

CITATION: [2008] NTMC 052

PARTIES: CRAIG CANT

v

BRYAN CLARK

TITLE OF COURT: Local Court

JURISDICTION: Civil

FILE NO(s): 20607984

DELIVERED ON: 19.8.08

DELIVERED AT: Darwin

HEARING DATE(s): 26.6.08

JUDGMENT OF: D TRIGG SM

CATCHWORDS:

Contract – loan of monies
- request for repayment

REPRESENTATION:

Counsel:

Plaintiff: Mr Welfare
Defendant: Self

Solicitors:

Plaintiff: Robert Welfare
Defendant: Unrepresented

Judgment category classification: B

Judgment ID number: [2008] NTMC 052

Number of paragraphs: 90

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

No. 20607984

[2008] NTMC 052

BETWEEN:

CRAIG CANT
Plaintiff

AND:

BRYAN CLARK
Defendant

REASONS FOR DECISION

(Delivered 19 August 2008)

Mr TRIGG SM:

1. This proceeding commenced on the 16th day of March 2006, when the plaintiff filed a Statement of Claim seeking \$20,000 plus interest and costs. This pleading was prepared by his then solicitor Anthony Buckland, and was in the following terms:

1. On or about the 1 January 1999 the defendant requested the loan of monies from the plaintiff.

Particulars

- (a) The defendant was a bookmaker engaged in the making of book at the Fannie Bay Racecourse.
- (b) During the course of that day the plaintiff had a substantial win on a horse named Greta Hall.
- (c) The defendant approached the plaintiff, from whom he had previously obtained funds, and asked if he could borrow "as much as you can get", as he had made some substantial losses and needed the money to keep his business afloat.

- (d) The money the plaintiff had won was not all his own being one third each of his own, his son's and his fathers. The plaintiff told the defendant to come to his address the next day and he would "see what he could do".
 - (e) The plaintiff gave the defendant his address.
2. The plaintiff advanced \$20,000.00 in cash to the defendant.

Particulars

- (a) On the 2nd of January 1999 the defendant came to the address of the plaintiff and they discussed the request in front of two other people, the plaintiff's son Vaun Cant and one Vicki Taylor.
 - (b) Then plaintiff advanced \$20,000.00 in cash to the defendant. The witnesses were present when this occurred.
 - (c) The defendant was highly appreciative and said to the plaintiff that he would "fix you (the plaintiff) up, look after you (the plaintiff) for helping me out".
 - (d) The defendant also told the plaintiff that he was the his last resort.
3. A few days after this occurred the plaintiff was imprisoned.
4. Three weeks after the plaintiff was imprisoned the defendant came to visit the plaintiff. The money was discussed and the plaintiff told the defendant that he "may as well keep the money and invest it" for the plaintiff so that he would have a "bit more till I get out".
5. Some years later the plaintiff wrote to the defendant and asked for his money to be returned. He sent some letters to the defendant. There was no reply.
6. On or about 2005 the defendant visited the plaintiff in prison. The plaintiff asked for the money and the defendant said that he had given it to one Eddie Loh, a person known to the plaintiff.

7. The defendant had no permission or authority to deal with the plaintiff's monies in this way.
8. In any event the plaintiff contacted Eddie Loh who advised that this had not occurred and that the defendant had misinformed the plaintiff.
9. On or about a date unknown the defendant sold his bookmaking business. He was required to refund monies of all account holders. The defendant did not make any payment to the plaintiff.
10. The defendant has failed to repay these monies in part or at all to the plaintiff.
11. On or about the 1st February 2006 the plaintiff, by way of his solicitor, sent a letter of demand to the defendant. The defendant did not respond and has failed to repay the said monies.
12. On or about the 13th of March 2006 Mr Mark Pettifer a friend of the plaintiff approached the defendant at his residence at 17 Stedcombe Avenue Alawa. The defendant admitted that he had received the twenty thousand dollars \$20,000.00 from the plaintiff. The defendant also refused to repay the plaintiff.
13. And the plaintiff seeks:
 - (a) repayment in full of the amount taken, together with;
 - (b) interest at the rate applied by the Supreme Court from time to time for the duration of the period the monies have been held by the defendant and;
 - (c) legal costs including disbursement incurred in these proceedings.

2. It is apparent from paragraphs 1 and 2 of the Statement of Claim that it was not alleged by the plaintiff that the initial agreement concerning the alleged loan/advance:

- stipulated any point of time by which the money was to be repaid;

- stipulated any interest that was to attach to the money;
 - did not explain how the defendant was going to “fix (the plaintiff) up” for helping him out, or when; and
 - did not explain how the defendant was going to “look after (the plaintiff)” for helping him out, or when.
3. When the trial herein proceeded before me on 26 June 2008 the plaintiff did not call either of the persons referred to in paragraph 2(a) of his Statement of Claim. He gave an explanation for this, but (as will appear later in these reasons) as events transpired their evidence would have been non-contentious.
 4. Further, at the trial on 26 June 2008 the plaintiff did not call the “Mark Pettifer” referred to in paragraph 12 of his Statement of Claim. No explanation was given for this failure.
 5. The defendant filed a hand-written Defence on the 18th day of April 2006, which was in the following terms:

1 Jan 1999 ??

2nd Jan 1999 ??

Three weeks after imprisonment, I came to visit? (rubbish) (prison records will show that to be false).

My first visit to discuss this was 3 – 4 years after his imprisonment. A guy tapped me on shoulder at Football at MC Oval and asked me to visit Craig in Berrimah. I did and everything was fine – his parting talk was of Eddie Loh not paying him. (I was asked to write to Eddie c/- Silverwater Correctional Facility). I wrote note but failed to send it. I think I visited Cant twice??

Further account statement being obtained from new owners of Sportsbet.

6. This initial Defence was clearly, in my view, a most unsatisfactory pleading, and did not adequately address the matters pleaded in the plaintiff's Statement of Claim. In particular he says nothing about whether there was a loan/advance of \$20,000 as alleged. What he does plead is that:
- It is "rubbish" and "false" that the defendant visited the plaintiff three weeks after the plaintiff was imprisoned;
 - The defendant's "first visit to discuss this was 3-4 years after his imprisonment";
 - The plaintiff told him about "Eddie Loh not paying him"; and
 - The plaintiff asked the defendant "to write to Eddie c/- Silverwater Correctional Facility", which he did but never sent.
7. At the hearing herein the plaintiff produced and tendered (by consent) offender visit records from the Berrimah prison. These records became ExP1. These records clearly show that the defendant's assertions (as noted in the first two bullet points in the preceding paragraph) are not correct. It is clear, and I find, that the defendant visited the plaintiff in prison on 16 February 1999, 11 April 1999, 10 August 1999 and 1 December 2004.
8. On the 10th day of May 2006 the defendant filed an Amended Defence, which was prepared by his then solicitor David Story. That pleading was as follows:
1. The defendant denies the allegation contained in paragraph 1 of the plaintiff Statement of Claim (hereinafter called "the claim"). The defendant admits particular a) of the particular of paragraph 1 but he denies paragraphs b) to e) of the said particulars.
 2. The defendant denies the allegations contained in paragraph 2 of the claim and the particulars alleged.

3. The defendant does not admit nor deny the allegation contained in paragraph 3 of the plaintiff's claim and says in any event it is irrelevant.
4. The defendant denies the allegations contained in paragraph 4 of the plaintiff's claim.
5. The defendant admits the allegations contained in paragraph 5 of the plaintiff's claim in so far as he acknowledges receiving written demands from the plaintiff.
6. The defendant denies the allegations contained in paragraph 6 of the plaintiff's claim.
7. The defendant does not plead to paragraph 7 of the plaintiff's claim.
8. The defendant cannot plead to paragraph 8 of the plaintiff's claim.
9. The defendant admits the allegations contained in paragraph 9 of the plaintiff's claim insofar as it admits that his bookmaking business was sold but denies that he was required to make any payment to the plaintiff although he was indebted in any way to the plaintiff.
10. The defendant denies the allegations contained in paragraph 10 of the claim and ***says that at no time was he indebted to the plaintiff.***
11. The defendant admits the allegations contained in paragraph 11 of the claim to the extent that he acknowledges that he received a letter of demand from the plaintiff's solicitor and that he did not respond. The ***defendant denies that he is indebted to the plaintiff or has ever been so indebted.***
12. The defendant denies the allegations contained in paragraph 12 of claim.
13. The defendant denies that the plaintiff is entitled to the relief sought in paragraph 13 of the claim or any other relief. (***bold italic*** emphasis added)

9. It is clear from the matters in paragraphs 10 and 11 of the Amended Defence (as highlighted in ***bold italic***) that the defendant was denying not only that he was not currently indebted to the plaintiff but further that he had ever been indebted to the plaintiff as alleged. In my view, that is the only reasonable conclusion that can be drawn from the words in paragraphs 10 and 11.
10. In my view, the effect of this pleading was that the defendant was denying that there was ever any loan/advance of \$20,000 (or any other amount) as alleged. If (as will become relevant later in these reasons) it was:
 - Admitted by the defendant that there was a loan/advance, but the amount of \$20,000 was in dispute; or
 - Admitted that there was a loan/advance of \$20,000, but the date of the loan was in dispute; or
 - Admitted that there was a loan/advance of \$20,000 (or some other amount) but it had been repaid in full;

then I would have expected a properly prepared Amended Defence (prepared on full instructions) to have expressly pleaded these matters. It clearly did not do so.

11. On the 7th day of June 2006 the Court gave leave to the plaintiff to file an Amended Statement of Claim within 21 days. No amended pleading was filed by the plaintiff, and the matter was set for a one day hearing on 17 January 2007.
12. On the 17th day of January 2007 the plaintiff appeared in person (and in custody as he continued to be a serving prisoner) and the defendant was represented by Mr Story. The Court file does not disclose why the hearing did not proceed on that day. The hearing

was adjourned to 25 June 2007, and the plaintiff was again given leave to file and serve an Amended Statement of Claim (which was to be done on or before 28 February 2007).

13. On the 28th day of February 2007 an Amended Statement of Claim was filed by the plaintiff. This pleading was prepared by the plaintiff's current solicitor, and was in the following terms:

Initial Loan agreement

- (1) On or about the 1 January 1999 the defendant requested the loan of monies from the plaintiff.

Particulars

- (a) The defendant was a bookmaker engaged in the making of book at the Fannie Bay Racecourse.
- (b) During the course of that day the plaintiff had a substantial win on a horse named Greta Hall.
- (c) The defendant approached the plaintiff, from whom he had previously obtained funds, and asked if he could borrow "as much as you can get", as he had made some substantial losses and needed the money to keep his business afloat.
- (d) The money the plaintiff had won was not all his own being one ~~third~~ each of **fifth** his own, and one ~~third~~ **two fifths** his son's and **two fifths** his fathers.
- (e) The plaintiff told the defendant to come to his address the next day and he would 'see what he could do'.
- (f) The plaintiff gave the defendant his address.
- (g) Later that day the plaintiff telephoned his father and his son and obtained their authority to loan their respective winnings mentioned in paragraph (1)(d) of this Statement of Claim to the defendant.**

(2) The plaintiff advanced \$20,000.00 in cash to the defendant.

Particulars

- (a) On the 2nd day of January 1999 the defendant came to the address of the plaintiff and they discussed the request in front of two other people, the plaintiff's son Vaun Cant and one Vicki Taylor.
- (b) The plaintiff advanced \$20,000.00 in cash to the defendant ("**the initial loan**"). The witnesses were present when this occurred.
- (c) The defendant was highly appreciative and said to the plaintiff that he would "fix you (the plaintiff) up, look after you (the plaintiff) for helping me out".
- (d) The defendant also told the plaintiff that he was his last resort.
- (e) **The initial loan to the defendant was made by the plaintiff on his own behalf and also on behalf of his father and his son.**

New loan agreement

- (3) A few days after this occurred the plaintiff was imprisoned.
- (4) Three ~~Three~~ **Six** weeks after the plaintiff was imprisoned the defendant came to visit the plaintiff. The money was discussed and the plaintiff told the defendant that he "may as well keep the money and invest it" for the plaintiff so that he would have a "bit more till **when** I get out".
 - (a) **The plaintiff and the defendant agreed that the defendant would repay the loan amount of \$20,000 plus 10% interest to date when the plaintiff demanded repayment, or when the defendant was released from gaol ("the new loan agreement")**
 - (b) **The new loan agreement was entered into by the plaintiff on his own behalf and also on behalf of his farther and his son**

- (5) Some years later the plaintiff wrote to the defendant and asked for his money to be returned. He sent some letters to the defendant. There was no reply.
- (6) On or about 2005 the defendant visited the plaintiff in prison. The plaintiff asked for the money and the defendant said that he had given it to one Eddie Loh, a person known to the plaintiff.
- (7) The defendant had no permission or authority to deal with the plaintiff's monies in this way.
- (8) In any event the plaintiff contacted Eddie Loh who advised that this had not occurred and that the defendant had misinformed the plaintiff.
- (9) On or about a date unknown the defendant sold his bookmaking business. He was required to refund monies of all account holders. The defendant did not make any payment to the plaintiff.
- (10) The defendant has failed to repay these monies in part or at all to the plaintiff.
- (11) On or about the 1st February 2006 the plaintiff, by way of his solicitor, sent a letter of demand to the defendant. The defendant did not respond and has failed to repay the said monies.
- (12) On or about 13 March 2006 Mr Mark Pettifer a friend of the plaintiff approached the defendant at his residence at 17 Stedcombe Avenue Alawa. The defendant admitted that he had received the twenty thousand dollars \$20,000.00 from the plaintiff. The defendant also refused to repay the plaintiff.
- (13) And the plaintiff seeks:
 - (a) repayment in full of the amount taken, **and interest on the amount as agreed by the plaintiff and the defendant** together with;
 - (b) interest at the rate applied by the Supreme Court from time to time for the duration of the period the monies have been held by the defendant **following the plaintiff's demand for repayment** and;

(c) legal costs including disbursements incurred in these proceedings.

14. I note that this was the first time that it was suggested in any pleading by the plaintiff that there had been any discussion about interest, let alone any amount. It is difficult to imagine that the plaintiff would remember this for the first time in February 2007 (almost 7 years after the oral agreement was allegedly entered into). No explanation was offered in evidence, as to why the plaintiff only remembered this alleged agreement about interest some 11 months after the original Statement of claim was filed. Also, somewhat surprisingly, the alleged agreement was only for interest to commence to run from the date of demand for repayment, or the plaintiff's release from gaol, not from the date of the loan/advance itself. Accordingly, on the plaintiff's own case (as pleaded at this time) the defendant had interest free use of the money until the unspecified date ("some years later") referred to in paragraph (5) of the pleading.
15. Further, no consideration was pleaded for this alleged new loan agreement.
16. On the 15th day of June 2007 Mr Story filed a Notice of Ceasing to Act and gave the defendant's last known address as "c/- Berrimah prison".
17. On the 21st day of June 2007 the plaintiff filed an application seeking that the hearing date of 25 June 2007 be vacated, and again seeking leave to file a further Amended Statement of Claim. In support of the Application Mr Matthews affirmed an affidavit on 21 June 2007 stating (in part) that the defendant was in Melbourne and unable to attend for the hearing. On 22 June 2007 the Court vacated the hearing date of 25 June 2007.

18. The defendant failed to attend a directions hearing on 11 July 2007 and 23 July 2007, so the plaintiff was given leave to proceed as if a Defence had not been filed.
19. On 24 August 2007 the defendant applied to have that latter Order set aside. In support of that Application he filed an affidavit of himself that he swore on 17 August 2007. In that affidavit he stated (in part):
 - I intend to defend the claim against me as it is merely a load of rubbish and contains many lies and fabrications of the truth;
 - The particulars of my defence are as per my previous Defence 10/5/2006;
 - The main thrust of my Defence is that Mr Cant has no evidence whatsoever of his claim;
 - It is true that we often owed each other sums of money however it is pure fabrication that I ever owed him monies that were not paid back;
 - He gave me oral approval for a Mr Edwin Loh to operate his betting account and do a series of business acts on his behalf;
 - Computer records are being sought to verify that Mr Loh collected all monies owed when the business Sportsbet was sold;
 - There is no debt between myself and Mr Cant.
20. This affidavit didn't make the defendant's position clear.
21. On 3 September 2007 the Court Ordered that the Order of 23 July 2007 (that the plaintiff was given leave to proceed as if a Defence had not been filed) be set aside. Further it was Ordered that the defendant file and serve an Amended Defence within 14 days.

22. The defendant filed a Notice of Amended Defence on 2 October 2007. This pleading stated as follows:

1. The defendant denies the allegation contained in paragraph 1 of the plaintiff Statement of Claim (hereinafter called "the claim"). The defendant admits particular a) of the particular of paragraph 1 but he denies paragraphs b) to e) of the said particulars. ***The defendant says further that the plaintiff has not provided authorisation from his father and brother to bring these proceedings on his behalf.***
2. The defendant denies the allegations contained in paragraph 2 of the claim and the particulars alleged.
3. The defendant does not admit nor deny the allegation contained in paragraph 3 of the plaintiff's claim and says in any event it is irrelevant.
4. The defendant denies the allegations contained in paragraph 4 of the plaintiff's claim.
5. The defendant ***denies*** the allegations contained in paragraph 5 of the plaintiff's claim insofar as he acknowledges receiving written demands from the plaintiff.
6. The defendant denies the allegations contained in paragraph 6 of the plaintiff's claim.
7. The defendant does not plead to paragraph 7 of the plaintiff's claim.
8. The defendant cannot plead to paragraph 8 of the plaintiff's claim.
9. The defendant admits the allegations contained in paragraph 9 of the plaintiff's claim insofar as it admits that his bookmaking business was sold but denies that he was required to make any payment to the plaintiff although he was indebted in any way to the plaintiff.
10. The defendant denies the allegations contained in paragraph 10 of the claim and says that at no time was he indebted to the plaintiff.

11. The defendant admits the allegations contained in paragraph 11 of the claim to the extent that he acknowledges that he received a letter of demand from the plaintiff's solicitor and that he did not respond. The defendant denies that he is indebted to the plaintiff or has ever been so indebted.
12. The defendant denies the allegations contained in paragraph 12 of the claim.
13. The defendant denies that the plaintiff is entitled to the relief sought in paragraph 13 of the claim or any other relief.
14. ***The plaintiff is statute barred from commencing this proceeding.***

23. This pleading is effectively identical to the Amended Defence filed on 10 May 2006 (even continuing the presumably incorrect use of the word "although" in paragraph 9), except for the matters that I have typed in ***bold italics***. In paragraph 5 the only change is to replace "admits" with "denies", but this leaves the paragraph in a state of grammatical confusion.
24. On 10 December 2007 the preliminary question as to whether the plaintiff's claim is statute barred as being out of time (as raised in paragraph 14 of the Notice of Amended Defence) was set for hearing on 15 February 2008. The hearing proceeded before me on that day. In the course of that hearing the defendant agreed that the first demand by the plaintiff for money was in 2005, and accordingly I ruled that section 12 of the Limitation Act was not a bar to this claim proceeding. I therefore ordered that paragraph 14 of the Notice of Amended Defence be struck out. At the same time I further Ordered that the plaintiff file and serve an Amended Statement of Claim giving particulars of the alleged advance referred to in paragraph (2) of the Amended Statement of Claim.

25. At the preliminary hearing on 15 February 2008 the defendant made the following statements in court:

- The visits I made to prison, we discussed his account, because he held a betting account with my company, and he passed on knowledge to me that another guy would take over his account, and that guy duly arrived in Darwin from Sydney and began conducting business on his account with my company, Sportsbet, which was operating from Fannie Bay Racecourse at the time. (T11)
- The visit I made in December 2004, there was an inkling there that in the meeting we had there that he hadn't received the money from this fellow who had taken over his account - this friend of his - and he asked me to write a letter to this guy who was in the Silverwater Correctional Facility in Sydney - he asked me to write a letter to him to tell that I had been talking to Craig and that the money hadn't been paid, but - - -

HIS HONOUR: Was that something to do with the \$20 000 or some other amount?

MR CLARK: The amount that he was talking about then was \$20 000, yes, but I had no idea what he was talking about because it was all jumbled up. There were lots of different times we loaned money off each other, you know. I loaned off him or he loaned off me at different times. We were gamblers. You know, we were at the races together. (T11)

- Further, the defendant denies there was any money owing' - that's myself. (T12)
- MR CLARK: I'm saying that Craig gave me instructions that Edwin Lo would operate his account from now on because he was his partner and that he duly did so for the next few months, prior to the business being sold late in 1999. (T12)
- MR CLARK: I don't know enough about the law to say anything. It just seems ridiculous to me that this is - I mean it's six years from the time he reckons he gave me the loan and then he's coming out with it six years later, all of a sudden I owe him money. (T15)

26. In my view, it follows from what the defendant was saying on 15 February 2008 that it was when he visited the plaintiff in prison that "he passed on knowledge to me that another guy would take over his

account". However, this is contrary to the defendant's evidence before me at the final hearing.

27. On 7 March 2008 the plaintiff filed a Further Amended Statement of Claim in effectively the same terms as the previous pleading, save that paragraph (2)(c) stated as follows:

The initial loan was agreed on the basis that 10% compound interest was payable until the money was all repaid and the defendant's house at 17 Stedcombe Avenue Alawa was pledged as collateral and the loan was payable on demand.

28. For the first time (and in the third attempt at a Statement of Claim) we have an allegation that there was any agreement about interest at the time of the original loan/advance. Further, rather than simple interest it is alleged that compound interest was agreed. It is difficult to imagine that the plaintiff would remember this for the first time in March 2008 (over 8 years after the oral agreement was allegedly entered into). No explanation was offered in evidence, as to why the plaintiff didn't remember this alleged agreement about compound interest in February 2007 when an agreement about interest was first pleaded (being some 11 months after the original Statement of claim was filed not alleging any agreement about any interest).
29. However, it seems to follow from paragraph (4) of the plaintiff's Further Amended Statement of Claim that the original agreement (as pleaded in paragraphs 2(b) and (c)) was varied by subsequent agreement (as pleaded in paragraph (4)), but what the consideration for this variation was (if any) is unclear both on the pleadings and the evidence.
30. At the hearing herein, the plaintiff gave evidence by video link from interstate where he continues to be a serving prisoner. He was the only witness called in his case. The defendant gave evidence and also

called Stacey Harris (who had been employed in the defendant's business as a bookkeeper/financial controller). In considering the evidence I will try and deal with events in chronological order.

31. The defendant conducted a betting business under the name of "sportsbet" from premises at the Fannie Bay racecourse. He appears to have taken bets primarily on sporting events other than racing, but did take some horse racing bets.
32. The plaintiff appears to have had an interest in gambling. What other interests he had, or what employment he ever had I was not informed.
33. At some time prior to June of 1997 the plaintiff had a betting account with the defendant. The plaintiff said that he came to Darwin in June 1997, and went to the defendant's premises to get the remaining funds out of his account. He said that he had changed bookmakers to a person named Mark Reid, and "didn't need to bet with Mr Clark anymore". It was the plaintiff's evidence that he "never had a bet with him (the defendant) since June 1997". However, in later evidence the plaintiff said in cross-examination at T52:

Okay. The question I'm asking you basically about the account is, your account with Sportsbet was under your name in Craig Cant's name, right?---That's correct.

And there was money in the account? In other words, you had credit, you had money in there to bet with?

HIS HONOUR: At what time?---I had a \$10,000 credit with you so there was no money (inaudible) unless I wanted to bet the \$10,000 if I needed to, .but I hadn't had a bet with you since July 1997.

MR CLARK: Okay. But you did have a betting account there and it operated with money it, correct? You had a betting account at Sportsbet?---I had a betting account at Sportsbet.

34. From this evidence it does not appear that the plaintiff did “get the remaining funds out of his account”, but rather he kept \$10,000 in the account. If this is truly the case, the reason for this was not explained. At T59 the evidence from the plaintiff remained uncertain when he gave the following evidence in cross-examination:

You were in Darwin in 1998. Most of 1998 you were in Darwin?---That’s right. I was in Darwin on February to - February till September. From September to November I was in Sydney and then I came back to Darwin.

Okay. So all those times you were in Darwin and you had a betting account at Sportsbet, correct?---I believe so. I - - -

And you had funds in that account?---It would have been a small amount because I remember getting funds off - coming back to Darwin in June '97 to get the funds off you.

Sorry?---I wasn’t betting with you because I was getting better deals from other bookmakers.

You’re talking a bit fast, I can’t understand?---I was not betting with you at the time because I was getting better deals from other bookmakers.

35. The plaintiff went on to say: “Then in September 1998 I was living at Randwick in Sydney and I received a phone call from Mr Clark saying how he needed money and he needed to keep his business afloat and could I help him. I’d just won \$7000 from Mark Reid for bookmakers operating at Fannie Bay Booking (?) and I told him he could have the \$7000 that I’d just won. He asked Matthew Bonson to go and pick the money up because he didn’t want Mr Reid knowing his financial situation.” (T24). The plaintiff said this transaction was completed.
36. The plaintiff said that the same thing happened later and he arranged for Bonson to collect a further \$7000 from Mr Reid.
37. The defendant gave evidence about some loans from the plaintiff in general terms at T63 as follows:

And I believe by the time '98, '99 Christmas when I first borrowed money off Mr Cant, I believe that that was probably towards the end of '98 when he was living in Darwin. And there were quite a few transactions between myself and Mr Cant. I have no recollection of amounts or payments made back and things like that in relation to the earlier loan. I was under a bit of financial pressure in my business and the business was up for sale and a cash flow problem had been created by a lot of money being owed to the company. So we were in a bit of financial trouble. But we struggled through and sold the business in August '99.

38. The defendant was apparently still in need of further money, and the plaintiff said that he introduced the defendant to an Edwin Loh (who apparently was another gambler) over the telephone, as he thought Mr Loh might be able to assist with some money.
39. In cross-examination the defendant put the following matters to the plaintiff (at T45-46) in relation to Loh:

Mr Lowe, Mr Edwin Lowe, what is his relationship to you?---An acquaintance.

An acquaintance?---Yes.

Would it be correct to say that you introduced him to me as your business partner? Would that be right?---No, because I've never done business - I've never had a business with him so it wouldn't be correct.

I beg your pardon?---I don't have a business with him, so it wouldn't be correct. I used to be a commission agent at the races and he used to bet all the time.

And you didn't do any business with him?---I might have put a bet on for him once or twice but I never had a business with him.

Weren't you both in the same area of business in betting on horses?---He was (inaudible) that's how I knew him through the race horses.

And you weren't a close friend of his?---I wouldn't class him as a close friend, I'd class him as - - -

Is it not true that you invited Mr Lowe to Darwin, invited him to come to Darwin to meet me?---I could have asked him to come to Darwin. He never came to Darwin when I was about. I had no knowledge of him ever being in Darwin.

I put it to you that you brought Mr Lowe into my office? You brought him into my office and introduced him to my staff?---That didn't happen. That didn't happen at all.

Okay. I also put it to you that Mr Lowe was introduced to me as your business partner by you and that you also told my staff, including my financial controller, that Mr Lowe would take over your betting account and operate it while you were in gaol? Is that the case?---Well, I couldn't have taken him out to visit you if I was in gaol, could I. That's just common sense.

I beg your pardon?---I couldn't have taken Mr Lowe out to visit you while I was in gaol.

No, I didn't say you did that. I said you did it before you - - -?---(inaudible).

Mr Lowe was introduced to me way before you went to gaol. In fact he came to Darwin in the previous dry season I believe, before that January wet season you're talking about in '99. I think in '98 in the dry season he was in Darwin and you invited him to Darwin?---When?

Six months, four months before you went to gaol?---It could have happened, I just didn't do it. Six months before I was living in Queensland.

Was it true that you were backwards and forwards to Darwin on regular occasions?

---No.

No?---I went to Darwin in June 1997.

Yes?---For four days.

And then what happened?---(inaudible).

And when were you back in Darwin again?---Well I got arrested there, I was in custody.

That was in '99, I'm talking about '98?---No, '97. I was in Darwin in '97 (inaudible).

Did you get arrested in 1997 as well?---That's right.

You did?---I got given bail in '98.

So you were in the Northern Territory on bail?---That's right.

So you were in the Northern Territory on regular occasions in '98?---I lived in Darwin in '98.

That's what I just said before. I said six months before you went to gaol Edwin Lowe came to Darwin at your introduction to me? You introduced him to me and my staff in the office?---As far as I know Edwin Lowe has never been in Darwin. He could have been when I was in gaol. So if he came and visited you while I was in gaol and he didn't visit me shows how close a friendship we had.

40. In his evidence the defendant said at T64:

I have no written records at all of transactions made out of Mr Cant's account or for that matter, whether there were any transactions out of the account at all, because Mr Lowe who was introduced to me by Mr Cant came to Darwin to loan me some money to help run the business and also to continue to operate Craig Cant's account. He brought Mr Lowe into our office and introduced him to myself and my staff and in particular my financial controller, her name was Stacey Mitchell (?). And Mr Lowe operated his account, Craig Cant's account. I presume there was some transactions which took place between January when he was in prison and August of '99 when the business was sold but I have no records of that.

41. Later in his evidence (at T75) the defendant said:

Do you remember ever borrowing any money off Mr Lowe?---Yes.

And how did you pay back Mr Lowe?---Same way, put the money in the account, in the Sportsbet, into his personal account under the name Edmond Lowe and then he was able to take that money out as it became available to us to pay him.

So Mr Lowe had a betting account with you, with Sporting bet under his name?---The company name is Sportsbet.

Yes?---And he only had an account in his name after he came to Darwin and was introduced to me by Craig. He only had an account in Sportsbet then because he took over Craig's account.

So did Mr Lowe have an account in his own name?---He did after he took over Craig's account because his name was changed from Craig Cant to Edmond Lowe.

And what is the procedure for someone to take over someone else's account?---Well he didn't give us anything in writing but I would have presumed that he would have come in – he did come in with Edmond Lowe and introduced him, it would have been a verbal notification to myself and my financial staff that this guy was going to take over his account.

And is your evidence that there was money in Mr Cant's account when he brought this man in and said take over the account?---Yes.

And when was that?---I would have thought it was just before Christmas sometime in November or December of '98.

Of '98?---Just before Christmas or new year. He came up from Sydney especially.

And at that time then the account that was headed up Craig Cant became Mr Lowe's account?---It did, yes.

In your evidence that you've just given today you said that when Mr Cant gave you this \$20,000 in cash that you went and credited Mr Cant's account?---But he was still out of gaol at that stage, yes.

Yes, that's right. But you're saying that in '98 Mr Cant ceased to have an account with you and it became Mr Lowe's account?---No, I didn't say that at all. I said that when he went into gaol – he knew that he was going into gaol, so he instructed me that Edmond Lowe would take over his account.

You just said earlier that in around Christmas '98 Mr Cant came with Mr Lowe to your office and said Mr Lowe's taking over my account?---He said he's going to take over his account, yeah.

Going to take - - -?---He was going to gaol. He knew he was going to gaol. He was on bail already for something else, then he got busted again in early January.

When did Mr Cant's account become Mr Lowe's account by your evidence?---The day that he brought him into the office and told us and it got changed that day as far as I know.

So that was in Christmas '98?---It was a few days before January '99.

A few days before January '99?---Well Christmas '98 is a few days before January 1999 isn't it.

Yes, all right?---So I reckon he came into the office in December '98. I don't know what day it was, I just know it was around December or November, around there. He came to Darwin introduced to me, did some betting and then when Craig knew he was going to gaol he told me this guy was taking over his account.

42. I found this evidence to be unconvincing. The defendant is saying that in about December of 1998 Mr Loh took over the plaintiff's betting account, and after that the account was in Loh's name. Then in January 1999 the defendant borrows \$20,000 from the plaintiff. Then without getting any permission from the plaintiff (as there is no evidence to suggest that what allegedly followed was ever discussed with the plaintiff) the defendant says he credited (by a notional accounting entry, as no money actually moved) the \$20,000 into a betting account which was now in the name of Loh, and operated by Loh. If this is what the defendant did, and I am not able to accept his evidence on the balance of probabilities (at T77 he said "I think that's the way it went, it's a long time ago"), then he had no lawful right to do this in any event.
43. The defendant called Stacey Harris (formerly Mitchell) to give evidence in his case. She used to work for the defendant at the relevant times. Her evidence confirmed that the plaintiff did bring Loh

into the business premises and she was informed that Loh could access the plaintiff's account. However, the defendant repeatedly asked very leading and prompting questions of Harris. I formed the view that Harris was not a partisan witness, but unfortunately the questioning by the defendant was so flawed that I am unable to give her evidence any real weight.

44. In his evidence in chief the plaintiff said that he moved back to Darwin in November 1998 and was living at Fairway Waters. However, given what he said in cross-examination as set out in the preceding paragraph this evidence appears to be at odds. However, he went on to explain the situation further at T59 in cross-examination as follows:

You were in Darwin in 1998. Most of 1998 you were in Darwin?---That's right. I was in Darwin on February to - February till September. From September to November I was in Sydney and then I came back to Darwin.

45. He went on to say that he was going to the races every day and would see the defendant a couple of times a week when he was there.
46. Around new year's day of 1999 the plaintiff said that he won some money on a horse and the defendant saw him collecting. He said that the defendant approached him and asked if he could borrow a further \$20,000, and he told the defendant that he would think about it.
47. Allegedly some of the money that was won belonged to the defendant's father and son as well. Whether this is in fact true I don't know. I have not heard any evidence from either of these persons. In any event it is not relevant in my view, as all the evidence suggested that any agreement was between the plaintiff and defendant only. What arrangement (if any) the plaintiff may have had with others was a matter between them.

48. The plaintiff went on to say: “The following day Mr Clark rang me. I said yes, come out to my house and you can have the \$20,000. He came out to my house.....I told him this the following day that he rang me and he arrived at my house a couple of hours later and I gave him \$20,000. He was very appreciative and left. A couple of – half a week later I was arrested and about six weeks later after I was arrested, Mr Clark came out and visited me and spoke about the money.” (T25)
49. At this point in his evidence there was no mention of any discussion about interest, or indeed any terms for the loan/advance of this money. The plaintiff went on to say that “he only stayed for a very short time, he just wanted the money” (T32). The defendant took up the issue as to whether interest was discussed at the time the money was handed over in his cross-examination of the plaintiff, and the following evidence was given at T42-43:

Okay, on the subject of interest. In evidence just before you were asked about what happened at Palmerston when I came to your place and you gave me some money. You were asked about what else happened there. You made no mention whatsoever of the fact that interest was discussed. You made no mention of the fact that there was a loan. Yet in your further amended statement of claim it says that the initial loan was agreed upon the basis of 10% compound interest was payable till the money was all repaid and the defendant’s house at 17 Stedcombe Street Alawa was placed as collateral and the loan was payable on demand. This was all discussed, according to your evidence in your amended statement of claim, this was all discussed on the very same day that you gave me the money, is that right?---No, the interest (inaudible) when you came and visited me at the gaol.

HIS HONOUR: Sorry?---(inaudible).

MR CLARK: I’ve got an amended statement of claim that says
- - -

HIS HONOUR: Please stop for a second. Sorry, I didn't hear it. Sorry, Mr Cant, it was very blurry, I didn't hear what was said and I need to hear it?---The interest was discussed at the meeting at the gaol when you came to visit me in the gaol.

MR CLARK: Well if that's the case then this amended statement of claim which I've got in front of me here is incorrect, because it quite clearly says that the loan and the 10% compound interest was discussed at your house in Palmerston and that the defendant was highly appreciative and said that I would fix you up and look after you for helping me out. And this was all done, according to this statement of claim, on the very first day that you gave me the money. Which one is true?---The interest was discussed at the gaol.

50. I find that the plaintiff's evidence is inconsistent with his pleading in paragraph (2)(c) of the Further Amended Statement of Claim.

51. Then at T51 for the second time (as will appear later in these reasons) in his cross-examination of the plaintiff the defendant said:

I see. All right, well we don't have any dispute about the fact that I asked you for a loan because that's plainly obvious, I'm admitting that. And I'm also admitting that I came out to your place and got some cash off you, but I don't remember it being 20,000. I've got the vague recollection of being 14,000 or 16,000 and you were going give me more later?---You borrowed 14,000 before when you asked Matthew Bonson to come (inaudible) sponsor 7,000, that's the 14,000 you borrowed and then you came back and borrowed the other \$20,000 in January.

52. In my view, on the pleadings and the way the matter had proceeded, there had been a large dispute about the loan of any amount as alleged by the plaintiff to the defendant. The defendant's admissions in his cross-examination of the plaintiff were a surprise. When the defendant gave evidence he said at T64:

The day that Craig loaned me money on the, just after that new year, would have been the Sunday when I went out to see him

at Palmerston. Now I've got a recollection that he gave me 16 or 14,000 that day. I've got a memory that he didn't have enough cash on him at the time and he'd give me the rest later. And I've got a – it's just in the back of my mind, I'm not sure of that. I'm pretty sure that he gave me more money to make up the rest of the money to 20,000 later. So on the day I think he gave me 14 or 16 or something. Within about a week after that particular day Mr Cant was arrested and put in gaol.

53. I raised with the defendant the difference between his Defence and what he was now saying about the \$20,000 and at T67 the following exchange occurred:

One thing I don't understand, Mr Clark, and I must say that the questioning of Mr Cant took me somewhat by surprise because it doesn't seem to fit in with your pleadings?---Sorry, what was that?

Your questioning of Mr Cant and the concessions you made in your questioning took me by surprise because it doesn't seem to fit in with your pleading in your defence. Why did you deny in your defence that there was any advance of \$20,000 in cash made to you on 2 January 1999 by Mr Cant?---Because it's the wrong amount, your Honour. I don't believe that he actually gave me that money that day.

That's not what you said. You simply denied it, denied anything, any advance. You didn't say I agree that he gave me \$15,000 but I deny 20?---My solicitor at the time who was operating for me did that paperwork for me. I have no idea that that was what the answers were. But I know for a fact that I deny the fact that he gave me \$20,000 on that day because it was incorrect. He didn't give me \$20,000 that day.

But you now say that he gave you \$20,000, whether it be on the same day or within one or two days over a couple - - -?---It might have been a week later, I don't know but he did give me extra money later, I know that, yes.

Do you agree he gave you \$20,000 in early 1999, whether it be on the one day or over a couple of days?---I don't know the exact amount but it was somewhere around that amount, yeah. There's never been a dispute about -

54. It appears from later evidence that the plaintiff was on bail for serious drug offences as at the time of this loan/advance. Shortly after the loan/advance he was arrested (on 6 January 1999) on further serious drug charges and has not been at liberty since. He was apparently sentenced to a lengthy period of imprisonment and spent many years in Berrimah prison. He appeared in court by video link from Queensland. Whether his NT sentence was transferred to Queensland, or whether he is now serving a sentence relating to offending in that State I do not know. The plaintiff is not a person of positive good character.
55. As to what the defendant did in relation to the \$20,000 he said at T64 when he gave evidence:

The procedure that took place, in my memory, is that whenever somebody did some transactions, there might have been – my best mate might have said can you lend me 100. If I gave him 100 cash out of my wallet and he had a betting account with me, then we would debit his account for 100 in there. Or if he gave me \$500 because I was at the pub and I needed some money off him or something, then we would credit that money to his account so that if Joe Bloggs had \$50 in his account and I saw him at the pub and he wanted to get that 50 off me, if I gave it to me out of my wallet then later I would debit his account 50 so the balance would be right. So I presume, this is only going on what we did on every other occasion and stuff, I presume that this money that Craig Cant loaned me was credited to his account, the Sportsbetting account, which then operated through Mr Lowe until August '99 when the business was sold. But when the business was sold I don't have any records, I don't have any memories, I've got no idea whether Mr Lowe had actually taken all the money out or whether that account was transferred over to the new company who took over the – took over all the accounts and debts for the company, for the Sportsbetting company that I had.

56. Accordingly, the defendant is presuming that is what he did. He appears to have no independent recollection to support his

presumption. Yet at T66 the following was said by the defendant in his evidence during an exchange with myself:

HIS HONOUR: Mr Clark, the letter firstly from Consolidated Sportsbet Pty Ltd to Mr Malcolm Richardson, how does that help me given that you don't know whether you did in fact credit \$20,000 to Mr Cant's account or not?---I do know I did that.

No, you didn't, that's not what you said?---I said I didn't know whether the money was taken out by Mr Lowe or not before the Consolidated Sportsbet took over the company. I said that every time somebody did a transaction cash wise like that, we always credited the money to their account.

That's what you normally did and that's what you assumed you credited the money on this occasion but you didn't know, it was just something you assumed?---I assumed that Mr Lowe had taken the money out before Consolidated Sportsbet - - -

No?---I didn't assume that. I knew that I put the money into Craig Cant's Sportsbetting account as an F5 transaction because - - -

No, that's not what you said. You said 'I assume I credited the money Craig loaned me to his account'. You now wish to change it and say you now have an express recollection of crediting it? That's not what you said?---Okay.

No, it's your evidence, you tell me?---Well I'm 90% sure, put it that way. Anyway, the point is that Consolidated Sportsbet took over the company and any monies that was in people's accounts when they took over became their responsibility.

57. Mr Welfare took the matter up further at T71 as follows:

But your evidence is that even if there was a day or so break that the sum total was 20,000 at early January?---I'm pretty sure, yes.

And is your evidence then – what did you do with the 20,000 at that time? How did you – what did you do with it?---With the cash?

Yes?---I would have actually deposited it into Sportsbet's bank accounts through my financial controller. I probably would

have given her the cash and said here's some cash to keep us afloat. And then I would have made – I probably would have made a deposit into his betting account of the same amount, whatever that amount was, to balance up his account so that he had the money in there.

Well what did you do?---Well that's what I did, I presume. I'm 99% sure. I can't say one million percent sure because it happened 10 years ago.

58. Thus at T64 he said "I presume, this is only going on what we did on every other occasion and stuff", yet by T66 he said "I do know I did that", but by the end of the exchange he was "90% sure". Then by T71 he "probably" did it, and finally he was now "99% sure". I am unable to accept the defendant's evidence in this regard. I found his evidence to be generally (and deliberately) vague. I formed the impression that he was a dishonest person who was reluctant to risk being tied down. When he was tied down he was generally caught out.
59. Visitor records from Berrimah Prison relating to the plaintiff were tendered without objection, and became ExP1. This document disclosed that the defendant first visited the plaintiff in prison on 16 February 1999. In relation to this visit the following evidence was given:

And what did you talk about on the 16th, if you can recall 16 February 1999?

---Probably why I got arrested and things like that. And we talked about the money that he had. He told me that he still couldn't give me any of the money back because he didn't have it to give back. And there was no problem with that. And probably what the gaol was like and what conditions were like and things like that. The second time he came out.

60. This must be the meeting referred to in paragraph (4) of the Amended Statement of Claim filed on 28 February 2007, as it was the only meeting that was "six weeks after the plaintiff was imprisoned". However, the plaintiff gave no evidence to support what is pleaded in

paragraph (4)(a) as the “new loan agreement”. On his evidence interest was not discussed at all at this meeting, and he confirmed this in cross-examination (at T43).

61. According to ExP1 the defendant again visited the plaintiff in prison on 11 April 1999. In relation to this visit the plaintiff gave the following evidence at T33-34:

The second time would have been some almost two months later. This was 11 April 1999 visit?---He came out then. I didn't ask for him to come out, he just came out of his own free will and spoke to me about the money, about the loan and (inaudible) if I needed it desperately for court or – he knew the situation I was in. And I told him he could use it as long as he liked.

HIS HONOUR: Sorry just go back on that again, I didn't quite hear, there was a background noise. Just take it slowly. Just tell me as much – as best you can word for word what was said?---We just spoke about the loan. I told Mr Clark it was not urgent, he could use the money and I still – he said – he asked me whether I want to go into his business, put the money in his business and I said no, I don't want to do that. He said I've got collateral of my house, the money's okay, I'll guarantee it and you won't have any problems with it, I've got a house to cover it. And I said well you can use the money as long as you like, it's not a problem and you can pay me interest and he said – we sat down and said look – he said what do you want. I said we could work out at say 10% and you can use the money as long as you like. (inaudible) I was only worried about him losing his business. And that's all that was said about it. And then mainly we just talked about the conditions of gaol and the charges while I was in gaol.

MR WELFARE: Did you commit any of this to writing?---No, you're not allowed to have pens or paper.

And did you talk about what type of interest it was or you just said 10% interest?

---10% interest. Mr Clark knew that the money – we'd spoken about how the money was money of my father's and son's and it wasn't needed at the time.

62. This evidence again is different to the plaintiff's pleading. This was over 3 months after he had been imprisoned and was therefore not the meeting "six weeks after the plaintiff was imprisoned". Further, even if this evidence is correct it again is not consistent with paragraph (4)(a) of the plaintiff's Further Amended Statement of Claim. It is pleaded that the 10% interest was "to date when the plaintiff demanded payment, or when the plaintiff was released from gaol". Yet on his evidence it was presumably to be 10% interest from 11 April 1999.
63. In relation to these two visits the defendant said in cross-examination, at T73:

Now we've heard evidence today when you were cross-examining Mr Cant about a number of prison visits to the gaol. Now do you agree that in – on 16 February 1999 you went there and discussed this loan with Mr Cant?---Not the case. I didn't go out there to discuss the loan with him at all.

So you never mentioned this loan on 16 February 1999?---I wouldn't have thought so.

What about on 1 April 1999?---I wouldn't have thought so.

Well I'm asking - - -?---I really don't think – I mean I can't remember but I don't think we discussed it.

Do you remember anything about these visits that you discussed?---It was more a curiosity thing I think. I went out there – a friend of his I suppose too, to a certain extent. But I wanted to find out what had happened to him and ask him questions about things like – we didn't – as far as I recall we didn't talk about Edmond Lowe and we didn't talk about the balance of his account or anything. We certainly didn't talk about loans or interest or anything like that, that's a lot of rubbish.

Well so you talked about his predicament?---Probably, yeah.

And did you talk about anything else at all?---Look, I really – I couldn't remember what details we talked about but I know we

didn't talk about a loan because at that stage we'd never made any agreement about loans, houses or interest or anything. There's never been any discussion of that at all.

64. This last piece of evidence that "I know we didn't talk about a loan because at that stage we'd never made any agreement about loans, houses or interest or anything" is clearly untrue. The defendant now admits that he loaned \$20,000 from the plaintiff in January 1999, and accordingly there was an agreement in place. The terms of the agreement are the only disputed issue.

65. The next visit from the defendant, according to ExP1, was on 10 August 1999. The plaintiff said at T34:

But he left that visit and a couple of months later in August he came down to visit me again and told me he was selling the business and he was sorting out – sort something out when the business was sold and I reaffirmed it, I said look, I don't want it, you use the money, I'm getting 10% of it now well, at least my father and son anyway, so it was only going to be put in the bank anyway (inaudible). And I told him I wasn't worried about the money and he said all right and left and I never heard from him again since then.

66. So again the plaintiff is suggesting that interest at 10% was running, which is different from his pleading in paragraph (4)(a).

67. I find the plaintiff's evidence in relation to these alleged discussions concerning interest to be very unsatisfactory and unconvincing. I am unable to find that interest was ever discussed between the plaintiff and the defendant.

68. In his evidence the defendant said at T64:

Now on those visits to the Berrimah Gaol the first three visits in '99, one was in February, one was in April and one was in August. On those three occasions when I was out there, not once did he speak at all about any interest. Not once did we speak about long term loans. This money that he loaned me was only a very short term thing. In fact I was under the

assumption when he first gave it to me that it was like only for a week or two weeks. There was never any mention of long term loans or interest or anything like that.

69. Later in his evidence (T74) the defendant stated that he had no memory or recollection of going out to the prison to see the plaintiff at this time. He accepted that he must have, but was unable to assist as to why he went or what was discussed.
70. The plaintiff went on to say that a couple of months later he was told that his brother had collected \$15,000, being the \$14,000 that Mathew Bonson had collected on behalf of the defendant, plus an additional \$1,000 which apparently was some form of interest.
71. Nothing then appears to have happened for a number of years. Four years later the plaintiff said he wrote to the defendant but he got no reply. I do not know if such a letter was ever sent. No such letter was produced in evidence. The plaintiff then said that he asked his father to get someone to track the defendant down. In his evidence the defendant said that he was tapped on the shoulder at the races one day and asked to go and visit the plaintiff in prison.
72. It is clear from ExP1 that the defendant visited the plaintiff in prison on 1 December 2004. In relation to this visit the plaintiff gave the following evidence at T34-35:

...then I received another visit from Mr Clark. He just came out and visited me, I didn't know he was coming, he came out and visited me. I said I need that money back now and (inaudible) and he said well I haven't got any money, I'm broke. And he told me, I said what about your house. Before you told me you had your house there was collateral for it and he said, yeah. And then he said, I paid that money to Eddie Lowe for you and I said, are you changing your story midstream sort of thing. So I thought – I didn't want to make an argument about it, so I thought well I'll get in touch with Eddie Lowe to see if I can get the money from him. And because I was in custody, I had to get someone to chase it up for me and the person I asked to chase

it up for me – your Honour, I don't know how to say this without – like hearsay, what he told me.

HIS HONOUR: I know it's a difficult thing but you can't really tell me about it?

---I can't I'd been making calls that Eddie Lowe was given my money by Mr Clark and Mr Clark had (inaudible) about it, I became aware of that.

73. At T47-49 the following evidence was given by the plaintiff in cross-examination:

Okay?---You told me you would get in touch with Eddie Lowe and sort the money out but you just never did it, you ignored me, you wouldn't speak to me.

I'm sorry what was that?---You told me to get in touch with Eddie Lowe, and I asked to write to him at Silverwater and sort it out and you just never did anything about it, you just ignored me when I tried to speak to you. You wouldn't talk to me.

The truth of the matter is that I came to visit you again on 1 December '04 which you said was 1900 and something days since the last time I saw you, nearly 2000 days later I get a tap on my shoulder at the football one day in Darwin, one of your friends asking me to come out and visit you again at Nightcliff oval. A guy come and tapped me on the shoulder and asked me to come and visit you again. I hadn't seen you for five and a half years. So I come out to see you and that was the very first time that you mentioned the fact that the money hadn't been paid to Eddie. In fact that particular day that I came out there you said to me that Eddie hadn't been paid and all this sort of stuff and it started getting into my head that you were starting to say that I hadn't paid the money and that's why I didn't come back, that's why I didn't speak to you again after that because I thought you were losing the plot.

HIS HONOUR: You can't comment on things that were in your head or what you might have done or why you might have done them. Going to this conversation, you say in December 2004 you visited him in prison and that Mr Cant told you the money hadn't been paid by you to Eddie. Is that what you're saying?

MR CLARK: That's right.

HIS HONOUR: What do you say about that, Mr Cant, do you agree with that?

---That's correct, your Honour.

MR CLARK: That's the case, that I came out there in December '04, having not seen you for five and a half years and you told me that you wanted me to write a letter to Mr Lowe at Silverwater Correctional Facility and there's the letter there in front of you, this letter here which I never sent to Eddie. I wrote a letter but I ended up keeping it at home and never sent it because I didn't want to get involved in your problems. Now Mr Lowe, how long was he in Silverwater?---I don't know. You told me that paid – originally you told me you had no money and then you told me that you paid the money to Mr Lowe and I said well he's in Silverwater, I can't get in touch with him, can you get in touch with him and sort it out and you told me you'd do that, but you didn't.

That's right, I didn't contact him?---I believe you knew - - -

I beg your pardon?---I believe you knew that the money hadn't been paid because (inaudible) told you that's what I wanted to speak to you about.

I'm sorry, what was that? I can't hear you?---I believe the reason you came out to visit me was because you knew the money hadn't been paid back because Mark (inaudible) what I wanted to speak to you about.

I think you're completely wrong there. You're saying that (inaudible) told me why you wanted – me to come out to Berrimah and talk to you when he came and tapped me on the shoulder, is that what you're saying?---I asked Mr Pedimo (?) to speak to you and could you come and visit me and sort something out because the money that I loaned you, you hadn't paid back.

All right, well in my memory that's completely false because when I got to Berrimah that particular day I had no idea that the money hadn't been paid to you or Eddie hadn't got the money or whatever it was that you were coming up with. In fact the very first time that you mentioned it to me was that day and that's the first I'd ever heard of it. I put it to you that's the truth of the matter. The truth is you mentioned it that day the very

first time and that your friend Mark Pedimo never said a word to me about it?---I don't know what you said.

It doesn't really matter.

HIS HONOUR: It does matter. Just a minute, Mr Cant, I'm just not quite sure what Mr Clark is putting to you. Mr Clark, are you putting to him that you did borrow – you did get \$20,000 off him but you gave it to Eddie Lowe, is that what you're putting to him?

MR CLARK: Sorry?

HIS HONOUR: Are you putting to him that you did get \$20,000 from Mr Cant but you say you did pay it to Mr Lowe, is that what you're saying?

MR CLARK: What I'm saying, your Worship, is I don't have any written records from Sportsbet from 1999 because all that stuff has been passed onto the next company that bought it and the one after that. So there's no records at all.

HIS HONOUR: Yes, I'm not worried about written records. The question is whether – this wasn't through Sportsbet, this wasn't a betting transaction. You seem to be – the questions you seem to be asking him seem to be based on the fact that there was \$20,000 owing but you say – you seem to be saying you paid it to Eddie Lowe, otherwise there's no reason for you to be agreeing to write to Eddie Lowe in Silverwater?

MR CLARK: Yep, correct. Mr Cant brought Mr Lowe into my office and introduced him to me and my staff and told my financial controller, who is going to give evidence later, that Mr Lowe would operate his account and that the money that was in his account – by the way, your Worship, the \$20,000 if it was 20,000 because at this stage I'm still not sure what amount of money. He did give me some money that day but I'm not sure how much it was. I think it was somewhere around the 14,000 or 16,000 and he said he'd give me the rest later. I'm not really sure of that. I've got a funny record about that in my head, memory. (emphasis added)

74. For the first time we heard that the defendant did admit that he loaned some money from the plaintiff at the relevant time, but he is “not sure what amount of money”. It appears to be the plaintiff's evidence that

at this time he asked the defendant for the money, and after the defendant initially said he didn't have any, he then said he had given it to Mr Loh.

75. It doesn't however appear to be the plaintiff's evidence that he told the defendant he should not have done this. Nor did he apparently tell the defendant to get the money back off Loh. Nor did he tell the defendant that paying Loh was without his authority and therefore he still owed the money to him. Rather, the plaintiff says (and the defendant agrees with this), the plaintiff asked the defendant to write to Loh in Silverwater Detention centre about the money. Exactly what he was asked to ask Loh, or say to Loh, was not made clear. The defendant admitted that he prepared a letter to send to Loh, but he never sent it. The intended letter was never produced into evidence.
76. The defendant said in his evidence at T65:

Mr Cant's friend came and tapped me on the shoulder at Nightcliff oval and said Craig wanted to see me. So within a couple of days I went out to Berrimah to visit him. It would have been 1 December '04. And within five or 10 minutes of meeting him the discussion came around to the fact that Edmond Lowe had got a message back to him that he hadn't ever got the money off me and that the money was never received by him, which to be honest with you, I don't even know whether it was true or not. It may have been true that he'd never got the money and maybe that the account with 20,000-odd in it was still sitting there for all those months between January and August and maybe at the end of that period the new company that took over had that account still there and Joe Bloggs has still got \$2000 in it. There's plenty of other people that did the same thing. Plenty of other new clients went over to the new company and just transferred their accounts over. That's why under the Racing Commission law that they've got to agree, the new company's got to agree to take over all the debts of the old company. That's one of the letters I've got here from the Racing Commission relates to that. So in December of '04 I went out to visit him. All of a sudden the conversion, from being friendly, all of a sudden it changed from being friendly, all of a sudden he was accusing

me of not paying Edmond Lowe. So within another 10 minutes or so I decided I wanted to go because I wasn't happy with it and he's telling me that I had to write to Eddie Lowe in Silverwater to find out why he hadn't paid the money or whatever. But I didn't do it. I did write a letter to him but I didn't send it because I basically thought that Craig was losing the plot and didn't know what he was talking about.

77. The plaintiff went on to say what he did after this last visit in prison at T35 as follows:

And I thought that Mr Clark might have been trying some sort of (inaudible) with me, so I go onto the NT Police about it. First of all I went to the Commissioner of Racing and told him what had happened. He wrote back and said it's got nothing to do with racing because that's a loan. It's got nothing to do with betting or anything like that (inaudible). So I got in touch with the NT Police. Two lady officers came and visited me at the gaol. I told them about this (inaudible) it's a loan, it's a civil matter, we can't do anything about it. He said that Mr Clark (inaudible) interested in it but it's a civil matter and (inaudible) and nothing (inaudible) so the police left it and I had to get a solicitor and go through all the courts trying to get it back. At no time did I tell Mr Clark to give my money to Eddie Lowe. Like I hardly knew Eddie Lowe, I wouldn't have trusted him as far as I could kick him. So there's no way I told Mr Clark to give him the money. I was surprised that (inaudible) my other brother had picked up \$15,000 from Mr Clark, I didn't even know he was going to give him that.

78. On 21 June 2005 the plaintiff wrote to the defendant. This letter was tendered and became ExD1, and stated as follows:

Dear Bryan,

Could you please organise to return the money to me that I lent you. The money was not even mine I had to get it from my father and son to help you out of your financial position.

You have had the money for over 6 ½ years now and my family need it back more than you so could you get something organised immediately.

I have had someone have a very persuasive talk to Eddie in Silverwater and he only received the money he lent you back.

He pointed out that, why would you give him my money when we didn't have a very close relationship. He didn't even know that you came to my house at Fairway Waters and borrowed more money from me.

He also said that if you had given him the 20 Grand that I had borrowed from my Father and Son. Why didn't you come and let me know that's what you had done. And why didn't you give the 20 Grand to my brother Michael when he got the money that Mathew Bonson picked up from Mark Reid for me.

He said that you are trying some sort of a rort because I was locked up by a bunch of corrupt pigs.

I went out of my way to help you out when you were in trouble so sort this money out for my family urgently.

Eddie said that he lent you \$34,000 in September and October 1998 so can you show me all the receipts.

Thanks

Craig.

79. The reference to "I have had someone have a very persuasive talk to Eddie in Silverwater" indicates the sort of person the plaintiff is. I understand that "Silverwater" refers to a correctional facility. Hence, all the main players in this matter (the plaintiff, the defendant and Loh) have spent time in gaol. None of them would appear to be persons of positive good character.
80. The defendant did not reply to this letter although he did receive it. The plaintiff wrote a second letter (which was undated) to the defendant not long after the letter of 21 June 2005. This letter (which formed a part of ExD1) stated as follows:

Brian,

Could you please get in touch with my son Vaun at 285
Algester Rd. Algester Qld 4115 Ph 0737114379 or 0411693716

and give him back the \$20,000 that you borrowed from us urgently.

We have been in touch with the Racing Board in the NT and know that you have been trying to pull a scam.

It is a pretty low act and bad things always happen to people that try these low acts so pay him back straightaway before your Karma catches up with you.

We went out of our way to help you so sort it out.

Craig.

81. This letter clearly contained some thinly veiled threats to the defendant. Again the defendant did not respond. Hence, as noted earlier, these proceedings commenced on 16 March 2006.
82. I find that the evidence of the plaintiff was false and untrue in relation to discussions about interest. I treat his evidence generally with caution. He did not impress me as an honest or trustworthy person.
83. I find that the defendant also was not a reliable witness of truth. I found him to be slippery with the truth. I treat his evidence generally with caution. He did not impress me as an honest or trustworthy person.
84. I make the following findings on the evidence before me:
 - In 1998 and 1999 the defendant's business was in financial difficulty;
 - The plaintiff and defendant were acquainted with each other as persons who were gamblers;
 - The plaintiff never borrowed any money from the defendant;

- The defendant needed money to keep his business operating;
- The defendant borrowed \$7,000 from the plaintiff on two separate occasions in the latter part of 2008;
- It is clear, and I find that the defendant did borrow a further \$20,000 in cash from the plaintiff in early January 1999;
- There was no discussion at the time this \$20,000 was loaned as to when it was to be repaid;
- There was no discussion at the time this \$20,000 was loaned (or at any subsequent time) as to there being any interest payable;
- There was no discussion between the plaintiff and the defendant as to the defendant crediting the amount of \$20,000 to any betting account that the plaintiff may have then held with the defendant:
- If the defendant did credit this \$20,000 (and I am not satisfied on the evidence that he did) to a betting account, this was done without the knowledge of the plaintiff;
- If the defendant did credit this \$20,000 (and I am not satisfied on the evidence that he did) to a betting account, this was done without the (express or implied) authority of the plaintiff;
- If the defendant did credit this \$20,000 (and I am not satisfied on the evidence that he did) to a betting account in the name of Loh, this was done without the knowledge of the plaintiff;

- If the defendant did credit this \$20,000 (and I am not satisfied on the evidence that he did) to a betting account in the name of Loh, this was done without the (express or implied) authority of the plaintiff;
- The plaintiff was arrested on 6 January 1999 and has remained in custody since, and was still in custody at the time he gave evidence before me;
- Sometime after the plaintiff's arrest the defendant repaid the two amounts of \$7,000 loaned previously by paying \$15,000 to the plaintiff's brother;
- There was an expectation (which was never expressed in words) between the plaintiff and the defendant that when the \$20,000 was repaid there would be some (unspecified) additional payment (effectively as a thankyou);
- The plaintiff requested the defendant to repay the \$20,000 when the defendant visited the plaintiff (at the plaintiff's request) in prison on 1 December 2004;
- The request for payment on 1 December 2004 was the first time that the plaintiff had requested repayment, and this was almost 6 years after the money was loaned;
- As a result of the lengthy delay in requesting repayment the defendant may have been (on the evidence I am unable to find that he actually was) prejudiced in his defence of the claim;
- On 1 December 2004 the defendant told the plaintiff that he had repaid the \$20,000 to Loh (I am unable to find that this assertion was in fact true);

- At no time did the plaintiff ever request or authorise (expressly or impliedly) the defendant to pay any money owed to him to Loh or any other person;
- If Loh did receive the \$20,000 (and I am not satisfied on the balance of probabilities that he did) he has never paid any of this money to, or for the benefit of, the plaintiff;
- The defendant has not repaid the amount of \$20,000 to the plaintiff (or to the benefit of the plaintiff);
- The defendant remains indebted to the plaintiff for the \$20,000 loaned in early January 1999;
- The plaintiff is entitled to a judgement against the defendant for \$20,000;
- There was never any agreement that interest would ever be paid (and I disbelieve the plaintiff's evidence in this regard).

85. The Court has a discretion to award interest "at the rate it considers appropriate on the whole or a part of the sum for the whole or a part of the period between the date when the cause of action arose and the date of judgement" under *rule 39.03 of the Local Court Rules*. In my view, the cause of action herein arose on 1 December 2004 when the plaintiff first asked the defendant for the repayment of the \$20,000. Accordingly, there has been about 44 months from then until this judgement.

86. In the instant case I was unimpressed with both the plaintiff and the defendant as witnesses. It was a transaction of dubious quality between two persons of poor character. There was no agreement about interest. But there was an unspoken expectation (as evidenced by repaying \$15,000 when he had only borrowed \$14,000 on another

occasion) that the defendant would eventually repay a larger amount than he had originally borrowed.

87. I will take a broad brush approach and will allow a lump sum of \$2,000 up to judgement by way of interest.
88. Why the plaintiff waited so long to pursue this money is questionable. He asserts that it wasn't all his. Whether this is true or not, I don't know. He says he won it on a horse at the races. Whether this is true or not, I don't know. Given that he was on bail for serious drug charges at the time, and was taken into custody a few days later on more serious drug charges, the money could well have been illegally obtained. I don't know.
89. In addition, the plaintiff paid \$255 to the Court when he commenced this action.
90. I therefore find that the plaintiff is entitled to a judgement against the defendant in the sum of \$22,255. I will hear counsel on the question of costs and any incidental orders.

Dated this 19th day of August 2008.

D TRIGG SM
STIPENDIARY MAGISTRATE