

# 1GC | Family Law

## WOOLLY LOANS

*How do you deal with parents?  
What can you do to help?*

Simon Sugar

26 November 2019

## The Question

How do you deal with parents over loans/gifts provided on 'woolly' and often, solely verbal terms?

What can and can't you do to help?

## The Question

Parents of a child getting divorced come to see you and they want advice to protect their interests in respect of recovery of a loan they made to their child in circumstances where the other spouse is likely to characterise the loan as a gift

# Unlock your inner Sherlock



# Primary Evidence?



# Contesting Primary Evidence

- Was money advanced under the agreement?
- Forgery of signatures on loan agreements
- Authenticity of the date of the document
- Sham
- Interpretation

## Gift or Loan?

- Key determination required is whether capital advanced was to be repaid?
- Forensic analysis assisted by balance sheet approach

# Corroborative Evidence

“Trivial facts are often the best hint to what is going on”

Chief Justice John Roberts  
US Supreme Court



## Corroborative Evidence

- Money trail - debit and credit
- Even cash has a trail
- Any repayment?
- Evidence of discussions surrounding advance and receipt?
- Traditional evidence
- Digital footprint: WhatsApp, text, email

# Corroborative Evidence

- Parents' wealth and inferences and importance to parents of documenting the advance
- Siblings
- Discussions post advance/receipt

# Corroborative Evidence

- Wills including attendance notes
- What was the money advanced under the loan to be used for? Trivial expenditure more likely to funded by gift?

# Terms



# Terms



## Discussions

- Term loan?
- Interest on capital outstanding?
- Repayment obligations?
- Who were the parties to the loan? Both parents? Both spouses?

## Woolly Loan

Nothing discussed about term of loan, nor interest, nor trigger events for repayment.

An advance of money with an obligation to repay albeit on unspecified terms.

## Implied Terms

- Loan will be repayable on demand
  - necessary to make the contract work/so obvious goes without saying
- Contractual interest will not be recoverable
  - not necessary to make the contract work/not so obvious that it goes without saying

# Recovery

- Demand repayment
- Does the parent creditor need and or want to take proceedings against the child debtor?
- Quantum of loan c.f. other resources of creditor and debtor and debtor's spouse

# Recovery

- Risk loan treated as soft & therefore child debtor may not be left with sufficient resources to repay on demand
- Motivation to reduce the assets of the marriage

## Joinder – FPR 2010, r 9.26B

- (1) The **court may direct that a person or body be added** as a party to proceedings for a financial remedy if:
  - (a) it is **desirable to add the new party** so that the **court can resolve all the matters in dispute** in the proceedings; **or**

## Joinder-FPR 2010, r 9.26B

(b) there is an **issue involving the new party and an existing party** which is connected to the matters in dispute in the proceedings, and it is **desirable to add the new party so that the court can resolve that issue.**

## Joinder

- ‘Desirable’ not ‘necessary’ so low bar
- In line with overriding objective
- Risk of inconsistent judgments
- How can court deal with computation element of financial remedy claim without determination of issue?

# Joinder

- If demand not met letter before action indicating an intention to issue proceedings unless joined
- Request be invited to intervene or apply to intervene

## Benefits of Joinder

- Party status and entitled to disclosure
- What does child say in his or her FE about debt?
- Debtor child bound by judgment on preliminary issue

## Drawbacks of Joinder

- Expense
- Delay especially if full **TL v ML** procedure followed
- A creditor parent with resources might consider delay and expense a driver to settlement

## Costs

- No order as to costs principle doesn't apply
- **Baker v Rowe [2010] 1 FLR 761**  
'Clean sheet' principle
- Decisive factor likely to be whether successful on preliminary issue
- Calderbank offers are admissible

## Procedure

**TL v ML and Others (Ancillary Relief: Claim Against Assets of Extended Family) [2005] EWHC 2860 (Fam)**  
guidance for the management of cases requiring the joinder of third parties as follows [paras 35-37]:

## TL v ML - Procedure

- The third party should be joined to the proceedings at the earliest opportunity;
- Directions should be given for the issue to be fully pleaded by points of claim and points of defence;

## TL v ML - Procedure

- Separate witness statements should be directed in relation to the dispute;
- The dispute should be directed to be heard separately as a preliminary issue, before the financial dispute resolution (FDR) appointment

## TL v ML - Procedure

- Guidance not a straitjacket
- **TL v ML** dealing with issues of beneficial ownership of property
- Proportionality of having a preliminary issue
- Or just join for FDR in first instance

## Preliminary Issue

- Not determined on the exercise of a discretion but whether an obligation to repay is found to exist on the balance of probabilities
- Weight of evidence including the trivial facts
- Weight of testimony

## Best Practice

- Assist with detailed forensic analysis of transaction and corroborative evidence in order to advise whether there is likely to be found to be an obligation to repay
- Develop strategy after detailed evaluation
- Joinder and preliminary issue or joinder and FDR