



**District Court
New South Wales**



Case Name: Robin John Steenson v Aqua Max Investment Pty Limited ACN 130 661 871

Hearing Date(s): 8 - 9 February 2018

Date of Orders: 16 February 2018

Date of Decision: 16 February 2018

Jurisdiction: Civil

Before: Norton SC DCJ

Decision:

- (1) Judgment in favour of the plaintiff in the sum of \$138,878.18.
- (2) The defendant to pay the plaintiff's costs.
- (3) If any party seeks a special order as to costs, or any other order, they should do so by filing a Notice of Motion, supporting affidavit and short written submissions within 14 days.
- (4) Exhibits are to be retained until the expiry of the appeal date.

Catchwords: Loan – Contract – Condition Precedent – Collateral Agreement

Legislation Cited: Not Applicable

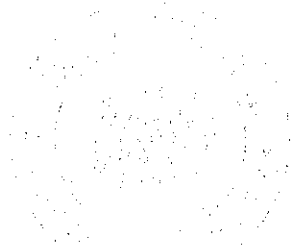
Cases Cited: *Bowes v Chaleyer* (1923) 32 CLR 159
Jones v Dunkel (1959) 101 CLR 298
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418

Texts Cited: Not Applicable

Category: Procedural and other rulings

Parties: Plaintiff: Mr Robin Steenson
Defendant: Aqua Max Pty Ltd

Representation: Plaintiff: Mr S. Blount (Counsel)
Defendant: Mr J. Capsanis (Solicitor)



Solicitors:

Plaintiff: Kenny Spring Solicitors

Defendant: JPC Practice

File Number(s):

2017/5006

Publication Restriction:

No

JUDGMENT

1 This is a claim by Mr Steenson for money said to be owed under 2 loan agreements entered into with Aqua Max Investments Pty Ltd on 8th February 2011. The defendant alleges that it is not required to pay back either the capital or the interest on the loans because the plaintiff is in breach of a condition precedent or collateral agreement. This judgment was written without the benefit of a transcript.

Pleadings

2 The Statement of Claim was filed on 16 December, 2016. It pleads that on or before 4 February 2011 the plaintiff agreed to lend the defendant \$25,000 for 5 years and up to \$50,000 for terms of 90 days. The terms of the loans are said to be contained in a document dated 8 February 2011 (paragraph 2). The defence denies that the defendant unconditionally agreed to repay the loans or the additional 25% of the first loan. It was admitted that it was part of the agreement that the defendant pay interest at rates of 8% per annum of the first year, 10% per annum for the second year, and 12% per annum for the 3rd, 4th, and 5th years in respect of the first loan. With respect to the second loan of \$25,000. It was admitted the interest rate was 5% per 90 days.

3 In answer to the claim the defendant alleged that the plaintiff had represented that he was an expert in products relevant to the defendant and marketing of those products particularly in country areas of NSW, that he was near retirement and wished to work with the defendant, that he had expertise in and would accompany the defendant to suppliers and trade fairs and market the products in New Zealand. The purpose of the 2 loans was said to be to purchase product and the repayment of the loans and payment of interest was conditional upon the plaintiff performing the matters outlined above. It was alleged that the defendant used the funds to buy product but other than some nominal acts the plaintiff failed to fulfil his obligations.

4 The statement of claim alleged that a payment of \$1500 was made on 4 February 2011 and a second payment of \$48,500 on 17 February 2011. In

breach of its obligations the defendant had failed to repay the principle and failed to pay the interest as agreed.

- 5 The defence pleaded that as the plaintiff had not performed his obligations the defendant was not in breach of its obligation to repay principle and interest under the loans.
- 6 At the hearing the plaintiff was represented by Mr Blount of counsel and the defendant by Mr Capsanis, Solicitor.
- 7 Mr Blount provided the court with a chronology (MFI 1), a schedule of issues (MFI 2) and a summary of his opening.
- 8 The plaintiff relied on the affidavits of Robin John Steenson sworn 4 August 2017 and Anna Lewis sworn 4 August 2017. The defendant relied on the affidavit of Ashok Kumar Dogra sworn 11 October 2017.

Background Facts

- 9 The plaintiff was born in 1949 and at the time of the hearing he was semi-retired. He has training in first aid and occupational health and safety. From 1984 to 1995 he worked as a loss adjuster. From about 1991 to 1996 he was a teacher of small business at TAFE. From 2001 he had worked in occupational health and safety and from 2006 to his semi-retirement in August 2012 he had worked for Bathurst and Oberon Council as a safety officer. He and his wife had moved to Bathurst from Sydney. The plaintiff had an interest in caving and the environment.
- 10 The defendant company was involved in the importation and distribution of goods particularly water filters. The head office of the company was at Homebush where it occupied a warehouse. There were 3 directors of the company (Mr Ashok Dogra, Mr Ron Fox and Mr Pantkaj Dogra). The plaintiff met two of the directors at a Trade Show in Bathurst in November 2010. At the time he was in full time employment as a public servant. The plaintiff was

impressed by the concept of water filters and reusable containers rather than using bottled water and formed a rapport with Mr Ashok Dogra.

11 In January 2011 the plaintiff had a meeting with the directors of the defendant in its office at Homebush. Discussions were entered into concerning the plaintiff providing the defendant with funds. The contents of these discussions were an issue at the trial.

12 On 4 February 2011 the plaintiff transferred \$1,500 from his account. The payment was made via internet transfer and was said to be made to the defendant (Exhibit A, page 8). The money was deposited into an account in the name of Aqua Max Australia Pty Ltd (Exhibit E), although the statement for that account is addressed by NAB to the defendant.

13 On the 8 February 2011, the plaintiff and all three then directors of the defendant signed into a written agreement for 2 loans totalling \$50,000. This agreement is on the letterhead of the defendant and was prepared by Mr Fox although the plaintiff may have been in the room with him when it was written. There were discussions at this time between Mr A. Dogra and the plaintiff. The content of these discussions was at issue at the trial.

14 The letter provides

"Rob Steenson

Rob S to lend Aqua Max Investments P/L \$25,000 (Twenty Five Thousand Dollars) for a period of 3 to 5 years at an agreed interest of
1yr 8% - 2yr 10% - 3rd to 5th yr 12% paid quarterly.

Repayment terms. Original investment plus 25% on repayments at 5 yrs.

Short term loans stock importing – 12 month agreement

Up to \$50,000 for a periods of 90 days @ 5% (90 days) = 20% annual"
(Exhibit A, Page 10).

15 On 18 February 2011 the plaintiff paid \$48,500 into the bank account of Aqua Max Australia (Exhibit E). When the plaintiff provided the money to the defendant he was asked to, and did sign a confidentiality agreement (Exhibit A, page 12). The plaintiff was also given some documents at that time and at other unspecified times (Exhibit A, page 13-43). There are indecipherable

signatures on some of these documents but it was not suggested to the plaintiff that any of the signatures were his. One document is dated in handwriting 17 February 2011 and another July 2011. The longest document is described as a Distributor Pack. It contains a distributor application and a distributor proposal form which are not completed.

- 16 The only documents produced by the defendant recording purchases of stock said by the defendant to have be made with funds provided by the plaintiff are dated 13 April 2011, 3 June 2011 and 22 December 2011, and total approximately \$29,000 (AUS) (Exhibit D).
- 17 On 6 October 2011 the plaintiff received and unsigned letter from Mr Ron Fox on the letterhead of the defendant (Exhibit A). The letter was addressed to potential investors and indicted that an excellent investment opportunity had arisen and the defendant was seeking investors to take up stock in parcels of \$75,000. The letter indicated that the proposal could be discussed more fully with Mr Ashok Dogra, managing director. The plaintiff did not reply to that letter.
- 18 On 28 October 2011, the plaintiff received an email from Mr Ron Fox which attached a letter 'as discussed with Ash' dated 27 October. The letter was on the defendant's letterhead and read -

"Rob Steenson, Convert current loan after payment of additional \$50,000 to 5% equity in AMI P/L. Our goal, to build the Company to a very saleable commodity within 5 years"

The names Ash, Kumar, Ron and Rob are typed on the letter and at the bottom there are two indecipherable signatures. It was not suggested to the plaintiff that either signature was his (Exhibit A, page 46-47).

- 19 On 18 June 2012 the plaintiff emailed Mr Fox with 2 options to bring "Aqua Max up to date" and annexing a calculation of interest payments due (Exhibit A, page 48-51). On 23 June 2011 the plaintiff emailed Mr A. Dogra "As you requested when we last spoke, here are our banking details" and requesting confirmation of a meeting the following day (Exhibit A, page 52). On 10

October the plaintiff emailed Mr A. Dogra providing details of deposits received in the last 5 weeks totalling \$3,250.00. The email then asked when the balance would be paid (Exhibit A, page 58 & 87). A follow up email was sent on 23 October 2011 again was only addressed to "Ash".

20 In January 2013, two amounts of \$250 were paid to the plaintiff (Exhibit A, page 87).

21 On 9 April 2013, the plaintiff sent an email to the email address of each of the three directors of the defendant detailing the arrears in interest payments and requesting "all monies owed be repaid as a matter of urgency" (Exhibit A, page 59). A follow up email was sent on 27 April 2014 (Exhibit A, page 61). On 16 May there was an email from Mr Fox to the plaintiff in the following terms -

"Ash is away and has asked me to send a message that he will phone you tomorrow, Saturday" (Exhibit A, page 63).

22 The plaintiff indicated that he had had to borrow against his and his wife's mortgage to invest (Exhibit A, page 67). On 24 May 2014 the plaintiff emailed all three directors indicating

"You did promise that you would send us an email by the middle of this week with your plan how you would get back on track to pay outstanding interest owed to us"

23 Mr Fox replied the same day –

"Ash will get back to you on Tues will contact you \$50 went into your bank today. Not a lot but a start".

24 From 17 February 2012 to 31 October 2016 payments totally \$14,630 were made to the plaintiff's account (Exhibit A, page 92-95). There were no payments after that date (Exhibit A, page 98).

25 On 24 April 2017 the plaintiff requested particulars of paragraphs 2 (a) (b) and (d) of the defence. The answers supplied in a letter dated 18 May 2017

indicted that the 3 directors of the defendant and the plaintiff were present when the words relied on by the defendant were alleged to have been spoken. Mr Pantkaj Dogra is the brother of Mr Ashok Dogra and is still a director of the defendant company. He is in regular contact with Mr A. Dogra. Mr Ron Fox has resigned as a director but Mr A. Dogra is aware of his home address. There is no evidence that either gentleman is unable or unavailable to give evidence.

- 26 Should the plaintiff be successful the total amount owed as at 9 February is \$138,878.18 (Exhibit B).

Issues

- 27 The defence admitted that the plaintiff had lent the defendant \$50,000 and the interest rates payable on the 2 loans. Which are those set out in the letter of the 8th February. By the time of addresses the issues between the parties were –
- (a) “Whether the signed document of 8 February 2011 is the entire agreement for loan between the two parties.
 - (b) Whether the defendant is liable to pay an additional 25% of the first loan sum.
 - (c) Whether the defendant’s agreement to repay the loan sums was conditional.
 - (d) Whether the plaintiff made the representations alleged by the defendant.
 - (e) Whether, even if the representations were made, they have the legal effect of creating as “condition precedent to any liability” in the defendant to repay “principal loan amounts and interest or otherwise.” (MFI 6)
- 28 The issue as to whether the defendant was liable to pay the additional 25% of the first loan (issue (b)) is the only issue which related to the interpretation of the agreement contained in the letter of 8 February, 2011.
- 29 Mr Blount submitted that the words of the written agreement are clear and that Mr A Dogra agreed in cross examination that repayment of the first loan included a further 25 % of the original amount. Mr Capsanis did not submit otherwise.

30 I accept the plaintiff's submissions and I find that if the defence is not made out, the amount owed by the defendant to the plaintiff would include this amount plus interest there on.

31 The main thrust of the defence related to the representations which Mr A. Dogra alleged the plaintiff had made.

32 The words relied upon by the defendant to establish the condition precedent are contained in his affidavit of 11 October 2017.

33 It is alleged by way of background that in November 2010 at the Bathurst Showground the plaintiff told Mr Ashok Dogra –

"I have a lot of connections in the country area and have country area experience, being in contact with different businesses and farmers. I have expertise in products relevant to you and am an expert to do marketing of your products. I have a lot of good connections in country areas of NSW due to my country area experiences. This is from my work and employment with different businesses and farmers. I'm a public servant, but can promote your product under your company name, then you can give a share back to me."

The plaintiff also said he would like to view the defendant's premises and talk the matter over with his wife before making a decision.

34 The plaintiff is then alleged to have said –

"I'm near retirement. This will give me an opportunity to occupy myself after retirement. I've got money to invest and would like to meet in your office. I could lend money to buy stock from China. I could help sell and move product and we do a share" (paragraph 6).

35 On 8 February it is alleged that the plaintiff said

"I cannot personally sell directly because I am a public servant. I can promote your product under your name. I do want to join the group. I would be a reliable associate as a team member and contribute my expertise and efforts in marketing and efforts in marketing and product and connections..."

"I can provide a cash investment of two amount of \$25,000 to finance purchase of new stock"

36 Mr A. Dogra alleges the plaintiff then said -

“In return it is conditional upon you providing your expertise...If you don't input and pass on connections, we don't repay principal or interest because we invest the money in stock”

37 The plaintiff is alleged to have replied –

“I'm confident I can put my expertise to make this venture successful and we enjoy the fruit together” (paragraph 15)

Evidence

38 The plaintiff in his affidavit of 4 August, 2017 agreed that at the trade show at Bathurst he met 2 of the directors of the defendant. He recalled it was Mr A. Dogra who asked for funds. The plaintiff recalled that Mr A. Dogra and he signed the agreement first, and then Mr A. Dogra went and obtained the signatures of the other two directors.

39 In his oral evidence the plaintiff agreed he had those types of conversations set out in paragraph 6 of Mr A. Dogra's affidavit but denied promising to promote the defendants products or work full time for the defendant. In response to the words in paragraph 13 of that affidavit, the plaintiff agreed that those topics were discussed and that he had told Mr A. Dogra he was a public servant and therefore could not sell direct. The plaintiff denied that Mr A. Dogra said that the return was conditional upon him providing his expertise. He stated that there was no way he would have lent \$50,000 if there was a suggestion that the defendant was not obliged to pay it back.

40 In cross examination the plaintiff said he was supplied by the defendant with the documents he had annexed to his affidavit by way of background information. The plaintiff agreed that at the time the agreement was entered into he was considering what he would do to keep busy when he retired but he had not set a date for his retirement. The plaintiff accepted that he knew people in rural NSW but maintained that he did not say he had expertise in the defendant's product. The plaintiff agreed he was asked to attend various functions but said he was not in a position to go because he was working. The

plaintiff denied that there were any strings attached to the repayment of the loans.

41 In oral evidence Mr A. Dogra confirmed the contents of his affidavit and gave additional evidence concerning the making of the agreement and conversations which took place before and after it had been signed. It was his evidence that it was Mr R Fox who drafted the letter of 8 February. Mr A. Dogra also gave evidence that the agreement written on 8 February had been drawn up when Mr R. Fox and the plaintiff were in a room together and he and his brother were elsewhere. He claimed that the agreement did not contain any reference to the representations made by the plaintiff because he trusted the plaintiff who was a professional man. Mr A. Dogra repeatedly answered questions by saying that Mr R. Fox could answer that questions and it was not his responsibility. Mr A. Dogra maintained that the funds provided by the plaintiff had been used to buy stock. When questioned about the email of 27 April 2014 Mr A. Dogra said he did not read the email.

42 Later in his evidence Mr A. Dogra said that that agreement had been torn up (or placed in a drawer) and that he and the plaintiff reached a gentleman's agreement as to repayment. Mr A. Dogra said that there had been conversations between him and the plaintiff at coffee shops. Mr A. Dogra maintained that such payments as were made to the plaintiff were made because the two men were friends and Mr A. Dogra wished to make things calm between the plaintiff and his wife.

43 Mr A. Dogra was adamant that the defendant did not have to make payments because the plaintiff has had not performed his part of the bargain.

Submissions

Plaintiff's Submissions

44 Mr Blount submitted the court would accept the plaintiff as a witness of credit. He had candidly admitted both in his affidavit and in his oral evidence that many of the matters deposed to by Mr A. Dogra were discussed but not in the

context of them being a representation or promise that the plaintiff would assist in the marketing of the defendant's product. It was said that these denials were consistent with the fact that the plaintiff was in full time employment at the time. It was submitted that the court would not accept the evidence of Mr A. Dogra because the agreement he alleged was inherently unlikely, describing it as a "head you win tails I lose agreement".

- 45 Significant emphasis was placed on the fact that the agreement is not in accordance with the written document. It was submitted the Court would not accept Mr A. Dogra as a witness of truth. Mr A. Dogra's evidence changed from his affidavit to his oral evidence and indeed during the course of the oral evidence. It was pointed out that important parts of Mr A. Dogra's oral evidence were never put to the plaintiff in cross examination. This suggested that had been made up by Mr A. Dogra during the course of his giving evidence.
- 46 It was submitted that the alleged agreement is inconsistent with the defendant having made payments when the plaintiff agreed he had not carried out the activities specified in the defence. It was said the court would not accept the explanation that payments were made because Mr A. Dogra liked the plaintiff.
- 47 It was submitted that the documents produced by the defendant in response to the Notice to Produce 'all documents evidencing purchase and movement of stock' showed Mr A. Dogra's assertion that the loan money had been used to buy stock was incorrect.
- 48 It was submitted that Mr A. Dogra was not an impressive witness who dealt with uncomfortable questions by saying it was something which Mr R. Fox was responsible for.
- 49 It was pointed out that there has been no evidence from Mr Fox or Mr P. Dogra and no explanation as to why neither was called, which leads to an inference that their evidence would not have assisted the defendant.

- 50 It was said that embedded in Mr A. Dogra's evidence was a true account. That is the defendant needed funds to buy stock and had sort a loan for that purpose from the plaintiff.
- 51 It was submitted that the court would not find that any such representation or promise had been made by the plaintiff.
- 52 It was submitted that in any event the remedy for the non-fulfilment of a condition precedent is that the contract is voidable at the election of the innocent party (*Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at [441]). The defendant has never terminated the contract and thus it is still on foot (*Bowes v Chaleyey* (1923) 32 CLR 159 at [190]). Further payments made by the defendant may amount to an affirmation of the original agreement as some were made after the alleged breach.
- 53 It was submitted that even if representations or promises were made the defendants remedy would be a cross-claim for damages which has not been pleaded or quantified.

Defendants Submissions

- 54 Mr Capsanis in his written submissions said the plaintiff made representations and the defendant's agreement was conditional on the plaintiff fulfilling those representations. As the plaintiff accepted he had not done this he had no enforceable rights. It was submitted that the defendant did not waive the benefit of those conditions. Further, whilst the defendant may be entitled to terminate the agreement it remains a condition precedent to the defendant repaying the principle or paying the interest on the loans. It was said that in entering into the agreement the plaintiff is bound by its terms even if the consequences are not to his advantage.
- 55 In oral submissions it was conceded that the cases referred to by Mr Blount correctly represent the law.

- 56 It was submitted that placed in context there was ample motivation for the plaintiff to make the agreement relied on by Mr A. Dogra. The rate of interest is high and the arrangement could be seen as part of a strategy to leave long term employment in the public service and work in an area that was of interest to him. It was said that the plaintiff had been given extensive material relevant to the defendant's business and this suggested that the plaintiff had a significant interest in the business and that the agreement was not just a loan.
- 57 With respect to Mr A. Dogra's evidence it was submitted that although emails were addressed to him, it would not be unusual they were not read as there was a clear division of responsibility in the company. It was said that the payments made were a friendly gesture to maintain harmony in the plaintiff's family.
- 58 With respect to the quantum of the claim it was conceded that the affidavit of Ms Anna Lewis and Exhibit B had been admitted without objection or cross examination, but the figure had not been checked by the defendant.

Consideration

Did the plaintiff make the representations made by the defendant?

- 59 The only evidence that suggests such representations were made comes from Mr A. Dogra. Mr A. Dogra maintained throughout his cross-examination that the words were said. Mr A. Dogra's evidence, in his affidavit and oral evidence differed and his oral evidence was internally confused and sometimes contradictory. When giving evidence Mr A. Dogra frequently said that the question should be asked of Mr R. Fox and denied that he had any responsibility for these types of matters. The contemporaneous documents summarised above show that Mr R. Fox often referred matters to Mr A. Dogra. Mr A. Dogra's denial of seeing various emails lacks credibility as does a great deal of his evidence.
- 60 The plaintiff denied making any such promises or representations. His evidence was that he would never have lent \$50,000 if there was any

suggestion that the defendant was not obliged to pay it back. This statement has the ring of truth particularly as the plaintiff had to draw down from his mortgage to lend the money. The interest rates are high and the requirement of repaying an extra 25% seems unusual. The contemporaneous documents suggest that the defendant was seeking money from various sources at about this time. There is no evidence that the interest rates were above what was normal for such an unsecured loan. I do not think the evidence establishes that the terms of the loan support the existence of a collateral agreement.

61 That same documentation suggests that requests were made to the plaintiff to invest further in the company and to convert the loan into equity. These requests are somewhat inconsistent with the loan not being repayable if the plaintiff did not perform certain work. This is particularly so as the correspondence was sent after there had been, on the defendant's version, several breaches of the agreement. Despite this, none of the correspondence mentions any failure by the plaintiff to carry out the terms of the agreement.

62 The contemporaneous note of the agreement supports the plaintiff's evidence. This document is on the letterhead of the defendant. There is a factual issue as to whether it was drawn up in the presence of Mr A. Dogra or while the plaintiff and Mr R. Fox were alone in another room. Regardless of where it was drawn up, if these representations were to be part of the agreement it would be expected that they would be contained within the document. The defendant drafted the document and it was not a pro forma document. The document did not provide that it contained all the terms of the agreement. The document was, however, especially written for the purpose of this transaction. It would have been a simple to have made reference to the alleged promises and representations in that document. I find the fact that the alleged promises are not contained within the document corroborates the plaintiff's evidence that they were not made.

63 The plaintiff's evidence is also corroborated by the circumstance that he was in full time employment when these discussions were said to have taken place, and as such it would have been difficult for him to perform any of the

promises. The existence of such a promise is not consistent with the defendant making sporadic payments of interest.

- 64 On any version of the evidence the document was drawn up by Mr R. Fox. It is the defendant's document. Mr R. Fox was said to have been there when representations were made. He was not called to give evidence and neither was Mr P. Dogra. I draw the inference that if called the evidence of these two gentlemen would not have assisted the defendant. I find that the signed document dated 8 February 2011 is the entire agreement for loan between the parties.
- 65 I accept there is much merit in the plaintiff's submission that the payments made by the defendant to the plaintiff may well amount to a waiver. I do not accept Mr A. Dogra's explanation for why they were made as again, that is inconsistent with the contemporaneous documents. I find that the making of such payments is inconsistent with their being an agreement as alleged by Mr A. Dogra.
- 66 The words relied on do not in my mind amount to a firm promise on behalf of the plaintiff. If they were made I find they were more in the nature of representations of possible future conduct and do not amount to a condition precedent to liability to pay. The plaintiff was in full time employment. He was considering retiring but no retirement date had been set.
- 67 It follows that I find that the defendant's agreement to repay the loan sums was not conditional on the plaintiff performing any work for the defendant. Even if I be wrong on that, I accept the plaintiff's submission that the appropriate remedy was for the defendant to terminate the contract and claim damages. This could have been done by way of a cross-claim but was not. Further, there was no evidence either pleaded or called which would allow such damages to be calculated.

Quantum

68 The defendant has not disputed the calculations performed by Ms Anna Lewis. Those calculations are explained in her affidavit, Exhibit A. I accept her updated calculation of damages (Exhibit B) accurately represents the amount owing as at the date of hearing. This is the amount which the plaintiff submitted should be reflected in the judgment.

69 I therefore make the following orders:

- (1) Judgment in favour of the plaintiff in the sum of **\$138,878.18**.
- (2) The defendant to pay the plaintiff's costs.
- (3) If any party seeks a special order as to costs, or any other order, they should do so by filing a Notice of Motion, supporting affidavit and short written submissions within 14 days.
- (4) Exhibits are to be retained until the expiry of the appeal date.

I CERTIFY THAT THIS AND THE PRECEDING PAGES CONSTITUTE A TRUE COPY OF THE REASONS FOR DECISION OF HER HONOUR JUDGE SHARRON NORTON SC DELIVERED IN THESE PROCEEDINGS.

A. Macca



