SUPREME COURT OF QUEENSLAND

CITATION:	*Berghan & Anor v Berghan* [2017] QCA 236
PARTIES:	**BARRY CLAUDE BERGHAN** **LORRAINE ALLISON BERGHAN** (appellants) **v** **BARRY MURRAY BERGHAN** (respondent)
FILE NO/S:	Appeal No 3445 of 2017 DC No 1592 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2017] QDC 47 (Everson DCJ)
DELIVERED ON:	Orders delivered ex tempore 9 October 2017 Reasons delivered 13 October 2017
DELIVERED AT:	Brisbane
HEARING DATE:	9 October 2017
JUDGES:	Sofronoff P and Philippides JA and Boddice J
ORDERS:	**Orders delivered 9 October 2017:** **1. Appeal allowed.** **2. Set aside the order made on 7 March 2017 dismissing the appellants' claim.** **3. Set aside the order made on 7 March 2017 that the appellants pay the respondent's costs of the trial.** **4. Judgment for the appellants in the sum of $286,471.09 with interest from 20 April 2015.** **5. The respondent to pay the appellants' costs of the trial and of the appeal on a standard basis.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – MATTERS NOT GIVING RISE TO BINDING CONTRACT – AGREEMENTS NOT INTENDED TO CREATE LEGAL RELATIONS – DOMESTIC, SOCIAL AND OTHER AGREEMENTS – where the appellants are the parents of the respondent – where the appellants advanced money to the respondent on several occasions and gave him the use of a credit card – where the respondent was the sole director of a company and some of the payments were made

into that company's bank account – where the appellants claimed that they informed the respondent that the funds had to be repaid and that the respondent stated that he would repay the funds – where the respondent denied that these conversations took place – where the respondent claimed that any payments made to him were made as gifts to himself or his company – whether there was an intention to create legal relations between the appellants and the respondent – whether the advancements were loans or gifts – whether the respondent's company was liable to repay the monies

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSIDERATION – WHAT AMOUNTS TO CONSIDERATION – ACTING OR RELYING ON PROMISE – where the respondent promised the appellants that he would pay the funds back – where no other consideration was provided in respect of the advancements – whether the respondent's promise that he would repay the funds amounted to consideration

Agricultural and Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570; [2008] HCA 57, cited
Berghan v Berghan [2017] QDC 47, overruled
Riches v Hogben [1986] 1 Qd R 315, not applied

COUNSEL: C J Crawford for the appellants
P W Evans (*sol*) for the respondent

SOLICITORS: Smith Leonard Fahey Lawyers for the appellants
McKays for the respondent

[1] **THE COURT:** The appellants married in 1966. At trial they were in their early seventies. The first appellant, Mr Berghan, is his wife's full time carer. They have four children, one of whom is the respondent. He was aged 45 at trial.

[2] In early January 2009 the respondent said to his father "Dad, I really need a loan". His father replied "Okay, Mum and I can loan you the money, but we need this to be repaid. When do you need the money by?". The respondent replied "I need the money as soon as possible. I will definitely repay the monies back and even more, I will look after you in your old age".

[3] As will appear, the respondent breached and continues to breach that promise that he made to his father.

[4] The respondent was the sole director of Centrgroup Pty Ltd which traded under the name Make Communications. He and his ex-wife were its only shareholders. The company was in financial distress. In response to his son's request, Mr Berghan caused the transfer of $98,000 to the bank account of the company on 27 February 2009.

[5] Thereafter, the respondent continued to ask his father and mother for more money which they provided to him. According to Mr Berghan's evidence, the terms of the respondent's request and his own response were similar on each subsequent occasion. On each occasion the son asked his father for money and his father acquiesced after making it plain that the money had to be repaid. In all, 13

advances of money were made in this way between February 2009 and September 2013.

[6] In addition, in late 2012 the respondent told his father that he was struggling to pay his bills. He asked to use his father's credit card. His father said "Okay, but you will need to repay any expenses you incur on the credit card including interest". Mr Berghan allowed the respondent to use his credit card and later caused a fresh card to be issued in the respondent's own name and gave it to him. In this way the respondent incurred a further $13,471.09 of debt.

[7] The total amount advanced by the appellants to the respondent was $286,471.09.

[8] The respondent made many written admissions that the payments constituted loans that he was liable to repay. In late 2014 relations between father and son and between the respondent and his brother, Nigel, became strained. On 8 January 2015 the respondent sent an email to Nigel in which he said, relevantly:

> "… The company I founded, then gave you 50 per cent, you've built (for an agreed income and equity position) and I still have 50 per cent equity in.
>
> Mate, you can't assume mum and dad own it just because you think so. For one, it's been valued at more than what I owe them. …
>
> Mum and dad are going to get their money back plus some. …
>
> The downfall of Make and the fact I dutifully owe mum and dad money is a separate conversation I have had with mum … "

[9] On 9 January 2015 Mr Berghan wrote to the respondent saying, relevantly:

> "Murray I want to bring to your attention mum and I are getting older and I have been unwise with giving so much of our money to you.
>
> About $300,000 without interest over the years up to the 9th Jan 2015.
>
> I need you to consider and agree to sell Melissa [their daughter] share of Official to myself and mum.
>
> We have nothing to back us now in life for our later years for all the years we have worked. So giving all that we have had has been very unwise.
>
> This has really concerned me and stressed me very much."

[10] In oral evidence Mr Berghan explained that the money that he and his wife had paid to their son constituted the substantial part of the money that they had.

[11] The respondent replied on the same day and said, relevantly:

> "Importantly, I have discussed paying back the money several times with mum. She has always said to me 'Don't worry about the money, just take care of you two in retirement'.
>
> So I'm very surprised this is all of a sudden urgent.

> If it is now urgent, I will need to find a way to get you the money. I don't want to release equity in the business as I will use the dividends to pay you back or borrow against it in future to do so."

[12] On 11 January 2015 Mr Berghan emailed his son, relevantly:

> "From our past bank statements mum and I will check out exactly the amount of monies loaned.
>
> Then we will have a talk. …
>
> Your attitude is causing mum and I a lot of stress."

[13] The respondent replied on the same day saying, relevantly:

> "The current stress, you describe, is being brought on by your own action over the past week. I've owed you the money for a while and had an agreement with mum for its return."

[14] On 12 January 2015 the respondent emailed Nigel, relevantly:

> "You are putting mum and dad into the negotiation, which is highly unfair and not good for their wellbeing.
>
> I have been living with them for a year. In fact, I went out with them two nights a week for almost five months. We had discussed, amongst many things, the money I owed them …"

[15] The bank statements of the appellant annotated the payments with the word "loan" or an expression to the same effect.

[16] On 10 April 2015 the appellants' solicitors wrote to the respondent demanding repayment of the money.

[17] In his Defence, the respondent denied that he had had the conversations alleged in the terms the appellants described. He also denied that some of the payments had ever been made. He then alleged that any payments that had been made had been gifts. He alleged that there had been no intention to create legal relations in respect of any of the payments. He made the same allegations in answer to the claim based on his credit card use.

[18] In relation to payments 1, 2, 3, 7, 8, 9, 10, 11 and 13 the respondent alleged that the payment in each case "was received by or on behalf of Make Communications", that "the objective intention of the parties was that [the payments were] made to Make Communications" and that they were gifts to the company.

[19] The final unmeritorious defence pleaded by the respondent was that the statute of limitations precluded the recovery of the payment of $98,000 that had been made in February 2009.

[20] There were no contemporaneous documents that referred to the payments as gifts. Nor were there any conversations in which that word, or any word like it, was ever used. Even the respondent did not give evidence suggesting that there had been. In every case the evidence of the appellants was that the respondent had promised that he would repay the money.

[21] Notwithstanding the respondent's denial that some of the payments had even been made, at trial he elected not to challenge the making of the payments. Nor were the

appellants challenged in cross-examination about the content of the conversations that they swore had taken place. However, in his own evidence the respondent denied that he had had the alleged conversations.

[22] The trial judge, Everson DCJ, made three factual findings that are relevant. First, he accepted the evidence of the appellants as reliable. Second, he rejected the evidence of the respondent. Third, he said that he "accept[ed] the evidence of the plaintiffs that it was the intention of the parties that the monies advanced by them to the defendant were to be repaid by him".[1] Those findings have not been challenged on appeal nor, indeed, have any of his Honour's findings. Therefore, this appeal turns on issues of how the law should be applied to the facts as found.

[23] Once his Honour had found that the money had been paid on the condition that it would be repaid, the result should have been judgment for the plaintiffs. However, Everson DCJ said:

> "I do not accept that the plaintiffs have discharged the onus of proving that there was an intention to create legally binding loan contracts with the defendant. Even if, extraordinarily, the defendant used the same mantra of "I'll pay you back in full and more and look after you in old age" practically every time the plaintiffs provided him with money, this is a general statement consistent with him being morally obliged to repay his parents rather than one which bears the indicia of entering into a binding loan agreement. In circumstances where no ledgers were kept and no demand was made until 2015, the transfers of money did not indicate an intention to create legal relations. Rather, in circumstances where the defendant's business, Make Communications, was struggling and this business employed his sister, the plaintiffs' daughter, it is understandable that they extended their charity to this organisation. The giving of the credit cards to the defendant for his use whilst he was injured and impecunious also does not indicate an intention to create a binding loan agreement enforceable at law. My conclusion is supported by the tenor of the email from the male plaintiff to the defendant dated 9 January 2015."[2]

[24] His Honour did not explain in his reasons why he thought the payments made to the respondent, which his Honour had accepted had been made on terms that the money was to be repaid, and which were payments that even the respondent had admitted in writing were loans, were nevertheless transactions that the parties did not intend to be legally binding. After all, although the respondent purported to swear the issue in cross-examination, asserting that the payments were gifts, that was not evidence that was either admissible or that could be used. The issue was whether or not the circumstances known to both parties at the time of each transaction demonstrated, objectively, that the payments had been made by way of loan. It is impossible to see how that was not so when, as we have said, even the respondent had admitted that they were loans at a time before the monies had been formally demanded from him.

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1 *Berghan v Berghan* [2017] QDC 47 at [27].
2 *Berghan v Berghan* [2017] QDC 47 at [27].

[25] The fact that no ledgers were kept by the appellants was hardly a material fact. The request had been made orally and had been acted upon almost immediately by bank transfer. It could hardly have been in the mind of the respondent's parents that their own son would deny in his pleading that some of the payments had ever been made (and would one day compel them to prove formally in court the making of the payments). It could hardly have been in their mind that they would need the assistance of the court to recover the money that their son had promised to repay and that he had several times admitted had been lent to him and that, for such a purpose, they should keep a ledger. Mr Berghan acknowledged in cross examination that he had not kept a ledger. It was not put to him that the reason he had not kept one was that the payments were gifts. He was given no opportunity to explain why, consistently with his case that the payments were loans, he did not keep a ledger. It is not possible, therefore, to use this as a basis upon which to conclude that the payments were gifts if it otherwise mattered.

[26] Nor could the fact that the appellants made no demand until 2015 bear upon the issue in any way. The respondent submitted that evidence of post-agreement acts may be used to illuminate the nature of the agreement and relied upon a statement to that effect by Kelly SPJ in *Riches v Hogben*.[3] Macrossan and Williams JJ gave separate reasons in that case and did not mention the point. Since 1985, when that case was decided, the High Court has decided *Agricultural and Rural Finance Pty Ltd v Gardiner*[4] in which the majority held that it is not legitimate to look at a post-contractual event to interpret a contract, which in that case was the way a receipt of money had been treated by a party.[5] In any case, there were no circumstances identified by his Honour which rendered any "delay" in making demand for repayment inconsistent with the existence of an intention to create legal relations.

[27] In addition, the appellants' motive in paying the money was immaterial. Of course they were undoubtedly moved by parental concern for their son. They were prepared to extend "charity", as Everson DCJ described it, to their son when they found that he was in financial need. However, what was relevant was not their motive in making the payment but the terms of the transaction. Those terms were, as his Honour found, that on each occasion the money had been paid, it had been paid upon the express oral condition that it would be repaid.

[28] If motive were material, then it would have been material to consider whether the parents really had been motivated to benefit the respondent by making him a gift of almost the whole of their money at this point in their lives. If motive was material it could not rationally be concluded that the appellants, despite insisting upon the repayment of the money as a condition of its payment, nevertheless intended to make this generous gift to only one of their four children leaving themselves in need.

[29] The respondent points to the religious convictions of the appellants as a foundation for inferring that the payments were gifts. We do not understand how that can be of any relevance. Nor does the fact that the appellants had in the past made many gifts to people. That is hardly capable of being something in the nature of similar fact evidence.

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3 [1986] 1 Qd R 315 at 316 per Kelly SPJ.
4 (2008) 238 CLR 570.
5 at [35] per Gummow, Hayne and Kiefel JJ.

[30] The evidence led by the appellants, both their oral evidence and the documents that contained the respondent's admissions, raised a strong case that these payments were loans. While the respondent bore no onus, it was forensically a matter for him to rebut the conclusion to which that evidence led. He failed to do so.

[31] Once one accepts that the money was paid upon the express condition that it should be repaid, as the Judge found, then the inescapable conclusion had to be that the resulting transaction was a contract of loan. In our respectful opinion his Honour's conclusion that the parties had no intention to create legal relations was an error. The finding has to be set aside.

[32] As to certain other payments, his Honour found another reason to deny judgment in the appellants' favour. He said:

> "To the extent that monies were paid into the account of Make Communications which is a business owned by a corporate entity with half the shareholding held by the defendant's estranged wife, it cannot be said that this is equivalent to loaning the defendant the money. The plaintiffs have been so vague about the circumstances surrounding the relevant transactions that they have not discharged the onus of proving that the request was made by the defendant personally rather than on behalf of Make Communications when there is evidence suggesting it was the intended recipient of the funds. Accordingly, I find that loans 1, 2, 3, 7, 8, 9, 10, 11, and 13 were either expressly, or by implication, loans to Make Communications and not the defendant personally. I find that loans 4, 5, 6 and 12 were indeed loans to the defendant but there was no intention to create legally enforceable loan agreements between the parties."[6]

[33] There had been no evidence given by anyone, at the time of the making of the loans, that the parties had agreed that the company would be an obligor. No such distinction was drawn by the parties upon the evidence they gave. On the contrary, the outcome of the relevant conversations, found by the Judge as having taken place, was that the respondent had said that *he* would repay. Against that, the respondent's case was not that it was the company that promised to repay but that all of the payments had been gifts.

[34] It was, of course, inherently unlikely that the appellants would have been prepared to make a gift to their son's company, of which he was only a 50 per cent shareholder, and which was in financial distress. Such a finding would also be inconsistent with the evidence accepted by the trial judge that the respondent himself had promised that he himself would repay the money. The appellants knew that some of the money would be used by him for living expenses and that other sums would be used in his business. How he intended to use it was, of course, his own affair.

[35] As Mrs Berghan said "Murray is Make", referring to the company. His Honour observed that that was "not legally correct". Nor was it. But Mrs Berghan was not making a legal point. She was making a factual one that the payments she and her husband made to their son had been made to him personally because they drew no distinction between him and the business that he conducted, irrespective of the legal

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6 *Berghan v Berghan* [2017] QDC 47 at [28].

vehicle he might have chosen through which to conduct that business. This is not a remarkable statement for a lay person to make. The respondent himself said, referring to himself and the company, that "I don't separate the two".

[36] It is in this context that the evidence that Mrs Berghan had noted on the bank statements that three of the payments were "loans to Make" has to be understood. She had not been present for the relevant conversations between father and son. Consequently, her opinion about the identity of the borrower, if that is what those notations signified, was an opinion that was formed after the contract had been entered into by somebody who had not been present when it was entered into and was not privy to the relevant conversation. Unlike the respondent's post-contractual statements, her statements were not capable of amounting to an admission. The expression of that opinion in writing on the bank statements had no bearing on the construction of the antecedent oral contract.

[37] In addition, this conclusion that the loans had been made to the company was inconsistent with the evidence of Mrs Berghan, which the Judge accepted, that in respect of one payment to the company, she had told her son that she and her husband would "loan you" the money. Further, one of these payments was given in cash to the respondent personally.

[38] As we have said, the appellants had sworn that on each occasion upon which the respondent had asked them for money he had promised that he would repay it. That evidence was accepted by the Judge. That finding did not leave it open for his Honour to find that it was the company that had made the promise to repay. Consequently, his Honour's finding that "loans 1, 2, 3, 7, 8, 9, 10, 11 and 13 were either expressly, or by implication, loans to Make Communications and not the defendant personally" was wrong and must be set aside.

[39] The evidence accepted by the trial judge leads to the inescapable conclusion that the payments made by the appellants to their son were contracts of loan in respect of which the monies were repayable on demand and were repayable by him personally.

[40] In the absence of an express term in the oral contracts about when the money had to be repaid the law would imply an obligation to repay upon demand.

[41] By a notice of contention, the respondent sought to sustain the trial judge's judgment upon a further equally meretricious ground, namely that "the appeal has no utility the as alleged contracts [sic] lacked consideration". This is misconceived and the notice of contention was rightly abandoned at the hearing. The consideration moving from the respondent was his promise to repay. This is elementary.

[42] There should have been judgment for the appellants.

[43] The orders that the Court made at the conclusion of argument were:

(a) Appeal allowed.

(b) Set aside the order made on 7 March 2017 dismissing the appellants' claim.

(c) Set aside the order made on 7 March 2017 that the appellants pay the respondent's costs of the trial.

(d) Judgment for the appellants in the sum of $286,471.09 with interest from 20 April 2015.

(e) The respondent to pay the appellants' costs of the trial and of the appeal on a standard basis.