SUPREME COURT OF QUEENSLAND

CITATION:	*Barklya Pty Ltd v Richtech Pty Ltd* [2014] QSC 233
PARTIES:	**BARKLYA PTY LTD (ACN 010 551 274)** (applicant/plaintiff) v **RICHTECH PTY LTD (ACN 010 977 536)** (respondent/defendant)
FILE NO/S:	BS3975/14
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	22 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	31 July 2014
JUDGE:	Alan Wilson J
ORDER:	**Application dismissed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – - where the applicant and respondent companies were engaged in joint real estate development enterprises – where the applicant advanced the respondent money under a funding deed – where the applicant alleges that that funding deed was repayable upon demand – where the applicant demanded repayment of the sum advanced and the respondent failed to do so – where the applicant seeks summary judgment against the respondent for that sum plus interest – where the respondent claims that the payments were made in the course of a long-standing business agreement and were payable out of profits if and when they arise – where the respondent alternatively submits that even if the payments are properly characterised as loans, they are only repayable out of profit rather than on demand – whether the respondent has a real prospect of success at trial for the purposes of determining whether summary judgment should be given against the respondent *Balmain New Ferry Co Ltd v Robertson* (1906) 4 CLR 379, cited *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, cited *Re Brookers (Aust) Ltd (in liq); Brooker v Pridham* (1986) 41

SASR 380, cited
Chianti Pty Ltd v Leume Pty Ltd (2007) 35 WAR 488, cited
Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232, cited
Hawkins v Clayton (1988) 164 CLR 539, cited
Westpac Banking Corporation v Hughes [2012] 1 Qd R 581, cited

COUNSEL: RA Perry QC for the applicant/plaintiff
PA Hastie QC for the respondent/defendant

SOLICITORS: Lynch Andrews for applicant/plaintiff
Thynne & Macartney for respondent/defendant

[1] **Alan Wilson J:** Barklya Pty Ltd alleges that between 1 July 2012 and 8 October 2012 it loaned, by various advances in that period, the sum of $7,142,076.68 to Richtech Pty Ltd which, despite demand in June 2013, Richtech has wrongfully failed to repay. Barklya seeks summary judgment for that sum, and interest of over $5,000,000.

[2] Richtech resists summary judgment. It says, firstly, that the monies advanced by Barklya were payments made in the course of a long standing arrangement within the Barclay family in the nature of investments in real estate development enterprises, ultimately to be reimbursed only when those enterprises were complete and profit had been taken from them; and, that has not occurred in the transaction to which these monies relate. Secondly, Richtech says that even if the payments are to be characterised as loans they were only repayable when Richtech had sufficient funds or profits from the real estate projects – and, that the evidence unequivocally shows that is not presently the case.

[3] The question is whether Richtech has established some real prospect of succeeding on at least one of these issues at a trial; if it has done so then the matter must go to trial.[1] Summary judgment should only be given, it has been said, in the clearest of cases where there is a high degree of uncertainty about the ultimate outcome of the proceedings if they went to trial.[2] I am persuaded, for the reasons which follow, that the circumstances (and the legal consequences of them) which attend the transactions are sufficiently equivocal to mean that summary judgment should not be given here.

[4] The background to the transactions is relevant to both issues – i.e., whether it is a loan or an investment, and, if a loan, its terms of repayment – and concern historical business relations between Mr Don Barclay and his late brother Mr Ian Barclay, who over an extended period through their respective companies bought, developed and sold land using, for that purpose, joint development companies. Barklya is a company principally owned and solely directed by Don Barclay. The company through which the late Ian Barclay participated in these joint ventures was Claybar Pty Ltd which, with another company called F-Clone Pty Ltd, is now owned and controlled by Ian Barclay's children.

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1 *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232 at 237 per Williams JA.
2 *Westpac Banking Corporation v Hughes* [2012] 1 Qd R 581 at 602 per Chesterman JA.

[5] Richtech is one of the joint venture companies. Monies were paid by Barklya and Claybar/F-Clone to Richtech for the purposes of funding a land development in Northern New South Wales known as 'the Seaside Project'.

[6] As the evidence of Don Barclay and one of Ian's sons Mr Bruce Barclay shows, contributions to that project until March 2012 were equal: Barklya and Claybar/F-Clone had each contributed almost $6,000,000. There have been delays and unforeseen but increased expenses in bringing the Seaside Project to completion and it is still unfinished. It has been funded in part by Westpac. Since 2012 Barklya had ceased providing funding and Claybar/F-Clone has now contributed over $14,000,000 – more than double Barklya's contribution.

[7] Don Barclay[3] says that over many years he and his brother Ian undertook various development projects. Typically, each project would be undertaken by a company formed by Don and Ian for that particular purpose with each as directors and equal shareholders. The projects would require funding and typically each of them would loan monies to the development company as the need arose, usually in equal amounts. These arrangements were conducted in a very informal manner: Don Barclay says '*I do not ever recall these loans being formalised in any way by the execution of loan agreements or company minutes*'.[4] Nor, he says, did he and Ian discuss repayment of those loans or ever make any agreements about dates or terms of repayment.

[8] Some cracks appear to have arisen in these successful but informal arrangements after 2009 when Don Barclay and members of his family independently moved to develop another large residential enterprise at Zilzie, on the Central Coast of Queensland, known as 'Seaspray'. Neither Ian nor any members of his family nor their associated companies were involved, and had not invested or contributed to the development of Seaspray. Approaches were, however, made to Ian's son, Bruce, in 2009 to that end. Bruce says that initially he and other members of the 'Ian Barclay Group' declined because they were busy with Seaside, and a number of other projects. In 2010, however, Claybar agreed to invest $10,000,000 in Seaspray and did so under a document by which that sum was advanced by way of a loan which could, however, later be converted to equity in Seaspray.

[9] Tensions arose around this transaction in 2012. Claybar suspended further payments to Seaspray under the agreement on 30 October 2012. A short time later, in November 2012, Don Barclay told Bruce that the 'Don Barclay Group' was no longer in a position to make any further funding contributions to Seaside. Bruce says that towards the end of November 2012 representatives of both groups met. According to Bruce, Don's son-in-law Tony Creswick advised that the Seaspray Project urgently needed $120,000 for wages and to meet the demands of creditors, which Barklya was unable to pay. After further discussions the Ian Barclay Group agreed to provide some additional funding for Seaspray, to be effected by an advance by Claybar to Richtech, putting Richtech in funds to make a partial repayment of the funding contributed by Barklya to the Seaside Project.

[10] That transaction was recorded in a document called a '*Funding Deed*' between Claybar, Barklya, Richtech and F-Clone dated 6 December 2012. According to its

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3 Affidavit filed 17 July 2014.

4 Paragraph [10].

introduction it is intended to record the terms and conditions upon which Claybar would provide additional funding to Richtech and to '*... govern how the Claybar Group loan and the Barklya loan will be repaid by Richtech*'.[5] Clause 2 of the Deed recites that Barklya has requested Richtech, and Richtech has agreed, to '*... repay part of the Barklya Loan in the amount of $100,000, subject to the terms and conditions of this Deed*'. Under cl 3 that amount, when advanced by the Claybar Group to Richtech, will then be transmitted to Barklya.

[11] Richtech, it will be remembered, had for some years been developing the Seaside Project in Northern New South Wales and received extensive funding for that purpose from the Barklya Group, and the Claybar/F-Clone Group. Under cl 9.1(b) of the Deed, however, it is expressed to supersede all prior agreements '*... in connection with the subject matter*'. That term is not defined but, in context, probably relates to previous funding arrangements for the Seaside Project.

[12] Under cl 6.1 the advances made respectively by Claybar/F-Clone and Barklya – now referred to as 'Loans' – are to be repaid in a specified priority '*... to the extent Richtech has sufficient available funds to do so*'.

[13] First, Richtech will pay, to whichever group has invested the greater sum, the difference between that sum and the lesser amount invested by the other Group, with interest. Then, Richtech will repay the principal of both loans and, then, interest to whichever group is entitled to it.[6] The obligation to pay interest only arises, again, if and when Richtech has sufficient funds for that purpose.[7]

[14] The evidence clearly establishes that Richtech does not, presently, have sufficient funds to make any payment to Barklya.

Is Barklya's investment properly characterised as a loan?

[15] Again, the evidence clearly establishes that until the Funding Deed there had been no written agreement between the parties when Barklya advanced over $7,000,000 during the years 2002-2012. The payments appear in financial statements of Richtech as 'loans' but Mr Don Barclay does not depose to any oral statements or agreements between him and Ian to that effect, and the accountant who acted for the joint venture entities (Robert Lunney) says:

> '*The cash contributions may have been recorded in the books of account of the joint venture entities or of the individual entities making the cash contributions as 'loans', but from an accounting perspective and from my recollection and understanding of how these particular joint entity developments were conducted this was not strictly correct. The cash contributions were really investments by the individual entities in the developments to be carried out by the joint venture entities. Like any investment, if the joint entity developments were successful the individual entities would recover the amount invested and would share equally in the profits realised on the developments. If there was no profit made on the developments after payment of third party creditors, the individual*

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5 Affidavit of Don Barclay filed 17 July 2014, Ex DEB-4, clause G.

6 Clause 6.

7 Clause 5.4.

> *entities would only be entitled to so much of their investment as remained available for distribution and if that resulted in an overall loss then they would share the loss*'.[8]

[16] This accords with Don Barclay's evidence about relations with his later brother Ian and, also, with various developments they had undertaken over the past two decades at Kirra Hill, Paradise Road, Casuarina and Salt.[9]

[17] A corporation's financial statements can constitute an acknowledgment of debt.[10] The proposition is not, however, immutable. In the face of Mr Lunney's evidence and what both Don Barclay and his nephew Bruce have said about historical arrangements, doubt must attend the question whether the financial records use something in the nature of a shorthand term – *loans* – to reflect what was in truth the historical arrangements they both described. In light of that evidence, Richtech has at least an arguable case that the transactions were investments repayable only when the enterprise had attracted sufficient funds for profits for that purpose and were not, in truth, 'loans' in the commonly used sense – connoting, e.g., a right to repayment on demand.[11]

[18] If Richtech ultimately persuades the court to that view then, because the investment with the enterprises not yet finished and no profits have yet been realised, Barklya has no immediate right to the funds it has invested.

If a loan, upon what terms?

[19] Even if that conclusion is wrong, Richtech has other arguments of sufficient force to resist summary judgment. First, the Deed itself speaks in unequivocal terms, in cl 6.1, of repayments of either of the Claybar Group or Barklya in a priority which only begins to operate when Richtech has sufficient funds available to do so. The evidence that it does not have presently have sufficient funds for that purpose is indisputable.

[20] It is argued for Barklya that cl 6 relates only to the priority of repayment, not the obligation to repay the loan itself; but the announced purpose of the Deed[12] is the repayment by Richtech to Barklya to part of the Barklya Loan and, on its face, for that purpose, relates to the repayment of $100,000 only.[13]

[21] Otherwise, nothing in the Deed compels repayment of the balance, or addresses that question except cl 6. That clause contains an explicit acknowledgement that repayment is only due, and to be made, when Richtech has sufficient available funds for that purpose. It is difficult to see how the Deed can be construed as one which requires repayment in full immediately upon the demand Barklya has now made.

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8 Affidavit Robert George Lunney filed 25 July 2013, paragraph [12].

9 Affidavit of Bruce Barclay filed 25 July 2013, paragraphs 17-21.

10 *Re Brookers (Aust) Ltd (in liq); Brooker v Pridham* (1986) 41 SASR 380 at 383-4 per King CJ (with whom Mohr J agreed); *Chianti Pty Ltd v Leume Pty Ltd* (2007) 35 WAR 488 at 514 per Buss JA (Martin CJ and Pullin JA concurring).

11 See H. G. Beale (ed), *Chitty on Contracts* (35th ed, 2012, Sweet & Maxwell) at [38-253].

12 As defined in cl 1.1.

13 Clause 2.

[22] Richtech also argues that, even if the Deed is capable of being construed to that end, there ought to be implied in it a term that loans were only to be repaid when there were sufficient funds to do so and, hence, from the ultimate gross proceeds of sale upon completion and not part way through the development enterprise.

[23] Again, the evidence of Don Barclay and Bruce Barclay point to the conclusion that Richtech was established for the purpose of undertaking the Seaside development and funding was provided for that purpose. As Richtech contends, a contract of that kind would not work if a funder was entitled at any stage during the development, and whatever the prevailing circumstances, to demand full repayment of its loans/investment. The contract would be unworkable and ineffective, and the development entity would always be exposed and vulnerable to any capricious decision made by one of the funders.

[24] Before a term will be implied in a contract, it must be reasonable and equitable and necessary to give business efficacy to the contract. It must also be capable of clear expression and not contradict any expressed terms in the written contract itself. It must also be so obvious that it '*… goes without saying*'.[14]

[25] Such a term may be implied by established usage or practice or a past course of dealings.[15] The way the brothers, Don and Ian, and the companies associated with them conducted their business in the past illustrates a long, established course of conduct of the kind argued for by Richtech. The term for which it contends sits very comfortably within that context and is, arguably, properly implied by that conduct.[16]

[26] The Deed does not offend nor detract from that conclusion. While it is expressed to supersede all prior agreements and understandings, the phrase in cl 6.1 acknowledging that Richtech is only obliged to make payments when it has sufficient funds accords, again, with a term to that effect.

[27] In light of these conclusions it is unnecessary to address further arguments advanced from the parties about interest. Richtech has an arguable case that the funds paid to it by Barklya were investment for a purpose which is not yet been completed and which are not, then, repayable now on demand. In the alternative if, in truth, the funds are now properly categorised as a loan or, in the past, should have been, then in neither event is the loan repayable now upon demand. That conclusion means that it cannot be said that the defendant has no real prospect of successfully defending the plaintiff's claim, and, hence summary judgement should be refused.

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14 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283.

15 *Hawkins v Clayton* (1988) 164 CLR 539 at 573.

16 *Balmain New Ferry Co Ltd v Robertson* (1906) 4 CLR 379 at 390-391.