# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Gold Ribbon (Accountants) Pty Ltd v Stoddart* [2003] QSC 332 |
| PARTIES: | **GOLD RIBBON (ACCOUNTANTS) PTY LTD ACN 081 156 078 (IN LIQUIDATION)**<br>(plaintiff)<br>**v.**<br>**EWAN ALISTAIR JAMES STODDART**<br>(defendant) |
| FILE NO: | S3821 of 2002 |
| DIVISION: | Trial |
| PROCEEDING: | Trial |
| ORIGINATING COURT: | Supreme Court, Brisbane |
| DELIVERED ON: | 6 October 2003 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 15-19 September 2003 |
| JUDGE: | Chesterman J |
| ORDER: | **1. Judgment for the plaintiff against the defendant in the sum of $885,000 together with interest at 13.5415 per cent from 18 October 2002**<br><br>2. **The plaintiff's costs of and incidental to the action are to be assessed on the standard basis up to 27 August 2003 and thereafter on the indemnity basis and are to be paid by the defendant** |
| CATCHWORDS: | GUARANTEE AND INDEMNITY – THE CONTRACT OF GUARANTEE – CONSTRUCTION AND EFFECT – COMMENCEMENT OF LIABILITY – VARIANCE BETWEEN GUARANTEE AND PRINCIPAL LIABILITY - where defendant is sued upon loan guarantee but resists - whether representations asserted would release the defendant from liability under guarantees – representations as to the term of the loan - whether alleged representations release the defendant from obligations as a guarantor<br><br>*Property Law Act* 1974, s45 (2)<br><br>*Bank of Adelaide v. Lorden* (1970) 127 CLR 185<br>*Masters v Cameron* (1954) 91 CLR 353 |
| COUNSEL: | Ms K.E. Downes for the plaintiff |

Mr R.G. Bain QC for the defendant

SOLICITORS: Blake Dawson Waldron for the plaintiff
Johnsons Lawyers for the defendant

[1] The plaintiff briefly carried on business as a money lender. Its customers were accountants in private practice. It borrowed $25,000,000 from the State Bank of New South Wales (which became Colonial State Bank, which was taken over by the Commonwealth Bank of Australia) which it on-lent at a rate of interest about five per cent higher than it paid the bank. The loans were unsecured. In those cases where the loan was made to accountants who had incorporated a company to carry on the practice, a guarantee would be taken from the shareholders who practised as accountants. The amount which could be borrowed was fixed by reference to the value of "receivables", that is debtors of the practice to whom bills had been rendered. The loan was not to exceed 80 per cent of the value of the debtors. The borrowers were required to have and provide proof of a current policy of professional indemnity insurance.

[2] As a term of its loan from the bank, the plaintiff was required to effect a policy of insurance indemnifying it against any loss on its loan portfolio. A policy was effected with HIH Casualty and General Insurance Limited ("HIH") in February 1999. By cl 3 of that policy the insurer was given the right of subrogation to take over and conduct, in the plaintiff's name, claims relating to a borrower's default.

[3] The plaintiff called its business "Accountants' Funding Programme" and loans made by the plaintiff were recorded in a document in three parts. Section A was entitled "Registration for the Programme" and set out the borrower's name, address, contact details and insurer. Section B contained the details of the value of the borrower's debtors, and Section C contained the terms and conditions of the loan. Relevantly, those terms were:

> '1. The applicant hereby applies to (the plaintiff) as administrator of the accountant's funding programme for registration of the programme.
>
> 13. The applicant will give to (the plaintiff) 90 days notice in writing if it intends to withdraw from the programme and acknowledges that unless the applicant is in default then (the plaintiff) will give to the applicant 90 days notice in writing if it intends to terminate the applicant's participation in the programme.
>
> 14. The applicant requests (the plaintiff) to provide funding of up to a maximum of 80 per cent of the receivables particularised and on the terms contained herein …
>
> 17. It is agreed as follows:
>
> (a) interests and fees ... are payable in advance at the rates and times which are notified … from time to time by (the plaintiff)

(b) the amount advanced ... is repayable upon demand if (the borrower) is in default ...'

[4] The contract documents did not themselves provide for a date for repayment but this lacuna was filled when the agreement to lend and to borrow was made. At that time the plaintiff notified the borrower by letter of further terms, in particular:

- 'You will be required to supply certification of the amount of outstanding receivables ... after your first three periods of participation (84 days) in the programme, and every 84 days thereafter. Your receivables will then be recalculated and any adjustments required to be made to the outstanding balance processed at the period prior to your next rollover date.
- Any funds that you may require to be adjusted after your initial advance is made, can only be accepted for processing on the next rollover date after your 84 day period.
- If you are required to repay funds, we will draw back the funds six days prior to the rollover date to ensure that cleared funds are available ...'

[5] The programme was thus one by which the loan was made for 90 days but could be extended an indefinite number of times on each occasion by a further term of 90 days. Prior to the expiration of each extended period the borrower was required to inform the plaintiff of the value of its debtors. If the value fell so that the amount of the loan exceeded 80 per cent of that value part of the principal would have to be repaid so that the amount lent did not exceed the calculated maximum. Conversely the amount borrowed could increase.

[6] The guarantee required of shareholders of corporate borrowers was in a standard form. It recited:

'In consideration of advances under or pursuant to the Accountants' Funding Programme... conducted by (the plaintiff) ... or other financial accommodation granted or hereafter to be granted ... to the (borrower) ... at the request of the guarantor (as testified to by the guarantor's execution hereof) (the guarantor)

Hereby:

1. Unconditionally and irrevocably guarantees to (the plaintiff) in accordance with the provisions set out in Schedule 1 ... the due and punctual payment to (the plaintiff) of all moneys which at any time or from time to time remain owing ... until a guarantor is released from the guarantor's liabilities ... which fall within one or more of the following descriptions.

   (a) Moneys which are then owing and payable or owing ... upon a contingency ... on any account and for any reason ...

2. Undertakes as a separate and additional obligation ... under this instrument and as a principal debtor to indemnify and

> keep (the plaintiff) indemnified against any loss that (the plaintiff) incurs as a consequence of the failure ... of the due and punctual payment... of any moneys falling within the description of the moneys hereby guaranteed'.

Schedule 1 contained the following relevant provisions:

> '2. The liability of the guarantor ... is not released by any act, matter or thing that (the plaintiff) may do or omit to do which but for these provisions would or might release the guarantor from that liability including but not limited to:-
>
> (a) The granting of time, credit or any indulgence or concession ... or any compounding or compromise, release, abandonment, waiver, variation ... of this instrument or any ... rights of (the plaintiff) against (the borrower).
>
> (c) (The plaintiff) becoming a party to or bound by any compromise ... relating to (the borrower).
>
> (g) (The borrower) being discharged from its obligation to pay all or any of the moneys hereby guaranteed otherwise than by the payment or satisfaction of those moneys.
>
> 3. This guarantee:-
>
> (a) is a continuing guarantee;
>
> (b) ...
>
> (c) remains in force until it has been released by an instrument in writing executed by (the plaintiff)'.

[7] The defendant is an accountant by profession and a member of the Chartered Institute of Management Accountants. He has a degree in Business from Deakin University and commenced practice in about 1984. He was a director and shareholder of Aikman Stoddart and Co Pty Ltd ("AS & Co") at all relevant times. He controlled the company which conducted its practice as accountants at Surfers Paradise.

[8] Although it is not the subject of evidence, it may safely be assumed that those accountants who sought to borrow from the plaintiff were those who did not have a good relationship with more conventional lenders and were prepared (or obliged) to pay a relatively high rate of interest. For its part, the plaintiff's chances of profitability depended upon finding a sufficient supply of accountants prepared to borrow on its terms but who would nevertheless fulfil the obligations as to payment of interest and repayment of principal. It engaged a company, Arts Finance Pty Ltd (Arts Finance) as a commission agent to canvass accountants and invite them to borrow from the plaintiff. It was paid one per cent of funds lent by way of reward. Another company, Austide Holdings Pty Ltd (Austide Holdings), was engaged by the plaintiff to attend to the book-keeping and administration of loans made. It was also paid one per cent of loans under administration by way of its remuneration. Arts Finance in turn engaged a number of sub-agents to approach accountants and find prospective borrowers. Mr Paul Mellor was one such sub-agent.

[9] The defendant, and AS & Co, were approached by Mr Mellor in September 1999. On 17 September 1999, AS & Co applied to register in the Accountants' Funding Programme and duly completed the application form which was signed by the defendant. It showed that it had receivables to a value of $548,686 and applied to borrow $350,000 on the standard terms I have already outlined. A guarantee in the terms also outlined were signed by the defendant on 17 September 1999.

[10] Austide Holdings was owned by Mrs Sherie Schweitzer, the *de facto* wife of a director of the plaintiff. Her estranged husband, Mr Ronald Schweitzer, was employed initially part time and then full time to assist her in administering and maintaining proper records of loans made by the plaintiff.

[11] By letter dated 22 September 1999 Mrs Schweitzer wrote to AS & Co:

> 'I am delighted to advise you that your application for funding ... has been approved.
>
> The total amount of your receivables are $548,686 and I understand that you wish to borrow $350,000 …
>
> On 27 September 1999 we will ... deduct the membership fee ... and ... funds will be paid to your account within the following few days.
>
> Attached is a schedule that ... provides information on declarations that will be required from you every 84 days in connection with the level of your receivables.
>
> Please note that continued participation in the Accountants Funding Programme is conditional upon the prompt payment of interest and the timely return to us of your declaration.'

[12] The attached schedule gave details of the advance, taxes, application fees and interest rate. It then set out the information which I have summarised in paragraph 4.

[13] On or about 12 October 1999 Mr Mellor again spoke to the defendant. He inquired whether AS & Co wished to borrow additional monies. The defendant replied affirmatively and applied for a further advance by a document entitled "Extension and Variation …". It certified a very substantial increase in the value of AS & Co's debtors. The total amount shown was $2,073,798. In fact this figure represented not fees rendered by AS & Co but those fees together with the value of work in progress which had not been made the subject of bills to its clients. This was done to justify the increase in the amount to be borrowed. The application was accepted, and by letter dated 21 October 1999, Mrs Schweitzer advised the defendant and AS & Co that a further $650,000 would be lent. This brought the total advance to $1,000,000 which was the maximum that the plaintiff would lend to any one borrower.

[14] HIH began its descent into notoriety in about December 2000. The Commonwealth Bank required the plaintiff to obtain an insurer of better reputation. It could not do so and the bank required the repayment of the plaintiff's debt to it. The plaintiff in turn was obliged to call upon its borrowers to repay their loans, giving them

90 days. Most were unable to do so. The plaintiff was wound up on 8 August 2001. Its liquidators commenced action against AS & Co which in turn was wound up on 18 October 2002. The defendant is sued on his guarantee but resists. Essentially Mr Stoddart maintains that the plaintiff, by various of its agents, represented on several occasions that the term of AS & Co's loan would be six years and that the guarantees executed by him would never be relied upon. These representations, startling in light of the documents, are said to give rise to a number of legal consequences, the upshot of which is that AS & Co was never in default and that the defendant has no liability under his guarantees.

[15] There is a further point which will have to be considered. It is that a compromise of AS & Co's liability to the plaintiff was made between the liquidators of the plaintiff, and AS & Co and the defendant, the effect of which was that Mr Stoddart was released from his obligations as guarantor.

[16] Before turning to consider the legal consequences of the statements on which the defendant relies it is best to review the evidence concerning them to determine whether there is any substance in the defence.

[17] On 31 January 2000, 4 April 2000, 18 July 2000, 18 September 2000 and 6 December 2000 AS & Co by the defendant applied to extend the loan for further periods each of 90 days. The documentary form by which the application for extension was made were identical. They included these statements:

> 'Whereas (AS & Co) has a current loan facility with (the plaintiff) and that facility is due shortly for payment and (AS & Co) wishes to extend and vary the facility as follows:
>
> A. Both (the plaintiff) and (AS & Co) agree that both parties are bound by the terms of the existing loan facility and shall remain bound by those terms in relation to any extension and variations hereby granted except where this application varies the previous terms.
>
> B. The applicant wishes to extend the existing facility for a further period of 90 days.
>
> C. The principal sum of the facility shall be adjusted in accordance with (the plaintiff's) spending policy consistent with the (AS & Co's) certified outstanding receivables.'

The amount of the loan applied for on each of those occasions was $1,000,000.

[18] For reasons which are not entirely clear but were connected to Austide Holdings desire to ensure that loans made by the plaintiff were fully and accurately recorded in proper documentary form, on 10 April 2000 Mrs Schweitzer wrote to AS & Co, for the attention of the defendant:

> 'Your application for extension of your loan facility … has been assessed and approved. To allow us to proceed with your rollover could you please sign this letter of offer confirming details of your existing advance.

> Payment Schedule
>
> Amount funded by way of loan: $1,000,000
> Date repayable: Upon (the plaintiff) giving (AS & Co) 90 days written notice
>
> Securities
> guarantees … being provided by the following persons:
>
> Ewen Alisdair James Stoddart …'

The letter dated 5 May 2000 was signed by the defendant and returned to Austide Holdings. It appears that a new form of guarantee and indemnity was also sent to Mr Stoddart at about the same time. It is also dated 5 May 2000 and is signed by Mr Stoddart. The document expresses itself to have been signed, sealed and delivered by the defendant in the presence of Ms Jaki Hogan, the defendant's secretary, who duly witnessed his signature.

[19] The guarantee was in these terms:

> '(The defendant) in consideration of advances under/or pursuant to the Accountants Funding Program conducted by (the plaintiff) … or other financial accommodation granted or hereafter to be granted and continuing to (AS & Co) … at the request of (the defendant)
>
> Hereby:
>
> 1. Unconditionally and irrevocably guarantees and indemnifies as a continuing security to (the plaintiff) in accordance with the provisions set out in Schedule 1 … the due and punctual payment to (the plaintiff) of all moneys which at any time or from time to time remain owing to (the plaintiff) including any … extension to … moneys advanced under the program … until (the defendant) is released from … liability … which fall within one or more of the following descriptions:
>
>    (a) Moneys which are then owing and payable … or which then remain unpaid by AS & Co to (the plaintiff) on any account and for any reason …
>
> 2. Undertakes as a separate and additional obligation … and as a principal debtor to indemnify and keep (the plaintiff) indemnified against any loss that (the plaintiff) incurs as a consequence of the failure for whatever reason … of the due and punctual payment by (AS & Co) of any moneys falling within the description of the moneys hereby guaranteed …'

Schedule 1 contained the following terms:

> 1. If at any time (AS & Co) makes default in the due and punctual payment of all or any of the moneys hereby

guaranteed (the defendant) shall forthwith … pay the same to (the plaintiff) on demand by (the plaintiff).

2. The liability of (the defendant) … is not released by any act, matter or thing that (the plaintiff) may do or omit … which but for these provisions would or might release (the defendant) from that liability including but not limited to:-

   (a) The granting of time, credit or any indulgence or concession to (AS & Co) … or any compounding or compromise, release, abandonment, waiver, variation … of this instrument.

   (c) (The plaintiff) becoming a party to or bound by any compromise … by or relating to (AS & Co) …

   (g) (As & Co) being discharged from its obligation to pay all or any of the moneys hereby guaranteed otherwise than by the payment or satisfaction of those moneys to (the plaintiff).

3. This guarantee and indemnity

   (a) Is a continuing guarantee;
   (b) Shall not be considered as satisfied by any intermediate payment or satisfaction of all or any of the moneys hereby guaranteed; and
   (c) Remains in force until it has been released by an instrument in writing executed by (the plaintiff).

[20] By way of digression it might be mentioned that the defendant argued that the guarantee of 5 May 2000 did not bind him because it was executed subsequent to the second advance made in October 1999 so that any consideration for the guarantee was past and of no value. The proposition cannot be right for two reasons. The first is that subsequent to the execution by the defendant of the guarantee the plaintiff extended the loan on a number of occasions and those further or extended advances constitute consideration. Secondly the instrument of guarantee and indemnity is expressed to be sealed. It was signed by the defendant and attested by at least one witness not a party to the instrument. It therefore takes effect as a deed by virtue of s 45(2) of the *Property Law Act* 1974.

[21] The point of the defendant's objection appears to be connected to his contention that the second guarantee was intended to support the second advance of $650,000. The defendant characterises this as a second loan, separate from the first so that the guarantee of 17 September 1999 does not bind him to answer for AS & Co's default in repaying the second loan. It is in support of this argument that the defendant submitted the second guarantee was unsupported by consideration.

[22] The argument is untenable. The terms of the first guarantee are clearly apposite to extend to the second advance or second loan, whichever it be. By clause 1 the defendant guaranteed the payment to the plaintiff of all money owing by AS & Co 'on any account and for any reason'. By the separate indemnity found in clause 2 of

the documents the defendant promised to indemnify the plaintiff against any loss which the plaintiff incurred as a consequence of the failure of AS & Co to pay any money falling within the description of 'moneys hereby guaranteed'. Furthermore, as I have mentioned, the second guarantee was supported by consideration and anyway took effect as a deed.

[23] To return to the narrative, the defendant signed a document headed 'Disclaimer' dated 5 May 2000 which was meant to accompany the guarantee also dated 5 May 2000. It is not clear when the defendant signed the disclaimer. He maintains it was 14 July 2000 when he faxed a copy of it to the plaintiff but as will appear I do not accept any part of the defendant's evidence. The date on which the disclaimer was executed is, in any event, immaterial. In form it was addressed to the directors of the plaintiff and referred to the loan to AS & Co. It went on:

> 'I am a guarantor in relation to your loan to the abovenamed.
>
> I acknowledge that prior to signing the guarantee your company strongly advised me to seek independent legal advice in relation to same.
>
> I have chosen not to seek independent legal advice and confirm to you the following:
>
> (c) I understand the nature of a guarantee.
> (d) I understand the implications and obligations upon me by signing a personal guarantee …'

[24] The nature of the defence and the appreciation of its acceptability requires a comparison of the pleaded defence, the defendant's evidence and that of his supporting witness, Mr Mellor, the cross-examination of the plaintiff's witnesses, and two affidavits sworn by the defendant in earlier proceedings.

[25] The defence alleges that the loan agreement made between the plaintiff and AS & Co for the loan of $350,000 was partly in writing and partly oral. The oral term was that the principal would not have to be repaid for at least six years. This oral term was made on behalf of the plaintiff by Mr Mellor and Mr and Mrs Schweitzer. The agreement to increase the loan by $650,000 to $1,000,000 is characterised by the defendant as a second loan. It is also said to have been made in writing and orally. Relevantly the oral term was that the principal was not repayable within six years. The oral term was made by Mr Mellor on behalf of the plaintiff. As an alternative case the defendant pleads that in September 1999 Mr Mellor, as agent for the plaintiff, represented to the defendant that the loan of any moneys from the plaintiff by AS & Co would be for a term of at least six years and that the plaintiff would not rely at any time on the guarantee signed by the defendant in September 1999. At the same time and place Mr Schweitzer also represented that the loan would not be repayable within six years.

[26] By way of further representations the defendant pleads that on or about 22 September 1999 Mrs Schweitzer spoke to him by telephone and repeated that the term of any loan would be for at least six years. In relation to the further advance the defendant alleges that on or about 12 October 1999 Mr Mellor again represented that any further advance would be for a term of at least six years. It is also alleged

that in May 2000 Mr Schweitzer also represented that the loans made to AS & Co by the plaintiff were for a term of at least six years and that the plaintiff would not rely upon the guarantee of September 1999.

[27] Thus, in summary, the oral statements or representations pleaded in the defence were that:

(a) The loan would be for six years; and were made by

(i) Mr Mellor in September 1999
(ii) Mr Schweitzer in September 1999
(iii) Mrs Schweitzer later in September 1999
(iv) Mr Mellor in October 1999
(v) Mr Schweitzer in May 2000

(b) The guarantees signed by the defendant would not be relied upon; and were made by

(i) Mr Mellor in September 1999
(ii) Mr Schweitzer in May 2000

[28] The defendant's evidence was that he was approached by Mr Mellor who explained the nature of the plaintiff's business and, in essence, invited AS & Co to borrow from it. A meeting was arranged and took place on 17 September 1999. The discussion concerned the value of AS & Co's receivables i.e. the amount of fees actually invoiced by AS & Co. The evidence was:

> 'At that stage we only included actual debtors. There was no work in progress … and when it came to the guarantee, Paul explained it was basically just a standard form that Gold Ribbon had to satisfy their lending criteria because I had raised the issue with him about not wanting to give a personal guarantee myself …' (T.220.50)
>
> 'He explained that the 90 day terms were effectively an administration process for Gold Ribbon as they had to acquire details each 84 or 90 days on what the current levels … were of the receivables … (the 90 days) … was something that Paul actually raised when he was going through the documentation … Paul said that he had been told by Gold Ribbon that the loans could run for as long as the accountants required them provided the monthly interest was paid and there was no default on the interest payments.' (T.221.30-.55)

[29] The defendant explained that despite the modesty of his practice he had clients who were endeavouring to promote companies whose business would be the exploitation of mineral or other resources. The hope was to list the companies on an American stock exchange. 1999, it will be remembered, was a time of speculative extravagance when stock exchange indices were high and rising. The defendant (and AS & Co) hoped to make substantial fees from the successful promotion and listing of the companies. That task was complicated and expensive and the defendant did not expect to be renumerated for his services until the companies were successfully floated. He anticipated that process might take between four and

six years. AS & Co had performed considerable work for those clients but had not rendered invoices. There was a substantial value in work in progress but no 'receivables' in respect of those clients.

[30] According to the defendant he explained to Mr Mellor:

> 'That a six year period was required in order to get these projects to fruition. His comment was "no problem at all with the term provided the interest is paid on time each month … a six year term was no problem at all." ' (T.223.40)

The defendant said that Mr Mellor gave him the telephone number of the plaintiff's Gold Coast office which he rang in order to speak to Mr Schweitzer because he:

> 'wanted confirmation … that essentially it wasn't a 90 day loan that a six year term was not going to be a problem.'

He spoke by telephone to Mr Schweitzer and:

> 'Explained that (he) had Paul Mellor with (him) … We had been discussing the loan and I had explained … the work on the overseas projects and the timeframe involved with that and told (Mr Schweitzer) that I wanted to confirm with someone at Gold Ribbon that a six year term would not be a problem …'

According to the defendant Mr Mellor said that Mr Schweitzer was the administrator of the loan. He said 'there was no problems as far as having a six year term … (and) explained (the 90 day call up) was merely an administrative process for Gold Ribbon and it wasn't actually the term of the loan …' (T.225.10-.50).

[31] The defendant testified that at the same meeting with Mr Mellor he said that he was not prepared to sign the guarantee, that he had no personal assets and any personal guarantee was worthless. Mr Mellor said that the guarantee 'was just one of their standard documents that had to be included in their paperwork (but) he had been told Gold Ribbon would not rely on it.'

[32] On receipt of the letter of 22 September 1999 Mr Stoddart noted the requirement for the provision of financial statements every 84 days. That concerned him because 'it had been represented to me that the loan was not a 90 day loan. It was for as long as we actually required it.' To allay his fears he rang the number he had been given earlier and spoke to Mrs Schweitzer and 'asked her for confirmation that … AS & Co could have the loan for at least six years.' He told her that both Mr Mellor and Mr Schweitzer had assured him that that was the case. Mrs Schweitzer obligingly 'confirmed that Gold Ribbon were interested in having finances out for a long as possible and saw no problem at all with a six year term.' (T.230.10-.50)

[33] Significantly the defendant confirmed that the amount inserted in the original application for the loan reflected the value of 'bills receivable not the overseas work in progress'. That is the amount used to justify the initial loan of $350,000 represented fees invoiced and in respect of which AS & Co would expect payment in accordance with its usual terms of trade.

[34] The plaintiff was actively promoting loans. Mr Mellor again approached the defendant in October and asked whether AS & Co wished to borrow further moneys. A problem no doubt was that it had already borrowed to the fullest extent against its debtors but Mr Mellor agreed, apparently with the support of his superiors, that the value of work in progress could be used to support additional borrowings. The defendant took advantage of the opportunity which is what led to the further advance and the sudden and large increase in the value of receivable reported in October 1999. According to the defendant he:

> '… was still concerned … about work in progress being included in receivables because of the fact that the company certainly couldn't afford to pay back an extra $650,000 in a 90 day period … (it) needed at least a six year period in order to recoup those fees.'

Mr Mellor:

> 'confirmed that there was no problem at all with the six year period.'

[35] The defendant and Mr Mellor met Mr Howes, a director of the plaintiff, early in January 2000 at the plaintiff's office in Surfers Paradise. Recollections about the meeting are vague but it seems likely that it was convened because AS & Co wished to borrow a further amount from the plaintiff but there was a limit on the amount which any one firm could borrow and AS & Co had reached that limit. Mr Mellor may have thought that Mr Howes could authorise a loan in excess of the limit. In any event no further amount was borrowed. The defendant regards the meeting as important because he claims he sought confirmation from Mr Howes that the term of the loan was six years, not 90 days and that Mr Howes:

> '… said words to the effect that we have never been late with an interest payment … and … he saw no problem in continuing on a long term basis for the six years.' (T.239.30)

[36] The defendant received the plaintiff's letter of 10 April 2000. He noticed the reference to the loan being repayable on 90 days' notice and to the fact that he had provided a guarantee. He was concerned because he had 'always been told that it wasn't a 90 day loan, that we could have it for as long as we wanted …' He telephoned Mr Schweitzer who said that 'it was not a problem, interest had been paid, the loan wasn't in default and to continue as long as we required it.'

[37] Some days later, on about 20 April 2000, the defendant received the second guarantee, that dated 5 May 2000 and was asked to sign it and have his signature witnessed. I am not sure the defendant is right about the sequence and dating of events but, according to his evidence, it was on or about 20 April that he received it. He:

> '… was concerned obviously because it was a guarantee and (he) knew there was supposed to be no guarantees … (He) rang Gold Ribbon and again spoke to Ron Schweitzer, told him that … guarantees weren't required and weren't being relied upon and I wasn't going to sign this one. … He said they were under pressure to tidy up all their paperwork and get their files into order. He had to get this signed and returned otherwise … their lenders could pressure on them to treat the loan as being in default and call it in.'

According to Mr Stoddart he said that:

> 'It had always been represented … that personal guarantees weren't being relied upon … but (Schweitzer) confirmed that they weren't relying on personal guarantees, that he had to get his paperwork in order …'

[38] A number of matters should be mentioned. Mr Schweitzer was not the administrator of the plaintiff's loans. That role was performed by Austide Holdings, Mrs Schweitzer's company. Mr Schweitzer was engaged initially on a part time basis as an accounts clerk to ensure that the plaintiff's loan documentation was in order. He was subordinate to his former wife and, as I understand the evidence, had no responsibility for lending. I formed a favourable opinion of his character and evidence. I accept his evidence that he was not employed by Austide Holdings until November 1999 and did not speak to Mr Mellor or the defendant in September 1999. That evidence is corroborated by Exhibit 19.

[39] A difficulty with the defendant's evidence is that when the first advance was negotiated in September 1999 there was no reason to be concerned that AS & Co could not repay the loan in less than six years. The advance was calculated by reference to fees actually invoiced, the receipt of which could be expected in the short term. The defendant's justification for insisting upon a six year term is that he could not anticipate receiving payment for work in progress on the company promotions in a shorter time but that consideration had no application to the initial advance which could be repaid from the receipt of bills actually rendered.

[40] It is significant that Mr Mellor did not admit to having made any of the representations himself, though it was pleaded he had done so, the defendant testified that he did and he was called to corroborate the defendant's evidence. He confirmed that the defendant was anxious lest repayment of the loan be demanded after 90 days but this was a concern shared by many of the accountants who borrowed from the plaintiff. His evidence did not go beyond this:

> 'Ewan wanted an assurance from us that it would be over a long term and he kept on talking about six years. He also mentioned to me … that it would probably take less, but he said he couldn't take the risk because of the … amount of money involved … He also wanted to find out whether he really had to sign a guarantee … I rang Ron Schweitzer for some clarification and also for some reassurance because Ewan wanted to talk somebody else besides myself … It was at the meeting when we filled the forms out … Ewan wanted some reassurances in regard to the time in particular … I rang Ron from Ewan's office … I told Ron who he was talking to and that he wanted some reassurances … then (the defendant) spoke for some time about the term and the reason for it and that he wanted to be assured that it … wouldn't be called before that term came about. I think there was a little bit of discussion on the guarantee … He told Ron six years.' (T.324.2-327.20)

[41] It will be recalled that the defence alleged that Mr Mellor, when negotiating the further advance of $650,000 in October 1999, repeated the representation, or promise, that the term would be for six years. The defendant mentioned this in his

evidence. Mr Mellor's testimony concerning the October advance makes no mention of it at all. The evidence is found at T.329.40-332.50.

[42] The defendant may have spoken to Mrs Schweitzer but I accept her denials that she told the defendant (or anyone else) that the loan could be for a fixed term of some years. It would not be surprising if an intimation were given that the plaintiff intended to extend the loan as often as was requested so long as there was no default by the borrower and the plaintiff's terms were met. This is not the same as a promise that the term would be fixed at six years. I am satisfied that both plaintiff and defendant understood that the term of the loan was that fixed by the contract documents though both expected that, barring unforeseen circumstances, the loans would be rolled over for as long as it suited both parties.

[43] The defendant himself admitted that if on a date when the loan was reviewed and the borrower applied for its extension it should be the case that there had been a marked fall in the value of the borrower's receivables then the plaintiff could call in the loan or part of it. See T.283.20, 291.25. This admission cannot stand with his contention AS & Co had a loan of $1,000,000 for six years.

[44] The defendant's evidence is a most unlikely tale. It cannot withstand his execution of the letter of 10 April 2000 which was required for the express purpose of recording the terms of the agreement between the plaintiff and AS & Co. Mr Stoddart signed it having noticed that it set out the term of the loan at 90 days' notice and recorded that he had given a guarantee. Noting those terms he signed the letter as a correct record of his company's contract and returned it. This is not a case of an orphan or a widow who speaks no English. The defendant is an intelligent, educated man who offers professional accounting advice for reward. I do not believe that he would have signed an acknowledgment of the terms of a contract which did not in truth reflect the terms of the agreement he had had his company make. This must be so given the defendant's professed anxiety that he not be liable as guarantor and that AS & Co not be obliged to repay the loan within six years. If he had been given oral assurances about these matters he would not have signed the letter in those terms.

[45] Exhibit 28 is a copy of a letter dated 18 March 2002 written by the defendant to the plaintiff's liquidators at a time when they were pressing for repayment of the loan to AS & Co. Mr Stoddart wrote:

> '… We have previously made you aware of our reliance upon the various promises and representations made by Gold Ribbon, and more specifically by Mr Paul Mellor … Mr Gary Howes … and Ms Sherie Schweitzer when deciding to accept the facility and structure our practice and its financial requirements accordingly.'

The absence of any stated representations by Mr Schweitzer is significant. It is also to be noted that the representation allegedly made by Mr Howes was in January 2000, months after the decision to borrow had been made.

[46] An application was made to wind up AS & Co. It was initially resisted. The defendant swore two affidavits as part of the resistance. In one, Exhibit 32, sworn 21 June 2002 the defendant gave a history of events quite different to that which he swore in these proceedings. The affidavit reads:

> '7. Paul (Mellor) and I arranged to meet at 11.00 am on 20 September 1999 … Paul arranged for me to talk by telephone to Ron Schweitzer … who was in charge of administering the loan and in that conversation Ron told me that the loans were not short term and that the documentation wording reflected 90 day roll over periods to satisfy their funding.
>
> 9. When we received the letter (22 September 1999) from Sherie Schweitzer I called her and again asked for confirmation that the loan would not be called up in 90 days and that we could have the funds for at least six years. Sherie confirmed what Ron Schweitzer had … told me.
>
> 10. On 12 October 1999 I again met with Paul Mellor (who) informed me that GRA still had surplus funds that they wished to lend. … I completed another application … In the course of that further dealing nothing was said by or on behalf of GRA … which changed the assurance and representation about the loan I have mentioned … or that the representations and assurances would or could be withdrawn. … It was on the basis on continuing reliance on those representations and assurances about the previous loan of the same type that the company applied for an undertook the further loan …
>
> 12. We met with Gary (Howes) … on 7 January 2000 …
>
> 15. In response to another fax from Ron Schweitzer I telephoned Ron and said Gary had told me not to worry about the guarantee as he was aware I had no assets in my personal name and that the insurance underwriting and life insurance policy were their security. Ron said that they were under pressure to get the guarantee form signed and that it could be treated as a default if I did not sign it … I subsequently signed and sent the guarantee form to GRA on 5 May 2000.'

[47] It will be noted that in this version of events the defendant did not allege that any fresh representations were made in October when AS & Co agreed to borrow the further sum of $650,000. It is plain from paragraph 10 of the affidavit that the case then was that continuing reliance was placed upon the September representations, not that further representations were made. It is also significant that it is now Mr Howes who was said to have made the representation that the guarantee would not be relied upon. That was not put to Mr Howes when he was cross-examined on behalf of the defendant.

[48] Apart from these serious discrepancies the defendant's evidence is impossible to accept. Had he made an agreement, or received a promise, that the loan was for a term of six years he would have had that recorded in writing. If he had received an assurance on which he relied he would not have sought constant confirmation by word of mouth. His evidence shows a level of anxiety that the loans be for a term of six years. His anxiety could only be allayed by written confirmation of the

promise that the loan was for six years. That he did not make or ask for such a written record indicates to me that the defendant's evidence is fabricated.

[49] Further inconsistencies are to be found in the defendant's second affidavit, Exhibit 33, signed 11 August 2002. This affidavit reads:

> '4.(i) At the time of the initial loan and prior to the execution of documentation … I had conversations with both Mr Paul Mellor and Mr Ron Schweitzer concerning the requirement that I sign a personal guarantee with respect to the company's loan. I told both Mr Mellor and Mr Schweitzer that I would not sign any personal guarantee as I had no assets in my name … I was assured by both Mr Mellor and Mr Schweitzer that the execution of the personal guarantee was required only to satisfy the bank which was providing the capital for GRA to make the loan and that GRA would not rely at any time on my personal guarantee …
>
> 5. Before I actually signed the guarantee I also spoke with Mr Gary Howes … who confirmed … that GRA would not rely on the guarantee in any circumstances.
>
> 7. Some … months after the sum of $650,000 was paid … I received a telephone call from Mr Schweitzer requesting that I sign a personal guarantee so that GRA could "tidy up their files to the satisfaction of the bank". I again was assured by Mr Schweitzer that GRA would not at any time rely on that personal guarantee …"

[50] The content of paragraph 5 of this affidavit was not put to Mr Howes in cross-examination. It differs from the content of para 15 of the earlier affidavit in which it is said Mr Howes' representation was made in April 2000 or later. It was not the subject of any evidence given by the defendant. The defendant seems to have abandoned that assertion altogether but it was one he was prepared to make on oath.

[51] The plaintiff's witnesses were, of course, cross-examined before the defendant gave evidence. It was not put to Mr Schweitzer in the careful cross-examination of senior counsel for the defendant that in September 1999 he had told Mr Stoddart that the plaintiff would not seek to rely upon any guarantee he signed. Mr Schweitzer of course denied having spoken to the defendant in September 1999. The present focus is on what was put to him about the conversation. It did not include any representation about the guarantee. He was cross-examined about a conversation he had with the defendant in about April 2000. It was put to him that Mr Stoddart had rung to ask why the second form of guarantee had been sent. This occurred:

> 'You said, I suggest, … "We are under some pressure from the bank to get our files in order and we have discovered that we have no guarantee from you with respect to the advance of $650,000" … No because that wouldn't have been something that I would have said to start off with … because it wasn't … at the insistence of the bank …

> Mr Stoddart went on. He said to you "I made it clear to Mellor at the beginning that I would not sign a guarantee. I only signed a guarantee based on his … assurance that GRA would not rely upon the guarantee." Do you remember that? – No.
>
> He said to you that … he had no assets … and he was not prepared to guarantee the loan. Do you remember that? – No.
>
> You said to him that the loan was unsecured and that GRA would not rely on any guarantee because it was fully covered by the debt of forgiveness insurance? – No.
>
> You said to him … that the guarantee merely needed to be signed to complete your … documentation to satisfy your lender. Do you remember that? – No.
>
> He said to you that on that basis he would sign the document. Do you remember that? – No.'

[52] It is a telling consideration that in putting the defendant's instructions to Mr Schweitzer it was not suggested that Mr Schweitzer himself had, earlier than April 2000, told the defendant that a guarantee would not be relied upon. If Mr Schweitzer had made such a statement as the defendant asserted in his second affidavit Mr Stoddart would have remembered it and would have reminded him of it. His instructions to his counsel clearly show that that was not the case. The content of the second affidavit, sworn to be true by the defendant, must be false.

[53] The defendant's claims about the guarantee are nonsensical. He did not wish to sign a guarantee and had no assets to support one. He was told that the plaintiff would never rely upon any guarantee but he nevertheless signed two of them because he was told it was required by the plaintiff's bank as a term of its making funds available which the plaintiff could on-lend. The defendant must therefore have been prepared to (i) participate in a sham transaction with the plaintiff to deceive its financier, or (ii) sign a guarantee knowing that the plaintiff might be forced by its banker to rely upon it. In the second event the defendant would be left in the awkward position of relying upon an oral communication to avoid liability under his written guarantee. In my assessment the defendant was far too cautious about his own position to have put himself in such a position. The execution of the disclaimer dated 5 May 2000 is impossible to reconcile with the defendant's evidence that he was not to be liable on his guarantee.

[54] In testimony the defendant made much of the existence of the policy of insurance between the plaintiff and HIH. He said that he had been told on a number of occasions by Mr Mellor and Mr Schweitzer that the plaintiff regarded the policy as its security for the loans and, as a consequence, the plaintiff was not concerned with the provision of guarantees in the case of corporate borrowers. The asserted rationale for the plaintiff's indifference to whether its loans were repaid does not bear scrutiny. The insurer was, as one would expect, expressly given the right, by way of subrogation, to pursue defaulting borrowers who did not repay their loans to the plaintiff. The existence of the policy offers no justification for a belief that the plaintiff did not care if its borrowers defaulted.

[55] There are some more points to be made about the defendant's evidence concerning the guarantee. Mr Mellor was called in the defendant's case. He was prepared to support the defendant with respect to the representation about the term of the loan but had this to say about the guarantee:

> 'Do you recall there having been a conversation by telephone with Mr Schweitzer in the first meeting you had with Mr Stoddart? – It was at the meeting when we filled the forms out.
>
> Do you remember Mr Stoddart speaking with Mr Schweitzer … on the telephone? – Yes.
>
> And do you recall there having been any discussion on the guarantee … - at the end of the conversation, just basically asked him, do I have to sign the guarantee?" Ron must have said something to him … when he finished he put the phone down and laughed … He said "they still want the guarantee."
>
> Did you say anything to Mr Stoddart … concerning what would … happen if he were to give a guarantee to GRA …? – I told him that GRA wouldn't advance the funds … if he didn't complete the guarantee.
>
> Did you say anything to him concerning what the consequence of completing the guarantee would be, whether or not it might be used or anything like that? – No.'

[56] The contrast with the pleaded case, the defendant's second affidavit and the defendant's evidence is stark. Mr Mellor directly and distinctly contradicted it.

[57] The plaintiff's liquidators negotiated with AS & Co, and the defendant, in order to recover the outstanding loan. The culmination was a meeting of 26 October 2001 at which Mr Rossiter, employed by the liquidators, and the defendant, reached agreement on a program for the repayment of the loan by instalments over time. As part of the new proposal Mr Rossiter told the defendant that he would have to sign another guarantee in respect of the promise to pay the instalments. In that regard he asked the defendant to provide a statement of his assets and liabilities. The defendant provided the statement on 14 November 2001. He listed as a contingent liability 'personal guarantees – Gold Ribbon 935000.00'. This document was the defendant's own handiwork. The embarrassment to his case caused by his inclusion of his liability as a guarantor to the plaintiff was obvious. In evidence his explanation for it was that Mr Rossiter had insisted that he include it even though Mr Stoddart protested that he had been promised that the guarantees he signed would not be enforced against him. According to the defendant Mr Rossiter said that unless that liability was included in the statement the proposal for a staged payment of the debt would not be put before the Committee of Inspection for approval.

[58] The difficulty with this evidence is that it was not put to Mr Rossiter and Mr Mellor who was at the meeting could not recall it. It suffers from the further disadvantage of being contradicted by the defendant's own particulars of the conversation with

Mr Rossiter. Paragraph 17(C)(c) of the further amended defence and counter-claim pleads that:

> '… In the course of the negotiations of the compromise the defendant informed … Rossiter that he … would not be guaranteeing Aikman Stoddart's liabilities … under the offer of compromise …'

Particulars were sought and were provided by letter of 12 September 2003 from the defendants' solicitors to the plaintiff's solicitors. The particulars were:

> 'The substance of the words used are set out in the following conversation (the defendant did not say the following are the exact words used … they convey the substance of the conversation)
>
> "Rossiter said: "I will need a statement of your personal assets and liabilities".
> Stoddart replied: "Why".
> Rossiter said: "You are the guarantor".
> Stoddart replied: "No. I was assured several times by GRA that the guarantees would not be relied on. They were covered by insurance."
> Rossiter said: "Well I know nothing about that".
> Stoddart said: "Well I'm not guaranteeing the loan and I have no personal assets anyway."
> Rossiter replied: "Well I'll have to show that to the Creditors Committee so I still want an Asset/Liability Statement."
> Stoddart replied: "OK but I will not sign any guarantees." '

[59] It is not possible to accept the defendant's evidence on this point. Indeed I am not prepared to accept the defendant's evidence on any point in contention. It is not necessary to elaborate my reasons further. He was a most unsatisfactory witness who, I am satisfied, lied quite deliberately to avoid liability on his guarantee. I prefer the evidence of Mr & Mrs Schweitzer whose denials that they made the representations ascribed to them I accept. Although Mr Mellor was called to corroborate the defendant's evidence he failed signally to do so with respect to the alleged representation concerning execution of the guarantees. He also offered but little support for the contention that the defendant was told the term of the loan could be for six years.

[60] By letter of 9 March 2001 the plaintiff advised the defendant that, due to circumstances beyond its control, it was unable to continue with the Accountants' Funding Program and, accordingly, pursuant to clause 13 gave notice that the full amount of the loan should be paid at the expiration of 90 days. By letter of 2 July 2001 the provisional liquidators of the plaintiff wrote to AS & Co referring to the letter of 9 March and pointing out that the loan should have been repaid on 9 June. The liquidators asked AS & Co to 'make immediate arrangements for the repayment' of the loan. A reminder letter was sent on 17 July because neither the defendant nor AS & Co had replied to the earlier correspondence. Mr Stoddart sent an email on 30 July the effect of which was to inform the liquidators that he was endeavouring to raise money to repay the loan and hoped to be able to do so 'by mid September'. He urged the liquidators not to take precipitate legal action. His correspondence concluded by saying:

> '… I note that interest is still being deducted … and I consider the firm not to be in default of its obligations …'

It is noteable that the defendant did not in terms assert that the loan was not repayable until the expiration of six years from the inception of the loan. If reference to an absence of default is to be taken as an assertion of that position it is Delphic indeed. Mr Stoddart again communicated by email on each of 7 and 8 August 2001. On neither occasion did he contend that the loan was not repayable because it was for a fixed term expiring in 2005.

[61] I am satisfied that the terms of the loan between the plaintiff and AS & Co are those found in the documents so that the loan was repayable on 90 days notice which had been given on 9 March 2001. I do not believe any representation was made to the effect that the loans would be for a fixed term of years. I am also satisfied that no representation was made concerning the unenforceability of the guarantees signed by the defendant. They, too, accordingly take effect according to their tenor.

[62] One last matter remains to be considered. It is that the plaintiff and AS & Co compromised their respective obligations by an agreement which obliged AS & Co to pay the debt over time and that that agreement excluded the defendant's liability as a guarantor. The argument is that by the agreement AS & Co compromised its right to dispute its liability to make the repayment before the expiration of six years and undertook an obligation to persuade a third party to undertake the sale of shares the proceeds of which would enable AS & Co to repay the loan. The compromise of rights and undertaking new liabilities is said to provide consideration for the discharge of the debt owed by AS & Co to the plaintiff so as to give rise to a new contract altogether. There is no doubt that the defendant did not guarantee the new contract. His counsel submits that the terms of the earlier guarantees do not catch the new set of promises contained in the compromise because they are not 'within the terms of' the guarantees.

[63] Counsel for the plaintiff accepts that a binding agreement was made for the repayment of the loan by instalments but submits that it did not have the effect of releasing the defendant from his guarantees of the due payment by AS & Co of the moneys borrowed from the plaintiff.

[64] An "agreement" was made on 26 October 2001 at the meeting I have mentioned. It was in essence that AS & Co would repay the outstanding amount of the loan, $910,000, by 44 monthly repayments commencing 31 December 2001. There was to be an initial payment of $50,000, two monthly payments of $25,000, a payment then of $200,000, a fifth payment of $25,000 and then 39 payments each of $15,000. The agreement was conditional upon the plaintiff's Committee of Inspection approving its terms. Mr Rossiter assured the defendant that he would recommend the approval of the arrangement and was confident that the Committee would give it. On that basis the defendant gave Mr Rossiter a cheque for $50,000. Some subsequent payments were made but AS & Co defaulted on the schedule of payments. Altogether it has repaid only $115,000.

[65] Despite the plaintiff's concession that there was a binding oral agreement I am not convinced that the arrangement of 26 October 2001 resulted in an enforceable contract. It is clear that any agreement was conditional upon the approval of the Committee and that approval was given subject to the agreement being reduced to

writing signed by AS & Co and guaranteed by the defendant. These two things did not occur.

[66] The terms on which the Committee approved the compromise appears in Exhibit 17. It was:

> 'That subject to receiving an executed asset management agreement from each borrower seeking to repay their principal loan over a period in excess of three months, the liquidator be authorised to enter into a repayment agreement with the borrower.'

The only agreement which the liquidator was authorised to make was one in writing and the writing in question required the defendant's guarantee of the obligations of AS & Co to make payments over time.

[67] By letter dated 18 February 2002 the liquidators wrote to AS & Co and Mr Stoddart:

> '… Your request for an extended repayment arrangement … has been ratified by the Committee of Creditors and we now enclose an asset management agreement for execution and return.
>
> This agreement reflects the changes you have requested to your loan facility and the execution and return of the document will constitute your acceptance of the terms and conditions detailed therein.
>
> You are advised that if the documents are not in our hands by (11 March 2002) then the agreement to extend your loan facility will lapse with your loan becoming immediately due and payable.'

The letter enclosed the asset management agreement for execution by AS & Co. The agreement was to be made between the plaintiff, the person named in Schedule 1 as the debtor and any person named in Schedule 1 as a guarantor. The execution page showed that it was to be signed by AS & Co and the defendant. He was identified in Schedule 1 as a guarantor.

[68] The case is one of the third class of contracts discussed in *Masters v Cameron* (1954) 91 CLR 353 at 360-362.

[69] I should perhaps add that Mr Rossiter's evidence, which I accept, was that an essential ingredient in the compromise was that the defendant should guarantee AS & Co's promise to pay the instalments. Mr Mellor corroborated the evidence (T.342.15-.25).

[70] I conclude that the discussions of 26 October 2001 did not result in a new contract binding on the plaintiff and AS & Co. It remained bound by the terms on which it borrowed the $1,000,000 from the plaintiff in 1999 and the defendant was bound by the terms of his guarantees to answer for the default of AS & Co.

[71] Even if it were otherwise I accept the submissions of counsel for the plaintiff that the terms of the guarantees are sufficient to catch AS & Co's obligations under the 'agreement' of 26 October. The first guarantee provided that the defendant's liability should not be released by the plaintiff becoming a party to or bound by any

compromise by or relating to AS & Co, or by AS & Co being discharged from its obligation to pay all or any of the money guaranteed which, of course, included the repayment of AS & Co's debt. There were similar provisions in the later guarantee. Under both instruments the defendant was liable as the principal debtor 'as a separate and additional obligation' to those as guarantor. That is by both instruments the defendant undertook as principal debtor to indemnify and keep the plaintiff indemnified against any loss that it might suffer from AS & Co's failure for whatever reason to repay the loan. As Barwick CJ pointed out in *Bank of Adelaide v Lorden* (1970) 127 CLR 185 at 191 a surety may agree in advance to remain liable on his guarantee though the debt of the principal debtor be discharged by composition or some means other than payment. Agreements to that effect are valid and the guarantor remains liable despite the discharge or alteration of the principal debtor's liability.

[72] Accordingly I give judgment for the plaintiff against the defendant in the sum of $885,000 together with interest at 13.5415% from 9 April 2002, and the costs of and incidental to the action to be assessed on the standard basis.