SUPREME COURT OF QUEENSLAND

CITATION:	*Guthridge v Coco* [2002] QSC 392
PARTIES:	**WILLIAM JOHN GUTHRIDGE** (plaintiff) **v** **SANTO ANTONIO COCO** (defendant)
FILE NO/S:	6599/02
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	28 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	25 and 26 November 2002
JUDGE:	Muir J
ORDER:	**Judgment for the plaintiff in the sum of $473,592.92 together with costs on an indemnity basis.**
CATCHWORDS:	CONTRACT – BREACH OF CONTRACT – DAMAGES – allegation of loan by plaintiff – guaranteed by defendant – allegation by defendant that sums paid by plaintiff were for the acquisition of share capital – extrinsic evidence admitted to establish consideration for guarantee – whether consideration past consideration COSTS – INDEMNITY COSTS – where objective evidence in favour of the plaintiff *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 at 561. *Bank of Credit and Commerce International SA v Ali* [2001] 2 WLR 735 at 739. *Breusch v Watts Development Division Pty Ltd* (1987) 10 NSWLR 311. *Coghlan v S H Lock (Australia) Ltd* (1987) 8 NSWLR 88. *Di Carlo v Dubois* [2002] QCA 225. *French v French* (1841) 2 M & G 644; 133 ER 903. *Investor's Compensation Scheme Ltd v West Bromwich Building Society* [1988] 1 WLR 896 at 912. *Lilley v Midland Brick Co Pty Ltd* (1993) 9 WAR 339. *Pao On v Lau Yin Long* [1980] AC 614 at 631.

COUNSEL: D R Cooper SC with M K Stunden for the plaintiff
P E Hack SC for the defendant

SOLICITORS: PMM Lawyers for the plaintiff
Gilshenan & Luton for the defendant

Introduction.

[1] The plaintiff claims against the defendant $473,592.92 pursuant to a guarantee evidenced by a letter dated 15 April. The document in question, addressed to the plaintiff and signed by the defendant is on the letterhead of Cosco Holdings. It provides –

> "Loan Agreement
>
> Dear William,
> I acknowledge the receipt of loan funds made available to Cosco Holdings P/L in the amount of $400,000.00. Details of loan schedule are as follows:
>
> | | |
> |---|---|
> | 1. Total Amount of loan | $400,000.00 |
> | 2. Repayment Schedule | Full amount plus interest to be repaid on 15 June 2001 |
> | 3. Interest | Interest at a rate of 20% (simple) over the term 2. above |
> | 4. Security | The loan is fully covered by my personal guarantee |
>
> A cheque for $480,000.00 will be paid to you on the 15th day of June 2001."

[2] The defendant's signature appears over the typewritten name and words –

> "Santo A Coco
> Managing Director"

[3] Cosco Holdings Pty Ltd, at relevant times, manufactured and sold paper products. Its financial statements for the year ended 30 June 2000 show that its net profit for that year after tax and bringing into account abnormal items of $7,054,974 was $4,331,344. The balance sheet revealed net assets of $25,815,481. Cosco, however, was experiencing liquidity difficulties. Under the heading **"Inherent Uncertainty Regarding Continuation as a Going Concern"** Cosco's auditors made the following comments –

> "Note 17 to the financial statements outlines a number of circumstances that may effect (sic) the company's ability to continue as a going concern. The company's current financing facilities have expired, and accordingly the facility is at call. The company is currently negotiating finance facilities. The outcome of a number of taxation related disputes in which the company is

> currently involved is not certain and it is possible that payment of these disputed liabilities could be demanded.
>
> Should the company not receive financial support from its financiers or obtain new financial facilities, be unsuccessful in the determination and settlement of its disputed taxation liabilities or be unable to generate sufficient cashflows to enable the company's obligations to be met, there is significant uncertainty whether the company will be able to continue as a going concern and therefore whether it will realise its assets and extinguish its liabilities in the normal course of business and at the amounts stated in the financial statements."

[4] The evidence reveals that Cosco's liquidity problems had existed for some months prior to 30 June 2000. Since before April of that year they caused the defendant to exercise close personal control over the payment of creditors by, for example, deciding which creditors should be paid in preference to others. Cosco went into administration on 5 October 2001 and subsequently went into liquidation.

[5] The plaintiff, who had had experience at a managerial level in the paper industry, commenced employment with Cosco in about January 2000. One of his roles was to advise on the possible sale of the shares and/or assets of Cosco or the sale of its shares to the public by means of an initial public offering. There was discussion about his being appointed Cosco's managing director but that appointment had not been made by 15 April 2000.

The plaintiff's version of the alleged loan agreement and guarantee.

[6] The plaintiff swears that on 15 April he had a discussion with the defendant in which he said, in substance, that he had access to some family moneys which could be available to assist Cosco's liquidity problem, but said that in terminating the existing investments, some charges would be incurred and interest would be lost. Having regard to these considerations, an interest rate of 20% per annum was agreed. He said that, with a view to refinancing negotiations then being conducted, it would be undesirable for Cosco to provide any security. The defendant then offered to guarantee the loan. The plaintiff went into his office and prepared the letter of 15 April 2000, which the defendant signed.

[7] Contrary to the assertion in the letter, the sum of $400,000 had not been paid at the time the letter was signed by the defendant. The evidence discloses that a total of $396,657.82 was paid by the plaintiff to Cosco by instalments, probably as follows -

Date	**Amount**
20.04.00	$177,500.00
26.04.00	$22,806.31
27.04.00	$96,351.51
30.05.00	$100,000.00

The defendant's version of the substance of the transaction.

[8] The defendant's pleaded case is that the signature on the letter is his but that it, together with some other such documents, were executed by him in blank and provided to the plaintiff "for the purpose of enabling the plaintiff to perform the functions of his role as the manager of … Cosco". Furthermore, it is alleged that in about March and April 2000 the defendant and the plaintiff orally agreed that the defendant would pay Cosco $400,000 in consideration for an "allotment of 5% of the issued shares in Cosco when it was floated as a public company". The moneys claimed, it is alleged, were paid pursuant to that agreement.

[9] The defendant's oral evidence, if accepted, provided broad support for the allegations.

The questions for determination.

[10] Mr Hack SC who appeared for the defendant, submitted that resolution of the case depended on determination of –

(a) which version of the facts relating to the provision of the sum of $400,000 (approximately) by the plaintiff to Cosco was correct; and

(b) whether, if contrary to the defendant's case, there was a guarantee, it was supported by good consideration.

There was no dissent to this proposition by Mr Cooper SC, who lead Mr Stunden for the plaintiff and I accept that it is broadly correct.

The evidence supporting the plaintiff's case.

[11] The plaintiff's version of the facts is supported by the letter, various documents of Cosco and by the evidence of other witnesses.

[12] Mr McCall, a bank officer, was employed as Cosco's chief financial officer between September 2000 and August 2001. He recalls providing a copy of the letter to Cosco's auditors prior to the preparation of the accounts for the year ended 30 June 2000 in response to a request by the auditors for evidence of the existence of the subject loan.

[13] Mr Frankish, then an employee of Westpac Banking Corporation, had the conduct of negotiations between Westpac and Cosco concerning a proposed refinancing of Cosco's borrowings from the National Australia Bank. Consequent upon those negotiations he delivered to Cosco and discussed with its directors, including the defendant, the terms of a business finance agreement. In that document, under the heading "**Specific conditions apply to this Borrower's Facilities**", the following condition appears –

> "The company will not, without the Bank's consent make any loan to, or repay any loan (other than loan of $400,000 made to the

company by William Guthridge prior to this agreement) made by, a shareholder, a Director or an Associate of a Shareholder or Director".

[14] Mr Frankish recalled that a draft of the document had been sent to the directors prior to the date on which the document was signed by the directors in his presence.

[15] Mr David Stephens commenced employment with Cosco as financial controller on 5 October 2001. He recalls that in or about April or May 2002 he had a conversation in his office with the defendant in which the defendant mentioned a reference to the loan by the plaintiff in a document prepared to support the entering into of a scheme of arrangement. He recalls the defendant saying words to the effect that there had been a loan with provision for interest at the rate of 20% per annum but that $100,000 had been retained to the plaintiff and that the balance of the loan should have been reduced accordingly. Mr Stephens explained, by reference to interest calculations, how the balance of the loan had been calculated and the defendant responded that he would take the matter up with the plaintiff. It was not suggested to Mr Stephens in cross-examination that his account of the conversation was inaccurate.

[16] As part of a financing arrangement in mid 2000, Cosco, the defendant, the plaintiff and others executed an investment deed dated 28 June 2000. It recited, inter alia,

> "A. The Shareholders are (or will shortly be) the holders of all the issued shares in the Company.
> B. The Directors are (or will shortly be) the only directors of the Company.
> C. The Investor proposes to subscribe for convertible notes of the Company on the terms of this deed".

[17] The Directors and the Shareholders were identified as the plaintiff and the defendant. Clause 9 relevantly provided –

> "(a) For so long as the Investor holds any Notes or any Shares in the Company, the Company undertakes to the Investor that:
> the Company will not, without the Investor's prior written consent;
> …
> (18) make any loan to, or repay any loan (other than the loan of $400,000 made to the Company by William Guthridge prior to the date of this deed) made by, a Shareholder, a Director or an Associate of a Shareholder or Director."

[18] Mr Jones, a director of "the Investor", and subsequently a director of Cosco, gave evidence of being telephoned by the defendant one evening whilst the terms of the deed were being negotiated in order to protest about the inclusion in the draft of clause 9(a)(24) (which appears on the same page of the deed as subclause (18)). Subclause (24) prevents the removal of the defendant as a director of Cosco without the prior approval of the Investor.

[19] The accounts of Cosco for the year ended 30 June 2000 show a loan to the defendant under the heading "Borrowings" in the sum of $396,658. The loan was

also recorded in monthly financial reports prepared under the supervision of Cosco's financial controller for the time being and distributed to directors, including the defendant, over a period of many months. These reports, if not given to directors prior to board meetings, were provided at board meetings. The loan to the plaintiff was also shown in two places, at least, in the report as to affairs lodged with the Australian Securities and Investments Commission pursuant to the *Corporations Act* and verified by the directors of Cosco (by this time called Softex Industries Pty Ltd) including the defendant.

[20] The defendant, whilst denying actual knowledge of the references to the loan in any of the financial documents, conceded that he was of the belief that Cosco's books would have shown a loan to the plaintiff of approximately $400,000 because "he [the plaintiff] recorded that because it was simpler to do it … I'd say that he was just covering his bets, although we had a deal. I would say that he was just leaving it there, it was easier to explain rather than explain 5% shareholding …" He also explained his signature on financial documents containing references to the loan upon the basis that he relied on advisors such as the plaintiff and signed what they put in front of him.

[21] The strength of this evidence stands to be assessed in the light of evidence that, despite prompting by Mr McCall to change the position, the defendant remained the sole signatory on Cosco's cheque account in 2000 and 2001. There is other evidence which suggests that it would be out of character for Mr Coco to give employees, even trusted ones such as the plaintiff, signed blank documents. Also, the evidence did not reveal that there was either a real or apprehended difficulty in the plaintiff's ability to have documents signed by the defendant whenever that proved necessary. They had offices in the same premises and met on virtually a daily basis.

[22] On 21 December 2000, Cosco's accountants wrote a letter to the plaintiff in which it was stated, inter alia –

> "Thank you for the draft employment agreement. In relation to the issue of shares in accordance with clause 7-1 we comment as follows: … In any case, if the shares are allotted to you on 30th April 2001, for no consideration, you will be liable for the tax in your 2001 income tax return, based on the market value of the shares".

[23] The letter contemplated that 5% of the shares in Cosco would be allotted to the plaintiff and that he would hold half of them for the defendant. The plaintiff swore that prior to the date of the letter, he had had a discussion with the defendant and the author of the letter "about the most tax effective way to issue [the] shares …".

[24] The plaintiff's version of events receives support also from the conduct of the defendant after receipt by him of a letter of demand dated 3 July 2002 from the plaintiff's solicitors to the defendant's solicitors claiming moneys payable under the loan agreement, a copy of which was enclosed with the letter. The letter demanded payment of $451,973.76 within seven days failing which, it was said, instructions were held to commence recovery proceedings without further notice. Neither the plaintiff nor his solicitors received any response to the letter from the defendant or

his solicitors until the service of defence on 19 August 2002. The claim was filed on 18 July and a summary judgment application together with affidavits in support was filed on 17 September 2002.

[25] When confronted with evidence of fraud and breach of trust by the plaintiff, one would have expected a definite and even explosive reaction from the defendant. The defendant's evidence was that he was "dumbfounded" by the letter and took it immediately to his solicitors, handed it over and said "you look after it". The effect of his evidence was that he gave no further instructions about the matter until other solicitors who were retained later asked him to come in and give a response, presumably to the statement of claim and material supporting the summary judgment application.

The matters supporting the defendant's case.

[26] In response to this formidable accumulation of evidence supporting the plaintiff's case, the defendant can point to little to corroborate his version of events. He is able to rely on evidence that on an occasion in May 2000, when dealing with a potential purchaser of shares in the company, the plaintiff asserted that the defendant owned 95% of Cosco and he owned the remaining 5%.

[27] The force of this evidence though is rather diminished by the accompanying assertion that the plaintiff had received the shares by way of a gift. Also, the accountant's letter discusses the share acquisition on the basis that there is to be no cash consideration. Mr Hack points also to the investment agreement, to which reference has earlier been made. That document, however, recites that the plaintiff is "(or will shortly be)" a shareholder.

Credibility.

[28] The credibility of the plaintiff was not seriously shaken in the course of cross-examination, whilst there were aspects of the defendant's evidence which I found quite implausible. I formed the impression that the defendant had been strongly affected by the collapse of his company and that this may have resulted in a degree of confusion in his mind about the events in question and in a loss of objectivity. Generally, I found his evidence unconvincing.

The question of law.

[29] It was argued by Mr Hack that the guarantee was unenforceable as not being supported by valuable consideration. He pointed to the introductory language of the letter which acknowledged receipt of $400,000 and submitted that any consideration for the guarantee was past consideration.

[30] A guarantee for a past debt is prima facia a guarantee for past consideration.[1] In my view though the 15 April letter cannot be construed as a guarantee for a past debt. Although the document acknowledges "the receipt of loan funds made available to Cosco", the wording is equally consistent with a transaction in which the guarantee is given contemporaneously with the making of the loan, as it is with a transaction in which the giving of the guarantee follows the making of the loan. The instrument is thus ambiguous and oral evidence may be admitted of the circumstances in which the guarantee was given.[2]

[31] In *Breusch v Watts Development Division Pty Ltd,* McHugh JA drew attention to the following statement of the judicial committee in *Coghlan v S H Lock (Australia) Ltd*[3] -

> "… there is … no reason why an advance of money pursuant to a request made contemporaneously with or prior to the guarantee should not constitute a good consideration for the sureties' promise to pay."

[32] His Honour went on to observe that –

> "Acting upon the principle, *ut res magis valeat quam pereat,* the courts, where possible, have invariably held that the words of a guarantee imported an executory or future consideration rather than a past or executed consideration.... The case has also established that, in determining whether the words of the guarantee were intended to have a future operation, it is permissible to ascertain what were the prior dealings between the parties in what was contemplated as to the future course of their dealings."

[33] As to the court's ability, in construing a contract, to look to surrounding circumstances, see eg. *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd*[4], *Investor's Compensation Scheme Ltd v West Bromwich Building Society*[5] and *Bank of Credit and Commerce International SA v Ali*[6].

[34] I also accept Mr Cooper's submission that the consideration for the guarantee is not stated in the letter and that, in consequence, extrinsic evidence as to the consideration is admissible.

[35] A generally similar approach to that of McHugh JA in *Breusch* may be discerned in the reasons of the Judicial Committee in *Pao On v Lau Yin Long*,[7] where it was said –

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1 *French v French* (1841) 2 M & G 644; 133 ER 903.

2 *Lilley v Midland Brick Co Pty Ltd* (1993) 9 WAR 339 and the cases cited in the reasons for judgment of Pidgeon J and *Breusch v Watts Development Division Pty Ltd* (1987) 10 NSWLR 311 at 314, 315 per McHugh JA.

3 (1987) 8 NSWLR 88.

4 (1987) 162 CLR 549 at 561.

5 [1988] 1 WLR 896 at 912.

6 [2001] 2 WLR 735 at 739.

7 [1980] AC 614 at 631.

> "There is no doubt – and it was not challenged – that extrinsic evidence is admissible to prove the real consideration where (a) no consideration, or a nominal consideration, is expressed in the instrument, or (b) the expressed consideration is in general terms or ambiguously stated, or (c) a substantial consideration is stated but an additional consideration exists. The additional consideration must not, however, be inconsistent with the terms of the written instruments."

Conclusion.

[36] For the above reasons, there is no defence to the plaintiff's claim and I propose to give judgment for the plaintiff in the sum of $473,592.92 together with costs on an indemnity basis. The judgment sum accords with a calculation of the debt provided by Mr Cooper in the course of the trial. It was referred to in addresses and its accuracy was unchallenged.

[37] The plaintiff seeks an order for costs on an indemnity basis. The above account of the facts and my findings support the appropriateness of such an order. The defendant attempted to resist a case supported by a wealth of objective documentary evidence, including evidence which amounted to admissions by him. His own case, conversely, received virtually no corroboration. In order to succeed, (other than on the consideration argument) the defendant needed to show that the plaintiff had misused a piece of Cosco's stationery signed by the defendant in order to bring a false document into existence. The defendant's evidence about the circumstances in which he came to sign the blank letterhead was inherently improbable, as was his allegation of the falsity of the document. The document was brought into existence prior to the accounts for the year ended 30 June 2000 when the plaintiff and the defendant were actively pursuing a public float of Cosco's shares and when the plaintiff was hopeful of receiving a substantial equity in Cosco in return for no cash consideration. It must have been apparent to the plaintiff that the way in which the transaction was recorded in Cosco's books and also the letter itself were highly likely to have come to the defendant's attention. In those circumstances, where it was important for the plaintiff to retain the defendant's trust, it is improbable that the plaintiff would have falsified the nature of the subject transaction in the books of Cosco, let alone produced a false document to support erroneous accounting entries.

[38] The circumstances in which it is appropriate to order costs on an indemnity basis were explored by White J, with whose reasons the other members of the court agreed, in *Di Carlo v Dubois*.[8] I respectfully adopt and apply her Honour's discussion and the principles revealed therein.

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8 [2002] QCA 225 at para 32 et sec.