, because financial information about the Londis business was not available or hard to come by, he agreed new terms with the defendant over the telephone. These terms were: that interest would accrue on all outstanding sums at a rate of 20% per annum, compounded monthly, with effect from 1 July 1992; that the amounts outstanding at that date were agreed to be the sums of £54,365 and £153,100 (£207,465 in total) estimated by the claimant; and that all the outstanding sums were to be repaid as and when requested by the claimant. Once again, there was no written agreement nor any written record of such an agreement made at the time, and the defendant denies that there was any such discussion or agreement.

Subsequent Repayments

28. In January 1993 the defendant transferred to the claimant in Australia at the claimant's request a sum of £10,000 which the defendant had first deposited in the Mandamus account in two instalments of £5,000.

29. The next repayments made by the defendant consisted of a series of regular cash deposits of £200 a week which he made into the Mandamus account between November 1996 and January 1998, when the deposits ceased. The total amount of these payments was £10,200. The claimant claimed in evidence that he made these payments because the claimant said that he wanted money to invest in a lithographic business (although no money was transferred from the Mandamus account to the claimant at that time nor until nearly three years later).

30. In January and February 1998 the defendant made two payments of, respectively, £1,700 and £1,600 to a third party at the claimant's request.

31. In November 2001 the defendant paid £7,000 into the Mandamus account. This brought the balance of the account to £21,549. A few days later the defendant transferred £20,000 at the claimant's request to the account of a lithographic business owned by the claimant in Australia.

32. Since then, no further sums have been paid by the defendant to the claimant. It is common ground that the total amount paid by the defendant to the claimant (between 1982 and 2001) is £72,336, of which £30,500 was paid after 1992 as described above.

Later Financial Information

33. The defendant has disclosed accounts for the supermarket business for the years ended 30 November 1993 and 1994, various trial balances for the years 1995 to 1997 and then further accounts for 1999 and 2000. The 1993 accounts include figures of £40,329 (and £49,704 for 1992) for "bank and other loans" and £12,671 for "bank loan interest and other charges" (£11,168 for 1992); and the

1994 accounts include corresponding figures of £44,765 for loans and £11,232 for bank loan interest and charges. While these figures may include amounts in respect of the Londis loan, I do not think it safe to draw any inference to that effect particularly as the amounts are much smaller than the outstanding balance calculated by the claimant in 1992 (even excluding the profit element). The trial balances for the years 1995 to 1997 include entries described as "Loan a/c re Patel" though mostly for amounts of around £8,000. Again, I do not consider that any inference can safely be drawn that these entries relate to the Londis loan. The 1999 and 2000 accounts do not appear to contain any entries which relate to the Londis loan.

The "2003 Document"

34. It was the claimant's evidence that from around 2002 he was becoming increasingly concerned that the defendant was getting older and that, if the defendant were to die, he might have problems obtaining repayment of the loan as he did not have anything in writing recording what had been agreed.

35. In March 2003 the claimant travelled to the UK from Australia to assist his sister who was living in Preston in divorce proceedings. The claimant says that when he was in the UK he wrote out a document to record the terms of the agreement that he had made orally with the defendant in 1992. He went to see the defendant in Swindon and met him at the Londis supermarket. He gave the document to the defendant who read it through and signed it without any hesitation.

36. The defendant agrees that in March 2003 the claimant visited him and stayed for one night but adamantly denies that any document was produced or signed during this visit. According to the defendant, the first time that he ever saw the document which purports to bear his signature was when a copy was produced by the claimant's solicitors in the course of this litigation. He maintains that he never signed the document and that his signature on the document has been forged.

37. The disputed document is dated 2 March 2003 and addressed "To whom it may concern". It states:

> "I, Vithalbhai B Patel hereby confirm and agree that funds invested with me by Upendra Rasiklal Patel & family and their legal entities for our joint venture investments into various businesses and properties since 1980 are under the following terms.
>
> - funds invested in 1980/82 £16,450 (sixteen thousand four hundred and fifty pounds) and in 1983 £40,000 (forty thousand pounds)
> - as per our revised verbal agreement in 1992, as financials are unavailable / difficult to come by, investment return is to be equivalent at rate of 20% per annum, compounded monthly, applied to all outstanding funds and unpaid returns with effect from 1st July 1992 on £54,365 + £153,100
> - As agreed before all outstanding funds and returns are to be paid as and when requested by Upendra Rasiklal Patel."

38. Pursuant to an Order made by Master Rose on 21 May 2009, the parties jointly appointed a single expert in the field of forensic handwriting examination to give an opinion on the issue of the authenticity of the defendant's signature. The conclusion of the expert, Ms Deborah Jaffe, in her report dated 15 June 2009 based on examination of the "2003 document" and an extensive amount of comparative material is that: "Due to the significant and extensive list of corresponding features, I believe that there is strong evidence for the proposition that Mr V B Patel is the author of the questioned signature ..." The conclusion that there is "strong" evidence is defined in the report as meaning that "the possibility of another author is most unlikely". Neither party asked Ms Jaffe to attend court to be cross-examined on her report.

Claims for Payment

39. The claimant next saw the defendant in January 2007 when the defendant attended the wedding of the claimant's son, Amar, in Nairobi, Kenya, followed by a trip with the claimant and his family to Lusaka. The claimant says that on this occasion he brought up the subject of the loan with the defendant and said that the outstanding sums needed to be paid. He asked the defendant if he had a record of repayments so that the amount owing could be reconciled and finalised; the defendant said that he did not but that he would dig out records and prepare a list of repayments. The defendant denies that such a conversation took

place and said that during this trip there was no talk of any money owing to the claimant.

40. In April 2007 the defendant and his wife came to Australia for a holiday and to attend Amar's wedding reception in Perth. They stayed with the claimant. It is not in dispute that, shortly before the defendant left to return home, the claimant brought up the subject of the loan. He gave the defendant a document he had prepared which set out the balances for each of West and Londis loans owing as at 30 June 1992 "as per details submitted to accountant, Chauhan", and which also stated as follows:

> "TERMS OF FUNDS INVESTED
>
> 1 Original agreement was as follows
>
> a) Interest at Barclays bank base rate plus 3.5% (average approx 17%), compounded at monthly rest on outstanding funds; and
>
> b) 20% of profit after interest but before family wages, fees etc
>
> 2 As financials were unavailable / difficult to come by, agreement revised to interest at 20%, compounded at monthly rest; and on outstanding funds"

41. According to the claimant, the defendant said that he knew the amount that he owed the claimant would be significant but requested the claimant to waive all interest. The claimant replied that he was not prepared to do so, but that he would consider reviewing the rate once the repayments made by the defendant had been agreed. The defendant's account of the episode is that the document was given to him when he was just about to leave for the airport. He put it in his pocket and did not read it until he got home. When he read the document he was taken aback, as it had never previously been suggested that the funds provided over 20 years earlier to assist him in purchasing the West and Londis businesses were interest-bearing loans. Despite this, the defendant agreed in evidence that he did not telephone or write to the claimant to say that he did not consider that any money was owing.

42. It is common ground that the defendant subsequently prepared a handwritten list of payments made to the claimant, and that in August 2007 the claimant's son Amar (who lives in the UK) travelled to Swindon and collected the list from the

defendant and sent a copy to his father. The list shows payments totalling £72,336. The payments are agreed by the claimant.

The October 2007 Meeting

43. On Sunday, 14 October 2007 the claimant met the defendant at his home in Swindon. Both their sons as well as other members of their families were also present. It is common ground that at this meeting the claimant outlined the history of the matter as he saw it and offered to reduce the rate of interest payable by the defendant to 15% per annum with similar monthly rests, from the time of the first advance in 1980. There is a conflict of evidence as to the defendant's response. According to the claimant and Amar, the defendant accepted this proposal. According to the defendant and Daksesh, they simply listened to what was said but did not give any response. Everyone then had a meal together and Amar returned to London. The claimant stayed with the defendant for two more days.

44. The next day (Monday, 15 October 2007) Amar prepared a spreadsheet calculation at the revised rate of 15% per annum. This showed an amount outstanding as at 31 October 2007 of £1,099,783. Amar sent this spreadsheet by email to the defendant's grand-daughter. The defendant was at work at the time but the claimant discussed the calculations with Daksesh who agreed to explain them to his father. The claimant says that the next day he spoke to the defendant who agreed to make payments to pay off the debt starting in November 2007 after making arrangements with his bank. The claimant then returned to Australia. However, when he subsequently telephoned the defendant, he was referred to the defendant's (new) accountant, Hemant, who said that there was no money owed at all. The defendant refused to speak to the claimant further about the matter.

45. The defendant and Daksesh deny that before the claimant left to return to Australia there was any discussion in which the defendant agreed to make any payments to the claimant. According to Daksesh, he had not yet had a chance to discuss the figures sent by Amar with his father when the claimant left.

However, Daksesh agreed in evidence that after the claimant had returned to Australia no one contacted the claimant to say that the defendant was not willing to pay the amount shown in the spreadsheet or any amount and did not consider that any money was owed. His comment was: "It should have been done but it wasn't".

Letters before Action

46. On 21 November 2007 the claimant wrote a letter to the defendant referring to the agreement which he said had been reached on 14 October 2007 and asking whether the defendant was going to honour this agreement, failing which he would have to proceed with the matter legally through the courts. The defendant said in evidence that he did not know why the claimant wrote this letter and that there had not been any agreement reached on 14 October.

47. On 29 April 2008 solicitors instructed by the claimant sent a letter before action to the defendant claiming repayment of a total sum of £4,371,592. The letter enclosed a copy of the document purportedly signed by the defendant in March 2003. The defendant replied denying that any money was owed. These proceedings were commenced on 19 June 2008.

The Issues

48. There are three disputed issues:

    (1) Were legally binding agreements made on the terms alleged by the claimant?

    (2) Is the claimant entitled to recover sums paid by Mandamus?

    (3) Can and should the court make an order under s.140B of the Consumer Credit Act 1974 on the ground that the relationship between the parties is unfair to defendant?

(1) The Nature and Terms of the Arrangements

49. It is the claimant's case that the money advanced to the defendant was lent on the terms described above. The defendant's case is that the arrangements made were entirely informal and not intended to be legally binding and that no terms were ever agreed as to the basis for repayment of principal or interest. In practice, it seems to me that the questions whether specific terms were agreed and whether the parties intended to make legally binding contracts stand or fall together. If specific terms which included the payment of a high rate of compound interest were agreed as the claimant alleges, the inference seems to me inescapable that those terms were intended to be legally binding.

50. On the evidence I have no hesitation in rejecting the defendant's contentions and accepting the claimant's case as to the existence and terms of the disputed agreements. My principal reasons are as follows:

    (1) My impression of the claimant, based on the facts of his business career and from hearing him give evidence, is that he is an astute and hard-headed businessman. While I accept that he had close ties of affection for the defendant and wanted to assist him and his family to become established in the UK, I am sure that the claimant would not have been prepared to advance substantial amounts of his money expatriated with some difficulty from Zambia other than on a basis which he believed would afford him a profitable return. His trust in the defendant was in part what gave the claimant confidence that the loans which he made were a good business proposition. It also explains the claimant's willingness to advance the funds on the basis of oral agreements.

    (2) Making every allowance for the defendant's age and some difficulties of communication, I formed the clear impression that much of what he said in evidence about matters directly relevant to the claim was untruthful. I therefore consider that I can place little or no reliance on his testimony about these matters.

(3) A sum which in my view can only reflect the money lent by the claimant plus some accrued interest was shown as a liability in the accounts for the first year of trading of the West business. This indicates both that the defendant regarded the loan as a legal liability and that it was agreed to carry interest.

(4) The handwritten notes and calculations made by the claimant during a telephone conversation with the defendant to discuss the purchase of the Londis business and the terms of the claimant's investment in it show that the claimant was only willing to advance money to assist in starting up that business if he could agree terms with the defendant which he felt would deliver a satisfactory return on his investment.

(5) The draft partnership agreement prepared in 1984 was in my view an attempt by the claimant to put the financial arrangements for the supermarket business onto a more formal footing. I do not accept the claimant's evidence that he had the agreement drawn up because he thought it would be a good idea to bring the defendant's son into the "joint venture". I think it likely that the claimant understood from the outset that Daksesh would be involved in the business. When Daksesh refused to sign the draft agreement, the claimant did not press the matter. However, he would not in my view have let it lie if he had not understood that he had a binding oral agreement with the defendant on which he could rely regarding the return that he was entitled to receive on his investment (on terms which were reflected and elaborated in the draft agreement).

(6) The accounts for the first year of trading of the Londis business not only show the business as being financed by a loan, which is clearly the loan provided by the claimant, but also show as an expense loan interest which corresponds to the rate which the claimant says was agreed. I reject as palpably false the defendant's claim in cross-examination that he told his accountant that no interest was payable on the loan but his accountant nevertheless decided to include a fictitious liability for interest in the accounts to reduce the taxable profit reported for the

business. I am also satisfied that the reason why the claimant was provided with a copy of the accounts was because he was requesting financial information in order to calculate his agreed share of the profits of the business.

(7) It was common ground that when the claimant visited the UK in June 1992 he went with the defendant to see the defendant's accountant, Mr Chauhan. I reject as another obvious falsehood the defendant's suggestion that this occurred simply because he happened to have a meeting with his accountant while the claimant was staying with him and the claimant accompanied him wherever he went. I am sure that the meeting was specifically arranged so that the claimant could find out directly from Mr Chauhan why no accounts for the Londis business showing its profits since 1984 had been produced.

(8) The calculations which the claimant faxed to Mr Chauhan on 22 July 1992 were prepared on the basis of the terms which the claimant says were agreed for the West loan (as extended) and for the Londis loan. Whether or not the claimant also sent a copy of the calculations directly to the defendant, I have no doubt that the defendant saw the calculations at the time and understood them to have been prepared on the basis of the terms which he had agreed.

(9) Although most of the repayments made by the defendant to the claimant were made in response to specific requests from the claimant and are equally consistent with either party's version of events, the regular payments of £200 a week made from November 1996 to January 1998 are in my view only explicable on the basis that the defendant recognised that he had an outstanding liability to the claimant. I reject as a further falsehood the defendant's suggestion that these payments had any connection with the claimant's later request to transfer money to his lithographics business in 2001. By this time the defendant had repaid the principal amount borrowed and the payments therefore also show that the defendant understood that he was liable to pay interest on the loan.

(10) The 2003 document, if authentic, is an express record of the terms said by the claimant to have been agreed in 1992, signed by the defendant. It is therefore essential to the defendant's case that the signature on the document is a forgery. I am satisfied that the signature is not a forgery and that the document was indeed signed by the defendant. I regard the reasoned opinion of the joint handwriting expert as the most reliable evidence of whether or not the signature is genuine.

(11) It is common ground that at the end of the defendant's stay with the claimant in Australia in April 2007 the claimant gave the defendant a document which set out the sums owing as at 30 June 1992 (as submitted to the defendant's accountant) and also set out the terms of the original agreement (for the Londis loan) and the terms of the revised agreement. I can think of no reason why the claimant would have invented these terms at that time and none was suggested.

(12) It is also common ground that the defendant did not raise any issue with the claimant about this document after it was given to him and that in August 2007 he provided a list of the repayments he had made. This conduct is only consistent in my view with the defendant's recognition that the document given to him accurately recorded the terms which he and the claimant had agreed.

(13) I regard it as highly improbable that, having come to the UK and visited the defendant in October 2007 with the object of reaching a resolution of the matter, the claimant would have returned to Australia without having obtained any response from the defendant to his proposal to recalculate the debt at an interest rate of 15%. It is even more improbable that, if the defendant had believed that he owed nothing to the claimant as all the money had been repaid, he would not have said so at the meeting on 14 October 2007 but would have waited until the claimant telephoned some time later from Australia to say this. I accept the evidence of the claimant and Amar to the effect that at the October meeting the defendant acknowledged his indebtedness to the claimant but asked the claimant to consider reducing it and in effect threw himself on the claimant's mercy

by saying that he would accept whatever the claimant decided was reasonable. The claimant proposed that the rate applied be reduced from 20% to 15% and the defendant accepted this. However, after the defendant had seen and had a chance to reflect on the spreadsheet calculation which showed that this resulted in an amount payable of over £1 million, he decided to deny that he owed any money.

51. On behalf of the defendant, Mr Davies submitted that it is inherently improbable that the defendant would have agreed to the terms alleged, as such terms would have made no commercial sense and would have rendered the defendant's businesses uneconomic. While it is true that a point was reached when so much interest had accrued that it became commercially impracticable for the defendant to pay off the loan, I do not accept that this was so from the outset. On the contrary, as discussed later, I am satisfied that at the time they were made the original loans made good business sense for the defendant. Mr Davies also submitted that if the defendant had agreed to pay high rates of compound interest on the loans as alleged by the claimant, it would have been commercial madness to allow the debt to grow over many years. I agree that this can be regarded as commercial madness but I do not find that a sufficient reason to infer that it is not what occurred. I will consider later how it came about. Mr Davies also relied on the absence of any chasing documentation and of any proper record kept by the claimant of the balance of the outstanding debt as inconsistent with the existence of a binding agreement. While I regard these factors as relevant to the fairness of the relationship and will return to consider them in that context, they do not in my view come anywhere close to displacing the clear conclusion to be drawn from the matters to which I have referred that the arrangements were intended to be legally binding.

52. I accordingly find that there were legally binding loan agreements made at each stage of the relevant history on the terms alleged by the claimant.

(2) The Mandamus Issue

53. The defendant put the claimant to proof that he is entitled to repayment of sums which were paid by Mandamus. Although the defendant was careful in his oral evidence to refer to sums which he withdrew from the bank account of Mandamus as sums paid to him by Mandamus rather than the claimant, he acknowledged that in operating the account he acted at all times on the claimant's instructions. It is clear that the loan agreements were made with the claimant and that, in so far as part of the money lent by the claimant came from the Mandamus account, Mandamus is to be regarded as acting as the claimant's agent or nominee. There is therefore no substance in this suggested defence to the claim.

(3) The Consumer Credit Act Issue

54. The third issue is whether, if a legally binding agreement was concluded in 1992 on the terms alleged by the claimant, as I have found that it was, there is an "unfair relationship" in respect of which the court can and should make an order under s.140B of the Consumer Credit Act 1974 to reduce or discharge the sum payable by the defendant.

55. Sections 140A to 140D were inserted into the 1974 Act by s.20 of the Consumer Credit Act 2006. They replace the provisions of ss.137 to 140 which allow the court to re-open "extortionate credit bargains" and give the court wider and more flexible powers. The new sections provide in relevant part as follows:

> "**140A Unfair relationships between creditors and debtors**
>
> (1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following--
>
> (a) any of the terms of the agreement or of any related agreement;
>
> (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
>
> (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).

…

(4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended.

…

140B Powers of court in relation to unfair relationships

(1) An order under this section in connection with a credit agreement may do one or more of the following--

(a) require the creditor … to repay (in whole or in part) any sum paid by the debtor … by virtue of the agreement …;

(b) require the creditor … to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;

(c) reduce or discharge any sum payable by the debtor … by virtue of the agreement or any related agreement;

…

(f) alter the terms of the agreement or of any related agreement;

…

(2) An order under this section may be made in connection with a credit agreement only--

(a) on an application made by the debtor …;

(b) at the instance of the debtor … in any proceedings in any court to which the debtor and the creditor are parties, being proceedings to enforce the agreement or any related agreement; or

(c) at the instance of the debtor … in any other proceedings in any court where the amount paid or payable under the agreement or any related agreement is relevant.

…

(9) If, in any such proceedings, the debtor … alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary.

140C Interpretation of ss.140A and 140B

(1) In this section and in sections 140A and 140B 'credit agreement' means any agreement between an individual (the 'debtor') and any other person (the 'creditor') by which the creditor provides the debtor with credit of any amount.

…

(4) References in sections 140A and 140B to an agreement related to a credit agreement (the 'main agreement') are references to—

(a) a credit agreement consolidated by the main agreement;

…

(7) For the purposes of this section a credit agreement (the 'earlier agreement') is consolidated by another credit agreement (the 'later agreement') if—

(a) the later agreement is entered into by the debtor (in whole or in part) for purposes connected with debts owed by virtue of the earlier agreement; and

(b) at any time prior to the later agreement being entered into the parties to the earlier agreement included—

(i) the debtor under the later agreement; and

(ii) the creditor under the later agreement …"

56. By reason of the transitional provisions contained in Schedule 3 to the 2006 Act the court has power to make an order under s.140B in connection with a credit agreement made before the 2006 Act came into force at the instance of the debtor in proceedings commenced after 6 April 2007 – as the present proceedings were.

57. On behalf of the claimant, Mr Adkin did not dispute that the 1992 agreement is a "credit agreement" to which sections 140A and 140B in principle apply, but he put forward two answers to the defendant's claim for relief under these provisions. First, he argued that the defendant is barred by limitation from seeking an order under s.140B. Second, he submitted that there was in any event no unfair relationship, having regard to all the relevant circumstances.

Limitation

58. The first question is therefore whether the defendant's claim for relief is time-barred. The claimant contended that it is barred by s.8 of the Limitation Act 1980 which provides that an action upon a specialty shall not be brought after the expiration of 12 years from the date on which the cause of action accrued. In support of this contention Mr Adkin relied on the cases of ***Rahman v Sterling Credit*** [2001] 1 WLR 496 and ***Nolan v Wright*** [2009] 3 All ER 823, both of which concerned attempts to re-open extortionate credit bargains under s.139(1) of the 1974 Act.

59. In ***Rahman***, the Court of Appeal held that the statutory right of a debtor to make an application to the court to reopen a credit agreement under s.139(1) on the ground that the credit bargain is extortionate was an action upon a specialty, as

an action upon a specialty includes an action upon a statute and the debtor's cause of action under s.139(1) arose out of and only out of the provisions of the 1974 Act. It appears to have been common ground in ***Rahman*** that the date when the debtor's cause of action accrued was the date when the credit agreement was made; and as less than 12 years had expired before the debtor applied to reopen the credit agreement, the Court of Appeal concluded that the application was not time-barred. In ***Nolan***, Judge Hodge QC sitting as a judge of the High Court followed and applied this approach. With regard to the proposition that the date on which the debtor's cause of action accrued was the date of the credit agreement, he said at p.839f-g, para [17]:

> "I have struggled in vain to identify any other possible candidate for the date on which the debtor's cause of action to reopen the credit agreement as an extortionate credit bargain could be said to have accrued; and Miss Anderson was unable to offer any convincing alternative to the date of entry into the credit agreement itself. Such an approach is consistent with the emphasis accorded by Dyson LJ in the *Paragon Finance* case to considering matters 'as at the date when the credit bargain is made, and at no other time' when determining whether a credit bargain is extortionate."

60. Mr Adkin submitted that this analysis applies equally to a claim for relief under s.140B and that, as the credit agreement under which the claim in this action is brought was made in 1992, which is more than 12 years before the action was commenced or the defence was filed, the defendant's claim for relief is time-barred.

61. On behalf of the defendant, Mr Davies agreed that the defendant's claim for relief under s.140B is an action on a specialty to which the 12 year time limit imposed by s.8 of the Limitation Act 1980 applies. However, he distinguished ***Rahman*** and ***Nolan*** on the ground that, in contrast to the position under s.139 of the 1973 Act, under the new provisions the court is required to consider the relevant relationship throughout its course and to take into account matters arising after the date of the credit agreement as well as the terms of the agreement itself.

62. It seems to me that it would be a serious flaw in the legislation if the claimant were correct that the time limit for seeking an order under s.140B expires 12

years after the credit agreement giving rise to an unfair relationship was entered into. This would mean that in cases where unfairness to the debtor has persisted for a sufficient length of time, including cases where the very length of time that the creditor has waited before taking steps to enforce the agreement is itself a cause of unfairness, the court would be powerless to grant relief. The potential anomaly can be illustrated by the facts of this case. Under the terms of the 1992 agreement no sum was payable by the defendant until a request for payment was made by the claimant, and no request for payment of the sums claimed under the agreement was made by the claimant until a letter from his solicitors dated 29 April 2008. Therefore the claimant's cause of action did not accrue until that date. However, if the claimant's contention were right, before the sum claimed under the credit agreement actually became due, the time limit for seeking an order to reduce the sum payable had already expired. That has been held to be the position in relation to s.139 of the 1974 Act, and it would be unfortunate if the new provisions which are designed to give the court wider powers were subject to the same defect. In my view, however, they are not.

63. What the court has to determine under s.140A is not whether the relevant credit agreement is unfair but whether the relationship arising out of the agreement is unfair; and in that context the court is specifically required by paragraphs (b) and (c) of sub-section (1) to consider as part of its assessment matters which have occurred after the making of the agreement. Some of the matters relied on by the defendant in this case as making the relationship between himself and the claimant unfair are matters which have occurred within the period of 12 years before the claim for relief was made. On any view the defendant must be entitled to raise and rely on those matters.

64. It would, however, be an artificial and unsatisfactory exercise if, in determining what is fair to the debtor, the court were permitted to have regard only to matters which occurred in the 12 years before the debtor's application was made and was required to shut its eyes to agreements between the parties and other relevant matters which occurred before that time. Such a partial enquiry into the course of the relationship between the creditor and the debtor would also be contrary to s.140A(2), which provides that the court "shall have regard to <u>all</u>

matters it thinks relevant" (my emphasis) – impliedly without limitation in time. In my opinion the possibility of such a time-limited assessment does not arise on the proper interpretation of the statutory provisions. As I construe s.140A, the question whether the relationship between the creditor and the debtor is unfair to the debtor, upon the answer to which the power to make an order under s.140B depends, is a single question which admits of a 'yes' or 'no' answer that has to be determined as at a particular point in time. However, in determining whether, at the relevant date, the relationship is or is not unfair, the court is required to have regard to certain matters specified in s.140(A)(1) and to all other matters it thinks relevant, whenever those matters occurred. There is no possibility, therefore, if the court is entitled to make the determination of fairness at all and is not barred by limitation from doing so, of restricting the temporal scope of the enquiry.

65. Hence the critical question is: what is the relevant date at which the fairness or otherwise of the relationship has to be determined? In principle, it seems to me that the determination should be made having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination. This means that if the relationship between the creditor and the debtor has ended, the determination should be made as at the date when the relationship ended; and if the relationship is still ongoing, the determination should be made as at the time of the trial.

66. When the debtor's cause of action accrues for the purpose of s.9 of the Limitation Act depends on when all the material facts have come into existence which the debtor needs to allege in support of an application for an order under s.140B: see e.g. ***Coburn v Colledge*** [1897] 1 QB 702, 706-7. Those facts are, first, that a credit agreement has been entered into between the creditor and the debtor and, second, that the relationship arising out of that agreement is unfair to the debtor. If I am right in my analysis of the date at which the fairness of the relationship between the creditor and the debtor falls to be assessed, the result is that the debtor's cause of action is a continuing one which accrues from day to day until the relevant relationship ends. It follows, in my view, that an application under s.140B can be made at any time during the currency of the

relationship arising out of a credit agreement, based on an allegation that the relationship is unfair to the debtor at the time when the application is made, or at any later time (as s.140A(4) expressly permits) until the expiration of the applicable period of limitation after the relationship has ended. (That period is 12 years except in so far as the relief sought is the recovery of money which has been paid by the debtor, in which case the effect of s.8(2) is that the six period prescribed by s.9(1) of the Limitation Act applies.)

67. In the present case the relationship arising out of the 1992 agreement is still continuing as the claimant is seeking to recover money payable under the agreement and which (as I have mentioned) only became due when a demand was made in April 2009. The principal relief sought by the defendant under s.140B is an order under paragraph (b) of sub-section (1) reducing or discharging the sum payable by virtue of the 1992 agreement. I therefore consider that, to decide whether the court has power to make the order sought, I must determine whether the relationship between the claimant and the defendant arising out of the 1992 agreement is (currently) unfair, and for this purpose it is both permissible and necessary to have regard to the whole history of that relationship. This history includes not only the 1992 agreement but also the earlier loan agreements, which are "related" agreements within the meaning of s.140C(4) + (7) because consolidated by the 1992 agreement.

68. I therefore conclude that the defendant's claim for relief under s.140B of the 1973 Act is not time-barred and that, in order to make the determination required by s.140A, I am entitled, and obliged, to have regard to all the matters referred to in s.140A whenever they occurred. I must therefore take account of the full history of the debtor / creditor relationship between the claimant and the defendant which I have outlined above. In making the determination, I also bear in mind that pursuant to s.140B(9) the burden lies on the claimant to prove that the relationship is not unfair to the defendant.

Unfair Relationship

69. Although it not clear exactly when the first loan agreement, for the West loan, was concluded, it is likely to have been shortly before the West business began trading in December 1980. The agreed rate of interest on the loan was 15% per annum, compounded monthly. At the time when the West business commenced, the Bank of England base rate was 14%, having been reduced from 16% on 25 November 1980. The defendant claimed that when the claimant offered to make this loan he was in the process of arranging a loan from his bank. I think it unlikely given his circumstances at the time that the defendant's bank would have been willing to lend him the money that he needed to buy the business; but if he had been able to arrange a bank loan, I am sure that he would have been charged interest at several percentage points above the base rate. It is also likely that the terms would have been more stringent and would have given the defendant less flexibility in terms of the timing of repayment than his agreement with the claimant. In these circumstances I consider that the terms of the agreement for the West loan were very favourable for the defendant, and certainly not unfair to him.

70. When the West loan was extended at the defendant's request, the interest rate was varied to 3.5% above the Barclays Bank base rate. Although this was not such a favourable rate as the previous rate had been when the original loan was made, I think it unlikely that the defendant could have arranged an unsecured loan from a bank on better terms. Bank statements disclosed by the defendant indicate that in May 1988 he took out a "flexible business loan" from Barclays Bank for what appears to have been a sum of £15,000 which he repaid with quarterly interest over a three year term. On my calculation, the interest rate on this loan appears to have been 3.5% above the Barclays Bank base rate (or thereabouts) – equivalent, therefore, to the rate agreed with the claimant when the West loan was extended. Again, I am satisfied that the terms of the agreement were fair to the defendant.

71. The Londis loan agreed in 1983 also carried interest at a rate of 3.5% above base rate. However, in addition to such interest the defendant agreed to pay to the

claimant 20% of the profits of the business. I have some qualms about the fairness of this arrangement as it effectively gave the claimant a double return on the same money as both a lender and an equity investor. However, I bear in mind that the amount of money advanced was substantial, that the business was a new venture and that the loan was unsecured. As when he purchased the West business, I think it unlikely that the defendant would have been able to arrange a bank loan at all at the relevant time for the amount that he required to purchase the Londis business. I also consider that the defendant was capable of making a realistic estimate of the potential turnover and profits of the business and of calculating whether the terms on which the claimant was offering finance made the business viable. I further consider, based on such information as there is about the performance of the business, that if he had paid the interest and calculated and paid the claimant's share of the profits punctually, it would have been possible for the defendant to service and ultimately pay off the debt while building up a successful business for his family at the same time. In all the circumstances I find that the terms of the agreement for the Londis loan were also fair to the defendant.

72. The problems for the defendant developed after the loan agreements were made for two reasons. First, he did not make regular payments of interest on either the West loan or the Londis loan with the result that, through the compounding of interest, the outstanding balance grew very substantially. I find it impossible on the evidence and at this distance in time to judge to what extent this was the defendant's fault or to what extent the situation may have been encouraged by the claimant who was happy for interest to accumulate and generate a compound return. I think it likely, however, that some of the factors which I identify below as making the relationship unfair after 1992 were already operating, albeit to a much lesser extent than subsequently, before the 1992 agreement was made. Second, financial information about the results of the Londis business was not forthcoming, with the result that the claimant's profit share could not be calculated and compound interest accrued on this element of the debt also. I am satisfied that the claimant attempted to chase up this information and that the failure to produce it was the fault of the defendant and his accountant.

73. By July 1992, when the claimant sent his calculations of the sums outstanding to the defendant's accountant, the amount of the debt had reached critical proportions. At that crucial juncture it seems to me that fairness to the defendant would have involved attempting to formulate a realistic schedule of payments which would have enabled him to reduce and ultimately to pay off the debt, with a reasonable rate of interest charged in the meantime. However, that is not what happened. Instead, terms were agreed orally in 1992 which I find were unfair to the defendant at the time of the agreement, and which became progressively more unfair to him thereafter. My reasons for regarding the terms as unfair are as follows:

(1) Unlike the original agreement for the Londis loan, the 1992 agreement was no longer in any sense a joint venture in which the claimant's return was linked to the profitability of the business. It was a straightforward loan agreement under which a fixed rate of interest was payable irrespective of how the defendant's businesses fared, and the fairness or otherwise of its terms must therefore be judged in that light.

(2) By 1992, the Londis business was no longer a risky start-up for which the claimant could be regarded as providing "seed capital", to use his description. It was an established businesses, trading profitably, and the risk to a lender was correspondingly less.

(3) The claimant has adduced no evidence to show that an interest rate of 20% per annum, compounded monthly, was a reasonable commercial rate to charge a borrower in the defendant's position in 1992, and in the absence of such evidence I conclude that it was an unreasonable rate to charge. It is unclear exactly when the 1992 agreement was concluded but it is likely to have been after 25 November 1992 when the claimant sent the last of his faxes to Mr Chauhan seeking information so that he could finalise matters with the defendant. At that time the Barclays Bank base rate was 7%. To charge an interest rate almost three times greater than the base rate and 13% above it was completely out of line with the terms of the original loans and in the circumstances seems to me exorbitant.

(4) As interest rates have fallen, the rate of 20% charged by the claimant has become more and more exorbitant. In January 1993, the Barclays Bank base rate fell to 6%. At the time when the 2003 document was signed, it was 3.75%. It is currently 0.5%.

74. Starting from this unfair position, I consider that the subsequent conduct of the claimant and the way in which he has exercised his rights under the agreement have very substantially increased the unfairness of the relationship. The following matters are in my view of particular significance:

(1) The claimant did not make any written record of the terms of the 1992 agreement until 2003, over 10 years after the agreement was made. While I do not consider that there is any necessary unfairness in enforcing an oral credit agreement and have already expressed my view that the earlier agreements between the claimant and the defendant were not unfair, a formal written contract – or at the very least a document setting out what had been agreed – would have served as a memorial for the defendant and helped to make it clear that the agreement was one which the claimant might choose to enforce by taking legal action even many years later, as he has now done. Conversely, I consider that the absence of any written record of the agreement made it easier for the defendant to believe that, as the years went by and no steps were taken by the claimant to request repayment, the agreed terms might not be enforced.

(2) Although in 2003 the claimant did (as I have found) record the terms of the 1992 agreement in a document which the defendant signed, he did not provide the defendant with a copy of that document either before or after getting the defendant to sign it. In preparing this record of the agreement the claimant was solely concerned, as it seems to me, to protect his own position and not with what was fair to the defendant. Fairness to the defendant would at the very least have involved giving him a copy of the document recording the terms of the loan agreement. (I would mention in passing that I think it entirely possible that, in circumstances where he

was not given a copy of the document, the defendant had forgotten its existence and that it came as a genuine surprise and shock to him when a copy was produced by the claimant's solicitors in April 2008.)

(3) Not once in the 15 years after the fax sent to the defendant's accountant in July 1992 did the claimant provide the defendant with any calculation of the amount which he considered to be outstanding. Even the document which the defendant was asked to sign in 2003 referred only to the balances calculated by the claimant as at 30 June 1992 over 10 years previously and contained no updated figures. If the defendant had borrowed money from a bank or other financial institution, he would as a matter of course have received regular statements informing him of the amount currently outstanding. In circumstances where interest on the loan was being charged at a very high rate and was being compounded monthly, it was in my view a matter of basic fairness that the claimant should provide the defendant periodically with calculations of the amount claimed to be owing. Not to do so once during such a long period over which the debt grew to a colossal size (particularly when coupled with the point I mention next) was in my view grossly unfair to the defendant.

(4) Of equal or greater significance is the fact that outstanding sums were to be repaid only as and when requested by the claimant and that after January 1993, so far as the evidence shows, only once during the next 14 years until he raised the subject of repayment in 2007 did the claimant request any money to be paid to him. This request was for a sum of £20,000, by then tiny in comparison with the size of the debt, to be transferred to the claimant's lithographics business in November 2001. The claimant also asked the defendant to make two payments totalling £3,300 to a third party in January and February 1998. My impression is that the reason why the claimant made no other request for payment was that he had no immediate need for the money and regarded the loan as an excellent investment which it was advantageous to leave to continue to accrue a very good return. However, the effect of this approach, in circumstances where no reminders or calculations of the amount

outstanding were being sent, was to encourage the defendant not to pay the interest accruing on the loan and also to foster a not unreasonable hope, which would have gathered strength as time went on, that the claimant was not going to insist on payment in accordance with the terms agreed in 1992. The unfairness which this caused to the defendant increased as the years went by because, the longer the claimant said nothing about any repayment, the more reasonable it became for the defendant to think that the terms orally agreed in 1992 would not be enforced while at the same time the faster the debt was growing through the compounding of interest.

(5) Although the claimant claimed in evidence that he had kept a record of payments made by the defendant in reduction of the debt, he did not disclose any specific record of such payments and I am satisfied that he did not keep one. It was for this reason that in 2007 he asked the defendant to provide him with a list of the payments that he had made, which the claimant then sought to reconcile with bank statements and other documents in his possession. Although the claimant agreed the figures provided by the defendant, I note that the claimant's 1992 calculation for the Londis loan includes a repayment of £10,000 in 1988/89 which does not appear in the defendant's 2007 list. Although this discrepancy was not explored in evidence, it is clear that the two lists cannot both be accurate – which further demonstrates the claimant's failure to keep a proper record of payments received. In my view the claimant owed it to the defendant as a matter of elementary fairness to keep a proper record of his own of such payments and not to depend on the defendant to provide this information and try to reconstruct it from bank statements and other old documents many years after the payments in question were made.

(6) Even when the claimant met the defendant at his home in October 2007 to discuss repayment of the debt, he did not provide the defendant with any calculation of the amount said to be due, either before or at the meeting. Instead he discussed the rate of interest only in abstract terms,

without informing the defendant of the practical consequences of the rate discussed. I have no doubt that this was a deliberate strategy on the claimant's part. He appreciated that if he performed a calculation of the amount claimed and provided this to the defendant, it would be so large that it would be much harder to reach any agreement with regard to repayment. As the claimant's son, Amar, said in evidence, if they had gone with the actual numbers, that could have had a different effect in terms of how the discussion went. I am sure that, whereas the fact that the calculation at a rate of 15% produced an amount owing of over £1 million did not surprise the claimant, it came as a complete shock to the defendant, and that if the claimant had explained the financial implications of what he was proposing the defendant would have perceived it differently. This was not a transparent approach.

75. All the above matters have to be considered in the context of the personal relationship between the claimant and the defendant. Two aspects of this are in my view of particular relevance. First, I have already mentioned that the closeness of the parties' relationship made it easier, as it so often does, for expectations to become blurred and for the defendant to hope or expect if the claimant did not ensure that the position remained clear that the claimant was not going to seek to insist on payment in accordance with terms orally agreed many years before. Second, it is my impression, noted at the start of this judgment, that the defendant looked up to the claimant because of his greater education and achievements as well as having trust and confidence in him. I consider that there was an imbalance in their relationship which increased as the defendant grew older and which partly explains the defendant's agreement to such unfavourable terms in 1992 and his passivity in making payments to the claimant only when the claimant requested him to do so, thereby causing the debt to spiral over time.

76. It is important to consider whether there are matters bearing on the fairness of the relationship which weigh in the opposite direction. There are two such matters, in particular, which I think relevant. First, the claimant did not ever say anything to the defendant between 1992 and 2007 to suggest that he was willing to forgive the debt. And on one occasion at least, when he asked the defendant

to sign the 2003 document, the claimant positively indicated that he was treating the 1992 agreement as still enforceable, albeit that he did not at that time make any attempt to enforce it. The defendant could have raised the subject with the claimant. He could also have taken the initiative and tried to repay the debt without being asked, as he did for a period from late 1996 until the beginning of 1998 when he made weekly payments into the Mandamus account. After those payments stopped, he did nothing about the situation even though (and perhaps partly because) he must have realised that the amount of the debt was becoming very large and steadily increasing. I think it likely that the defendant did not raise the issue because he was afraid to confront it and hoped that if nothing was said about it for long enough it would somehow go away.

77. Second, I think it relevant that the defendant has benefited very substantially from the loans made by the claimant. As I have found, it was only as a result of those loans that the defendant was able to purchase first the West news agency and then the Londis supermarket, which have been the key to his and his family's prosperity. It was the claimant's evidence that at the meeting on 14 October 2007 the defendant acknowledged that he and his family would not have achieved the lifestyle which they have without the money lent by the claimant. I am satisfied that the defendant did say this, and that it was true.

78. Even giving full weight to these matters, however, I have reached the very clear conclusion that the relationship arising out of the 1992 agreement was unfair to the defendant – because of the terms of the agreement, because of the way in which the claimant has exercised his rights under the agreement and because of the other acts and omissions of the claimant to which I have referred.

79. I must therefore consider what order, if any, to make under s.140B in the light of this determination. It is plain from the width of the provisions that the intention is to give the court a very wide discretion to make whatever order it thinks just. But in principle it seems to me that the order made should reflect and be proportionate to the nature and degree of the unfairness which the court has found.

80. Approaching the matter in this way, I do not think it would be right to make an order of the kind which the defendant seeks to the effect that no further sums are payable to the claimant. My reasons for this consist essentially in the two matters which I have particularly identified as counting against the defendant. In the first place, despite the claimant's failures to request repayment or to provide any calculations or reminders of the amount outstanding, I do not consider that the defendant was ever entitled to believe or that he ever actually did believe that the debt had simply been forgiven by the claimant. Secondly, I do not consider that the sums which the defendant has in fact repaid fairly reflect the benefit which he has derived from the loans, particularly given that most of the repayments were made many years after the money was originally lent.

81. The amount claimed by the claimant has two components. The first is the sum of £207,465 which the claimant estimated was the total amount outstanding as at 30 June 1992 and which it was agreed would be treated as the amount owing to the claimant at that date. The second is the compound interest which has accrued on that sum over the subsequent 17½ years.

82. Looking first at the sum of £207,465, I have found that the terms of the earlier agreements under which this amount was calculated were not unfair to the defendant. Although the profit figures used in the calculation were notional and were not based on the actual profits of the Londis business, I have found that the lack of financial information about the performance of the business was the fault of the defendant and that the assumptions made were reasonable. Further, although some of the interest rates used were inaccurate and unduly favourable to the claimant, the defendant must bear some of the responsibility at least for this as his accountant was asked on several occasions to confirm the figures and failed to do so. I have concerns about the way in which the Londis loan in particular had grown through the compounding of interest and as to whether this resulted in part from some of the same factors which I have identified as unfair to the defendant later, but I have not felt able to reach any definite conclusion about this.

83. Turning then to consider the further interest which is claimed from 1 July 1992 on the sum of £207,465, I have found that the rate of interest which was orally agreed in 1992 was unfair to the defendant. But, more than this, I have found that the claimant's subsequent conduct was unfair to the defendant in a number of major respects. I have in mind, in particular, the claimant's failure over the next decade and a half to provide any further calculation – or even to keep any proper record – of the amount outstanding and the almost complete lack of reminders and requests for repayment throughout these years, all in the context of the absence of any written agreement or confirmation of the terms agreed and my findings about the nature of the relationship between the parties and the imbalance in that relationship. When I add to this my concerns about the accuracy and fairness of the starting figure and the fact that the defendant made further payments totalling £30,500 after 1992 (which were the only further payments that the claimant ever requested), I have come to the conclusion that it would not be fair to the defendant to require him to pay anything more now than the sum of £207,465. When this is combined with the sums totalling £72,336 which the defendant has already paid, the resulting amount received by the claimant will be £279,801 – which is approximately five times the amount of the original loans. For the fact that he will not be paid more than this and that much of the money will be paid so long after the loans were made, the claimant in my view has only himself to blame.

Conclusion

84. I conclude that in 1992 the parties made a legally binding loan agreement on the terms alleged by the claimant which consolidated earlier loan agreements between them and that the amount contractually due under the 1992 agreement is the amount claimed by the claimant. But I also conclude that the relationship between the parties arising out of the agreement is unfair to the defendant and make an order under s.140B of the Consumer Credit Act 1974 to reduce the sum payable by the defendant by virtue of the 1992 agreement to the sum of £207,465.