Judgment 03/2013

De Putron and De Putron and De Putron
Royal Court
1st February 2013

Application to determine whether the first defendant is debtor to the estate and to determine the financial position between the first and second defendant.

Approved Text
01.02.2013

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between:	**PETER NICHOLAS DE PUTRON** **(as one of the joint Administrators of the Estate of John Whitehead De Putron)**	**Plaintiff**
	-and-	
	TIMOTHY RICHARD DE PUTRON	**First Defendant**
	-and-	
	LAURA MARGARET DE PUTRON **(née Anderson)**	**Second Defendant**

Hearing date: 24th, 25th, 26th October & 4th December 2012

Judgment handed down: 1st February 2013

Before: Richard James McMahon, Esq., Deputy Bailiff

Jurats: S Mowbray, C Le Pelley and T J Ferbrache

Counsel for the Plaintiff: **Advocate P T R Ferbrache**

Counsel for the First Defendant: **Advocate F J Haskins**

Counsel for the Second Defendant: **Advocate N J Barnes**

Cases & legislation referred to:

Royal Court (Reform) (Guernsey) Law, 2008
Williams, Mortimer and Sunnocks, *Executors, Administrators and Probate*
Zamir and Woolf, *The Declaratory Judgment*
Pothier, *A Treatise on the Law of Obligations or Contracts* (1806 English translation, William David Evans)

Investor Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98
Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251
National Bank of Greece SA v Pinios Shipping Co No 1 [1990] 1 All ER 78
Fiona Trust and Holding Corporation v Privalov [2011] EWHC 664 (Comm)
Devaynes v Noble, Clayton's case (1816) 1 Mer 529

Introduction

1. This judgment has been prepared in accordance with the provisions of section 16(5) of the Royal Court (Reform) (Guernsey) Law, 2008:

> *"(5) A reasoned judgment in civil proceedings in which the Jurats (and not the Bailiff alone) are sitting shall contain –*
> *(a) the Jurats' findings and decisions,*
> *(b) any dissenting findings or decisions made by different Jurats,*
> *(c) the identity of the Jurats making dissenting findings or decisions,*
> *(d) the Bailiff's findings, decisions and directions of law and procedure, and*
> *(e) the application of his findings, decisions and directions of law and procedure to the facts.*
>
> *(6) In this section "the Bailiff" means the person presiding over the proceedings."*

2. The Deputy Bailiff did not sum up to the Jurats in open Court but instead retired with them, as he is permitted to do under section 14(2) of the 2008 Law.

3. The Deputy Bailiff reminded the Jurats of their respective roles. The Deputy Bailiff is the sole judge of questions of law and procedure and the Jurats are the sole judges of questions of fact. The Jurats must accept his directions on the law and follow them. He directed the Jurats to have regard to the whole of the evidence presented to the Court, and to form their own judgment about the affidavit evidence and the exhibits thereto, and which evidence is reliable and accepted, and any which is not. The Deputy Bailiff directed that the facts of the case are the Jurats' responsibility. They may take account of the arguments in the submissions they heard, but are not bound to accept them. Equally, if at any time the Deputy Bailiff appeared to express any views concerning the facts, or emphasise a particular aspect of the evidence, the Jurats were not to adopt those views unless they agreed with them. When it comes to the facts of this case, it is the Jurats' judgment alone that counts.

4. In this judgment, the findings of fact are the unanimous findings of the Jurats.

5. The Deputy Bailiff directed the Jurats that the burden of proof is on the Applicant throughout and to apply the civil standard of proof of the balance of probabilities, adding that to establish something on the balance of probabilities means to prove that something is more likely so than not so.

6. At the conclusion of the hearing, the Court reserved its judgment. In the knowledge that the Defendants wished to know the outcome sooner rather than later, the Court re-convened on 4 December 2012 for the purpose of informing the parties about its findings, briefly explaining how those conclusions had been reached. The Court indicated that its full reasoning would be set out in a written judgment, which now follows.

Background

7. This action relates to one particular aspect of the Personal Estate of the late John Whitehead de Putron (hereafter referred to as "the Deceased"), namely whether the First Defendant is a debtor of that Estate and, if so, to declare the terms on which that indebtedness operates in relation to the Estate, thereby enabling the First Defendant to account to it. This step has also been taken as a result of the need to know the financial position of the First Defendant

because of proceedings in the Matrimonial Causes Division between him and the Second Defendant.

8. The Plaintiff, Peter de Putron, is one of the sons of the Deceased and brings this action in his capacity as one of the joint Administrators of the Deceased's Personal Estate. The Second Defendant, Timothy de Putron, is the Plaintiff's brother and is also the joint Administrator of the Deceased's Personal Estate. The Second Defendant, Laura de Putron, was married to the First Defendant, but their marriage has now failed.

9. The final version of the Cause on which the action proceeded set out that the Deceased had died intestate on 3 October 2009, leaving a widow and three children as the beneficiaries of his Personal Estate. The Court heard evidence from the sister of the Plaintiff and the First Defendant, Frances Birley, but did not hear from the Deceased's widow. One of the assets alleged to form part of the Deceased's Estate is the benefit of a series of loans made by the Deceased to the First Defendant. Some documentation relating to those loans has been identified, but the full terms on which those loans were made were not neatly crystallised into documents recognisable as loan agreements. Accordingly, the terms on which those loans were made are unclear and the Plaintiff seeks declaratory relief in respect of those terms. Save for the first loan made, which is acknowledged to be interest-free, consistent with the approach taken by the Deceased in relation to all three of his children, the loans are understood to carry interest, quite possibly at different rates. Each of the six loans was for a purpose associated with property acquisition. During July 2011, the First Defendant made some payments to the Estate to reduce his indebtedness. The Cause asserted that the Second Defendant was aware of the loans and had benefited from them during her marriage to the First Defendant.

10. The Defences of the First Defendant admitted that the loans existed and that he owed the Estate a sum of money still to be ascertained. It was pleaded on his behalf that he was uncertain as to the precise interest rate to be charged but that interest was accruing throughout the period of the loans at the minimum level of interest that the Deceased would have been able to obtain on his capital. He held telephone discussions with his father about the terms of the first five amounts provided to him as loans and a face-to-face discussion about the final loan, used to purchase property in Guernsey after his family re-located. He did not make any written records of those discussions. He acknowledged it is not in his interest to have to account to his late father's Estate, but understood that it is his legal duty to do so. Accordingly, all he wishes is for there to be a declaration of the fair rate of interest to apply to all but the first interest-free loan. He considers that a fair rate would be between the rate of any commercial borrowing he himself could have obtained and what the Deceased would have received in respect of his capital if that capital had been invested elsewhere.

11. The Defences of the Second Defendant denied that the monies provided by the Deceased to the First Defendant were loans at all. Her case was that these monies were gifts, whether from the outset or because they came to be treated as gifts during the lifetime of the Deceased. She highlighted the fact that no one had told her prior to July 2011 that the First Defendant would have to repay the monies he had received. Accordingly, she claimed that the First Defendant owed nothing to the Deceased's Estate and that the declaratory relief sought by the Plaintiff (and supported by the First Defendant) should not be granted.

12. At the hearing, the Plaintiff was represented by Advocate Peter Ferbrache, the First Defendant by Advocate Haskins and the Second Defendant by Advocate Barnes. The Court is grateful to all of them for their helpful submissions.

The facts

13. The Court received evidence from the Plaintiff, Frances Birley and both Defendants, from which a picture of how the Deceased came to provide monies to the First Defendant emerged. Evidence was also given by the Plaintiff's Jersey-based solicitor, Hiren Patel, about the steps he had taken to arrange for relevant information to be extracted from the Deceased's computer and then analysed. He also produced some calculations, which showed what the various possibilities advanced on behalf of the Plaintiff would mean in financial terms. Evidence was also given by Advocate Alison Ozanne, who had also been instructed by the Plaintiff in this matter, about a meeting she attended on 13 July 2011 with both Defendants, in relation to which there were different accounts.

14. In his lifetime, the Deceased was a well-known and respected public figure. He served as a member of the States of Deliberation from 1973 to 1982. By profession he was an accountant. He built up his accountancy practice from a tiny start-up to a business of over 100 people, of which he was the senior partner.

15. The Deceased died on 3 October 2009. He had made a will of realty on 20 February 2003. However, he died intestate as to his Personal Estate. His father's intestacy came as a surprise to the Plaintiff, who in years past acted as an advisor to his father about the latter's investments. He recalled a conversation he had had with his father about wills in or about 2004, during which the Deceased had told the Plaintiff that the loans he had made, including accrued interest, would be accounted for in his will. Joint Letters of Administration were taken out from the Ecclesiastical Court by the Plaintiff and the First Defendant on 4 December 2009.

16. The Plaintiff described the Deceased's philosophy as regards his children as being that he would provide an education and nothing more. The Deceased's other children concurred with that assessment. The Deceased was content to facilitate them, amplifying what they had obtained for themselves, but would not give. In the Plaintiff's words, the Deceased was "*against welfare junkies*" and was not "*a something for nothing merchant*". The First Defendant also described his father as being "*old school*", where your word is your bond. This approach explained why nothing was put into writing between them. In many respects that philosophy was consistently recorded by the Deceased in one of the documents found on his computer after his death, to which more detailed reference will be made shortly.

17. The relationships within the de Putron family were not always harmonious. There had been a total breakdown between the two brothers, the Plaintiff and the First Defendant, for approximately six years until they became properly reconciled in April 2011. The Jurats found from the way both spoke about the event that this was a highly emotionally-charged reunion. The Plaintiff and the Deceased were not on good terms for approximately the last two years of the latter's life, with the reconciliation taking place some six weeks before his death.

Loans to Plaintiff

18. The Plaintiff explained that he was provided with an interest-free loan by his father when he first purchased a house in the United Kingdom, in the sum of £127,500, which he subsequently repaid to the Estate earlier in 2012. However, the remainder of the support that was provided to him was on less advantageous terms. When he studied for a MBA qualification at Wharton Business School in 1990-92, he did not get any funding from his family and relied on borrowing money from a government student loan scheme. He also borrowed money to do with his business, De Putron Fund Management. That funding was provided through one of his father's investment companies, Wildernesse Holdings Limited. All of those loans, including the business loans, were initially agreed orally.

19. The Court was provided with one written subordinated loan agreement dated 16 March 1998 as evidencing the type of arrangement agreed between the Deceased and the Plaintiff. It does not appear to have been prepared particularly professionally, but the Plaintiff explained that the loan was documented in this way because it was originally an oral agreement and the

auditors suggested it be put into writing. The Plaintiff also explained that the parties to the agreement were two companies, although neither is described as such on its face. The agreement records that a principal amount of US$100,000 was loaned and that the applicable rate of interest was LIBOR plus 5%. Interest was to be payable twice each year on 1 October and 1 April. The term of the loan was five years.

20. In the financial statements of Wildernesse Holdings Limited up to 31 December 2001, audited by BDO Guernsey Limited, reference was made to a loan account to P N de Putron which had reduced from £1,302,950 in 2000 to zero in 2001. The loan account was described as "*interest bearing and unsecured, with no fixed date for repayment*". A further document set out how the outstanding balance on that loan account had been settled by a transfer on 28 December 2001 from the Plaintiff and the apparent reallocation of the much smaller balance resulting as a loan to Maida Limited.

21. The Court was also referred to an undated document headed "PdP Loan from Wildernesse", which sets out a series of loans advanced on dates in 1997 and 1998, with interest being calculated and added quarterly, on the last days of September, December, March and June, right through to a final interest calculation to 28 December 2001, which was the date on which the loan was repaid by the Plaintiff. The calculations show the interest payable on the 3-month LIBOR rate and also the 3-month LIBID rate. The document records that its source was Roger Harlow and that the interest rate actually used was the lower LIBID rate. There was a second, apparently related document, headed "Details of 'Sub' Loan from Wildernesse to Peter N de Putron" which shows how the US$100,000 loaned on 17 April 1998 in accordance with the subordinated loan agreement attracted interested at the LIBOR plus 5% rate from that time until 28 December 2001 for the relevant 6-month periods, or parts thereof.

Loans to Frances Birley

22. The first loan from the Deceased to his daughter, Frances, was for approximately £30,000 in 1981. Their agreement was oral and not put into writing at all. Frances had inherited a property, Fontaine Fleurie, from a distant cousin. It needed some work done on it before it could be rented out. The loan was for the purpose of carrying out those necessary improvements. It was repaid by way of the Deceased receiving the entirety of the rental income over a period of the following 10 years or so. Frances recalls her father telling her that this form of payment would ensure that he received at least the same interest on his loan as if he had earned interest on his capital in the bank. As matters turned out, the amount repaid in this manner was probably more than if a notional rate of interest had been fixed.

23. Subsequently, about one year after her having married Tom Birley, the Deceased provided to his daughter a loan of £160,000 out of the proceeds of sale of a property in England, 78 Wroughton Road, owned by Ashmead Limited, one of the Deceased's investment companies. That loan was mentioned independently of these proceedings during Frances' divorce from her former husband. In a letter dated 16 April 2003, her Advocates commented on her liabilities by reference to "*the only significant debt is a loan from her father in the sum of £160,000. There is no documentation available in relation to this.*" That loan has not yet been repaid by her to the Estate, but she accepts she has to account for it.

First Defendant's position

24. The First Defendant qualified as a teacher of mathematics in England in 1991. At that time, he was still living in student-type accommodation. When he got a job at Mill Hill School, he rented school accommodation. He had no savings. His borrowing capacity was limited. Without assistance, he would have struggled to get a foothold on the property ladder.

25. The First Defendant was aware his siblings had had loans from their father. He identified a property he wished to purchase, namely 55 St Dunstans Road. The purchase price was £146,000. The Deceased lent him the money to purchase this property without him needing to obtain any commercial borrowing. Although he was unable to locate the relevant bank statement, the initial amount of money borrowed, covering the deposit, was £20,000.

Subsequently, on 4 February 1993, £130,000 was transferred into his bank account, enabling him to pay out £133,120 to effect completion on 10 February 1993. He was the sole owner of that property because it was bought with his money. He was excited at the prospect of owning property and, upon collecting the Second Defendant from work one day, told her he had bought a house. The Jurats accepted the First Defendant's evidence, even without documentary support for the initial £20,000, that payments totalling £150,000 were made to him by the Deceased prior to the completion of his purchase of 55 St Dunstans Road.

26. Within a few years, the First Defendant wished to move house to be closer to his work. He and the Second Defendant had married in 1994. They found a large, 7-bedroomed property, 27 Pattison Road, which they liked. In order to afford that property, for which £287,000 was paid, the First Defendant needed additional monies. He sought an additional loan from his father. The Deceased agreed to lend him £50,000. That sum was paid across to him on 26 July 1996. The First Defendant was the sole owner of that property as well. Although he had not seen any documentation until 2011, when the note in the Deceased's handwriting was discovered, the terms set out in that document, to which reference will be made in due course, reflected what the First Defendant understood to be the position.

27. Unlike the first loan, which the First Defendant understood to be interest-free, his father having adopted that approach consistently for all three children to get them on to the property ladder, this further borrowing for 27 Pattison Road would carry interest at a level that meant both sides of the bargain gained something from the arrangement. As with subsequent borrowing, there was no discussion between them of actual rates. The Deceased simply indicated to the First Defendant that there was no point in him going off and paying a higher rate of interest in the marketplace. Accordingly, the First Defendant took the intended rate to be between what his father could obtain with his capital invested elsewhere and what the First Defendant would have to pay for commercial borrowing.

28. The First and Second Defendants approached 27 Pattison Road similarly to 55 St Dunstans Road. Being larger properties than their own needs, they rented out parts to tenants to help with the expenses. The First Defendant had also recognised that it was possible to make a capital gain through property by improving it before selling it on. By undertaking property developments, the Defendants were improving their station in life and supporting their chosen lifestyle.

29. In relation to 27 Pattison Road, there were two specific projects for which further injections of capital were needed. The first was to construct a conservatory. It was designed by the Second Defendant's architect brother. This work was undertaken in 1998. The Deceased transferred to the First Defendant £25,000 on 20 April 1998 for this purpose. The second project was to upgrade a bathroom. Again, the Deceased provided £25,000 to the First Defendant for payment into his account on 19 July 1999 to assist with this expense.

30. With the experience of having worked on his own residences, the First Defendant, together with the Second Defendant, embarked on a small business venture of acquiring buy-to-let properties. Because 27 Pattison Road had been funded through the sale of 55 St Dunstans Road and inter-family money, it was at that time mortgage-free. This situation enabled the First Defendant to open a Virgin One account, secured on 27 Pattison Road, as a means of obtaining funds to use to purchase an investment property known as Sandwell Mansions. This was a 4-bedroomed property jointly owned by the Defendants and was acquired in the autumn of 1999. The purchase price was £227,500, funded though the Virgin One account credit and a buy-to-let mortgage obtained commercially from Mortgage Express. The Second Defendant described the First Defendant as prudent with money, seeking out the most preferential mortgage terms. The interest rate for the Mortgage Express borrowing was not believed to have exceeded 10% at any time.

31. By early 2000, the couple were in the process of marketing Sandwell Mansions for sale, although that sale did not complete until 20 June 2000. The ultimate sale price achieved was

£355,000. That property had been renovated very quickly and, within a short space of time, they were making a profit of some £120,000. It was understandable that, if they could, they were keen to undertake a similarly profitable venture.

32. They identified another property for this purpose, St James Mansions. This property was purchased on 28 February 2000 for £325,000. Again, it was jointly owned by the Defendants. In order to afford this property, the First Defendant approached the Deceased for a loan. £150,000 was paid into the First Defendant's Virgin One account on 7 February 2000. The First Defendant recalls the Deceased comparing his position with the Plaintiff's, commenting that the First Defendant was producing a rate of return better than the Plaintiff's business. Accordingly, the Deceased was content to provide additional capital to the First Defendant for the latter to use in his and his wife's buy-to-let business venture, again on interest terms, the details of which were unspecified.

33. On 21 May 2001, the First and Second Defendants purchased a property known as Frognal for £295,000. This purchase was achieved without seeking any further financial input from the Deceased. Frognal was a further buy-to-let venture for them. It was similarly jointly owned by the Defendants.

34. By 2002, the First Defendant had left his job at Mill Hill School. The Defendants went travelling around the world for an extended period of eight months. The Second Defendant suggested that this decision supported her view that the First Defendant did not owe his father money, as now claimed, because no one in their right mind would opt to do what they did knowing that their liabilities were as large as they are now suggested they were. The First Defendant noted, however, that they owned three London properties and were making lifestyle choices they could afford. Balancing those contentions, and even bearing in mind that there was evidence that the Deceased had not mentioned the payment of any interest by the first Defendant, the Jurats do not regard this decision to travel as being indicative that the First Defendant was unaware at that time of his ongoing liabilities to his father.

35. The Defendants re-located to Guernsey by September 2002. The First Defendant secured a teaching post. The couple were living with the First Defendant's parents. 27 Pattison Road, their old London home, was put on the market, but did not sell until 28 February 2003. The sale price was £750,000. The First Defendants' parents owned other property in Guernsey, one of which could have been made available to the Defendants and their child to live in. The Second Defendant explained that they did not believe that this was the right option for them. The relationship between the First Defendant and the Plaintiff was already discordant and it would not have helped matters for them to have been seen to take over a parental property in this way, even if it had been earmarked for the First Defendant to inherit at some future date.

36. The Defendants looked for their own house and identified a property they wished to buy known as La Tourelle. Even with the sale proceeds from 27 Pattison Road, this property was more than they could afford. The First Defendant explained in evidence that he knew the Second Defendant was very keen to buy this property and, wishing to keep her happy, he sought further assistance from his father, who also wanted the Second Defendant to be happy and to settle well into Guernsey. The Deceased provided the balance of the purchase price of £800,000. On this occasion, it was a very specific sum, rather than a rounded amount. £230,555.39 was deposited into the First Defendant's bank account on 12 May 2003 before being transferred out, together with the monies from the sale of 27 Pattison Road, on 14 May 2003. La Tourelle is still owned jointly by the Defendants.

37. The two buy-to-let properties in London were sold at different times. On 1 July 2005, St James Mansions was sold for £550,000. On 28 May 2010, Frognal was sold for £595,000. Both sales realised a good return on the Defendants' investments. The Defendants had taken out mortgages in joint names for the four jointly-owned properties. When Frognal was sold, the proceeds were used to repay the mortgage they then had secured on La Tourelle. That mortgage had been taken out by the Defendants by reference to the First Defendant's then

salary in order to secure the tax relief available on mortgage interest and to pay down some of the buy-to-let borrowing secured on the properties in London. The remainder was used by the First Defendant to purchase shares. He had been a stockbroker before training as a teacher. The First Defendant later sold those shares so as to repay monies to the Estate. The amounts repaid were £200,000, £96,685.04, £25,000 and £25,000 on 1, 14, 18 and 19 July 2011 respectively. Those payments aggregate to £346,685.04.

38. The First Defendant described his family's lifestyle as being one beyond the means of his income from teaching. It was a lifestyle that neither he nor the Second Defendant wished to forego. This included when they travelled before settling in Guernsey. Because the value of their assets was always higher than the amount he owed to his father, it did not worry him. They could, if the need arose, have sold their assets and cleared their debts.

The administration of the Deceased's Estate

39. Advocate Le Marquand, instructed by the Plaintiff, assisted the de Putron family with extracting Letters of Administration from the Ecclesiastical Court. The provisional value of the Deceased's Personal Estate was declared to be £365,000, with Court fees on that value amounting to £1,186. The Plaintiff and the First Defendant faced some criticism from the Second Defendant for what was clearly a gross undervaluation because it did not take into account the various loans to the Deceased's children, which they must have known about. Various items of correspondence with the Registrar of the Ecclesiastical Court were produced, which explain the process for estimating values of estates and calculating the fees payable.

40. Because of the state of the relationship between the Plaintiff and the First Defendant in late 2009 and through 2010, not a great deal of progress was made in ascertaining what the assets of the Deceased were that fell into his Estate and needed to be distributed amongst the family members on his intestacy. The absence of communication between the brothers is shown by the Plaintiff feeling the need to resort to sending letters to the First Defendant, and to other members of his family, in September, November and December 2010 in what can only be described as a more formal tone than might be expected between a close-knit family. The Plaintiff did not receive any satisfactory response from the First Defendant. This sequence of events culminated in the Plaintiff instructing a firm of Advocates in February 2011. AO Hall then wrote to the First Defendant on 4 April 2011.

41. The Plaintiff arranged for the Deceased's computer to be taken from Guernsey to Jersey in March 2011. On 19 May 2011, he then gave it to his solicitor, Mr Patel, for safekeeping and Mr Patel subsequently caused QCC Interscan Ltd to make clone copies of the hard drive, from which the documents that offer a picture of how the Deceased regarded the financial provision he had made for his children were extracted. Mr Patel also commissioned an expert report to ascertain relevant dates for the making and accessing of the documents that had been found on the Deceased's computer.

42. During the time he was not communicating with the Plaintiff, the First Defendant's role in administering the Deceased's Estate was to take steps to get in some assets from Wildernesse Holdings Limited and in August or September 2010 to make distributions from those assets to the Deceased's children and grandchildren. He did this without consulting the Plaintiff and those distributions were subsequently repaid because, as the Plaintiff explained to him, they had not got in all the assets of the Estate so any distributions were premature.

43. The First Defendant acknowledged that he had buried his head in the sand in the immediate aftermath of his father's death. He explained that he did not wish to confront the fact that he was indebted in a large amount to the Estate. This and other matters were placing a strain on his marriage. He did not want to lose the family home. The First Defendant was also not on good terms with his brother, the Plaintiff. This is clear from his refusal to accept any correspondence sent to him by the Plaintiff. The Second Defendant also declined to sign for a letter sent to their home.

44. In April 2011, the First Defendant decided to contact the Plaintiff. He described his position as finding that "*the net was closing in*", so he "*picked up the phone and faced his demons*". His marriage was in difficulties and he wanted to resolve the bad relationship he had with his brother. He discovered that the Plaintiff was away from his home and in the Canary Islands. A plane was despatched to transport the First Defendant to the Canaries to visit with his brother. They were understandably emotional days and, apart from the First Defendant acknowledging that loans existed for which he would have to account to the Deceased's Estate, the brothers did not discuss in any detail the amounts and terms of those loans.

45. Following the reconciliation between the brothers, they agreed to regularise the position between the First Defendant and the Estate. The information about the amounts loaned to him by the Deceased was provided by the First Defendant, who was apparently not reluctant to sign the document that was produced. As the Plaintiff said in evidence, "*it was business that needed to be completed*". The interest rate of LIBOR plus 5% was chosen by them because that was the rate the Plaintiff recalled he had paid, as indeed shown in the example of the subordinated loan agreement dated 16 March 1998. These were the circumstances in which the letter signed by both of them and dated 12 May 2011 came to be created. When other documentation, to which detailed reference will be made, came to light, the brothers realised that what they had done in an attempt to regularise the position did not accurately reflect what had happened. Accordingly, neither now wishes to rely on the terms set out in that document.

46. In the light of all the material placed before the Court, the Jurats find that this document dated 12 May 2011 signed by the Plaintiff and the First Defendant does not set out the terms on which the monies provided by the Deceased were loaned. Insofar as it might be advanced as an agreement between them, it is flawed due to the mistakes made as to the facts on which it purports to be based. Some of the dates referred to as the dates on which the monies were provided by the Deceased to the First Defendant are wrong. The amount recorded in respect of La Tourelle is now known to be inaccurate. As such, the Jurats reject any suggestion that this document provides evidence of the terms on which the Deceased provided monies to the First Defendant.

47. Subsequently, on 23 June 2011 and at the Plaintiff's request, the First Defendant consented to a bond over La Tourelle in the sum of £1 million in favour of the Estate. He considered it only fair, just and reasonable to do this to protect the position of the Estate. Because of the strain in his marriage, he did not tell the Second Defendant about him having taken this step.

48. The First and Second Defendant attended a meeting with Advocates Alison Ozanne and Brehaut, of AO Hall, on 13 July 2011. Advocate Brehaut's file note was produced in evidence before the Court. It was an open meeting, as distinct from a "without prejudice" meeting, although the Second Defendant has claimed not to have been aware of that fact or the consequences, indicating that she had no previous experience of attending lawyers' meetings. The Second Defendant's attendance was organised through the First Defendant and they attended together. The file note records that the Second Defendant questioned what was meant by use of the word "loan" and that "*she thought that the money received had been 'assistance' or perhaps 'early inheritance'*". Advocate Ozanne said in evidence that she was struck by the Second Defendant wanting to know what the couple were worth. The First Defendant believes that, prior to them attending that meeting, he had not told the Second Defendant that he had started to make repayments to the Estate in respect of what he understood to be loans from his father.

49. The Plaintiff described sorting out his father's Estate as a process of discovery. Following their reconciliation in April 2011, he and the First Defendant attempted to piece together what they understood to be the position from their own knowledge. Subsequently, documentation was unearthed, including those found on the Deceased's computer, which made them alter their assumptions. One example of this was the original reference to their sister's loan, made from the proceeds of sale of their father's property, having been cancelled as a wedding

present to her and her ex-husband, which was proved to be incorrect when the documentation relating to her liabilities at the time of her divorce was produced by her. Another relates to the estimate of the Deceased's personal Estate provided by the Plaintiff to Advocate Le Marquand. The Plaintiff acknowledged that he had even overlooked the loan he had had from his father, but explained that he needed to check his documentation to see whether the loan had been repaid at the time when he repaid the mortgage from the proceeds of sale of his first UK property. The Jurats accept that errors have been made but do not read anything sinister into the making of those errors by the people concerned.

The documents

50. One of the key documents adduced was a handwritten note headed "T. R. de PUTRON" (hereafter referred to as "the handwritten document"). It was found by the Deceased's widow amongst the latter's papers. It has been written in the Deceased's hand on what was referred to as "accountancy paper", something that the Deceased apparently used regularly for making his records and with which his family was familiar. It is undated, but reads:

> "*1 Agreed to loan T. R. de P the sum of £50,000.00*
> *2 The loan is to be repaid on the sale of the house at 27 Pattison Road, London N. W. 2.*
> *3 Interest is to be at 6% per annum*
> *4 Interest will be paid quarterly on 31st October 31st January 30th April and 31st July by bankers order.*"

By referring expressly to 27 Pattison Road, the Jurats concluded that this document evidences the terms on which the Deceased advanced the sum of £50,000 to the First Defendant on 26 July 1996. The First Defendant confirmed that he had not seen this document prior to his father's death, only seeing it for the first time towards the end of 2011, but accepted that it recorded what had been agreed between them about interest.

51. Other relevant documents were retrieved from the hard drive of the Deceased's computer. Although the Second Defendant had queried the authenticity of those documents, after Gurpreet Singh Thathy, an expert in digital forensics, had reported in his statement dated 6 October 2012, she accepted that the dates of creation and modification of those documents occurred during the Deceased's lifetime and that the documentation so produced was valid documentation as recorded by the Deceased and which she had to accept at face value.

52. One of those documents, referred to as "loans" or "spreadsheet 2" under the file name "Possessions (version 1).xls" lists the loans made by the Deceased to his children. From the information now supplied to the Court, it does not appear to be entirely accurate, but it does closely reflect the position. It refers to the Plaintiff's first UK property and the amount loaned of £127,500. It also refers to the sale of 78 Wroughton Road, with the proceeds being received into Ashmead, and to the amount of £160,000 as being "*Proceeds loaned to Frances 11th October 1993*". As regards the First Defendant, it refers to £150,000 against 55 St Dunstans Road in 1992 and £100,000 against 27 Pattison Road, both of which are broadly consistent with what the First Defendant has said. However, there is only reference to one of the £25,000 tranches provided in respect of 27 Pattison Road and the date is given as 20 April 1996 when the bank statement shows it was actually on that day in 1998. The reference to £150,000 in 2000 against St James Mansions is again accurate, but in respect of La Tourelle, there is simply a reference to £200,000.

53. In the same file, as "spreadsheet 3", which is also referred to as "Will", was a document bearing the date 17 July 2002, the opening words of which are "*In determining the basis of distribution of my assets on my death I would set out my objectives as follows*". The Jurats consider that it is a reasonable inference to draw that the date given accurately records when this document was prepared by the Deceased because the document refers to the possibility of his daughter, Frances, separating from her husband and the Court has seen a document dated

16 April 2003 dealing with financial matters arising on the divorce of Frances from her ex-husband.

54. The main relevance of this document, however, is that, under the heading "PERSONALTY", it records:

> "*My principal assets consists of shareholdings in two private investment companies*
>
> *a) Ashmead Investments Limited*
> *b) Wildernesse Holdings Limited*
> *c) Loan to Charles Wilcox*
>
> *and loans to my three children.*"

There was no dispute that the reference to the loan to Charles Wilcox referred to an arrangement the Deceased had with that gentleman in relation to an earlier investment of his in Trident Travel that was then being acquired by the Wilcox family through a loan extended by the Deceased. That loan had been fully repaid by the time of the Deceased's death in 2009. However, by referring in the same context to the "*loans to [his] three children*", it is asserted on behalf of the Estate by the Plaintiff, and with support from his siblings, that this supports their contention that, in the Deceased's mind, the monies that had been provided by him were clearly loans and not gifts.

55. The file "Possessions (version 1).xls" also included a list of bank accounts, a letter addressed to the First Defendant setting out the Deceased's wishes in relation to his real property, albeit that the First Defendant had not seen that document until it was extracted from the computer, and "spreadsheet 1", also referred to as "summary", which set out the Deceased's assets by reference to cash, loans, life assurance policy, stocks and shares, properties, chattels and his stamp collection. It refers to the loans in the amounts recorded in "spreadsheet 2" in relation to each of the Deceased's children and a loan for Trident Charter.

56. An updated version of that "summary" document appeared on the Deceased's computer in a file named "Possessions.xls". Although the Deceased's apparent valuation of two of his properties had reduced and there had been some movement in the figures recorded in respect of the bank accounts, the main change was the deletion of the loan to Trident Charter. This change corresponds to the fact that that loan had been repaid in full. The amounts of the loans to the Deceased's three children remained unchanged from the "Possessions (version)1.xls" "summary" document.

57. Another significant document found on the Deceased's computer was headed "*Philosophy for support for Peter de Putron and my other children*", dated 28 November 2004 (hereafter referred to as "the philosophy for support document") and reads in full as follows:

> "*To help with provision of capital for enterprises that the children may wish to embark apon (sic). So far as all three children have been concerned I was prepared to put up the capital on an interest free loan basis for the provision of houses for them in the UK.*
>
> *So far as Peter was concerned, I had financed Petron on a risk free basis and Petron failed. I lost 100pc for my investment.*
>
> *So far as Tim was concerned, I have loaned him money to invest in property at either market interest rates or reduced rates when he was not making good.*

> *So far as Frances was concerned, I have not provided financial support except for the payment of school fees for the children. The base concept with Frances is that her husband should have been the main source of her finances.*
>
> *Prior to her marriage I had loaned her money, again interest free for repairs and improvements to the house she had inherited.*
>
> *The bulk of the support has been on interest or favourable interest terms. There have been loans to the children at varying rates of interest.*"

58. The final set of documents on which the Court focused was the calculations produced by Mr Patel. He had been instructed to prepare material showing approximately what the First Defendant would owe based on a variety of scenarios. He had analysed what level of borrowing would have been available to the First Defendant if he had used his credit card, obtained a personal loan, paid interest at base rate plus 2% or at the 3-month LIBOR, with and without a margin of 5%, or at a flat rate of 6%, being the rate recorded in the handwritten document. He also calculated what sort of return the Deceased would have got if investing his capital in a building society. He had assumed that the repayments made by the First Defendant in July 2011 would have been applied to the longest standing loans first and offered an indicative blended rate for the entire period of the First Defendant's borrowing. Those blended rates ranged from the credit card rate of 8.75% down to 2.55% and 2.14% for LIBOR and the basket of rates for deposits from building societies respectively. In absolute terms, the highest at which the Estate's claim by reference to these calculations was put would be to use the credit card rate, meaning that in excess of £2.5 million would have been outstanding at the date of the hearing. If just the basket of building society rates were used, the figure dropped to below £½ million.

59. Because of the incorrect assumptions on which these calculations were based, they did not offer precise figures on which the Court could rely. However, they did offer the Jurats a very stark picture of the differences in consequences depending on which rates applied to the various tranches of money provided to the First Defendant by the Deceased and so became useful material in the Jurats' deliberations. The Court is, therefore, grateful to Mr Patel for his industry in producing such comprehensive material.

Legal principles and directions

60. It is an unusual situation where one Administrator of an Estate brings proceedings against another Administrator, especially where those proceedings are not strenuously defended. However, the circumstances of this case make it one of those rare situations where the course of action adopted is the only effective mechanism to secure the type of relief sought in respect of all parties. In the Skeleton Argument submitted on behalf of the Plaintiff, reference was made to para. 54-73 of the 19th ed. of *Executors, Administrators and Probate* by Williams, Mortimer and Sunnocks:

> "*… in equity one representative may bring an action against another [see Allen v Storey (1585) Toth. 86]. Thus one of two executors may sue the other for an account and payment of money owing by such other executor to the testator at the time of his death, and the persons beneficially interested in the estate are not necessary parties [see Peake v Ledger (1850) 8 Hare 313]. Thus if one or more executors wishes to enforce a claim of the estate against another proving executor, he can only do so by instituting administration or other equitable proceedings.*"

61. The Deputy Bailiff directed the Jurats that these principles were, in his view, equally applicable in the present case. The references to "executor" could be read as including references to administrators acting in relation to an intestate person. The relief sought on behalf of the Deceased's Estate was a form of equitable relief, seeking first a declaration as to

the extent of the First Defendant's indebtedness, which was opposed by the Second Defendant, and, if such declaratory relief were forthcoming, a requirement for the First Defendant to account to the Estate in respect of the level of indebtedness declared.

62. The Deputy Bailiff further directed the Jurats in relation to what declaratory relief amounts to by reference to the passage taken from paragraph 1-02 of *The Declaratory Judgment* by Zamir and Woolf, also partially quoted in the Plaintiff's Skeleton Argument:

> "*A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words coercive, judgment which can be enforced by the courts. … A declaratory judgment … pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant. … In other words, the declaration simply pronounces on what is the legal position.*"

He also reminded the Jurats that the granting of declaratory relief involves the exercise of the Court's discretion, adding that, of course, when they consider exercising such a discretion they have to do so judicially.

63. The Deputy Bailiff explained to the Jurats that any declaration granted would be binding as between the parties to the proceedings. This was main the reason why the Second Defendant had been made a party, because the outcome of these proceedings would necessarily have an impact on the matrimonial proceedings between the two Defendants. However, the Jurats were not being asked to determine the position as between the two Defendants, but rather to ascertain whether the monies admittedly provided to the First Defendant by his father during the latter's lifetime were to be regarded as loans or gifts and, if the former, the terms on which those loans had been made. There had been no suggestion that the Second Defendant was a party to any of those arrangements. If the monies provided were regarded by them as loans, the parties to those contracts were the Deceased, now represented on behalf of his Estate by the Plaintiff, and the First Defendant.

64. In respect of the first issue for the Jurats to resolve, relating to whether the payments received by the First Defendant were or were not loans, the Deputy Bailiff directed the Jurats that a loan is an arrangement made under a contract but that the contract did not need to be in writing or even evidenced in writing. When the Second Defendant referred in her evidence to understanding that a loan arose under a signed written agreement, like with a bank, she was giving her understanding of the term, but the legal position is different. A loan can be governed by an oral contract. The contract's terms did need to be certain, and the Jurats would assess the evidence given on behalf of the parties in order to ascertain whether, on the balance of probabilities, they were satisfied that the required terms about repayment and any interest rate were established adequately. Given the way in which the Second Defendant's case had been advanced, the Jurats were reminded to consider the matter as at the date of receipt of each tranche of money by the First Defendant and, if satisfied that the money at that time was lent, to go on and consider whether subsequent events indicated that the Deceased had waived repayment of the loans or had agreed to vary the terms in some way that meant they were no longer loans.

Ascertaining contractual terms

65. If the Jurats decided that the monies provided by the Deceased to the First Defendant were agreed to be loans, and remained loans at the time of the Deceased's death in 2009, they would need to go on and identify the terms on which those loans were made. In that regard, reference had been made to a number of sources from which guidance might be obtained.

66. In matters of contract, guidance is often taken in Guernsey from the work written by M. Pothier, *A Treatise on the Law of Obligations or Contracts*. The Deputy Bailiff directed the Jurats that they could, therefore, sensibly rely on the extracts from the English translation

prepared by William David Evans and dated 1806 and, in particular, the extracts from Article VII of the section on Effect of Contracts, headed "Rules for the Interpretation of Agreements":

> "*1st Rule. We ought to examine what was the common intention of the contracting parties rather than the grammatical sense of the terms.*
> *Rule 2. When a clause is capable of two significations, it should be understood in that which will have some operation rather than that in which it will have none.*
> *3^{d} Rule. Where the terms of a contract are capable of two significations we ought to understand them in the sense which is most agreeable to the nature of the contract.*
> *7th Rule. In case of doubt, a clause ought to be interpreted against the person who stipulates any thing, and in discharge of the person who contracts the obligation.*
> *8th Rule. However general the terms may be in which an agreement is conceived, it only comprises those things respecting which it appears, that the contracting parties proposed to contract, and not others which they never thought of.*"

67. In the context of the present case, the Deputy Bailiff reminded the Jurats that the arrangements between the Deceased and the First Defendant were family arrangements as opposed to a fully arm's length commercial relationship and that they should consider whether and, if so, how those arrangements may impact on the nature of the contract. A convenient label to apply to them might be "the Bank of Dad". They should also take into account that they were being asked to divine the terms of the contract actually made and not what they felt the parties should have agreed but never thought about. Another relevant consideration to bear in mind is that if there were to be more than one possible way of interpreting what had happened, there was support in Pothier's Seventh Rule for the argument that the terms would be those that proved the most favourable to the First Defendant, because he was the person contracting the obligation.

68. The Skeleton Argument on behalf of the Plaintiff had also highlighted the approach taken under English law by reference first to the speech of Lord Hoffmann in *Investor Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, in which he summarised the principles used for judicial interpretation of documents (at page 114g):

> "*(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *(2) … it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
>
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. …*
>
> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.*
>
> *(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people*

> *have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.*"

69. This approach was further explained in *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251. At para. 39, Lord Hoffmann clarified that relevance was necessary as part of what background knowledge could reasonably be regarded as being available to the reasonable person. At para. 8, Lord Bingham of Cornhill helpfully indicated that:

> "*… the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words their natural and ordinary meaning in the context of the agreement, the parties, relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment …*".

Lord Clyde then emphasised (at para. 78) the need to take an objective approach in order to impute a common intention to the parties:

> "*The knowledge reasonably available to them must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact have had any conscious intention in relation to the eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances.*"

70. The Deputy Bailiff directed the Jurats that these principles applied equally as a matter of Guernsey law. They are not inconsistent with the guidance contained in Pothier's work and the set of principles can be read as a whole. Although their Lordships were referring primarily to the construction of written agreements, the principles could be adapted to contractual terms agreed orally, whether or not also evidenced in part through some writing, as in this case. The exercise that the Jurats needed to undertake was to consider the totality of the evidence of the contractual terms and to identify objectively what the terms agreed between the Deceased and the First Defendant were. In doing so, they were entitled to have regard to how a reasonable person with relevant background knowledge would approach the task of identifying the terms of the agreement between them.

Interest

71. If the Jurats found that any of the monies provided by the Deceased to the First Defendant were interest-bearing loans, a further consideration for them was whether such interest was simple interest or compound interest and, if the latter, the period by reference to which the unpaid interest was compounded through adding the relevant amount to the outstanding capital. Although the cases to which the Plaintiff referred, namely *National Bank of Greece SA v Pinios Shipping Co No 1* [1990] 1 All ER 78 and *Fiona Trust and Holding Corporation v Privalov* [2011] EWHC 664 (Comm), dealt with the way in which the Court's discretion to award interest should be exercised in the situations found in those cases, they do also point to the rationale for awarding a successful claimant interest on any monies awarded. For example, at para. 13 of the more recent case, by reference to other authority, Andrew Smith J

explained that the purpose of interest "*is fairly to compensate the recipient of interest for being deprived of money which he should have had*", explaining that it is not meant to be punitive or have regard to the use to which the person required to pay interest has put the money in the meantime. Interest is compensatory to the recipient for being kept out of his money for a period of time.

72. The Deputy Bailiff therefore directed the Jurats to take these sentiments into account in ascertaining the way in which the Deceased and the First Defendant might have approached the question of rest periods for interest. They could bear in mind that any commercial borrowing to finance house purchases would often attract interest payable, and so compounding when unpaid, at monthly periods. Equally, they could have regard to the fact that these were family arrangements where the terms might be more advantageous to a borrower and also that the accrual of interest on monies placed on deposit, ie, the return to the Deceased if they treated that as the base figure from which the rate for each loan bearing interest would be calculated, might not be as frequent as monthly. If the Jurats considered it relevant, they could also compare the position reached between the Plaintiff and the Deceased when the former borrowed money for his business.

Repayments made

73. The final question to be determined was how to approach the repayments to the Estate already made by the First Defendant on various dates in July 2011. The Plaintiff had applied the payments received to the longest standing loans, referring to a different extract from Pothier's work taken from Article VII of the section on Performance of Obligations, headed "Rules for the Application or Imputation of Payments", the Fourth Rule of which provides:

> "*If the debts are of an equal nature, and such that the debtor had no interest in acquitting one rather than the other, the application should be made to that of the longest standing.*"

This approach also applies in English law (see *Devaynes v Noble, Clayton's case* (1816) 1 Mer 529) and had been utilised by Mr Patel when preparing his indicative calculations.

74. During the hearing, Counsel for all parties agreed with the approach suggested by the Deputy Bailiff, by reference to the Third Rule, and particularly the second passage from Corollary III:

> "*When the application has neither been made by the debtor nor by the creditor, it ought to be made to that debt which the debtor at the time has the most interest to discharge. …*
> *Among civil debts the application should rather be made to those which produce interest, than to those which do not.*"

Although the Deputy Bailiff directed the Jurats that Pothier also commented that "*All these corollaries may be subject to exceptions, which are left to the discretion of the judge*", meaning that the way to approach the repayments was a matter for them to determine, he suggested that they might feel that the equity of the situation in which the parties found themselves would be addressed, in the manner agreed by Counsel, by applying the repayments in discharge of any loans found by starting with whichever was the least beneficial to the First Defendant as debtor.

Discussion

75. In accordance with the Deputy Bailiff's directions, based on the extract from Williams, Mortimer and Sunnocks to which reference has already been made, the Jurats fully understood that the Plaintiff was not bringing these proceedings as a result of any personal animosity between him and any of the other parties, but was doing so in a representative capacity as one of the Administrators of the Deceased's Personal Estate. In that capacity, he

is under a duty to get in the assets of his late father's Estate. They also appreciated that, because of the allegation that the First Defendant is indebted to the Estate, even though he is the other Joint Administrator of that Estate, the First Defendant could not be proactive as a Plaintiff, which is why he was a Defendant to the proceedings.

76. The Jurats further acknowledged that good faith is assumed unless and until bad faith is alleged and proved. In this case, there was no allegation of bad faith made by the Second Defendant. Although there might have been an impression at times that the Second Defendant was coming close to alleging that the de Putron family members were colluding so as to gang up on her, the Jurats have treated all the evidence at face value, recognising that, in the absence of any such allegation, the family members have the benefit of the presumption of good faith. Insofar as there were different inferences to be drawn from events or documentation, the Jurats decided which inferences they preferred.

77. Given the Deceased's background as an accountant, the Court understands why each of his three children explained that their father was a meticulous keeper of records and notes. It is, however, slightly surprising that that there are so few written indications relating to the monies provided to the Deceased's children. The Jurats have paid particular attention to the handful of documents produced and the evidence given by the witnesses. The Jurats noted that the Second Defendant's opposition to the relief sought on behalf of the Estate was based not on any contrary documentation but on her perception of the family dynamic over a period of two decades. They also understand that her concerns for her future will have played a part in her articulating a stance that did not have the effect of wiping out her immediate family's financial position as would have been the situation had the terms simply been as apparently agreed between the Plaintiff and the First Defendant. They noted from the demeanour of the witnesses that there remains a high degree of antipathy between the Plaintiff and the Second Defendant, and took that into account when considering the weight to give to what they both said.

Loans or gifts

78. The Second Defendant accepted that the documents produced to the Court, to which reference has been made, were valid documents. She referred to the family dynamic over the 20 or so years she had known them. She drew attention to the Plaintiff's falling out with his father, the pair only becoming reconciled some weeks prior to the Deceased's death and also to the longer falling out between the Plaintiff and the First Defendant, which was only resolved in 2011. By comparison, the relationship between the First Defendant and his father was always good and she also had a good relationship with her late father-in-law. Accordingly, she felt that the Deceased, during his lifetime, would have said something to her about the level of indebtedness being racked up, had that been the reality. Because he did not make any mention of the First Defendant's level of indebtedness, her position was that the absence of any discussion with her supported her contention that the monies provided by the Deceased were not loans but were gifts. As she put it, the Deceased "*would never have called in the money*".

79. The Second Defendant admitted that she was unable to produce any pieces of paper to show or suggest that the monies provided to the First Defendant by the Deceased were gifts. She also accepted that the various documents put to her used the word "loan" or "loans". However, she said that whenever the First Defendant referred to money being provided by his father, he described it as being "given" and, to her recollection, never referred to the monies as being "loans".

80. The position of the Deceased's children was quite different from that of the Second Defendant. They all said in evidence that their father would not waive loans. It simply was not his way. Consequently, each of them understood that the monies provided to them by their father needed to be repaid, on whatever terms were applicable in respect of those

monies. This was entirely consistent with what the Deceased himself had set out in his philosophy for support document.

81. Aside from noting that additional fees become payable if the value of the Estate previously declared proves to have been lower than reality, something that the Plaintiff confirmed he understood on behalf of the Deceased's Estate, the Jurats did not feel they needed to make any further findings about the Joint Administrators' dealings with the Ecclesiastical Court in 2009. In particular, they did not consider that the failure to have in mind the value of the loans advanced to the Plaintiff when he gave his instructions to Advocate Le Marquand prior to extracting their Letters of Administration, or the failure of the First Defendant to spot that the loans to him could not have been included in the estimated figure, indicated that the monies provided by the Deceased were not loans at all. Such a suggestion would have entailed alleging that the family had subsequently chosen to collude together to assert that the monies were loans rather than something else and such an allegation of bad faith would have had to have been expressly pleaded. It had not been and so the presumption of good faith prevailed.

82. Moreover, the contemporaneous documentation provided to the Court supports the contention that the monies were indeed loans and not gifts. The Jurats accept the submission that a person such as the Deceased would know the difference between making a loan and making a gift. Accordingly, they find that where the Deceased has recorded an amount as being a loan, that was the status that the money provided by him had.

83. The Jurats noted that the Deceased had not apparently taken any steps during his lifetime to seek repayment of any capital advanced to the First Defendant or even to insist upon payment of interest, whether periodically or by taking something in respect of accumulated interest as and when the First Defendant was selling a property in which equity was available. The Jurats accepted the comment made by the First Defendant that when 27 Pattison Road was sold he and the Second Defendant had recently had their first child and were looking for a Guernsey property, so the loan was not called in but rolled forward into that other property. The Jurats took the view that the absence of any repayments over the lifetimes of the loans did not mean that the monies advanced lost the character of being loans. There was nothing positive pointing to the character of the monies provided by the Deceased changing at any time during his lifetime.

84. The Jurats accepted the assertion of the family members that is was simply not in the Deceased's character to waive loans and rejected the suggestion made on behalf of the Second Defendant that the documentation in which the Deceased recorded the monies as loans was a way of him demonstrating to himself the extent of the wealth he had by then accumulated. On the contrary, the recording of the amounts as loans was, in their view, indicative of the monies being loans and nothing else. The loans to the children were recorded in the same way as the loan to Charles Wilcox, which supported treating the amounts in the same fashion. Although these documents were apparently not shared with others, they Jurats also rejected the submission on behalf of the Second Defendant that these were merely "*internal musings*".

85. The Jurats recognise that the documentation that was discovered does not always reflect with complete accuracy what the position was. However, the Jurats regard those inconsistencies as indicative of the Deceased misremembering the position as and when he created or modified the documents, rather than showing that what he recorded should be disregarded in its entirety. By way of example, in the philosophy for support document, the Deceased refers to the loan in respect of Fontaine Fleurie, which ran primarily through the 1980s, as having been interest free, a mistake that Frances Birley was unable to explain. However, that loan had been repaid more than 10 years earlier and the style of the document, which was written in 2004, was to explain the slightly different approach the Deceased took in respect of his daughter, where her former husband, from whom she was by then divorced, had been expected to be the main provider for her and his assistance was directed more towards his grandchildren.

86. Therefore, despite the Second Defendant's different assertions as to what she would have expected to happen if the monies in question were genuinely loans, the Court finds that all six of the amounts of the money provided to the First Defendant are properly to be regarded as loans from the Deceased and not gifts. The real question, therefore, is about the terms on which each loan was advanced.

Terms of loans

87. As a general comment, the Jurats were conscious that the lending arrangements between father and son were family arrangements and so of a type quite different from what the First Defendant may have found had he had to borrow in the commercial marketplace. In particular, this meant that the various constraints on borrowing unsecured and in the sums involved to which Mr Patel had referred in his evidence not directly relevant to what terms the Deceased and the First Defendant were to be taken to have agreed. The Jurats have taken into account that the Deceased and the First Defendant remained on excellent terms throughout the relevant time. They are also aware that, as a retired accountant and a teacher of mathematics, both were sufficiently numerate to be aware of the consequences of what might be regarded as penal interest rates and would not have agreed to something that would not have been manageable by the First Defendant. They considered that it was no doubt because the First Defendant would have been so severely penalised in the marketplace had he wished to borrow to the extent that he did that he felt able to approach his father for financial assistance on significantly better terms. This is an example of the benefits of a benevolent "Bank of Dad".

88. The Jurats noted that the First Defendant had accepted throughout that he had had loans from his father but was uncertain of the precise rate of interest, save that the minimum rate in respect of each of the loans other than the initial interest-free loan, was no less than the Deceased would have been able to obtain on his capital at commercial interest rates. They have also borne in mind the reference in the Deceased's philosophy of support document to "*market interest rates*". The first five loans were discussed during telephone conversations and the final loan was discussed face-to-face at the time of the First Defendant selling 27 Pattison Rd when the Deceased agreed to make up any shortfall on the purchase of La Tourelle on the same terms. In respect of what the First Defendant recalls of those conversations, the Jurats accept that his recollection is made in good faith.

Terms of first loan

89. No one has suggested that the first loan of £150,000 to the First Defendant was anything other than an interest-free loan. This loan was made to assist with the first purchase of residential property by the First Defendant.

90. The Plaintiff's evidence was that he was provided with an interest-free loan of £127,500 to assist with his first purchase of residential property. There had been no written evidence of that loan. To make that purchase, he also had a mortgage from the Halifax Building Society. When he sold that property, after owning it for about 15 years, he settled the outstanding loan from the building society. He had only repaid the loan to his late father's Estate within the previous six months or so.

91. Frances Birley's position was similar, although not identical. Her father had provided an interest-free loan to her after her marriage. The loan represented the proceeds of sale of a house in England, which had been beneficially owned by her father through one of his companies. There was no written agreement relating to that loan. However, at the time of her divorce, in a letter dated 16 April 2003 from her Advocates, reference was made to "*the only significant debt [being] a loan from her father in the sum of £160,000*".

92. In the light of the arrangements described by all three of the Deceased's children, effectively confirmed by the Deceased himself in his philosophy for support document, the Jurats are satisfied that the loan of £150,000 provided by the Deceased to the First Defendant in or about February 1993 for the purchase of 55 St Dunstans Road was an interest-free loan, repayable to the Deceased on demand.

Terms of second loan

93. In relation to the second loan, which was of £50,000 and made on 26 July 1996 to assist with the purchase of 27 Pattison Road, the Jurats accept that the terms of that loan were as set out in the handwritten document.

94. In doing so, the Jurats have taken into account the prevailing interest rates in July 1996. The calculation sheets provided by Mr Patel show that the 3-month LIBOR rate was at the time a fraction under 6% whereas the basket of building society rates on deposits was in the middle of the range between 4 and 5%. Bearing in mind the approach the Deceased then took with the Plaintiff, the Jurats find that the Deceased will have had an eye to the LIBOR and LIBID rates, with or without margins. Accordingly, choosing to fix the rate at 6% offered the Deceased the LIBOR rate rounded up, which was a benefit to him when compared with what his capital may have been earning and a benefit to the First Defendant as being a lower rate of interest than he would have obtained had he gone to the commercial marketplace and taken out a small mortgage. In reaching that conclusion, the Jurats further accept that the First Defendant had the borrowing capacity to have obtained a loan of £50,000 secured on 27 Pattison Road.

95. The Jurats also find that the other terms recorded in the handwritten document are relevant, both in respect of this second tranche of borrowing and subsequently. This document is the clearest evidence that the Deceased envisaged quantifying the balance outstanding on the loan by reference to quarterly interest. That approach is consistent with the reference point being a 3-month lending rate, such as 3-month LIBOR. The Jurats therefore find that the terms of this loan were agreed between the Deceased and the First Defendant by reference to such an interest rate period, unpaid interest being compounded on the dates specified, and that the parties envisaged at that time that the loan would be repaid in full out of the sale proceeds as and when the First Defendant came to sell 27 Pattison Road.

Terms of third and fourth loans

96. Although these two loans were advanced at different times in 1998 and 1999, the Jurats have treated them the same way because they were both provided by the Deceased in respect of upgrades to the First Defendant's home, 27 Pattison Road. Although the Plaintiff and the First Defendant argued that these loans could be distinguished from the loan of £50,000 to assist with the purchase of 27 Pattison Road, thereby attracting a different rate of interest from the 6% figure set out in the handwritten document, having regard to all the circumstances of the arrangements between the father and son, on balance, the Jurats have concluded that it is more likely that these two "top-up" loans were aggregated with the original loan in relation to the house purchase.

97. There is support for that conclusion in the documents. In the file "Possessions (version 1). Xls" found on the Deceased's computer, dealing with the loans to his children, he has aggregated the three amounts into £100,000 listed against 27 Pattison Road. Accordingly, and also bearing in mind that, at the time of advancing these additional sums the First Defendant had not repaid anything towards the initial loan of £50,000, the Jurats have concluded that the parties added the two £25,000 tranches to the totality of the First Defendant's borrowings on the same terms.

98. In accordance with the terms evidenced in the handwritten document, when 27 Pattison Road was sold on 28 February 2003, the Jurats find that the three loans crystallised. In other words, the arrangement envisaged between the parties at the outset was that the capital and accumulated compound interest was calculated at this time to produce a figure to carry forward. The Jurats are not persuaded that the arrangements simply continued on the same terms with the Deceased waiving the requirement he had in mind that the loan would be repaid. Consequently, in accordance with the suggestion offered by the Plaintiff in his evidence, the crystallised balance on these loans was rolled forwards into the borrowing the

First Defendant had from his father for his next family residence, La Tourelle, but on the terms that the parties agreed in respect of that loan.

99. Given that there is a short gap between the sale of 27 Pattison Road and the acquisition of La Tourelle, the Jurats have concluded that the agreement between the Deceased and the First Defendant was that, with the purchase of La Tourelle looming, the crystallisation of the borrowing in respect of 27 Pattison Road took place not on the sale of that property but on the date when La Tourelle was purchased. In this way, those three loans, which were already being treated as a single aggregated arrangement at 6% interest per annum, payable, or compounding, on the quarterly dates set out in the handwritten document, were consolidated into the new loan for La Tourelle on the terms of that latter loan and the fixed interest rate of 6% came to an end.

Terms of fifth loan

100. The fifth loan of £150,000, advanced on 7 February 2000 is, in the view of the Jurats, distinct from the other loans. This loan was utilised by the First Defendant as part of his buy-to-let venture and, in the Jurats' view, this makes it more of a commercial venture than the provision of a home for the First Defendant and his family.

101. The Jurats took into account that the Plaintiff had borrowed money from the Deceased, through Wildernesse Holdings Limited, on a much more commercial basis than the other borrowings in relation to house purchases. Although the Plaintiff stated that he had borrowed at LIBOR plus 5%, which was the reason that he and the First Defendant had attempted to crystallise the arrangements at that rate in their letter of 12 May 2011, the documentation provided to the Court showed that a larger portion of the Plaintiff's business-related borrowing from his father's assets had been at the much lower LIBID rate without any percentage margin on top.

102. The Jurats, therefore, found themselves considering the various options presented to them as examples of the ways in which the Deceased and the First Defendant may have agreed the interest rate and other terms for this tranche of borrowing. In doing so, they considered the flat 6% rate used in respect of 27 Pattison Road, LIBID or LIBOR without any margin, one of those rates with a percentage margin up to 5%, or a rate drawn from other published rates available for savings or borrowing on credit cards. Because they were dealing with the benevolent "Bank of Dad", the Jurats rejected the suggestion that they should bear in mind what type of borrowing would have been available to the First Defendant to support this venture. The First Defendant had already managed to borrow commercially for the first buy-to-let property, Sandwell Mansions. Interest was already payable on that mortgage at a rate higher than the Deceased was able to get through depositing money with a financial institution. The Jurats concluded that it was quite understandable and reasonable for the Deceased and the First Defendant to agree terms that would benefit both of them. In accordance with the guidance offered in the authorities, particularly Pothier, the benefit to be derived would tip more in favour of the First Defendant than the Deceased, meaning that the rate of interest the parties fixed would not unduly penalise the former. The consequence of this approach, which is entirely consistent with the parameters mentioned in the discussions with his father described by the First Defendant, is that any interest rate would provide some benefit to the Deceased by offering a higher rate of return than what was available on deposited money, but would not equate to what the First Defendant would have had to pay had he gone to the markets.

103. By the time that the First Defendant sought this loan from the Deceased, the latter had experience of lending money to the Plaintiff at a floating rate of interest, rather than the fixed rate used for the First Defendant's borrowing associated with 27 Pattison Road. Because of this being a business venture, the Jurats have concluded that the overall pattern of arrangements within the family points towards this loan similarly being agreed by reference to LIBOR or LIBID.

104. The Jurats noted some differences between the lending arrangements. In the Plaintiff's case, the funding arrangements were made out of Wildernesse Holdings Limited to a company established by the Plaintiff, which appears to be more arm's length than directly between father to son. The limited information provided to the Court about the Plaintiff's company's borrowing suggest that different rates of interest were applied to different loans. A fairly significant series of loans in 1997 and 1998 attracted the lower 3-month LIBID rate, whereas the subordinated loan agreement dated 16 March 1998 was by reference to 6-month LIBOR plus 5%. Because there had been no consistent approach in respect of the Plaintiff's borrowing for his company, the Jurats did not have a precise model to use when ascertaining what was agreed between the Deceased and the First Defendant.

105. Because of the continuing borrowing associated with 27 Pattison Road by reference to 3-month interest rests, on balance the Jurats concluded that the parties would have approached this business venture loan on a similar basis, if only for ease of calculation. Accordingly, the Jurats find that this loan was agreed by reference to quarterly compounding interest.

106. As regards the rate of interest agreed, the Jurats noted from Mr Patel's calculations that LIBOR was running a fraction above 6% at the time and that the interest rate for the basket of building society rates had risen to a point between 5 and 6%. Taking into account the parties' experiences with the loans in respect of 27 Pattison Road, the Jurats have concluded that the rate they had in mind when St James Mansions was being acquired was going to be more than the 6% already operating and needed to provide a similarly enhanced return to the Deceased. Accordingly, the margin above LIBOR was not going to be higher than the prevailing rates at which the First Defendant could have borrowed commercially, which means that the LIBOR plus 5% figure suggested by the Plaintiff and the First Defendant was rejected by the Jurats, and would be much closer to what the Deceased might have obtained on his capital at the time. The Jurats also noted the types of margins used in other industries, as shown in the case law to which the Court was referred. They concluded that the margin above 3-month LIBOR to provide a similar level of return to the Deceased, but at a floating rate for the duration of this loan, is 1%.

107. When considering the other terms of this loan, the Jurats have also taken into account that a further buy-to-let property, Frognal, was acquired by the Defendants without any financial input from the Deceased, and infer from that that the loan in respect of St James Mansions was regarded by the parties as associated with that property, in a similar fashion to the loans associated with 27 Pattison Road. Accordingly, when St James Mansions was sold in 2005, this fifth loan crystallised in a similar way to the loans on 27 Pattison Road a couple of years earlier. In effect, the terms of the loan included the requirement that the First Defendant needed to repay it at that time the property was sold out of the proceeds. When he did not repay it, the Deceased and the First Defendant agreed to consolidate the capital sum represented by the crystallised loan into the only other interest-bearing loan the First Defendant had at the time, associated with La Tourelle.

108. In reaching that conclusion, the Jurats considered whether the Deceased and the First Defendant might have instead agreed to treat the loan associated with St James Mansions be treated as thereafter being associated with Frognal, all as part of the Defendants' buy-to-let business venture. However, the Jurats consider that it is more likely than not that the parties desired to consolidate the borrowing into a single loan rather than perpetuating two separate tranches of borrowing and have taken into account that Frognal was acquired without any involvement from the Deceased and so might properly be regarded as outside his sphere of influence.

Terms of sixth loan

109. When considering the approach taken by the Deceased and the First Defendant to this final tranche of borrowing, the Jurats have taken particular note of the fact that the Defendants and their young family were re-locating to Guernsey and had been living with the First

Defendant's parents for a short period before finding their own house to buy. In light of the fact that the First Defendant was not repaying the loans associated with 27 Pattison Road, which a very rough calculation undertaken at that time would have shown that a balance of approximately £140,000 was due, together with the first unpaid interest-free loan, and that a substantial additional amount was needed to complete the purchase of La Tourelle, the Jurats have concluded that the terms for this consolidated loan associated with the family home were agreed at the most favourable terms to the First Defendant. In their view, this is consistent with the excellent relationship the First Defendant had with his father and the First Defendant's evidence that both of them wanted the Second Defendant to be happy.

110. By 12 May 2003, the 3-month LIBOR had dropped to between 3 and 4%, indicating that the 6% rate for the 27 Pattison Road borrowing should be brought to end because otherwise the First Defendant would be being quite heavily penalised. The Jurats considered whether the parties might have taken an approach similar to that evidenced by the handwritten note and chosen a fixed rate. However, the parties' experience of working with a floating rate by reference to LIBOR for the loan associated with St James Mansions leads the Jurats to conclude that the benefits to both of using such a floating rate would have been apparent. However, because this was a loan in respect of the family residence, the Jurats conclude that the 3-month LIBOR rate, without any uplift, was the rate agreed to be used.

111. The Jurats further find that the other terms of this loan were also agreed on a similar basis to the earlier interest-bearing loans. Therefore, interest continues to be payable quarterly and is compounded if it remains unpaid.

Making good

112. In his philosophy for support document, the Deceased referred to lending the First Defendant "*money to invest in property at either market interest rates or reduced rates when he was not making good.*" The Jurats considered whether there was a time when the First Defendant might have been regarded as "*not making good*" and so able to benefit from a reduced rate of interest. The Jurats noted that the term "*making good*" was apparently understood by the Deceased as meaning that the person is in employment. In her evidence, Frances Birley had referred to the possibility of her repaying her loan during her marriage "*if [her] husband had made good*", which indicated to the Jurats that this term was one used and understood in a certain way within the family.

113. The First Defendant stated that he had always had a job which, in the Deceased's eyes meant he was "*making good*". However, there was a time before his family's re-location to Guernsey when the First Defendant did not have employment. He had gone travelling for an extended period. There was, however, no suggestion that the First Defendant had asked for any special consideration, such as suspending interest payments or applying a lower interest rate, during that period.

114. The Jurats concluded that, in the absence of any evidence indicating what the consequences would be, save for this reference to "*reduced rates*", and the circumstances in which it would operate, it was more likely than not that, having regard to the First Defendant's position throughout the entirety of the period when he owed money to his father, the parties did not switch from the prevailing rates, which was 6% for the 27 Pattison Road loans and LIBOR plus 1% in respect of the St James Mansions loans to any reduced rates. There were too many unknowns to be able to reach any other informed conclusion. For example, the reference to investing in property may have meant that this alternative approach was limited to the buy-to-let business venture rather than the acquisition of family homes and it was arguable that the buy-to-let business, comprising two properties at the time of the First Defendant being between jobs, was sufficiently successful to be regarded as "*making good*" in any event.

Repayments

115. When the First Defendant made payments to the Estate totalling £346,685.04 in July 2011, the findings of the Jurats about the loans and the terms thereof set out above mean that only two

loans were then in existence. The original interest-free loan of £150,000 was one and the other was the consolidation into a single loan at 3-month LIBOR of the amounts referable to 27 Pattison Road, the balance of the purchase price for La Tourelle, and the later addition of the crystallised amount in respect of St James Mansions was the other. Accordingly, adopting the approach set out in the guidance in Pothier, those repayments were to be applied to the only interest-bearing loan and not to settling the interest-free loan first, which would not have been of so great a benefit to the First Defendant. The balance of the interest-bearing loan was, therefore, reduced during July 2011 and the reduced balance produced has continued to attract interest at LIBOR since. The interest-free loan also continues in place.

Conclusions

116. In the light of the findings of the Jurats, they are satisfied that the First Defendant borrowed money from the Deceased on the terms set out and that, during his lifetime, those loans were not converted into gifts, whether through waiver of them or otherwise. In all the circumstances of this case, the Jurats have further decided that this is an appropriate case in which to grant a form of declaratory relief setting out those terms, which will be for the benefit of all the parties moving forwards. Not to grant the declaration sought would leave the parties unsure of exactly where they stand.

117. Because the approach taken in the Cause on which the action proceeded was to apply the repayments made in a different fashion to the way the Jurats have determined should be the case, the figure pleaded at para. 18(a) appears to be wrong and so cannot be used. The Court is not, therefore, in a position to declare what the principal sum and accrued interest owed by the First Defendant, and for which he must account to his late father's Estate, actually is. When the Court re-convened on 4 December 2012, Advocate Ferbrache undertook to have an appropriate calculation prepared and to share it with Counsel for the other parties. If the calculation based on the conclusions set out above is agreed, it can then be incorporated into a draft Act of Court setting out the terms of the declaration the parties consider appropriate. If it has not been agreed, the parties should identify a mutually convenient date on which the case can be listed before the Court for these matters to be resolved. Any ancillary orders sought by any party can similarly be dealt with by listing the case before the Interlocutory Court.

