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E-alert: A gift or a loan? The perils of giving money to family members

By ,

The saying “never mix family and money” rang true in the recent Queensland Court of Appeal decision *Berghan & Anor v Berghan*.[1] In this case, elderly parents were successful in claiming $286,471.09 with interest from their son, who refused to pay back an alleged loan. The son, at first instance in the District Court was successful in arguing that the monies were given to him by his parents as a gift. However, the Court of Appeal held that the amounts given to the son were loans, which, objectively the parties intended would be repaid.

Background of the Transactions

Throughout 2009, the son’s company was under significant financial stress. After the son approached his parents, his father caused $98,000 to be transferred to the son. Soon after, the son continued to request money. The father complied and caused further transfers of money to the son.

Then in late 2012, when the son was struggling to pay his bills due to an injury, the son asked to borrow his father’s credit card and incurred $13,471.09 of debt.

The evidence accepted by the trial judge[2]was that:

- Before the first transfer of money in 2009 a conversation took place whereby the money was described as a “loan” which was agreed to be repaid.
- Each of the 12 transfers thereafter were preceded by similar conversations, whereby an undertaking was taken by the son to repay any money transferred in his favour.
- The use of the credit card was on the basis that all expenses incurred would be repaid.

The Decision at First Instance

While the trial judge accepted this evidence, his Honour found that the Plaintiff parents had failed to discharge the onus proving that there was an intention by the parties to create a legally binding agreement for the loans. His Honour concluded this on the grounds that:[3]

- The son's statement to repay the loan was premised on the ground that he would also look after the parents in old age. His Honour concluded this general statement was a moral obligation which was also encompassed in the obligation to repay the loan, as opposed to a legally binding requirement.
- Because the parents had not maintained a ledger of the transfers as alleged loans, this behaviour indicated that the parents did not intend to have the money repaid.
- The parents in making the payments to the son, for the benefit of the company, were simply discharging their maternal obligations because their daughter was an employee at the son's company. The transfers were therefore of a charitable nature, as the motive of the parents was to ensure that the son's company did not fail, so in turn their daughter could retain her job.
- The parents allowed their son to use the credit card when he was injured and impecunious. These circumstances were therefore of a charitable nature rather than as part of any intention to form a legally binding agreement.

The Decision on Appeal

On Appeal the Court[4] determined the issue to be whether both parties at the time of the transactions had objectively demonstrated that the payments were made by way of a loan agreement.[5] Based upon the evidence accepted by the trial judge, the Court determined:

- The circumstances that no ledger had been kept by the parents of the money owed by the son could not be a fact which counted against an agreement for a loan forming. The parents would not have had in their mind that one day they would be required to formally prove the payments in a court against their own son.[6]
- The lengthy period it took the parents to make a demand for the money should not count against their assertion that a breach of contract existed. The Court held post contractual conduct cannot be taken into account when interpreting the terms of a contract.[7]
- The *motive* the parents had in transferring their son the money, be it "charitable" or otherwise, was not relevant. Rather, of relevance was what the parties' objective *intentions* were when making the transactions.[8]

The Court set aside the decision of the District Court. The Court observed that once it was determined on the evidence that the monies were paid with an understanding that they would be repaid, that it was an "inescapable conclusion" that the transactions were a contract of loan.[9] The Court gave judgment in favour of the parents for all the transactions and for the credit card debt in the sum of $286,471.09, with interest.

Points for Consideration

This case offers a number of timely reminders:

Firstly, the decision highlights the perils which may arise when informal transactions between family members occur.

Secondly, it gives rise to the issue of elder abuse, which, with Australia's ageing population, has become a fast growing issue.[10]

Thirdly, parties will be legally bound to an agreement because of their *intention* to form contractual relations, not because of their *motivation*. This is so even if the intention arises through a domestic or social context.

Family members entering into financial agreements (such as loans or guarantees for example) with other relatives should always firstly seek legal advice and have such arrangements documented.

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[1] [2017] QCA 236.
[2] *Berghan & Anor v Berghan* [2017] QCA 236, [2]-[6] and [22].
[3] *Berghan & Anor v Berghan*[2017] QCA 236, [23].
[4] Sofronoff P and Philippides JA and Boddice J.
[5] *Berghan & Anor v Berghan* [2017] QCA 236, [24].
[6] *Berghan & Anor v Berghan*[2017] QCA 236, [25].

[7] *Berghan & Anor v Berghan*[2017] QCA 236, [26]. See particularly: *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570.
[8] *Berghan & Anor v Berghan*[2017] QCA 236, [27].
[9] *Berghan & Anor v Berghan* [2017] QCA 236, [31].
[10] Although cases involving elder abuse are not new to Australian courts, see for example: *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

Should you wish to discuss any matters arising out of this article, please contact the author:

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