

**PARTIES:** SHERWIN, Peter

AND:

SHERWIN, Florence Fay

v

COMMENS, Craig Robert

AND:

COMMENS, Maria Jan

**TITLE OF COURT:** SUPREME COURT OF THE  
NORTHERN TERRITORY

**JURISDICTION:** SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING TERRITORY  
JURISDICTION

**FILE NO:** 44 of 2007 (20710748)

**DELIVERED:** 30 October 2008

**HEARING DATES:** 21, 22, 23 & 24 July 2008

**JUDGMENT OF:** SOUTHWOOD J

**CATCHWORDS:**

CLAIM FOR RECOVERY OF DEBTS – Whether payments of monies were advanced by way of loans or gifts – whether documents constitute acknowledgment of loans – whether demand for repayment was made to debtor – claim allowed

*Elsinora Global Ltd v Deputy Commissioner of Taxation* (2006) 155 FCR 413; *Heydon v Perpetual Executors Trustees and Agency Co (WA) Ltd* (1930) 45 CLR 111; *Hexiva Pty Limited and Ors v Lederer and Ors (2)* [2007] NSWSC 49; *Kalls Enterprises Pty Ltd (In Liquidation) and Ors v Baloglow and Anor (No 3)* [2007] NSWCA 298, applied

*Hungerford v Walker* (1989) 171 CLR 125, referred to

**REPRESENTATION:**

*Counsel:*

Plaintiffs:	M Maurice QC
Defendants:	Self represented

*Solicitors:*

Plaintiffs:	Cridlands
Defendants:	Self represented

Judgment category classification:	B
Judgment ID Number:	Sou0812
Number of pages:	27

IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Sherwin and Sherwin v Commens and Commens* [2008] NTSC 45  
No 44 of 2007 (20710748)

BETWEEN:

**PETER SHERWIN**  
First Plaintiff

AND:

**FLORENCE FAY SHERWIN**  
Second Plaintiff

AND:

**CRAIG ROBERT COMMENS**  
First Defendant

AND:

**MARIA JAN COMMENS**  
Second Defendant

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 30 October 2008)

**Introduction**

- [1] This is a proceeding for the recovery of debts that are claimed by Mr and Mrs Sherwin to be due and payable to them by Mr and Mrs Commens. The proceeding was commenced by Writ filed on 19 April 2007. Mr Peter Sherwin and Mrs Florence Fay Sherwin claim the sum of \$1,120,000 plus

interest from their son-in-law, Mr Craig Robert Commens, and their daughter, Maria Jan Commens.

- [2] Mr Commens was unrepresented. He has defended the claim against him. On 13 August 2007 judgment in default of appearance and defence was entered in favour of Mr and Mrs Sherwin against Mrs Commens for the sum of \$1,120,000 plus interest in the amount of \$31,588.60 and costs of \$737.00.
- [3] In their Second Further Amended Statement of Claim, Mr and Mrs Sherwin plead as follows:
1. The plaintiffs are the parents of Maria Jan Commens and the parents-in-law of Craig Robert Commens.
  2. On or about 23 December 1999 the plaintiffs lent to the defendants the sum of \$500,000 and on or about 19 December 2001 the plaintiffs lent a further \$500,000 to the defendants. On or about 28 December 2000 the plaintiffs lent to the defendants the sum of \$50,000, and on or about 20 September 2002 the plaintiffs lent to the defendants the sum of \$70,000 (“the loans”).
  3. The moneys advanced by the loans were for the use of and to assist the defendants in the business partnership conducted by them in the name of CR & MJ Commens (“the business”).
  4. It was an implied term of the loans that they would be repaid by the defendants to the plaintiffs within a reasonable time after request being made for payment.
  - 3A. Alternatively, the loans were repayable upon request being made for repayment.
  5. The sale of the defendants’ remaining two farming properties was completed on or about 15 June 2005, immediately following which the plaintiffs requested repayment of the loans.

6. The defendants have failed to pay the plaintiffs any sum in respect of their indebtedness to the plaintiffs, and are indebted thereto in the sum of \$1,120,000.
7. The plaintiffs have lost the use of the amount of the loans from the date of their advance and claim damages in accordance with the principles in *Hungerford v Walker* (1989) 171 CLR 125.

And the plaintiffs claim \$1,120,000, interest and costs.

- [4] During the course of the hearing, Mr and Mrs Sherwin abandoned their claim for damages in accordance with the principles in *Hungerford v Walker*<sup>1</sup>.
- [5] In his Further Amended Defence Mr Commens admitted that on or about 23 December 1999, Mr and Mrs Sherwin paid to him and Mrs Commens the amount of \$500,000 and that on or about 19 December 2001 Mr and Mrs Sherwin paid to him and Mrs Commens a further amount of \$500,000. Mr Commens denied that the monies were advanced by way of a loan. He alleged that both payments were gifts from Mr and Mrs Sherwin to him and Mrs Commens and are not repayable. Mr Commens did not admit that the sums of \$50,000 and \$70,000 were paid to him and Mrs Commens by Mr and Mrs Sherwin. In the alternative Mr Commens alleged that if the amounts of \$50,000 and \$70,000 were paid to him and Mrs Commens then those amounts were also gifts to assist him and Mrs Commens in their married life together and are not repayable.

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<sup>1</sup> (1989) 171 CLR 125

### **The issues**

- [6] The principal issue in the proceeding is did Mr and Mrs Sherwin pay the four amounts totalling \$1,120,000 to Mr and Mrs Commens by way of loan or was the money advanced as gifts?
- [7] The burden of proving that the four amounts totalling \$1,120,000 were advanced as loans is on Mr and Mrs Sherwin: *Heydon v Perpetual Executors Trustees and Agency Co. (WA) Ltd* <sup>2</sup>.

### **The evidence**

- [8] The evidence that was led on behalf of Mr and Mrs Sherwin comprised an affidavit of Mrs Sherwin that was sworn on 8 February 2008, the oral evidence of Mrs Sherwin, an affidavit of Mr Sherwin that was sworn on 8 February 2008, the oral evidence of Mr Sherwin, a report and oral evidence of Michelle Helena Novotny who is a handwriting expert, and a report and oral evidence of Dr Venugopalan who is a psychiatrist. Both Mr and Mrs Sherwin gave evidence about the circumstances in which they came to advance the total amount of \$1,120,000 to Mr and Mrs Commens. Ms Novotny gave evidence that in her opinion it was highly probable that the second signature on Exhibit P1, which is a written Acknowledgement of Loan of \$500,000 from Mr and Mrs Sherwin, is that of Mr Commens. Dr Venugopalan gave evidence that Mrs Commens suffers from a major depressive disorder that is in partial remission with active psychiatric treatment. In his opinion, giving evidence in court and being subject to

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<sup>2</sup> (1930) 45 CLR 111

cross-examination could be a major stress for Mrs Commens in her present mental condition and it is likely that such stress would have a significant adverse affect on her mental condition.

[9] Mr and Mrs Sherwin did not call Mrs Commens to give evidence.

Mrs Commens is in Mr and Mrs Sherwin's camp. Mr and Mrs Commens have separated. They are in the process of going through a divorce and proceedings are on foot in the Family Court of Australia. Mrs Commens is living in a house that is owned by Mr and Mrs Sherwin and they are paying for some of her legal fees in the Family Court of Australia. However, no adverse inference can be drawn against Mr and Mrs Sherwin for not calling Mrs Commens to give evidence. They did not call her to give evidence because they believed that she was psychiatrically unfit to give evidence. Their decision is supported by the evidence of Dr Venugopalan. I accept the evidence of Dr Venugopalan. In my opinion there was a significant risk that Mrs Commens' mental condition may suffer adversely if she gave evidence. The risk remained even if Mrs Commens gave evidence by way of video conferencing.

[10] Mr Commens gave oral evidence, and an affidavit that he swore on 15 May 2008 was read. Mr Commens gave evidence that he was not privy to any discussions about the advancement of the four amounts totalling \$1,120,000. All of the discussions about those amounts were between Mrs Sherwin and Mrs Commens. At all times he understood that each of the four amounts of money was a gift. Mr Commens also gave evidence that at no stage before

he was served with a copy of the Writ did either Mrs Sherwin or Mr Sherwin ask him to repay any of the four amounts of money totalling \$1,120,000.

### **The first defendant's credit**

[11] Before setting out my findings of fact it is necessary to state what is my assessment of the evidence of Mr Commens. I found Mr Commens to be an almost wholly unreliable witness. He was deliberately evasive, defensive and dissembling. He feigned a lack of knowledge about his financial position at the relevant times. I find that he lied to the Court when he said that he did not sign Exhibit P1 which is a written acknowledgement that the amount of \$500,000 which was paid to Mr and Mrs Commens on 19 December 2001 was to be repaid to Mr and Mrs Sherwin. I also find that Mr Commens lied when he said that he neither caused the various facsimiles about the financial position of his and Mrs Commens' farming business to be sent to Mr and Mrs Sherwin nor did he have any knowledge of those documents being sent to them. Having done so, I have found it difficult to accept most of his evidence.

[12] Mr Commens' evidence that he did not sign Exhibit P1; the facsimile dates on the various statements of financial position that were sent to Mr and Mrs Sherwin were fabricated; and he had no involvement in sending the documents to Mr and Mrs Sherwin lacked the ring of truth and reality. He admitted that, bar one document which was in Mrs Commens' handwriting, all of the statements of financial position which were sent to Mr and

Mrs Sherwin were in his handwriting and there was no evidence that the facsimiles had been tampered with in any way.

[13] I do not accept Mr Commens' argument that each of the four sums of money was a gift. Mr Commens' argument is intrinsically implausible.

Mr Commens said that he had no dealings with Mrs Sherwin about financial matters, Mrs Commens had all of the dealings with Mrs Sherwin about financial matters, but he did not say that Mrs Commens told him at any stage that Mr and Mrs Sherwin were giving them a gift of any money or that he enquired about how the money came to be paid into his bank account. It cannot be that money appeared in his bank account but he had no conversation with Mrs Commens about how the money came to be paid into his bank account. Mr Commens failed to provide any basis for his belief or assertion that the four sums of money were paid as gifts. He failed to do so in circumstances where, according to his own evidence, he had full use of all four sums of money for the purposes of the farming business.

[14] Mr Commens lied because of his antipathy towards Mr and Mrs Sherwin, which has arisen because he believes that Mr and Mrs Sherwin have not duly recognised his true worth or the contribution that he has made to their family or the care that he says he has provided to Mrs Commens, and because he does not want to repay the sum of \$1,120, 000. Mr Commens' antipathy towards Mr and Mrs Sherwin was glaring throughout the proceeding.

[15] On the other hand I accept the evidence of Mr and Mrs Sherwin. They were unshaken in cross-examination, and their evidence was logical and internally consistent. Their evidence was also supported by the Acknowledgment of Loan dated 20 December 2001 that was signed by Mr and Mrs Commens and the statements of financial position that were sent by Mr and Mrs Commens to Mr and Mrs Sherwin before the two amounts of \$500,000 were advanced to them.

[16] To the extent that there is a conflict between the evidence of Mr and Mrs Sherwin and Mr Commens I prefer the evidence of Mr and Mrs Sherwin.

### **The facts**

[17] I make the following findings of fact.

[18] During 1989, Mr and Mrs Commens became interested in purchasing two rural properties, "The Glen" and "Lonesome Dove". The properties are situated near Oakey which is a small country town in the Darling Downs in South East Queensland.

[19] In February 1990, Mr and Mrs Sherwin advanced an amount of approximately \$924,361 to Mr and Mrs Commens to purchase The Glen and Lonesome Dove. In or about June 1990, Mr and Mrs Commens completed the purchase of the two properties. The properties were purchased with money provided by Mr and Mrs Sherwin. Mr Commens says that the money which was advanced for the purchase of the properties was a gift. Mr and

Mrs Sherwin say that the money was advanced as a loan. It is not necessary to decide this question nor is it necessary to decide, if the monies were a loan, if the debt was forgiven. No claim is made by Mr and Mrs Sherwin for the repayment of that money.

[20] After Mr and Mrs Commens purchased The Glen and Lonesome Dove they sold their home in Brisbane. The home was purchased for them by Mr and Mrs Sherwin as a gift. Mr and Mrs Commens then made their home on Lonesome Dove. Mr Commens made improvements to the two properties and he conducted farming activities on the properties. Mrs Commens was his partner in the farming business. In order to conduct the farming activities Mr Commens acquired farm machinery, plant and equipment, the acquisition of which he financed through institutional lenders. He also obtained an overdraft facility at his bank which he used in part to meet the operational expenses of the farming business, in part to pay for some improvements to the properties and in part to obtain income for him and Mrs Commens.

[21] In addition to obtaining finance from banks and other institutional lenders, Mr and Mrs Commens also received advances of money from Mr and Mrs Sherwin which were used to pay for improvements to the two properties including the construction of a large dam on The Glen, to purchase a tractor, to purchase cattle and for operational expenses. Apart from moneys which were advanced to Mr and Mrs Commens to purchase a house in Carindale in Brisbane, all of the money advanced by Mr and Mrs Sherwin to Mr and

Mrs Commens, in which Mr Commens had an interest in receiving, was advanced in connection with Mr and Mrs Commens' farming business.

[22] The farming activities of Mr and Mrs Commens were not successful. They appear to have over capitalised on infrastructure and other improvements to the properties; Mrs Commens made very little contribution to the operation of the properties; Mr Commens was not a very skilful farmer; he became distracted by other matters; he devoted a lot of time to caring for his wife, who became an alcoholic and who suffers from psychiatric problems, and to caring for his children; and from time to time the properties were affected by drought. In his affidavit sworn on 15 May 2008, Mr Commens states that over the 15 years that they owned the rural properties they struggled financially. They had few good seasons but the good seasons were significantly outweighed by the bad seasons. They struggled to keep afloat. As a result Mr and Mrs Commens got into significant debt and from time to time they were pressured by the banks and other financial institutions about the payment of various outstanding amounts of money.

[23] On or about 4 May 1999, Mr and Mrs Commens purchased a rural property called "Success" for \$600,000. Mr and Mrs Commens borrowed the whole of the purchase price of \$600,000 for the property from the National Australia Bank Limited. The loan was an interest only loan with a floating interest rate which was required to be repaid to the bank as soon as possible.

[24] By the beginning of December 1999, Mr and Mrs Commens owed the banks and other financial institutions more than \$1 million. They had an overdraft of about \$500,000, the interest only loan of \$600,000, and they owed money for the acquisition of various farm machinery, plant and equipment. In his affidavit sworn on 15 May 2008, Mr Commens states that, although the bank was not about to foreclose, they were struggling financially. The farm was not productive and it was not producing anywhere near enough income to support Mr and Mrs Commens and their children.

[25] On or about 18 December 1999 Mr Commens telephoned Mrs Sherwin and they had a conversation to the following effect:

Mr Commens: Granny, can you give us some finance to carry us through because the banks are up us and we need to pay our overdraft.

Mrs Sherwin: We don't really want to give you any more money because we have been putting in too much and not getting anything back.

Mr Commens: You'll get it back.

[26] Mr Commens then handed the telephone to Mrs Commens and she and Mrs Sherwin had a conversation to the following effect:

Mrs Commens: Mum, we're desperate – the banks are after us for money and we need \$500,000 to stay a float.

Mrs Sherwin: I don't really want to put any more in but I'll speak to [Mr Sherwin] about it. We are not getting any interest on this money and we aren't seeing any of it coming back. I'll let you know.

[27] I find that in the course of the above conversation Mrs Commens was acting as Mr Commens' partner in the farming business.

[28] After she spoke to Mr and Mrs Commens on 18 December 1999, Mrs Sherwin spoke to Mr Sherwin about Mrs Commens asking Mrs Sherwin if they would advance her and Mr Commens the sum of \$500,000. Mr Sherwin told Mrs Sherwin that he did not want to lend Mr and Mrs Commens any more money. He said that he would not stop Mrs Sherwin from lending them more money but she should ask Mr and Mrs Commens for some documentation about their financial position so they could assess how Mr and Mrs Commens were going.

[29] On 20 December 1999, Mrs Sherwin telephoned Mrs Commens and told her that she and Mr Sherwin might agree to lend them the amount of \$500,000 if Mrs Commens sent Mrs Sherwin some documentation setting out their financial position. Mrs Commens agreed and at about 10.10 pm on 20 December 1999 either Mr Commens or Mrs Commens sent Mr and Mrs Sherwin a facsimile which very roughly set out some details about the financial position of Mr and Mrs Commens' farming business. The facsimile was handwritten by Mr Commens and it has the telephone number of Mr and Mrs Commens on it and the header 'CR & MJ Commens'. A copy of the facsimile was tendered in evidence.

[30] The details on the facsimile dated 20 December 1999 that were in Mr Commens' handwriting included the following: 'overdraft \$500,000',

‘loan \$110,000’, ‘machinery payment \$18,000 twice yearly’, and ‘new farm \$600,000’. Mr Sherwin perused the facsimile dated 20 December 1999. He was not satisfied with the limited information that it contained about Mr and Mrs Commens’ financial position. As a result, he either faxed the facsimile dated 20 December 1999 back to Mr and Mrs Commens or he requested Mrs Sherwin to obtain more detailed information from them.

[31] On 22 December 1999, Mr and Mrs Sherwin received a further facsimile from Mr and Mrs Commens. The facsimile has Mr and Mrs Commens’ telephone number on it along with the header ‘CR & MJ Commens’. The contents of the facsimile were handwritten by Mr Commens. The facsimile was tendered in evidence as Exhibit P4. The facsimile contains more detailed information about the financial position of Mr and Mrs Commens’ farming business. Not only did it contain a summary of the various amounts owed by Mr and Mr Commens but it contained the interest rates applicable to each amount owed and a rough statement of income and expenditure. The document contains a statement that was handwritten by Mr Commens that, “We can cope with all of the payments if we could reduce the overdraft and cut expenditure.”

[32] The facsimiles respectively dated 20 and 22 December 1999, were provided by Mr and Mrs Commens to Mr and Mrs Sherwin for the purpose of persuading Mr and Mrs Sherwin to lend them the amount of \$500,000. The fact that Mr and Mrs Commens sent the facsimiles to Mr and Mrs Sherwin rebuts Mr Commens’ suggestion that the amount of \$500,000 was a gift. I

accept Mr Maurice's submission that if the monies were intended as a gift there would be no need for Mr and Mrs Sherwin to scrutinise the financial position of Mr and Mrs Commens' farming business. The only purpose for which the financial information was sought and given was so that Mr and Mrs Sherwin could assess if they had any prospect of getting their money back from the conduct of the farming operations.

[33] Mr Sherwin reviewed the contents of the facsimile dated 22 December 1999. He did not think that the further information provided by Mr Commens was reliable information and he did not want to lend the amount of \$500,000 to Mr and Mrs Commens. Nonetheless, Mr Sherwin told Mrs Sherwin that it was up to her if she wanted to loan Mr and Mrs Commens the amount of \$500,000 and they reluctantly agreed to lend the money so that Mr and Mrs Commens could clear their overdraft.

[34] On 22 December 1999 Mrs Sherwin telephoned Mrs Commens and they had a conversation to the following effect:

Mrs Sherwin: We will lend you the money but it must be paid back.

Mrs Commens: Yes. Ok Mum.

[35] I find that in the course of the above conversation Mrs Commens was acting as Mr Commens' partner in the farming business.

[36] On 23 December 1999, Mr and Mrs Sherwin caused the sum of \$500,000 to be paid into Mr and Mrs Commens' bank account. I find that on

23 December 1999 Mr and Mrs Sherwin lent Mr and Mrs Commens the sum of \$500,000 which was repayable on demand. While there was no discussion between the parties about when the sum of \$500,000 was to be repaid, the law implies that in such circumstances the amount of \$500,000 was repayable on demand.

[37] On or around 27 December 2000, Mrs Commens telephoned Mrs Sherwin and she asked Mrs Sherwin for a further loan of \$50,000 so that Mr and Mrs Commens could pay wages and other operating expenses of their farming business. The substance of their telephone conversation was as follows:

Mrs Commens: Mum, we need another loan. We need to pay for fuel, stores and wages and the like. The banks look like cutting everything off.

Mrs Sherwin: I know you are desperate but I still need to speak to dad because we are worried about the level of debt and still no repayment. If we lend you the money you need to know that it needs to be repaid like everything else.

Mrs Commens: Yes of course, we will repay it.

[38] I find that in the course of the above conversation Mrs Commens was acting as Mr Commens' partner in the farming business.

[39] On 28 December 2000 Mr Sherwin arranged for the sum of \$50,000 to be transferred to Mr and Mrs Commens account with the National Australia Bank Limited. I find that on 28 December 2000 Mr and Mrs Sherwin lent Mr and Mrs Commens the sum of \$50,000 which was repayable on demand.

While there was no discussion between the parties about when the sum of \$50,000 was to be repaid, the law implies that in such circumstances the amount of \$50,000 was repayable on demand.

[40] After the purchase of Success on 4 May 1999 and obtaining the two loans from Mr and Mrs Sherwin totalling \$550,000, the financial position of Mr and Mrs Commens' farming business did not improve. The properties continued to be affected by drought and Mr Commens was spending a lot of time caring for Mrs Commens instead of working on the land. They remained in a difficult financial position.

[41] In early December 2001, Mrs Commens telephoned Mrs Sherwin and asked her for a further loan of \$500,000. The substance of the telephone conversation was as follows:

Mrs Commens: Mum, we're desperate again. The banks are up us again and they have been further up Craig. Can you lend us \$500,000?

Mrs Sherwin: Look, we don't want to loan any more money. I will have to beg your dad for it.

[42] I find that in the course of the above conversation Mrs Commens was acting as Mr Commens' partner in the farming business.

[43] Following the above telephone conversation Mrs Sherwin spoke to Mr Sherwin about Mrs Commens' request for a further loan of \$500,000. Mr Sherwin told Mrs Sherwin that he was against lending Mr and Mrs Commens more money but if she wanted to lend them more money he

would reluctantly agree to do so. Mr Sherwin told Mrs Sherwin that before they agreed to any further loan they should obtain some further information about Mr and Mrs Commens' financial commitments.

[44] On 9 December 2001 either Mr Commens or Mrs Commens sent a facsimile to Mr and Mrs Sherwin containing very rough details about the extent of Mr and Mrs Commens' indebtedness in relation to their farming business, the amounts owing in relation to various farming machinery, plant and equipment, an estimate of some of the costs of planting certain crops on the rural properties and some income projections based on the production of various crops. Mr Commens had handwritten the information contained in the facsimile and the facsimile had Mr and Mrs Commens' telephone number on it and the header, "CR & MJ Commens".

[45] The facsimile dated 9 December 2001 reveals that Mr and Mrs Commens were carrying a debt level in excess of \$1.4 million and that Mr and Mrs Commens had annual financial commitments for various machinery, plant and equipment of about \$140,000.

[46] Mr Sherwin was unsatisfied with the detail of the financial information contained in the facsimile dated 9 December 2001 and arrangements were made to obtain further financial information from Mr and Mrs Commens. On 13 December 2001, Mrs Commens sent another facsimile to Mr and Mrs Sherwin. The facsimile contained additional financial information about Mr and Mrs Commens' farming business. The facsimile dated 13 December

2001 reveals that Mr and Mrs Commens were carrying a total debt in excess of \$1.8 million, urgent and pressing bills totalled \$670,000, Mr and Mrs Commens expected to incur costs of \$115,000 in relation to the production of crops, and they expected to earn an income in excess of \$800,000.

[47] I find that in sending the facsimile dated 13 December 2001, Mrs Commens was acting as Mr commens' partner in the farming business. I find she was so acting whenever she may have sent the statements of financial position to Mr and Mrs Sherwin.

[48] The facsimiles respectively dated 9 and 13 December 2001, were provided by Mr and Mrs Commens to Mr and Mrs Sherwin for the purpose of persuading Mr and Mrs Sherwin to lend them the further amount of \$500,000. The fact that Mr and Mrs Commens sent the facsimiles to Mr and Mrs Sherwin rebuts Mr Commens' suggestion that the amount of \$500,000 was a gift. I accept Mr Maurice's submission that if the monies were intended as a gift there would be no need for Mr and Mrs Sherwin to scrutinise the financial position of Mr and Mrs Commens' farming business. The only purpose for which the financial information was sought and given was so that Mr and Mrs Sherwin could assess if they had any prospect of getting their money back from the conduct of the farming operations.

[49] After Mr and Mrs Sherwin received the facsimile from Mr and Mrs Commens dated 13 December, Mr Sherwin reviewed the financial

information contained in the facsimiles. He was concerned that the estimated income of Mr and Mrs Commens' farming business was inflated and that the expenses of operating the farming business had been under estimated. His overall impression was that the level of Mr and Mrs Commens' debt was disproportionate to the size of their rural properties and the financial information that he had received reaffirmed his view that he did not want to lend them any more money. As a result, Mr and Mrs Sherwin agreed that they would only lend Mr and Mrs Commens the further sum of \$500,000 if they were prepared to sign a document acknowledging that the money was a loan which was to be repaid.

[50] On 19 December 2001 Mrs Sherwin spoke to Mrs Commens on the telephone. The substance of the telephone conversation was as follows:

Mrs Sherwin: We will transfer the money to your account begrudgingly but we need you both to sign a letter saying that you will pay back the \$500,000 and we want you to send us the original.

Mrs Commens: Yes, we will send a letter signed by both of us.

[51] I find that in the course of the above conversation Mrs Commens was acting as Mr Commens' partner in the farming business.

[52] On 19 December 2001, after the Mrs Sherwin's telephone conversation with Mrs Commens, Mr Sherwin sent instructions to the Commonwealth Bank to transfer the amount of \$500,000 to Mr and Mrs Commens' bank account. On 20 December 2001 Mrs Commens prepared a handwritten acknowledgment

of the loan of \$500,000. The acknowledgment is dated 20 December 2001. It is signed by both Mr and Mrs Commens. It states as follows:

This is a letter to say that P & FF Sherwin gave a much appreciated loan to CR & MJ Commens for the amount of \$500,000 (five hundred thousand dollars) to be repaid.

Thanking you very much.

[53] Mrs Commens sent the written acknowledgment of loan to Mr and Mrs Sherwin. The original document was tendered in evidence as Exhibit P1. I find that on 19 December 2001 Mr and Mrs Sherwin lent Mr and Mrs Commens the amount of \$500,000 which was repayable on demand. While there was no discussion between the parties about when the sum of \$500,000 was to be repaid, the law implies that in such circumstances the amount of \$500,000 would be repayable on demand.

[54] Mr Commens denied that he signed the acknowledgement of loan dated 20 December 2001. However, having looked at the various specimen signatures that Mr Commens' acknowledged were his signatures and having considered the expert report of Ms Novotny and her oral evidence, I am satisfied that Mr Commens did sign the Acknowledgement of Loan. Mr Commens did not stand up well to the cross-examination of Mr Maurice QC about this issue. At times, Mr Commens went very close to conceding that it was his signature. When asked if the document could have come into existence in 2001, Mr Commens stated that it could have come into existence at any time. When asked, if the document was brought into

existence in 2001, it would have been highly probable that it would have been put in front of him and he would have been asked to sign it, Mr Commens answered it might have or it could have been but he did not know. When asked by Mr Maurice QC to state his reasons as to why he maintained that the acknowledgement of loan was a ‘dodgy’ document, Mr Commens almost forgot to mention his allegation that the document did not contain his signature.

[55] In the middle of September 2002 Mrs Commens telephoned Mrs Sherwin to ask for a further loan of \$70,000. The substance of the telephone conversation was as follows:

Mrs Commens: Mum, we need another \$70,000 to pay for planting crops, wages and other bits and pieces. We can’t pay ourselves.

Mrs Sherwin: We can’t keep lending you both money, especially when you are not paying us back. I will have to check with Dad.

[56] I find that in the course of the above conversation Mrs Commens was acting as Mr Commens’ partner in the farming business.

[57] After the above telephone conversation, Mrs Sherwin spoke to Mr Sherwin and they agreed to lend Mr and Mrs Commens the further amount of \$70,000. On 20 September 2002 Mrs Sherwin telephoned Mrs Commens and they had a conversation the substance of which was as follows:

Mrs Sherwin: Dad has agreed to loan you both another \$70,000 but the money has to be repaid.

Mrs Commens: We will pay you back.

[58] I find that in the course of the above conversation Mrs Commens was acting as Mr Commens' partner in the farming business.

[59] On 20 September 2002 Mr Sherwin arranged for \$70,000 to be transferred from his Commonwealth Bank account to Mr and Mrs Commens' bank account. I find that on 20 September 2002 Mr and Mrs Sherwin lent Mr and Mrs Commens the amount of \$70,000 which was repayable on demand. While there was no discussion between the parties about when the sum of \$70,000 was to be repaid, the law implies that in such circumstances the amount of \$70,000 was repayable on demand.

[60] On 30 November 2002 Mr and Mrs Commens sold The Glen. On 15 June 2005 Mr and Mrs Commens sold Lonesome Dove and Success. Following the sale of Lonesome Dove and Success and the payment of the debt which was owed to the banks, Mr and Mrs Commens purchased three new properties. The properties were situated at Corey Street, Speeds Road and Sussex Drive. The Corey Street property was a town block with a dwelling on it in which Mr and Mrs Commens lived for a period of time. The Speeds Road property is a 220 acre grazing block that was purchased for \$300,000. The Sussex Drive property is a one acre block. Mr Commens also made a loan to Mark and Andrea Talbot of \$140,000 and a separate loan to Mrs Talbot of \$20,000. Mr and Mrs Commens were also left with \$750,000 from

the proceeds of the sale of Lonesome Dove and Success which was placed in their bank account.

[61] In the middle of 2004, Mrs Sherwin had a conversation with Mr Commens at the Sheraton Hotel in Brisbane. During the conversation Mrs Sherwin told Mr Commens that he would have to start paying some of the borrowed money back to Mr and Mrs Sherwin. After Mrs Sherwin made this statement Mr Commens left the room in which they were sitting at the hotel.

[62] After the sale of Lonesome Dove and Success, Mrs Sherwin spoke to Mrs Commens about the unpaid loans. The substance of the conversation was as follows:

Mrs Sherwin: Rusty, you have money now. Go to the bank and get a cheque for \$1 million and pay us back.

Mrs Commens: Mum, if I do that, Craig has threatened me that he will not help me with the children – he said he won't lift a finger to help me with the children. I can't do it.

[63] A few weeks after the above conversation, Mrs Sherwin again spoke to Mrs Commens about the unpaid loans. The substance of the conversation was as follows:

Mrs Sherwin: Rusty can you get me a cheque for \$500,000. You know I had to beg your father for that money to help you both out.

Mrs Commens: Mum, Craig told me that we don't owe you any fucking money. I can't get you that cheque.

[64] Mrs Sherwin made the demands of Mrs Commens for the repayment of the loans when she believed Mr and Mrs Commens were in a position to repay the outstanding amounts.

[65] Despite the demands made by Mrs Sherwin, Mr and Mrs Commens have refused to pay and have not repaid the loan amounts that are the subject of this proceeding. As a result, on 19 April 2007 the Writ was filed in the proceeding. I accept Mr Maurice's submission that the reason for the delay in the commencement of the proceeding was that Mr and Mrs Sherwin were reluctant to commence a legal proceeding against their daughter and they were concerned about the effect that any legal proceeding would have on the relationship between Mr and Mrs Commens. However, in April 2007 Mrs Sherwin was told by Mrs Commens that her relationship with Mr Commens had broken down and she was going to separate from Mr Commens. Mr Commens has not suggested that the loans were forgiven after the conversations referred to in pars [61], [62] and [63] above.

[66] I find that amount of \$1,120,000 is due and payable by Mr Commens to Mr and Mrs Sherwin.

### **Interest**

[67] Mr and Mrs Sherwin have claimed interest since 1 July 2005, which date approximates to the date that Mrs Sherwin made the demand for repayment that is referred to in par [63] above, at the rate of 10.5 per cent per annum. The rate of interest of 10.5 per cent per annum is the rate of interest that is

applicable on a judgment of the Court under the Supreme Court Rules. The Supreme Court Rules provide that the rate of interest payable on a judgment of the Court is the rate of interest specified in the Federal Court Rules. Rule 35(8) of the Federal Court Rules specifies that a judgment debt carries interest at a rate of 10.5 percent per year.

[68] In support of the proposition that the rate of 10.5 percent per year should be the applicable rate of interest up to judgment, Mr Maurice QC relied on the following authorities: *Kalls Enterprises Pty Ltd (In Liquidation) and Ors v Baloglow and Anor (No 3)*<sup>3</sup>; *Elsinora Global Ltd v Deputy Commissioner of Taxation*<sup>4</sup>; *Hexiva Pty Limited and Ors v Lederer and Ors (2)*<sup>5</sup>. In accordance with those authorities I accept that an interest rate of 10.5 per cent is a fair and reasonable rate of interest. There was no evidence before the Court to suggest that a rate of interest of 10.5 percent per year was penal or non-commercial.

[69] Applying a rate of interest of 10.5 per cent per annum from 1 July 2005, Mr Maurice QC calculated the amount of interest claimed by Mr and Mrs Sherwin up to 21 July 2008 as follows:

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<sup>3</sup> [2007] NSWCA 298

<sup>4</sup> (2006) 155 FCR 413

<sup>5</sup> [2007] NSWSC 49

Date of Loan	Date Interest Runs	Date of Award	Loan Amount	FC Interest Rate	Total Days Unpaid	Total Interest
23/12/1999	1/07/2005	21/07/2008	\$500,0000	10.50%	1116	\$160,520.55
28/12/2000	1/07/2005	21/07/2008	\$50,000	10.50%	1116	\$16,052.05
19/12/2001	1/07/2005	21/07/2008	\$500,000	10.50%	1116	\$160,520.55
20/09/2002	1/07/2005	21/07/2005	\$70,000	10.50%	1116	\$22472.88
						\$359,566.03

[70] The above calculations result in a daily amount of interest of \$322.19 being payable on the total amount due and payable of \$1,120,000.

[71] In my opinion Mr Commens should not be required to pay interest for the whole of the period from 1 July 2005 to 30 October 2008. The loans were gratuitous loans and Mr and Mrs Sherwin deliberately decided not to commence recovery proceedings until they were satisfied that the relationship between Mr and Mrs Commens had irretrievably broken down which was in or about April 2007. In my opinion interest should only run from the date that the Writ was filed in the proceeding which was on 19 April 2007 and I exercise the Court's discretion under s 84 of the Supreme Court Act as to the awarding of interest accordingly.

[72] I determine that Mr Commens should pay Mr and Mrs Sherwin an amount of interest of \$180,104. I have calculated that amount by multiplying the daily amount of interest of \$322.19 by 559 days being the number of days between 19 April 2007 and 30 October 2008.

**Orders**

[73] I make the following order:

There shall be judgment for the plaintiffs against Mr Commens for the sum of \$1,120,000 plus interest of \$180,104 being a total amount of \$1,300,104.

[74] I will hear the parties further as to costs.

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