IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION) **PLAINT NO. 7/03**

BETWEEN **PETER UREN** of Burleigh Heads, Australia, Retired

Plaintiff

AND **ARTHUR HOSKINGS** of Rarotonga, Restaurateur

First Defendant

AND **TEINA HOSKINGS** of Rarotonga, Restaurateur

Second Defendant

Hearing: **19 November 2003**

Counsel: **C Little for Plaintiff**
N George for First and Second Defendants

Date of Judgment: **10 December 2003**

RESERVED JUDGMENT OF DAVID W..LIAMS J

CONTENTS

Solicitors: See Attached

Solicitor for the Plaintiff:
Charles Little
Barrister & Solicitor
PO Box 167
Avarua, Rarotonga
Cook Islands
Tel: 00682 21619
Fax: 00682 21619
Email: clittle@oyster.net.nck

Solicitor for the First and Second Defendants:
Norman George
Barrister & Solicitor
PO Box 517
Rarotonga
Cook Islands
Tel: 00682 20452
Fax: 00682 20541

Introduction

[1] The chronological sequence of events is not in dispute and may be summarised as follows. The plaintiff is a retired sales manager, aged 71, who resides at Burleigh Heads, Australia. He is an Australian national. The first and second defendants are residents of Rarotonga and have a lengthy history of employment in the hospitality industry. The first defendant is aged 54 and the second defendant is aged 51. It will be convenient, and I hope not disrespectful, to address the parties in this judgment by their Christian names. Where I am referring to the first and second defendant together I shall refer to them as "the Hoskings".

[2] The Hoskings first met Peter in 1989 when the Hoskings were working at the Hayman's Holiday Resort on Hayman Island, Queensland, Australia. They struck up a friendship. At that stage Peter was a single person still employed as a sales manager. It was his practice to take an annual week long vacation on Hayman Island so he saw a good deal of the Hoskings on his annual visits there between 1989 and 1992. The friendship continued and developed. On one occasion in 1990 the Hoskings allowed Peter to stay in their private house at Hayman Island when they were away in Sydney.

[3] In 1992 the Hoskings returned to the Cook Islands to manage the Tamure Resort Hotel. During that same year Peter paid them a surprise visit in Rarotonga and stayed with them for ten days. The friendship was renewed.

[4] There was no contact between the parties between 1992 to 1998 apart from one telephone call where Peter spoke to Teina. Peter's 1998 visit to Rarotonga involved Peter bringing with him his partner Barbara Ellis. At the time of Peter's arrival in May 1998 the Hoskings were the owners of the Oasis Motel. Teina explained in evidence that as of 1998 "times had been tough" in the Rarotonga tourist industry for the last few years. They had defaulted on payments to the bank in respect of financing of the Oasis. The bank had issued default notices calling up their mortgage but they had managed to reach arrangements with the bank which preserved their position.

[5] Not long before Peter's visit in 1998 the Hoskings had become aware through one of Teina's relatives, who was acquainted with the landlord, that the business/lease for PJ's restaurant in Rarotonga was for sale. The background was that PJ's had been closed for approximately nine months because the business had failed. The Hoskings were interested in disposing of the Oasis and acquiring the PJ's lease and setting up a restaurant business. While Oasis had a less attractive situation off the main road down a driveway, the major attraction of the PJ's business was that it was on a prime road frontage.

[6] The financial circumstances of the Hoskings were such that they would have to raise money to acquire the PJ's lease. This was not an easy task due to their financial position. It so happened that on the visit in May/June 1998 the possibility of the Hoskings acquiring the PJ's business was discussed with Peter. There was no dispute that in June 1998 Peter advanced $40,000 to the Hoskings to enable them to acquire the PJ's business. Nor was there any dispute that in order to furnish the $40,000 Peter had to borrow $12,000 from his own bank and to pay interest on that loan at 12.7% over three years. The loan was eventually repaid.

[7] The Hoskings duly took over the PJ's business. The Hoskings eventually sold the Oasis in June 2000, but for a couple of years they were running both businesses. While it has changed its name PJ's has been fairly successful.

[8] Peter retired in 1999 and the sole source of his income now is his Australian Government pension. He has no investments. His retirement was in prospect at the time the $40,000 was advanced to the Hoskings in June 1998.

Procedural Matters – Abandoned Defence under Development Investment Act 1977

[9] Peter took the view that the $40,000 was advanced as a loan. On 31 August 1999 he wrote to the Hoskings asking for repayment. There was no response to his letter. On 12 February 2003 his solicitor wrote a letter of claim to the Hoskings claiming $40,000. Again the money was not forthcoming. Proceedings were therefore issued by Peter against the Hoskings on April 2003. Notice of intention to defend was filed on 17 April 2003 and the

Hoskings took the course of each filing affidavits on 7 July 2003 as a means of spelling out their defence. The defence was simple. The $40,000 was a gift and therefore they were under no obligation to repay. Their statement of defence accordingly asserted that the $40,000 had been provided because of the years of friendship enjoyed by the parties which Peter wanted to continue for the rest of his life. The Hoskings sought to support their position by pointing to the absence of a loan agreement or any other written undertaking concerning repayment. They did acknowledge that seven months after the $40,000 was provided, when the relationship had soured, Peter unilaterally decided to insist upon a repayment arrangement in a monthly amount which they could afford. The Hoskings admitted receiving subsequent demands for repayment but said that they had chosen to ignore the demands as they were of the understanding that Peter had altered the grounds upon which the parties entered into the transactions by changing a gift into a loan. They vigorously denied the existence of a loan.

[10] There was an alternative defence of illegality under the Development Investment Act 1977. In the course of the closing submissions counsel for the defendant outlined this defence. The Court drew attention to the fact that the 1977 Act had been repealed and replaced by the Development Investment Act 1995/1996. One of the effects of the 1995/1996 Act was to repeal section 46 of the Development Investment Act 1977 which had been inserted into the latter Act by the Development Investment Act (No 2) 1991. Section 46 had provided that in any case where a foreign enterprise carried on business in the Cook Islands in contravention of the 1977 Act, any loan or other contract entered into by that foreign enterprise should be illegal and of no effect, and none of the provisions of the Illegal Contracts Act 1987 were available to that foreign enterprise to save the transaction.

[11] Section 44 of the Development Investment Act 1995/1996 repealed the 1977 Act including section 46 and introduced a regime which, broadly speaking, reinstated the Illegal Contracts Act and entitled a foreign enterprise to apply from relief against illegality under the Act so long as the foreign enterprise and

the other party had no knowledge that they were contravening the Act. Section 40 of the 1995/1996 Act provides:

> "(1) A person who is in breach of any provision of this Act who, but for this section, would be entitled to apply for relief under the provisions of the Illegal Contracts Act 1987, shall not be entitled to relief under that Act where that person –
>
> (a) has deliberately done or made an act or omission in contravention of this Act; or
>
> (b) knew or ought reasonably to have known that the act or omission done or made by him was in contravention of this Act.
>
> (2) In any case to which subsection (1) applies, the onus of proving that an act or omission was deliberate, or that he did not or could not reasonably have known that an act or omission was in contravention of this Act, shall lie upon the person seeking relief, provided that ignorance of the law shall not be grounds for relief."

[12] In an exchange with counsel for the Hoskings during his closing address the Court pointed out that the pleaded defence under the repealed 1977 Act could not succeed since it was not the relevant statute at the time of the relevant transactions. Counsel was advised that if he wished to apply to amend the defence so as to rely upon the 1995/1996 Act an amendment would be entertained, but its fate would depend upon the attitude of counsel for the plaintiffs. The Court would have to rule on any such application. After counsel for the defence conferred with his clients he advised the Court that no amendment would be sought but neither did the Hoskings withdraw the 1977 Act defence. However, after hearing submissions from counsel for the plaintiff, the Court was then advised by Counsel for the Hoskings that the pleaded 1977 Act defence would not be pursued. The end result is that the sole question in the case is whether the $40,000 was advanced as a loan or as a gift. No question of illegality remains.

Legal Principles concerning Gifts and Loans

[13] The parties were one in agreeing that the law in this area was accurately laid down by Hardie-Boys J in *Milne v Armijo*, Unreported CP 7/88, 25 August 1989 and *Re Matthews*, [1993] 2 NZLR 91, both of which cases the Court had provided to counsel in advance of the hearing to assist them in their preparation. The statements from those cases, which both counsel agreed

provided the legal framework for resolution of the present dispute, were first the summary on pages 2 to 3 in *Milne v Armijo*:

> "The legal principles are clear and are to be found in the judgments of the Court of Appeal in *Seldon v Davidson* [1968] 1 WLR 1083. The law is that where there is not the kind of relationship in which the presumption of advancement arises, and it does not arise here, the payment of money by one person to another prima facie gives rise to an obligation to repay within a reasonable time of the making of demand but if the borrower repudiates the loans and asserts that the payments were gifts that repudiation renders the moneys immediately repayable. And if the recipient disputes the obligation to repay, it is necessary for him to prove a gift. Whether there was a gift turns on two things: firstly, delivery; and secondly, intention of the donor; the latter being what is significant rather than the understanding of the donee. It is interesting in that respect to refer to the decision in what in a way is the reverse of the facts of this case in *Dewar v Dewar* [1975] 2 All ER 728 where the payor intended a gift, the payee thought it was a loan, but it was nonetheless held to be a gift.
>
> In as much as on one view of this case there was a possible misunderstanding by Mr Armijo and also because of the particular nature of the association between the parties, Mr Rogers submitted that this is one of those domestic type cases where there was no intention to create legal relations and so the law will import no contract, here no contract of loan, with the consequence that the payments became gifts. This approach has been developed by the Courts to deal with domestic transactions of rather different kinds from the mere payment of money. In that kind of case the presumption of advancement arises or may arise and where it does not there is in my view no reason for any notion of what would in effect be an implied gift or a gift by default. Instead the law in effect implies a contract of loan with the obligation to repay as I have indicated. This case, however, turns not so much on these points of law as on simple issues of credibility, but the principle as to where the onus lies is nonetheless of importance.

The importance of the objectively assessed intention of the donor, not the donee was reiterated at page 12:

> As I have said, for there to be a gift there must be the appropriate intention on the part of the donor and that, of course, is able to be established by inference from words and conduct in the same way as any other intention. It is not enough for the alleged donee to believe a gift is intended although often that belief may be based on what the donor said, itself sufficient to impute the necessary intention to the donor."

[14] Counsel for the plaintiff also drew attention to the passage on pages 13-14 which emphasised that credibility is crucial in such cases:

> "Credibility always has to be decided on an assessment of the witnesses themselves, of the inherent credibility of their evidence and of any other evidence supporting it or detracting from it. After considering carefully all that I have heard and seen over the last two and a half days, my conclusion is that the Plaintiff's account is more credible, probably not necessarily in every detail, but certainly as to the central issue. As usual one has the feeling there is more to be said than one has heard, and it may well be that Mrs Milne has in various respects overstated to Mr Armijo's disadvantage and understated to

her own advantage. She probably feels very foolish about the whole episode. As I find is often the case, I put little store on a comparison of the demeanour of the witnesses, especially where there are two people of such different personalities and cultural backgrounds and where language difficulties intrude. On any view of the matter, Mrs Milne acted very foolishly, whether it was to keep on trusting a man who was obviously not keeping his word, or to keep plying him with money in the hope to retain his affections, or a combination of both. However, I do not take her to be the sort of person to have thrown her money away in the way Mr Armijo suggested, especially when the first large payment represented the savings she had put aside for a special purpose, and when the second required her to borrow from her own sons. I cannot believe that she would send $4,000 to Chile as an enticement to a man who, according to him, was persisting in his rejection of her and who had deceived her."

[15] So far as *Re Matthews* is concerned counsel referred the relevant passage (on page 94):

> "Where there is a transfer of property without consideration, and where the parties are not connected by blood, there is no presumption of advancement, and so it is for the recipient or transferee to prove that the transfer was a gift: *Seldon v Davidson* [1968] 2 All ER 755. In the case of a voluntary conveyance of real property, the position is succinctly stated in *20 Halsbury's Laws of England* (4th ed) at para 40:
>
> > "In a voluntary conveyance of real property, a resulting trust for the grantor is no longer implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee, but if a conveyance is expressed to be for valuable consideration, although in fact none was paid, the grantee, if he asserts that a gift was intended, must produce the clearest evidence of the alleged donor's intention, otherwise there may be a resulting trust for the grantor."
>
> It follows that in this case Mr and Mrs Linton must produce the "clearest evidence" of the donor's intention to make an outright gift."

The Evidence as to Events when the $40,000.00 was Advanced

[16] Peter gave evidence on his own behalf, along with his partner Barbara Ellis, who it will be recalled had been with him in the Cook Islands when the $40,000 was provided. Both the Hoskings gave evidence which was conveyed by way of their affidavits along with supplementary oral evidence. All four were cross-examined. There was not a great deal of dispute as to the chronological sequence of events but, as might be expected, there was a difference of view as to what had been done and said around the time the $40,000 was provided.

[17] With the possible exception of one matter upon which Arthur testified which is discussed in paragraph 32 below all witnesses gave their best recollection of the events in question. However, there was a tendency on both sides to engage

in hindsight embellishment, especially concerning the precise discussions which took place when the arrangements were made for the provision of the $40,000. In those areas where there is any direct conflict of evidence I prefer the evidence of Peter, and Barbara Ellis, to the evidence of Teina and Arthur.

[18] In his evidence-in-chief Peter confirmed that he went to Rarotonga in May 1998 on a package deal at the Edgewater Resort. There had been no contact between 1992 and 1998. At Edgewater he was not happy and after two days went to stay with a friend called John Lindsay. Near the end of the stay Peter ran into Teina and Arthur. They were at the Oasis. They said, "Come and stay your last few days with us." Peter was very pleased to see the Hoskings so he accepted their invitation.

[19] It was during these last three to four days of his stay, one night after dinner at the Oasis, that the discussion about PJ's restaurant came up. Teina and Arthur said that PJ's had been very successful. It was up the road from them. It had been taken over by the son of the former owner but he had not succeeded in his management. PJ's had been closed for seven to eight months. Teina and Arthur wanted to lease PJ's. The lease money being asked for was $45,000. Peter claims he told them, "Try to get it down to $40,000 and I'll lend you the money." He said he really cared for them as his friends. He said Teina and Arthur were very pleased. Peter claimed he had said he would not charge interest because he knew he would return to Rarotonga. I took this to be an allusion to the fact that he would receive hospitality on the subsequent trips to Rarotonga which trips he certainly envisaged after his retirement.

[20] Ms Barbara Ellis gave evidence and her version of these conversations was much the same effect. She remembered that Peter had said he could lend the money. She stated that Peter said words like the following:

> "I think we would be able to help you out with $40,000 by lending you the money."

[21] Both Peter and Barbara accepted that the terms of repayment were not discussed in the initial meetings but they said that there had been a luncheon the following day at Trader Jack's Restaurant in Rarotonga before they left to return to Australia. Peter and Barbara were firm in their evidence that during

the course of the luncheon it had been agreed that the Hoskings would send a written contract concerning the loan to Peter in Australia and that the Hoskings agreed to "send what they could each month, $200 or so". The Hoskings denied all of this. Mrs Hosking said she never discussed business over lunch. However, she did acknowledge that she and Arthur had said, as Peter and Barbara claimed, that the Hoskings would not include Peter in the licence for the PJ's business because they would not want to expose him to unnecessary financial risk. I accept Peter and Barbara's evidence that there was an arrangement agreed at Trader Jack's whereby some note, record, or contract concerning the loan was to be prepared and forwarded to Peter in Australia and that there were discussions about repayments. I do not accept the evidence that no business was discussed. The offer of the $40,000 was an obvious topic for discussion over lunch.

[22] The main evidence for the defence was from Teina. Her affidavit evidence was to the following effect:

> "12. It was during this time when we were having difficulties with the Development Bank over our property that discussions extended to us buying the lease on PJ's Restaurant.
>
> 13. The Plaintiff encouraged us to lease PJ's Restaurant, he said he had some money and would be prepared to give the money as a gift for the years of friendship we have had and wished us to continue for life.
>
> 14. About the end of May 1998 the Plaintiff sent the money being the sum of $40,000 by telegraphic bank transfer, which we used to buy the lease on PJ's Restaurant which we changed to Hosking's Chinese Restaurant which we still have.
>
> 15. No loan agreement was signed as there was no loan and I recall a lawyer handling the lease saying how lucky we were to receive the money without the need to pay it back."

When asked in cross-examination about the discussion when Peter first offered to provide the $40,000, her evidence as to what Peter said was rather different. She said Peter's words had been to the following effect:

> "I have some money. I can give you money for PJ's. It would involve us being together a lot. If you have to let go of Oasis you can have PJ's."

She claimed there was no mention of a loan.

[23] The oral evidence of Mr Hosking was brief on the central issues. He did little more than confirm his affidavit in which he said in paragraphs 6 and 7:

> "6. During the Plaintiff's stay, he became aware of financial difficulties we were having, we were interested in renting PJ's Restaurant which was vacant for some six months to secure us a better business venture.
>
> 7. The Plaintiff offered to help, as he had some money, by putting the following proposition to us:
>
> > "I would be prepared to give the money as a gift for the years of friendship we have had and I want us to continue for life."
>
> 8. The only condition the Plaintiff mentioned was for Teina and I to look after him in kind whenever he visited Rarotonga.
>
> 9. We continued with the discussions right until the end of the visit and in May of 1998, the Plaintiff sent the money by telegraphic transfer."

[24] He could not recall discussing business at lunch at Trader Jack's but did not explicitly deny that business had been discussed. He could not recall the contract or loan being mentioned at lunch. He simply said in his evidence that Peter had "given money to us to help with PJ's". He said there were no conditions. He denied a promise to send the contract to Australia and said that the first time that repayment was requested was after the dispute had materialised.

[25] In relation to the critical conversations between the parties over the $40,000 I do not accept the affidavit evidence of the defendants nor their oral evidence. I find no evidence that there was an express statement by Peter that the money was being gifted to them. Bearing in mind the rather modest resources of the plaintiff, that he would need to borrow some part of the $40,000, and the fact that the parties had not seen each other for six years, an outright gift seems to me to be highly improbable. I find that either the word "loan" was used, or, as Teina said in cross-examination, that Peter simply said "I can help you with $40,000" never mentioning a loan and never intending that it was to be a gift. I further accept Peter's evidence that he said during a meal at the Oasis, "I won't charge you interest" because he "knew [he]'d be back" and expected some hospitality in return.

Subsequent Developments

[26] The foregoing findings are sufficient to decide the case in favour of the plaintiff but I find that in any event that the subsequent conduct of the parties strongly supports Peter's position that a loan had been granted. First of all Peter was obliged to apply for finance for $12,000 of the $40,000. The "personal loan enquiry" he made on 28 May 1998 records that the purpose of the loan was "assisting friends with purchase of business". Secondly, I accept his evidence that he was surprised that no contract appeared after he had transmitted the $40,000, that he telephoned the Hoskings two or three times over the next 3-4 months and asked why there was no contract and no sign of part payments, and that he was given evasive answers.

[27] Thirdly, during Peter's 1998 visit to Rarotonga I consider that Peter is telling the truth when he said that on that occasion he was told that "as soon as the restaurant comes good we will send you the money". Teina explained in her evidence that it took a lot of extra money to get PJ's running over and above the $40,000 and that they had had to raise additional finance, with a different bank, to facilitate the upgrade. All of that is entirely consistent with a statement that they would pay the money when the business started to progress.

[28] Fourthly, in June 1999 Peter returned and raised with the Hoskings the issue of payment and was promised $150 a week. He went to the ANZ Bank in Avarua and asked for a cheque deposit slip to enable the Hoskings to pay money into an account he had opened in Rarotonga for this purpose. He said that no such money was ever paid. The Hoskings acknowledged receiving the passbook. Peter said that on this visit Arthur promised to repay out of the proceeds of a sale of some family land which sale was then being negotiated by Teina's family. In cross-examination Teina admitted that the land had subsequently been sold for $450,000 but said that it was "not all hers and had to be shared with her family".

The Demands for Repayment – Arthur's Written Admission of a Loan

[29] A handwritten letter dated 4 August 1999 from Peter to Teina and Arthur states in part:

"I received your letter this week re the charges for past accommodation and meals... I am surprised and disappointed you have seen fit to bill me. You personally extended to me the offer to come and stay as often as I wished, no charge was ever mentioned on any occasion. Particularly bearing in mind that I had waived interest in respect of my loan of $40,000 to you, you have never repaid any amount of this despite promises to do so.

How many of your friends would lend $40,000. If you had borrowed from the bank it would have been an even bigger burden financially as you were obviously deep in debt when I lent you the money (with Oasis). The cost to me financially above the $40,000 (loss of my interest... and interest on $12,000 loan totals $54,300... I would appreciate how and when you intend to repay me as I have rung the ANZ Bank and as no payment has been made over 12 months. What has happened to the Teina I used to know?

Sincerely

Peter."

[30] In August 1999 Peter wrote to the Hoskings in the following terms:

"Dear Teina and Arthur,

Re Loan $40,000

As you have not responded to my Fax dated August 4 1999 I now request that you take immediate steps to repay this loan with regular payments.

When the above amount was originally loaned to you in June 1998 I opened an account and supplied you with an account number to enable monthly payments to be deposited.

On my last visit in June 1999 a bank deposit book was made available to you for this purpose.

The loan was made on the basis of friendship and repayment was sought on the same basis.

Photostat copies of documents confirming this debt and a copy of the transfer slip that released $40,000 from my bank account to your bank and a letter from you acknowledging your indebtedness to me have been previously forwarded to you.

To date not one repayment, which is important to my security, has been effected by you. Unless you commence a satisfactory and reliable scheme of repayment I will be left with no option other than to consult my lawyer and have this matter decided in court. As any court proceedings will have to be held in Rarotonga this will undoubtedly involve additional costs.

If a suitable proposal and repayment is not received by September 21st 1999 I shall take immediate steps for recovery through my solicitor."

[31] There was no reply to that letter. Eventually Peter briefed a lawyer in Rarotonga. On 12 February 2003 Mr Charles Little sent the following letter to the Hoskings:

"I act for Peter Uren. My client advises me you are indebted to him in the sum of $40,000. Unless you admit liability and contact me to arrange repayment

within 21 days of the date of this letter the sum of $40,000 plus interest at the statutory rate of 8% per annum calculated from 2 June 1998 to date (the debt) I am instructed to commence legal proceedings for recovery of the debt without further notice to you."

[32] On 5 March 2003 Arthur replied to Mr Little as follows:

"Dear Sir,

Re: Peter Uren

We have received your letter on behalf of Peter Uren.

You may be aware that Peter Uren did not receive Development Investment Board approval for the lending.

Nevertheless, we acknowledge having borrowed money from Peter Uren. Our financial position at this time does not allow us to make any repayment."

[33] That letter contains an express acknowledgement that money had been borrowed from Peter. It says not a word about the alleged gift. It was written after legal advice had been taken by Arthur. When confronted in cross-examination with this devastating admission Arthur sought to suggest that he had not composed the letter, it had been prepared for him by his solicitors, it did not accurately express his views, and that he did not read it properly before he sent it. I entirely reject these explanations. If, in truth, there was a gift and if legal advice had been taken, then surely this was the occasion upon which the true position of gift would have been spelled out. The first mention of "gift" was not until 7 July 2003 in the two affidavits which were filed on that date. Instead there was in this letter an explicit written acknowledgement of a loan and two alternative explanations as to why repayment was not possible: one, that the consent of the Development Commission had not been obtained (i.e. it was an unenforceable illegal loan) and two; that they were unable to pay. The latter claim is also lacking in credibility because Teina said in evidence that the current business is "fine" and acknowledged that she had received part of a fairly recent $450,000 family land sale.

Result – Plaintiff entitled to $40,000.00 and Interest

[34] Applying the legal principles referred to in [13] to [15] above and for all of the foregoing reasons I find that the plaintiff is entitled to recover the sum of $40,000.00. The Hoskings have failed to prove a gift. Peter did not intend to

make a gift of the $40,000.00. Peter is also entitled to prejudgment interest under section 89 of the Judicature Act at the rate of 8% from 31 August 1999 down to the date of judgment.

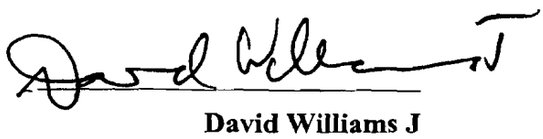
[35] Pre-judgment interest under the Judicature Act is discretionary so the Court requested submissions on the matter. Counsel for the Hoskings said that no interest should be awarded because of the inherent nature of the transaction which was "a dealing between friends". He emphasised that no interest had ever been called for. There was no agreement for interest at the outset and none should be allowed now. He submitted that the fact that Peter himself had had to pay interest on part of the sum lent was irrelevant because this had not been disclosed to the Hoskings. He did, however, concede that the $40,000 had provided a 'lift-off' for the Hoskings on the PJ's business and that that business had been rewarding and successful.

[36] The Court does not accept these submissions on interest. Especially bearing in mind the circumstances of the plaintiff as a retired person, the difficulty to which he has been put in recovering the $40,000, and the absence of any effort to make repayments by instalments when requested, interest is properly recoverable.

Costs

[37] Peter is entitled to costs. If the parties cannot agree costs they must file memoranda within 21 days from the date of this judgment. The Court will then fix costs and disbursements.

SIGNED at Auckland on the 10th of December 2003 at 4.30pm.



David Williams J