SUPREME COURT OF QUEENSLAND

CITATION:	*Lane v L3 Enterprises Pty Ltd & Anor* [2007] QSC 288
PARTIES:	**ANTHONY DESMOND LANE** (plaintiff) **v** **L3 ENTERPRISES PTY LTD** **ACN 105 501 335** (first defendant) and **JOHN ANTHONY LANE and MONIQUE NAOMI LANE** (second defendants)
FILE NO:	BS 7934 of 2006
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	11 October 2007
DELIVERED AT:	Brisbane
HEARING DATE:	1 October 2007; 2 October 2007
JUDGE:	Chesterman J
ORDER:	**Judgment for the plaintiff against the second defendant in the sum of $324,885.60**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – ORAL CONTRACTS - CONSTRUCTION – where the plaintiff and second defendants entered into an entirely oral loan agreement – where subsequently the plaintiff signed a document purporting to lend the same amount of money to the first defendant – where the plaintiff erroneously understood the document to be no more than a document formalising the original oral agreement with the second defendants – whether in fact there were two distinct and separate agreements - whether the second defendants were bound by the first oral agreement notwithstanding the subsequent written agreement CONTRACTS GENERAL CONTRACTUAL PRINCIPLES - PARTIES – CONSTRUCTION AND INTERPRETATION where the second defendants wished to purchase a business through the first defendant – where the plaintiff agreed to provide the funds - where the plaintiff transferred the majority of the money in question to the vendor's solicitors trust account for that purpose – where the company accounts

of the first defendant showed this sum as a liability owed to the second defendants – whether the transfer of money from the plaintiff was a transfer to the first defendant or to the second defendants

CONTRACTS GENERAL CONTRACTUAL PRINCIPLES - TERMS – CONSTRUCTION AND INTERPRETATION – BREACH - where the plaintiff claimed that the transfer was a loan to the second defendants payable initially by monthly interest repayments – where the second defendants claimed the money was a gift – where the money constituted a large amount of the plaintiff's assets – where the plaintiff had previously evidenced a desire to involve himself with the second defendants on a commercial basis - where the seconded defendants made two payments of monthly interest into a bank account set up for that purpose – where the defendants claimed that these payments were made in prosecution of a sham to assist the first defendant in falsely representing his income and not in relation to loan repayments – whether such evidence existed – whether the facts suggested that the agreement was a loan – whether the second defendants were in breach of that agreement

Equuscorp Pty Ltd v Glengallon Investments Pty Ltd (2004) 218 CLR, applied
D.T.R Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423, applied
Seldon v Davidson (1968) 1 WLR 1083, applied
Summers v The Commonwealth (1918) 25 CLR 144, applied

COUNSEL: Mr F.G. Forde for the plaintiff
Mr N.H Ferrett for the defendants

SOLICITORS: Deacons for the plaintiff
Woods Prince for the defendants

[1] This sad little case is a contest between a father and his son and daughter in law. Mr Anthony Lane, the plaintiff, sues to recover the sum of $265,000 which he claimed he lent the second defendants in August 2004 to enable them to purchase a newsagency business. They assert the money was a gift advanced in consideration of natural love and affection, and in gratitude for the support they offered the plaintiff after the death of his wife.

[2] The contest is complicated by the presence of the first defendant, a company the only shareholders and directors of which are the second defendants. As an alternative defence the second defendants assert that, if there was a loan, it was made to the first defendant which has been stripped of all its assets and is an empty shell.

[3] The transaction between plaintiff and second defendants was entirely oral. There is, however, a written loan agreement between the plaintiff and the first defendant which, on its face, records a loan and the first defendant's obligation to repay capital after five years, with interest to be paid by monthly instalments at seven per cent per

annum. Until a month ago the plaintiff's claim was only against the first defendant. Even now the claims against the first and second defendants are pleaded as alternative claims.

[4] Despite the pleading the plaintiff's case presented in evidence was of a loan to the second defendants and a claim to recover the monies from them. No relief is now sought against the first defendant. The second defendants contend that if their testimony that the advance was a gift is rejected then the monies were lent to the first defendant as evidenced by the written loan agreement which binds the plaintiff, and limits him to his pointless action against the company. When choosing this forensic tactic the second defendants must have overlooked the prohibition on company directors against taking corporate money for themselves and the powers the Corporations Act confers on liquidators to recover those monies.

[5] No more need be said on that topic. The case is in the end a simple one. A rehearsal of the evidence of the three witnesses to the transaction will show why.

[6] All these witnesses, it must be said, were vague historians and their respective accounts of the conversations were far from precise. It was my impression that the plaintiff found the litigation distasteful and his dislike of it made him reticent.

[7] The plaintiff's wife died in September 2002, after a prolonged illness. The second defendants who were living and working in Melbourne returned to Brisbane to offer the plaintiff physical and emotional support. They lived with the plaintiff, rent free, for some months before buying their own house in another suburb. During their stay Mrs Monique Lane kept the house tidy and cooked evening meals but the plaintiff had employed the services of professional cleaners for many years and continued to do so. They cleaned the house and undertook his personal washing and ironing.

[8] Mr John Lane has always worked in financial institutions and obtained such employment on his return to Brisbane. His wife was interested in starting her own business and they selected a newsagency as her first venture, it being thought a suitable enterprise for a beginner.

[9] Shortly after his wife died the plaintiff sold a home unit they had owned at the Gold Coast and paid the proceeds of sale, $465,000, into an interest bearing term deposit with Westpac. His only other assets were a rural property at Goomburra worth about $150,000 on which there was a mortgage debt of $70,000 and his small engineering business worth between $100,000 and $200,000. When his wife was alive they had lived at Goomburra and the Gold Coast but after the sale of the unit Mr Anthony Lane rented a house near his business in Drewvale.

[10] By about March of April 2004 the second defendants had identified a small newsagency, Gem News, in Hamilton as a likely prospect for their acquisition. The second defendants had no money of their own. They had required the assistance of the plaintiff to buy their house in Brisbane. He had guaranteed the repayment of their home loan which was of the entire purchase price. The income from the business was insufficient to support repayments of any money borrowed by the business. With these circumstances in mind Mr John Lane's evidence is that he and his wife went to speak to his father '… looking for advice on how we could maybe move forward with this and what he could … offer in relation to it …'. At the time

Mr John Lane knew that his father had sold his Gold Coast unit and had 'a substantial sum' in the bank.

[11] The plaintiff's evidence was that not long before the second defendants bought the newsagency his son approached him and asked him to lend him $220,000 to enable him make the purchase. The plaintiff's recollection was that only he and his son were present and that Mrs Lane was not. The plaintiff agreed to make the loan but he said that it had to be 'set up … properly with a contract' and that he would open a bank account into which interest would be paid.

[12] I interpolate to say that it is admitted on the pleadings that at all times Mr John Lane was acting on behalf of his wife, and it is common ground that the advance of $265,000, be it gift or loan, was to the second defendants and not to Mr John Lane only.

[13] Mr John Lane agreed to the requirement that the agreement be reduced to writing and he said that he would prepare the document. They also discussed the payment of interest. The plaintiff asked for monthly payments of interest and Mr John Lane agreed. The two men also agreed upon a rate. It was to be one in excess of what the plaintiff was receiving on his bank deposit but less than the bank would charge the second defendants if they borrowed from it. The plaintiff left it to his son and Mr Nicholson, his bank manager, to work out the precise rate. The only agreement reached with respect to the date for repayment of capital was that the loan was to be repaid when the second defendants sold the newsagency business, or, if there was no sale, 'eventually'. It is admitted on the pleadings that a sale occurred on or about 1 June 2006.

[14] Some time later Mr John Lane again spoke to his father and said 'We need another $45,000 for stock'. The plaintiff replied 'Well, okay. … I'll lend you the other 45 grand.' On that occasion, also, only the plaintiff and his son were present.

[15] Following this conversation the plaintiff contacted Mr Bernard Nicholson, his bank manager, to request him to break the deposit before the expiration of its term and to apply $265,000 from that deposit in accordance with directions from Mr John Lane.

[16] On 23 August 2004 $265,000 was paid from the plaintiff's bank account. The direction for the payment came from Mr John Lane to Mr Nicholson who accepted the instruction because the plaintiff had authorised him to do so. $231,240.20 was paid to the trust account of Messrs Klar & Klar, the solicitors for the vendor of the newsagency and $33,759.80 to the first defendant's bank account.

[17] On 16 August 2004 the plaintiff opened a 'Classic Plus Account' at his bank, the Acacia Ridge branch of Westpac. The account was initially opened in the name of the plaintiff and his wife who, by that time, was dead. The account name was adjusted in February 2005 to record the plaintiff as the sole account holder. The plaintiff's evidence was that this was the account opened to receive interest payable pursuant to the loan to the second defendants and that he had told his son that he would open such an account. Two payments were made to its credit: one on 9 December 2004 and one on 1 February 2005. Each was for $1,524.65 which, as calculation shows, is a month's interest on $265,000 at seven per cent. The two payments were effected by electronic transfer from the first defendant's bank account. They were initiated by Mrs Monique Lane on instructions from her husband.

[18] About a week or two after the second defendants had taken possession of the newsagency the plaintiff visited them at the shop. During their conversation he told them that 'they didn't have to pay any (interest) payments for three months (to enable them) to get on their feet.' They expressed suitable gratitude and accepted the waiver. That meant that the first instalment of interest was due on 24 November. It was not paid. The plaintiff contacted his son to enquire about the missed payment. Mr John Lane explained that 'things were tight' and that receipts by the business were below expectations. The plaintiff accepted the explanation and said nothing more. As I mentioned, one payment of interest was made on 9 December but none on 24 December 2004 nor 24 January 2005. The plaintiff believes he would have contacted his son again about non-payment and been given some similar explanation.

[19] Shortly before Christmas Mr John Lane produced the written agreement which his father had earlier asked for. Mr John Lane 'brought the document over to me and opened it … and I said … where do I sign. I signed it and … he said … do you want a copy? I said no, you keep the copies.' The plaintiff's recollection was that only he and his son were present and that Mr John Lane opened the agreement at the execution page, which he signed. He did not read it before signing it because he trusted his son to have faithfully recorded their agreement. When he signed it both second defendants had already put their signatures to the document.

[20] The loan agreement is dated 23 August 2004 and is said to be made between the plaintiff as lender and the first defendant as borrower. Mr John Lane explained that he took as his precedent loan documents used by his employer at the time, Suncorp Metway. Relevantly the term of the loan was said to be five years or such lesser term as agreed. There was to be a minimum annual repayment of interest in the sum of $18,550. The rate of interest was to be seven per cent subject to a variation upwards. The agreement is elaborate. Many of its provisions are inappropriate for a loan between family members which needed only a simple record of the transaction. For example there are three recitals which contemplate a series of advances between plaintiff and first defendant. None of the witnesses in the case suggest that was so. The agreement specifies the term of the loan as five years whereas the plaintiff's evidence was that the only discussion on the point was that the loan was to be repayable on the sale of the business.

[21] The plaintiff testified that he did not notice that the document described the borrower as the first defendant. He said he 'didn't even look'. He was adamant that he lent the money to his son and daughter in law. He also testified that his son did not say anything to him about the company, the first defendant, being the borrower of the money. His evidence on that point was not challenged in cross-examination.

[22] In about February of 2005 the plaintiff wanted a copy of the loan agreement. He asked his son for one and told him that he needed it to show the bank which he was about to approach to borrow money to buy a block of land. He explained later that he did not need the loan agreement for that purpose but gave that as a reason, or excuse, to his son for requesting the document.

[23] He said his real reason for wanting a copy was that the second defendants were not paying interest. This omission occasioned the plaintiff to ring his son more or less regularly to ask him when he was 'going to put some money in the bank?' It seems

he was easily fobbed off but after February 2005 the plaintiff became concerned and his relationship with the second defendants cooled.

[24] Eventually the plaintiff consulted solicitors and on 31 May 2006 Messrs Murphy Schmidt wrote to:

> 'J A and M N Lane
> L3 Enterprises Pty Ltd ATF Jomon Trust'

The letter read:

> 'We are instructed as follows:
>
> 1. Our client has a loan agreement with (the first defendant) in which you are both directors.
>
> 2. Our client was the lender under the loan agreement.
>
> 3. The loan amount was $265,000 which was lent to (the first defendant) on or about 23 August 2004.
>
> 4. The terms of the loan agreement required (the first defendant) to repay the loan by way of instalments.
>
> 5. (The first defendant) made two repayments …
>
> We are instructed that (the first defendant) has defaulted … by failing to make further repayments.
>
> Pursuant to clause 6 … the balance of the entire loan amount is now due and owing … . Our client requires payment … within 14 days …'

[25] The defendants' solicitors replied on 29 June 2006:

> 'We are instructed that the sum of $265,000 was provided as a gift to (the first defendant) with a "loose arrangement" that at some time in the future there may be a repayment. The amounts paid on the 9th December 2004 and 1st February 2005 were part of this loose arrangement.
>
> At the time of the gift, there was certainly no fixed agreement, time span or even that interest would be paid. In about October/November 2004 your client was in the process of purchasing land and approached our clients for assistance in his loan application. This led to the document entitled 'Loan Agreement' dated 23 August 2004. Our instructions are that it was understood that your client would not attempt to enforce the provisions of the document.
>
> Accordingly the sum claimed will not be paid.'

[26] The contents of both letters sit uneasily with the parties' evidence and have obvious relevance to credit. I will return to that point later, after the conclusion of the narrative.

[27] The plaintiff received a telephone call from his son after his letter had been sent but before the defendants' solicitors reply. Mr John Lane said 'Where am I going to get $265,000 from?' His father replied that all he had to do was pay interest once a month and 'everything will be fine'. No payments were made. I should mention that Mr John Lane did not deny this conversation and it was not, as I recall, put to the plaintiff that that conversation did not occur.

[28] In early February 2005 the plaintiff signed a contract to purchase a block of land in a new development in his suburb. He thought it might become his home. He signed a contract on 8 February 2005. The vendor signed three days later. The price was $255,000. The plaintiff had the balance of his deposit in the Westpac deposit account of $205,000. He needed to borrow a further $50,000 and applied to the bank for that purpose. In his loan application he listed as an asset 'loan to son and daughter in law to assist with newsagency $265,000'. He did not include as part of his income interest due under the loan. He did list his income as $130,000. This is the figure which appears in his income tax return for the year ended June 2004. It seems he exaggerated the value of some other assets. He put the land at Goomburra at $500,000 and the value of his business also at $500,000.

[29] In cross-examination the plaintiff was taxed with the point that the advance had been paid to or on behalf of the first defendant: some to the vendor of the business and the balance to the first defendant's bank account. Mr Lane explained that he 'knew nothing of where the money was being paid because (he) had nothing to do with it. It was just done at the bank. … (He) left that up to the bank manager' and did not involve himself in the transactions.

[30] He was also challenged on his solicitor's letter of demand which asserted that the loan had been to the first defendant. Mr Lane's answer was that 'the solicitors found that out. I didn't know.' He provided them with a copy of the loan agreement. He remained firm in his testimony that the loan was to the second defendants. He claimed that he had told his solicitor the money was lent to his son and daughter in law.

[31] Proceedings were commenced on 19 September 2006. The claim was for monies lent by the plaintiff to the first defendant pursuant to the written agreement of 23 August 2004. On 22 July 2007 the defendants' solicitors sent the plaintiff's solicitors a letter dated 25 May 2007:

> '… We are instructed that (the first defendant) does not hold any assets and is no longer an operating company. Accordingly, should judgment be obtained against our client, whilst we do not accept that judgment should be obtained, we advise that our client would not be in a position to satisfy any judgment obtained.
>
> We are instructed that the company is to be deregistered and wound up at the conclusion of this matter.'

[32] On 7 September 2007 the plaintiff amended his pleadings to join the second defendants and allege against them the oral agreement of loan which was the subject of his evidence. It was put explicitly to the plaintiff in cross-examination that he had concocted this evidence to avoid the consequence that a judgment against the first defendant would be worthless. Mr Lane denied the recent invention but the suggestion allowed his counsel to adduce evidence of prior consistent statements. The plaintiff had spoken to his bank manager when he gave instruction for the breaking of the term deposit and authorised Mr Nicholson to deal with the advance of $265,000 in accordance with Mr John Lane's directions. In these conversations the plaintiff advised Mr Nicholson that he was lending the money to his son and daughter in law. Mr Nicholson corroborated the evidence.

[33] The conduct of the defendants' case was distinctly odd. Their counsel intimated in plain terms that the second defendants would not maintain their plea that the advance from the plaintiff was a gift. The only defence was to be that the plaintiff had lent the money to the first defendant in accordance with the written agreement. Mr John Lane would be the sole witness.

[34] Having been called to testify Mr John Lane was breathless in his anxiety to claim that the money was, in fact, a gift. After some prevarication he accepted that the gift was made to him and his wife, not the first defendant. His explanation for the loan agreement was that it was, and was intended to be by all signatories to it, a sham. According to Mr John Lane his father had said that he needed evidence of additional income to obtain the loan from Westpac to enable him to buy the land. Accordingly he drew up the agreement to provide the necessary evidence. To add verisimilitude he made the two payments to the plaintiff's 'Classic Plus Account'.

[35] This disreputable conduct led Mr John Lane to attempt to claim privilege against answering some of Mr Forde's questions on the ground that his answers might tend to incriminate him. An examination of the circumstances convinced me that there was no basis for such a fear. The document was not in fact shown to Westpac and there was no evidence that the plaintiff intended to borrow money and not pay it back in accordance with the terms of the loan. I could not see the slightest possibility that Mr John Lane had committed an offence against s 488, or s 408 of the Criminal Code and the claim for privilege was disallowed.

[36] At the conclusion of Mr John Lane's evidence counsel for the defendants announced that he would, after all, advance the defence of gift and intimated that he would call evidence from Mrs Lane and Mrs Downes, which was duly adduced.

[37] Mr John Lane's evidence was that he and his wife discussed with the plaintiff their desire to buy the newsagency. He said that they 'went through the whole discussion with him about … wanting to buy a newsagency and that the newsagency was valued about this much, we still had to negotiate on price but it was something that we wanted to do and the reasons why … we did go in length … . Because (the plaintiff) knew that we couldn't actually move forward with this transaction on our own what sort of support … we could gain from him. That's when he offered us the funds to purchase the newsagency.'

[38] The reason for the delay between the advance on 24 August 2004 and the production of the loan agreement was said to be that the document was prepared at the plaintiff's request in late November or early December 2004. The document

'was never needed … when the money was first handed over as the funds were a gift'. It was signed on Christmas day when the plaintiff and both second defendants were at Drewvale prior to going to Christmas lunch with the plaintiff's daughter. There was, Mr John Lane said, a discussion about the document which occurred with the three of them sitting at the kitchen table 'going through the document, each page, outlining what the document entailed' after which they all signed it.

[39] He took both copies of the agreement away and had the signatures witnessed by Mrs Downes later that day or Boxing Day. He did not give a copy of the document to the plaintiff for about a month because they had 'no scheduled catch-ups'.

[40] In cross-examination Mr John Lane described the initial discussion with the plaintiff as 'looking for advice on how we could maybe move forward with (the purchase) and what he could … offer in relation.' The plaintiff's response was to 'give us the money.'

[41] Mr John Lane's account of why he came to make the two payments was barely comprehensible (T72.15-.45). It comes down to no more than the fact that the plaintiff telephoned him, gave details of the bank account which 'he wanted the money to go into' and said that 'a transaction needed to go into the account, … because he needed an agreement to be put in place.' This is as consistent with the plaintiff's evidence that he asked for interest payments to be made in accordance with the oral agreement as it is with the second defendants' assertion that payments were made to lend colour to the sham. Indeed if the latter were the fact one would expect Mr John Lane to have made a better fist of saying so.

[42] The books of account for the first defendant were in evidence. They show that at 30 June 2005 the first defendant included as a current liability the sum of $264,849.70 described as 'beneficiaries' current accounts'. The beneficiaries were identified as the second defendants who had each 'introduced capital' to the company in the sum of $140,000. The accounts in the following year, 30 June 2006, show that the monies owed to beneficiaries had decreased substantially and that the second defendants had received $141,730.35 each from the company. The money came from the proceeds of the sale of the business which occurred in June 2006.

[43] Although Mr John Lane was reluctant to accept the obvious inference from the accounts, it is clear that the second defendants advanced $280,000 to the first defendant to enable it to purchase the newsagency business and recovered the loans on the sale of the business. The source of the funds lent to the first defendant was the money advanced to the second defendants by the plaintiff. The accounts allow no other explanation. It is consistent with the evidence of both second defendants that the plaintiff advanced $265,000, whether by gift or loan, to the second defendants and not to the plaintiff.

[44] Mrs Lane's evidence in corroboration of her husband's was brief. She said that after having selected the Gem Newsagency as their preferred acquisition she and her husband turned their thoughts towards how they would raise the money to buy it. They thought about a loan from a financial institution or 'approaching (the plaintiff) for some assistance …'. It was the second thought that was most appealing and they did, in fact, 'approach Tony (the plaintiff) in March or April of 2004'. They discussed with him how they 'would finance the newsagency' and Mr John Lane

'took' his father through the financial information he had about the newsagency. During the discussion the plaintiff 'said he would give (the second defendants) the money to purchase Gem News and then reiterated that he has had his time and he would want to give something back to us for all that we had done for him.'

[45] Mrs Lane also said that on the day prior to settlement of the purchase, when a stock-take of the business was being undertaken, the plaintiff arrived and spoke to her on the footpath. They were alone. The plaintiff said 'I'm glad I was able to do this for you after all you've done for Kathy and I.' The reference was to the plaintiff's late wife.

[46] Mrs Lane corroborated her husband's evidence that the plaintiff signed the loan agreement on Christmas day. She could not remember whether she had signed it on that day or whether she signed it subsequently in her mother's presence. She said that the document was put on the kitchen table around which sat her husband and father in law. They 'went through the document and he signed it'. The perusal was 'very casual'. '… Paragraphs were pointed out where things were … discussed between (Mr John Lane) and his father and then it was … to the back page … and it was signed by (the plaintiff).'

[47] After the document was signed they drove with the plaintiff to his daughter's house for Christmas and, on the way, inspected the land in the new estate which he wanted to buy.

[48] Mrs Lane confirmed that the money was a gift to her and her husband and not to the first defendant.

[49] The agreement was signed by the plaintiff and by the second defendants as directors on behalf of the first defendant. The signatures purport to have been witnessed by Mrs Yvonne Downes, Mrs Monique Lane's mother. She did not witness the plaintiff's signature, though she said his signature was on the document when she signed. She saw her daughter and son in law sign. The evidence as to execution cannot be reconciled. If Mrs Downes is right in saying her daughter signed the document in her presence Mrs Lane cannot have signed it as she says when her husband and father in law signed it. The contradictions do not help the defendants' case.

[50] Two points require consideration. They intersect. They are:

- Whose evidence, as between plaintiff and second defendants, should be accepted?

- What is to be made of the written loan agreement of 23 August 2004?

[51] It is logical to start with the second point because its existence and the plaintiff's early reliance on it have obvious relevance to credibility.

[52] The document is signed by the plaintiff and second defendants. It records unequivocally a contract of loan between the plaintiff and the first defendant. It was the basis for the plaintiff's demand, made through his solicitors on 31 May 2006 and it was the only basis on which he brought legal proceedings to recover outstanding loan monies until he was informed that the first defendant could not

begin to satisfy any judgment against it. Normally these circumstances would lead to the rejection of evidence that the loan agreement was not a true record of the relevant agreement. If the defendants' case had been that the first defendant did indeed borrow $265,000 from the plaintiff, his assertion that he had lent it to the second defendants could not be accepted. But in this case none of the witnesses to the transaction claimed that the first defendant borrowed anything from the plaintiff.

[53] The plaintiff's evidence is that he lent the money to his son and daughter in law. They agree they received the money, but by way of gift. They affirm in their evidence that the money came to them, not their company though they applied it by lending it to the company to enable it to purchase the newsagency. Mrs Lane gave that evidence explicitly (T130.35). Mr John Lane was more reluctant to accept the point but he eventually did so (T78.41). It is the only conclusion possible from the first defendant's accounts.

[54] The question of fact to be determined is whether the payment was by way of loan or gift. There is no question about the recipient of the payment, and no question that the written agreement was intended by any of its signatories to reflect or record the real transaction between them.

[55] I prefer the plaintiff's evidence. It must be said that all witnesses were imprecise and vague narrators and none of them told a coherent, completely comprehensible account. Nevertheless the indications support the plaintiff.

[56] The first point is that he opened the 'Classic Plus Account' for the receipt of interest in August 2004, the month of the advance. It is a contemporaneous indication that the plaintiff expected to receive payments by way of interest on the advance, which can only mean it was a loan.

[57] The second indication is that a gift of $265,000 would have been most improvident on the part of the plaintiff. It was about a third of his entire wealth. He was a man in his early 60's, active and in good health. He had his own future. The sum was more than half of the proceeds of sale of what had been his home. I think it most unlikely the plaintiff would have made such a gift when his own resources were modest.

[58] There is the fact that the plaintiff told his bank manager, Mr Nicholson, that he was lending the money to the second defendants. Mr Nicholson's evidence was unchallenged. The plaintiff recorded the sum as a loan to the second defendants when listing his assets in the loan application he made to Westpac.

[59] The loan agreement itself, though it nominates the first defendant as the borrower, is a powerful indication that the transaction between the plaintiff and the second defendants was one of loan. The two rival explanations for it are (1) that the plaintiff signed it, not looking at it at all closely and not realising that it named the first defendant as borrower, and (2) that it was a sham, unrelated to the gift, produced at the request of the plaintiff to deceive Westpac's officers into thinking the plaintiff's assets and income were greater than they really were.

[60] It is said against the plaintiff that he misrepresented his net worth in his loan application. He overstated both the value of his rural property and his business. This is true. The circumstance does not lead me to reject the plaintiff's evidence.

[61] The plaintiff's explanation is plausible though it is very odd that he should persist in claiming under the written agreement at a time when he should have comprehended it was not the agreement pursuant to which he claimed repayment, and he had solicitors advising him. I suspect the plaintiff is naïve in matters of business, though no doubt a competent tradesman, and he did not fully understand the nature or consequence of the error the agreement constituted. Be that as it may I accept his evidence that he signed the agreement in the mistaken belief that it recorded the loan between him and the second defendants.

[62] The difficulties in the second defendants' version outnumber those in the plaintiff's case. The first is that the plaintiff did not use the loan agreement to support his application to Westpac. He did not show a copy of the agreement to the bank and he did not even record the interest due under it as part of his income in the application form he completed. These are odd omissions if the document was produced for the very purpose of being produced to the bank to show an additional income.

[63] Moreover the plaintiff did not need the support offered by the loan agreement to succeed in his application. He was borrowing $50,000 on a property towards the acquisition of which he was himself providing $205,000. His income as revealed by his tax return was more than adequate for the bank's purposes.

[64] Another problem is that the loan agreement was on any view of the evidence asked for and produced at the latest by December 2004. The plaintiff gave evidence that he did not decide to buy the land until February 2005. Yet the agreement was said to have been produced to bolster an application for finance to buy the land. Mrs Lane sought to overcome this difficulty by her evidence that the plaintiff was looking at the land at Christmas and that she and her husband inspected it with him. That episode was not put to the plaintiff in cross-examination. His evidence that he became interested in the land only in February 2005 was uncontested in cross-examination.

[65] The payment of the two instalments of interest also poses a difficulty for the second defendants. It is one thing to assist with the preparation of a false document but to pay $3,000 to give the sham some semblance of authenticity is another. There is no suggestion that the money would be repaid by the plaintiff once the bank had been duped. The second defendants are clearly people to whom money is very important. I would doubt they would part with so much of their own money to help the plaintiff's cause. Moreover there is no clear evidence that the plaintiff asked the second defendant to make the loan payments as part of the deception he intended to practice on the bank.

[66] The timing of the first payment of interest is also difficult for the second defendants' case. It occurred on 9 December 2004 before the written agreement was drafted and executed, but of course after the oral agreement, which the plaintiff propounds, was made.

[67] There is then the contents of the second defendants' solicitor's letter of 29 June 2006 in response to the plaintiff's demand for payment. The defendants, through their solicitors, asserted:

> '… that the sum of $265,000 was provided as a gift to (the first defendant) with a "loose arrangement" that at some time in the future there may be a repayment. The amounts paid on the 9th December 2004 and 1st February 2005 were part of this loose arrangement.'

These statements of fact are a marked departure from the second defendants' evidence. They were both clear that the gift was to them, not their company. Mr John Lane was equally clear that the two instalments were of interest, not a repayment of capital and that the payments were made not as part of any loose arrangement for repayment but as a means of lending veracity to a sham transaction.

[68] Another difficulty for the defendants' case is that the plaintiff did not keep a copy of the loan agreements after they were signed. He let his son take them away, yet it is said he was anxious to show the agreement to the bank. Even if it be the case that they were taken to allow Mrs Downes to witness the signatures there is no reason why they could not have been returned quickly to the plaintiff. The fact that Mr John Lane had not scheduled a meeting with his father for about a month did not mean he could not have posted one of the copies, or that the plaintiff could have retained one himself and had his daughter, whom he was seeing at Christmas, subscribe as witness. The fact that the second defendants took the agreements is more supportive of the plaintiff's case and his complete trust in his son.

[69] Mrs Lane's evidence of her conversations with the plaintiff is unconvincing. The plaintiff was not nearing the end of his life. He was a fit, vigorous and active man in his early 60's. It is notoriously impossible to put a price on affection but the second defendants had not done anything for the plaintiff other than live rent free in his house for three months and cook his evening meals.

[70] Accordingly I accept the plaintiff's evidence and reject the second defendants'. I find that there was an agreement between them for a loan of $265,000. The rate of interest was not expressly agreed but has been fixed by the parties' subsequent conduct. The two instalments of interest paid reflects a rate of exactly seven per cent and the plaintiff accepts the payments as correctly reflecting the rate at which interest is payable.

[71] The rejection of the defendants' evidence as to the provenance of the loan agreement means that the explanation for it is that it was meant to record the loan, as the plaintiff said. It is therefore puzzling that Mr John Lane should prepare a document exhibiting the first defendant as borrower. The reason is probably to be found in some evidence he gave (T78.55). Mr John Lane's understanding of things was that 'the entity that had used the money should have its name attached' as borrower. He may have been genuine in his expression of belief. It finds echoes in some other evidence he gave when questioned about the first defendant's accounts. That company did get the benefit of the money and it may be the fact that it did so by loan from him and his wife who borrowed the money from the plaintiff was too subtle for his understanding.

[72] There may have been some uncertainty about the term of the loan. The plaintiff's evidence was that the money was to be repaid on the sale of the newsagency or if there were no sale, 'eventually'. A term that the loan be repaid upon a contingency that might not occur or otherwise 'eventually' may well be void for uncertainty. In that case the loan would be one with no date fixed for repayment, in which case it is

repayable on demand; see *Seldon v Davidson* (1968) 1 WLR 1083 at 1088 or, perhaps, within a reasonable time after request for repayment has been made; see *Seldon* at 1090. In any event the contingency has occurred and demand has been made.

[73] Counsel for the defendants submitted that if I concluded the transaction was a loan I must find that the loan was made pursuant to the written agreement which must regulate the relationship between the parties. The result will be a judgment against the first defendant. The submission is that the parties are bound by the terms of their written agreement whether or not the plaintiff read it before signing. It is pointed out that there is no claim for rectification of the agreement and no plea that it is unenforceable by reason of mistake. The plaintiff, on his evidence, signed the loan agreement as a record of the loan transaction he had made with the second defendants and it was 'the one that was meant to be the loan agreement'. It is submitted that the plaintiff's mistake as to the effect of the document is legally inconsequential. He is bound by the terms of the agreement in the absence of a challenge to it on such grounds as mistake or misrepresentation.

[74] The law was emphatically stated by the High Court in *Equuscorp Pty Ltd v Glengallon Investments Pty Ltd* (2004) 218 CLR 471 at 483. The court said:

> 'The respondents each having executed a loan agreement, each is bound by it. Having executed the document, and not having been induced to do so by fraud, mistake, or misrepresentation, the respondents cannot now be heard to say that they are not bound by the agreement recorded in it. The parole evidence rule, the limited operation of the defence of non est factum and the development of the equitable remedy of rectification all proceed from the premise that a party executing a written agreement is bound by it. Yet fundamental to the respondent's case that the operative agreements between the parties were wholly oral, and reached earlier than the execution of the written agreements, was the proposition that the written agreements subsequently executed not only may be ignored, they must be. That is not so. Having executed the agreement, each respondent is bound by it unless able to rely on a defence on non est factum, or able to have it rectified. … There are reasons why the law adopts its position. The first, it accords with the "general tests of objectivity [that] is of pervasive influence in the law of contracts". The legal rights and obligations of the parties turn upon what their words and conduct would be reasonably be understood to convey, not upon actual beliefs or intentions.
>
> Secondly, in the nature of things, oral agreements will sometimes be disputable. Resolving such disputation is commonly difficult, time consuming, expensive and problematic. Where parties enter into a written agreement, the court will generally hold them to the obligations which they have assumed by that agreement.'

[75] I have quoted the passage at length because of its uncompromising expression. It is the principle upon which the second defendants rely. Nevertheless it does not have the consequence which they contend for. This is not a case, such as *Equuscorp*, in which the plaintiff is sued on a written agreement and tries to ameliorate the writing

by reliance on oral terms. The plaintiff does not assert that he is not bound by some part of a written agreement he signed on which he is sued, or that written terms should be displaced by oral ones. Nor is it a case in which the plaintiff sues on the written contract. This is a case in which the plaintiff sues upon a wholly different contract. The plaintiff is not asserting that some of the terms of the written agreement are not as they appear in the writing. He is not asserting that there is a contract inconsistent with the written loan agreement. He is propounding a wholly different agreement made with different people. His case, as finally formulated, was of an oral agreement of loan with the second defendants. Had the plaintiff sued on the written agreement he would have been bound by its terms, as would the first defendant, but he is not suing on it. He is suing different parties on a different contract. The oral contract of loan with the second defendants is not inconsistent in its terms with the written contract with the first defendant. Both can operate according to their terms. There are two separate and distinct contracts.

[76] In this case there is unanimity that no loan was made to the first defendant and that the written loan agreement does not record any transaction actually made. The parties differ in their reason for that stance but they share it. The law does not compel the plaintiff to sue on a document which does not form the basis of his claim and which no party to it accepts is binding.

[77] There is another answer to the defendants' submission. It is that the written loan agreement never came into effect. Its terms never became operative and the plaintiff could not have sued on it and is not, therefore, bound by it.

[78] As I mentioned it contained three recitals, the first of which was that 'the borrower may … request the lender to make a loan … under this agreement and the lender may, in its … discretion, make a loan …'. The second recital was that 'unless otherwise agreed … any loan made by the lender to the borrower on or after 23 August 2004 shall be deemed to be a loan under this agreement.'

[79] Clause 3 provided that the borrower could apply for a loan and the lender might in its sole discretion make the loan. By clause 4 each advance was to be deemed a separate loan. Interest was payable at seven per cent per annum and any loan made was for a term of five years. Item 4 of the schedule to the agreement provided that the initial loan under the agreement was for an amount of $265,000.

[80] The 'borrower' identified in the loan agreement was the first defendant. The 'lender' was the plaintiff. The evidence is clear and admits of no mistake. The plaintiff never lent any money to the first defendant. There is no evidence that the first defendant ever requested the lender to make a loan of any amount. Even if one inferred from item 4 in the schedule that the plaintiff and first defendant contemplated that an advance would be made, it never was. The plaintiff could not have succeeded in an action against the first defendant for the recovery of money lent. His claim would have been met by the fact that he was never asked to lend money to the first defendant and he never did.

[81] There is a further answer to the defendants' submission. It is that the parties to the written loan agreement abandoned it and neither regarded it as being still on foot. As far as the evidence goes the first defendant had never regarded it as an effective contract. By the time the action came on for trial the plaintiff had adopted the same attitude.

> 'In these circumstances the parties must be regarded as having so conducted themselves as to abandon or abrogate the contract.'

Per Stephen, Mason and Jacobs JJ in *D.T.R. Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 434. In *Summers v The Commonwealth* (1918) 25 CLR 144 Isaacs J said (151-2):

> 'Whatever the terms of a contract may be, it is possible for the parties so to conduct themselves as mutually to abandon or abrogate it. In … *De Soysa v De Pless* … neither party had repudiated or refused to perform the contract, nothing in the nature of decision had occurred, but, said Lord Atkinson … "one party to a contract is not bound to give to the other an unlimited time to do that which the other has contracted to do. There must be some point in time in which delay or neglect amounts to refusal … . The project seemed to have been … abandoned by all parties concerned." '

[82] The analysis is applicable here. Despite the existence of the written loan agreement the first defendant made no request for an advance and the plaintiff lent no money to it. By the time the action came to trial no party to the proceeding regarded the written loan agreement as being in force. It is, I think, right to conclude that it had been abandoned.

[83] The plaintiff's claim is for the return of $265,000 with interest at seven per cent from 24 November 2004 to 1 June 2006, the date on which the business was sold. Interest amounts to $28,104.52, making a sub-total of $293,104.52. Credit is given for the two instalments of interest actually received which reduces the sum to $290.055.15. Interest is claimed then at the rate of nine per cent pursuant to s 47 of the *Supreme Court Act* 1995. No evidence was led in support of the rate and it has no statutory support but the defendants' counsel intimated that he accepted it as reasonable. Accordingly I allow interest for the subsequent period in the sum of $34,830.45.

[84] There will be judgment for the plaintiff against the second defendants in the sum of $324,885.60.