
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : MAYO -v- GEPP [No 2] [2018] WASC 46

CORAM : ALLANSON J

HEARD : 4-7 SEPTEMBER, 3 NOVEMBER 2017

DELIVERED : 20 FEBRUARY 2018

FILE NO/S : CIV 1547 of 2015

BETWEEN : JILL ELIZABETH MAYO
LARRY BERNARD MAYO
Plaintiffs

AND

PETER GEPP
First Defendant

ROSS SYDNEY CALNAN
Second Defendant

DIANNE CALNAN
Third Defendant

PETRE CRISTEA
Fourth Defendant

DOROTHY ALICE CRISTEA
Fifth Defendant

Catchwords:

Contract - Action for repayment of loan - Where loan made by purported agent -
Whether agent authorised by defendants - Turns on own facts

Legislation:

Corporations Act 2001 (Cth), s 436A

Result:

Judgment for the plaintiffs against the second defendant

Category: B

Representation:

Counsel:

Plaintiffs	:	Mr C R Bailey
First Defendant	:	No appearance
Second Defendant	:	In person
Third Defendant	:	In person
Fourth Defendant	:	No appearance
Fifth Defendant	:	No appearance

Solicitors:

Plaintiffs	:	Williams & Hughes
First Defendant	:	No appearance
Second Defendant	:	In person
Third Defendant	:	In person
Fourth Defendant	:	No appearance
Fifth Defendant	:	No appearance

Case(s) referred to in judgment(s):

Nil

1 **ALLANSON J:** In August 2008, Jill and Larry Mayo, advanced
\$375,000 which was used in payment of a deposit on a house being
purchased by Dianne Calnan. The advance was arranged by Peter
Gepp - a business associate of Mrs Calnan's husband, Ross. Mr and
Mrs Mayo believed that Mr Gepp was acting on behalf of Mr and Mrs
Calnan; they say that he was not. There are two critical issues. Was
Mr Gepp acting with the Calnans' authority, so that they must repay the
principal and outstanding interest. If not, are they liable to make
restitution for the money received.

The parties

2 The plaintiffs, Mr and Mrs Mayo, operate a horse riding school from
their property in Oakford. Neither of them is sophisticated in business
dealings. Neither of them had operated a business before opening the
school.

3 The second and third defendants are husband and wife. Mr Calnan is
a real estate agent. Mrs Calnan has worked in real estate as a sales
representative and receptionist. Mr Calnan was formerly a director of
Calnan-Oldfield Pty Ltd, trading as Fruit Property Applecross. Mr Calnan
was also a director and shareholder of Lyndon Holdings Pty Ltd before it
was deregistered on 25 March 2010. The importance of those companies
is explained below.

4 The first defendant, Peter Gepp, was an accountant. He had
conducted his own practice and had acted for the plaintiffs. He was also
in a business relationship with Mr Calnan, and was a director of
Calnan-Oldfield. He was recorded as being a director of Lyndon
Holdings between 2002 and 2004.

5 Mr Gepp did not participate in the proceedings either before or at
trial. It was common ground that he is infirm and no longer has the
capacity to give evidence. It is unfortunate that Mr Gepp was not
available, as he had direct knowledge of matters central to the case.

6 The action against the fourth and fifth defendants was discontinued
before trial. For the purpose of these reasons, I will refer to the second
and third defendants, collectively, as the defendants as they were the only
active defending parties.

7 Both plaintiffs and both defendants gave evidence. The plaintiffs
also called Carl Alan Louis Huxtable. Mr Huxtable is a chartered
accountant and registered liquidator. He acted as voluntary administrator

of Calnan-Oldfield from 18 June 2010; later, between 3 September 2010 and 27 July 2015, he was deed administrator under a deed of company arrangement.

Calnan-Oldfield Pty Ltd

8 Calnan-Oldfield was registered on 15 June 2006. It carried on a real estate business trading as Fruit Property Applecross. Calnan-Oldfield was formed by the amalgamation of three real estate businesses: Brayer Pty Ltd (Elders Real Estate, Applecross), Lyndon Holdings Pty Ltd (Roy Weston Ross Calnan Team) and Lafayette Investments Pty Ltd (Roy Weston First Choice).

9 Mr Calnan was its sole director and company secretary until 1 December 2006, when Mr Gepp was appointed company secretary. Mr Calnan continued as a director until 4 June 2010. Mr Gepp gave notice of his appointment as a director on 26 July 2009, although Mr Calnan disputes the validity of that appointment.

10 Calnan-Oldfield had 100,000 issued shares. Mr Calnan was the sole shareholder until 2009. The intention, however, was that Mr Calnan and Mr Gepp were to contribute equally and each own 50% of Calnan-Oldfield.

11 Calnan-Oldfield commenced trading in about December 2006, and commenced trading as Fruit Property Applecross in February 2007.

12 Mr Gepp was the accountant for Calnan-Oldfield. Mr Calnan said that Mr Gepp had 'full responsibility for the functions of accounts and the finances of the company', although there were other accounting or bookkeeping staff employed. It appears that the accounts may not have been well maintained. In 2009, Calnan-Oldfield engaged an external accounting firm to reconstruct and provide proper accounts from the company's inception. The records included accounts shown as 'drawings' by Mr Calnan, which the external accountants had allocated to loan accounts. These 'drawings' included payments to the plaintiffs, recorded as interest.

13 In July 2009, Mr Gepp lodged a change of company details, certified by Mr Gepp as company secretary, recording his appointment as a director, and his son as a shareholder of half the issued shares. Mr Calnan disputes that the notice was effective.

14 Calnan-Oldfield went into voluntary administration on 18 June 2010, and was subject to a deed of company arrangement from 3 September 2010 until July 2015.

The plaintiffs' case

15 The plaintiffs say that on about 21 August 2008, they entered an oral loan agreement with the defendants for the sum of \$375,000. Interest was to be the actual interest cost to the plaintiffs on their existing line of credit plus \$550 per week. The loan was to be repaid in full within six months of the advance: statement of claim, par 8.

16 The plaintiffs did not meet or speak to the defendants, but dealt solely with Mr Gepp. They allege that Mr Gepp was acting as the defendants' agent. In particulars, they plead that agency is to be inferred from the defendants' acceptance of the loan moneys and the performance of the loan agreement by making interest payments: particulars, A1 - A3.

17 The money was advanced on 28 August 2008 in accordance with a direction given by Mr Gepp. Interest was paid regularly by transfer to the plaintiffs' bank account until June 2010, when, but for two payments in September 2010, the \$550 a week payment ceased. The weekly payment of \$742.81 (an approximation of the actual interest cost of the loan) continued until 2 September 2013.

18 The interest payments were out of an account of Fruit Property Applecross. They were coded in the business accounts as 'Ross drawings'.

19 The plaintiffs demanded repayment on 9 April 2013, with accrued interest, but the loan remains unpaid.

20 The plaintiffs claim repayment and damages. Alternatively, they seek restitution of moneys received by the defendants as moneys paid under the mistaken belief that the loan agreement existed and was enforceable.

The defendants' case

21 The defendants do not deny that \$375,000 was paid into the trust account of Mrs Calnan's settlement agent on or about 28 August 2008, and was applied towards the purchase of a property in Attadale. They plead that the property was purchased solely by Mrs Calnan.

22 The defendants deny the loan and any obligation to repay any moneys to the plaintiffs. They deny that Mr Gepp was acting on their

behalf and deny making any repayments. They say that Mr Gepp had complete control over the financial accounts of Calnan-Oldfield, and they do not know what payments were made to the plaintiffs or why those payments were made.

23 The defendants further say that if the \$375,000 was paid as a result of the plaintiffs' mistaken belief as to the existence of a loan, the payment caused them to change their position: they believed the moneys were a debt owed to them by Mr Gepp; they completed the purchase of the Attadale property and obtained a mortgage to facilitate its purchase; and they did not seek to recover the debt owed to them by Mr Gepp.

24 The defendants further plead that the Attadale property was sold to a third party on or about 23 February 2013.

The facts

The advance

25 Many of the primary facts on which the plaintiffs base their case were solely within their own knowledge (or known only to them and Mr Gepp). Little of that evidence was disputed.

26 In 2007, the plaintiffs engaged Mr Gepp to advise them and assist them with a business plan for setting up a horse riding school at a property they had owned since 1995. In 2007, they owed only about \$100,000 on the property. Mr Gepp was an accountant, trading as 'SPS Accounting for Life' through the company, Auks Pty Ltd. Mr Gepp assisted them to obtain a line of credit from Westpac Bank, up to a limit of \$900,000. The line of credit was in place by September 2007. The plaintiffs needed to draw down only \$430,000 of this to set up the riding school. The riding school opened in September 2008.

27 On 14 August 2008, Mrs Calnan offered to buy a property in Attadale from John Abrusci; Mr Gepp witnessed her signature on the offer. Mr Abrusci accepted on 19 August 2008. The purchase price was \$1,375,000, of which \$375,000 was a deposit. In his witness statement, Mr Calnan said that Mr Gepp assisted in negotiating the vendor terms. In oral evidence, he departed from that statement and said that the terms had already been agreed when Mr Gepp met Mr Abrusci. He said that Mr Gepp 'finalised' the agreement with Mr Abrusci, and explained that 'Mr Gepp had a responsibility to come up with a deposit - all agreed that he would come up with the deposit'.

28 Terms of the contract included that the deposit was to be paid by the possession date, which was 1 September 2008. Mr Calnan entered into a written guarantee of the obligations of the buyer under the contract. Mr Gepp witnessed his signature on the guarantee. Mr Calnan also entered a loan agreement with Mr Abrusci for \$1,000,000, with monthly payments of \$8,333.33.

29 In August 2008, at a meeting, Mr Gepp told the plaintiffs:

- (1) he knew someone who wanted to borrow \$375,000;
- (2) the borrower would pay the Westpac rate plus \$550 a week for making the loan;
- (3) the loan would be for six months only; and
- (4) it was 'risk free' and a good way of supplementing the income from the riding school.

30 Mrs Mayo asked who the borrower was and Mr Gepp said it was his 'good mate Ross Calnan and his wife'. That evidence, in my opinion, is not admissible as evidence that the defendants were his principals.

31 The plaintiffs agreed to the terms proposed by Mr Gepp.

32 On about 28 August 2008, at the request of Mr Gepp, the plaintiffs drew on their line of credit and transferred \$375,000 to a bank account, the details of which were provided by Mr Gepp. The bank account was the trust account of Byford Settlements, a settlement agency that was acting for Mrs Calnan in the purchase of the Attadale property.

33 Mrs Mayo testified that the money was advanced approximately a week after the meeting with Mr Gepp, which puts the meeting after the signing of the contract for the Attadale property.

34 The first payments of interest to the plaintiffs' account were made on 17 September 2008, with two deposits to meet the first six weeks interest: \$3,300 (6 x \$550) and \$4456.68 (6 x \$742.78). There is a corresponding withdrawal from the Fruit Property account on 16 September 2008. Weekly deposits of \$550 and \$742.81 were made from 9 October 2008. The amount of \$742.81 remained constant, despite fluctuations in interest rates, and appears to have been an approximation of the rate paid by the plaintiffs to Westpac at the time of the advance.

35 The payments were made from an account with Bankwest in the name of Calnan-Oldfield trading as Fruit Property Applecross, and recorded in bank statements as L&J Mayo-interest. The interest payments were coded in the MYOB records of Fruit Property Applecross as 'Ross Drawings - L & J Mayo'. They were recorded in the plaintiffs' account as 'DEPOSIT FRUIT PROPERTY A Interest' until September 2013.

36 The \$375,000 was not repaid at the end of six months. The weekly payments of \$550 continued for 10 months until 15 June 2010 (immediately before the appointment of an administrator to Calnan-Oldfield) and then ceased, except for two payments on 21 and 28 September 2010. Weekly deposits of \$742.81 continued until 2 September 2013.

37 There are no records in evidence to show the source of funds transferred to the plaintiffs account after June 2010, except for the two payments from Calnan-Oldfield in September 2010.

38 The plaintiffs did not meet the defendants at any time. Nor did they contact them about the repayment when it came due after six months, or at any time after that. They dealt exclusively with Mr Gepp.

Calnan-Oldfield enters administration

39 In June 2010, Mr Calnan resolved that Calnan-Oldfield was insolvent or likely to become insolvent and that an administrator should be appointed under the *Corporations Act 2001* (Cth) s 436A. Carl Alan Louis Huxtable was appointed as administrator on 18 June 2010.

40 The first meeting of the company's creditors was held on 7 July 2010 (the time having been extended by the Federal Court). The second meeting was held on 23 July 2010.

41 On 23 July 2010, the plaintiffs lodged a proof of debt with the administrator of Calnan-Oldfield, the debt described as 'deposit purchase property for Ross and Dianne Calnan'. Mr Gepp also prepared, but did not submit, a proof of debt on behalf of the plaintiffs.

42 In his third report to creditors, dated 8 August 2010, Mr Huxtable reported that, at 30 June 2009, the company was insolvent. While total liabilities only just exceeded total assets, the current liabilities were \$352,134 with current assets of only \$88,940. At about 27 May 2010, the company's liquidity had deteriorated slightly.

43 Mr Huxtable further reported:

- (1) The weekly payments of interest to the plaintiffs were coded to an account titled 'Ross Drawings - L&J Mayo' in the accounts of Calnan-Oldfield. The payments to Mr Abrusci were also coded as drawings to Mr Calnan - 'Ross Drawings - RSC - J Abrusci' - and totalled \$91,666 during 2009 and 2010.
- (2) The company had made other payments of a personal nature on behalf of Mr Calnan, including ATM withdrawals and payment to a settlement agent for a property in O'Connor. These had been recorded as drawings for Mr Calnan.
- (3) The company had paid amounts in respect of a second property owned by Mrs Calnan.
- (4) The purchase of the business of Lyndon Holdings by Calnan-Oldfield was accounted for by the creation of a loan account.
- (5) Lyndon Holdings had been deregistered in March 2010, but, if reinstated, may have a claim against Calnan-Oldfield for \$547,387.

44 Mr Huxtable also reported on transactions with related entities, although he provided only preliminary comments.

45 On 13 August 2010, the creditors of Calnan-Oldfield resolved to execute a deed of company arrangement (DOCA). The plaintiffs were not participating creditors in the DOCA. Their claim was originally rejected, but the administrator later revoked the rejection of all claims by non-participating creditors and did not adjudicate those claims.

46 The plaintiffs had been asking Mr Gepp about repayment of the loan from early to mid-2009. Throughout 2010 and 2011, the plaintiffs met Mr Gepp on several occasions. On one of those occasions, he told them 'it is my debt now and you don't need to worry about it'. At another meeting in 2011, Mr Gepp suggested signing over the rent roll income of Calnan-Oldfield as security for the loan. Mrs Mayo said that in 2011, Mr Gepp asked Mrs Mayo and her husband to sign a handwritten letter, dated 3 November 2011, to acknowledge that they would be repaid.

47 Mr Huxtable ceased acting as administrator when the DOCA was
executed on 3 September 2010. Mr Huxtable was deed administrator until
27 July 2015.

Mr Calnan's response to the administrator

48 On 10 August 2010, Mr Calnan wrote to Mr Huxtable to set out his
concerns regarding the administration. Relevantly, he addressed the
money received from the plaintiffs:

The advance credited to my loan account in August 08 of \$165,936 came
from the sale of my wife's house. Further a mortgage was raised on my
wife's property in December 2006. Of the total mortgage of \$359,199,
\$259,199 was paid to Calnan-Oldfield and \$100,000 was paid to Roy
Weston First Choice as advised by Mr Gepp. This amount also needs to
be taken into account. As a result of these transactions, Mr Gepp promised
that he would borrow through Calnan-Oldfield \$375,000 and reduce the
amount owing to me by this amount. This would help my wife to purchase
a home, having earlier sold her home to assist the company. The
arrangement with Mayo's was made by Mr Gepp without any involvement
by me or my wife and was done solely to return funds owed to my
wife [TB 328].

The Attadale property

49 The Attadale property was purchased in the name of Mrs Calnan
only.

50 The defendants together entered a bank loan in April 2010 for
\$960,000. This was at about the time that Mr Calnan was aware that
Calnan-Oldfield may be insolvent.

51 The defendants sold the Attadale property on about 8 March 2013.

The evidence of the defendants

Mrs Calnan's evidence

52 Mrs Calnan had limited knowledge of the events relevant to this
action. She said in evidence that she was a director of Lyndon Holdings,
but she is not recorded on Australian Securities and Investment
Commission records as having held any office in that company. In oral
evidence she agreed that she had not participated in managing the
business, but was an employee.

53 Mrs Calnan said that her share of Lyndon Holdings (\$200,000) was
to be used to set up the new business, together with funds from a

re-mortgage of a property in her name in Booragoon. She also consistently described the money paid for the deposit on the Attadale property as funds which Mr Gepp owed to her as a result of those arrangements. Mrs Calnan did not appear to have any personal knowledge of the arrangements between her husband and Mr Gepp. She based her evidence on what her husband had told her.

Mr Calnan's evidence

54 Mr Calnan said that when he and Mr Gepp agreed to start the new business (incorporated as Calnan-Oldfield) Mr Gepp did not have sufficient funds to match the defendants' capital, but agreed to contribute funds to balance the loan account when he had access to further funds. Lyndon Holdings would provide \$400,000 worth of assets, constituted by the rent roll (\$300,000) and \$100,000 towards the set up costs of the business. Mrs Calnan's 50% share of Lyndon Holdings would be recorded as a loan to Calnan-Oldfield. Mrs Calnan would also provide \$300,000 by a loan from re-mortgaging her house in Booragoon to help pay for the purchase of the business of Elders Real Estate Applecross. The \$300,000 was paid to the Lyndon Holdings account on 1 September 2006, as Calnan-Oldfield did not have a general account at that time.

55 Mr Calnan said that Mr Gepp was to make a \$300,000 initial payment with the remainder owed to Mrs Calnan. When he had funds, Mr Gepp would provide a further \$200,000 to Calnan-Oldfield, enabling the loan from Mrs Calnan to be cleared, and Mr Gepp and Mr Calnan would then have equal loan accounts recording equal capital contributions.

56 In April 2008, Mrs Calnan sold the Booragoon property. In August 2008, from the proceeds, she transferred \$165,936.94 to Calnan-Oldfield. Mr Calnan said that \$100,000 was transferred to Mr Gepp as a personal loan. He said that Mr Gepp agreed that he would introduce \$275,000 into Calnan-Oldfield to enable the company to repay Mrs Calnan, and would repay the \$100,000 owed to Mrs Calnan.

57 Mr Calnan said that, in about August 2008, he asked Mr Gepp to confirm that he could repay the money owed to Mrs Calnan so they could pay the deposit and stamp duty on the Attadale property. Mr Calnan said that he assumed the money received by the settlement agent was from Mr Gepp, as repayment. He said that Mr Gepp knew about the purchase, as he had helped negotiate the original contract with Mr Abrusci, and had witnessed Mrs Calnan's signature on the contract. The \$375,000 payment to Byford Settlements was 'more or less the amount owed by Mr Gepp so

that Calnan-Oldfield could repay Dianne and to balance the loan accounts, and repay Dianne for the \$100,000 personal loan to Mr Gepp'.

In order to balance the loan accounts he would have to make that payment to Calnan-Oldfield rather than to you or your wife, wouldn't he?---Which then Calnan-Oldfield would pay back.

So your - can I just clarify that your position is that the \$375,000 was paid to you by Calnan-Oldfield rather than by Mr Gepp?---Say that again.

Your position - is what you're saying now is that you understood that the \$375,000 that was paid into Byford Settlements Trust Account was a payment - a was a repayment of the capital contributions or loans you had made - - -?---Yes.

---to Calnan-Oldfield? (ts 161)

58 Mr Calnan said that Mr Gepp had complete control over the accounts of Calnan-Oldfield, including their preparation and management. Mr Calnan said that he did not have a director's loan account with Calnan-Oldfield in relation to money borrowed from the plaintiffs, and had never authorised Mr Gepp to establish a loan account in his name or to make payments to the plaintiff from Calnan-Oldfield. He only became aware of the payments to the plaintiffs in about March or April 2009.

59 Generally, Mr Calnan did not accept the accuracy of the MYOB records prepared while Mr Gepp was the company accountant, and disputed the conclusions reached by Mr Huxtable because it was based on information provided by Mr Gepp.

60 Mr Calnan's evidence is not consistent with the report of Mr Huxtable, and the financial records supporting his conclusions.

61 First, by June 2007, Mr Gepp, through his company Auks Pty Ltd, had contributed approximately the same capital as Mr Calnan and Lyndon Holdings. Documents obtained by Mr Huxtable are consistent with Mr Gepp making two payments of \$100,000 to Calnan-Oldfield, and two payments of \$50,000 to Mr Calnan or Lyndon Holdings, in February and March 2007. In June 2007, there is a further payment of \$200,000 to Lafayette Pty Ltd (the owner of Roy Weston First Choice). Mr Huxtable accepted confirmation of another payment of \$250,000 in December 2006, although that does not show on the bank statements he produced. It is, however, supported by the draft financial statements prepared by the external accountants, which record non-current liabilities, including borrowing from 'Gepp Group' of \$628,500 in 2008 and \$549,380 in 2009.

62 Second, the company has no recorded debt to Mrs Calnan, although it did record a debt to Lyndon Holdings of \$547,387, and an advance by Mr Calnan to the company in August 2008 of \$165,936. That debt to Mr Calnan was recorded as still outstanding in 2010 (although offset by amounts owed to Calnan-Oldfield).

63 More generally, Mr Calnan's evidence does not recognise the distinct legal personalities of the defendants as individuals and Lyndon Holdings as a company. The acquisition of Lyndon Holdings by Calnan-Oldfield was treated, in the records of Calnan-Oldfield, as creating a debt owed by Calnan-Oldfield to Lyndon Holdings. Mr Huxtable concluded that, in 2010 when it was deregistered, Lyndon Holdings may have had a claim against Calnan-Oldfield for \$547,387. In his evidence, Mr Calnan treated this as including a debt to Mrs Calnan owed by either Calnan-Oldfield or by Mr Gepp, so that the money advanced by the plaintiffs was a 'repayment' of an existing debt to Mrs Calnan by either Mr Gepp or Calnan-Oldfield.

Was Mr Gepp acting as the agent for Mr and Mrs Calnan?

64 The plaintiffs' case is that Mr Gepp had authority to secure the loan on behalf of the defendants. Their case was not pleaded as subsequent ratification of Mr Gepp's conduct.

65 There is no direct evidence of agency. In particulars of the statement of claim, the plaintiffs relied on acceptance and application of the loan money and their performance of the loan agreement. The issue is whether there is sufficient evidence to support the inference that the defendants authorised Mr Gepp to borrow on their behalf.

66 I find:

- (1) Mr Gepp was not acting on his own behalf or on behalf of Calnan-Oldfield.
- (2) The funds were paid directly to Mrs Calnan's settlement agent as payment of the deposit then due to Mr Abrusci under the contract for the purchase of the Attadale property.
- (3) The interest payments were made in a manner that was consistent with what the plaintiffs had agreed with Mr Gepp (allowing for the approximation of the actual costs of the plaintiffs' funds) until June 2010.

- (4) For approximately 10 months, the interest payments were made by Calnan-Oldfield and were coded to Mr Calnan's loan account.

67 Those findings are in the context that Mr Calnan was the sole director of Calnan-Oldfield until 3 September 2009 and a director until June 2010 while these payments were being made. He used Calnan-Oldfield as a vehicle for paying other personal amounts, including the payment to Mr Abrusci and payments on other property-related borrowings for properties in Mandurah and O'Connor, in a manner consistent with how the interest payments were made through the company. I do not believe his evidence that he did not know those payments were being made as 'drawings' on his account.

68 These matters together support the inference the plaintiffs would have the court draw that Mr Gepp was acting as Mr Calnan's agent.

69 The defendants' explanation of why Mr Gepp secured the loan is, in my opinion, untenable.

70 First, it depends on the court accepting that Mr Gepp acted either dishonestly or irrationally in incurring a personal debt for the benefit of the defendants and for which he expected the defendants to be liable. Despite the repeated assertions of Mr Calnan, he has not adduced any evidence to show that Mr Gepp was dishonest.

71 Second, there is a significant inconsistency in the defence case:

- (1) The defendants' pleaded case is that they received \$375,000 believing that it was money owed to them by Mr Gepp and which they anticipated receiving from him: defence par 15.
- (2) In his witness statement, Mr Calnan said that he had agreed with Mr Gepp that Mr Gepp would introduce \$275,000 into Calnan-Oldfield to enable the company to repay Mrs Calnan.
- (3) In oral evidence, Mr Calnan agreed that he understood that the \$375,000 that was paid into Byford Settlements Trust Account was a repayment of the capital contributions or loans he had made to Calnan-Oldfield.
- (4) In his letter to Mr Huxtable of 10 August 2010, Mr Calnan explained the loan as the result of a promise that Mr Gepp 'would borrow through Calnan-Oldfield \$375,000 and reduce the amount owing to me by this amount'.

72 Third, Mr Calnan described this transaction as one that would 'equalise the loan accounts'. Mr Gepp borrowing through Calnan-Oldfield would not do this. And, on the evidence of Mr Huxtable, I find that Mr Gepp had made a capital contribution to Calnan-Oldfield, through Auks Pty Ltd and his family trust, roughly equivalent to that of Lyndon Holdings and Mr Calnan before August 2008.

73 Fourth, as noted above, if the \$375,000 was in repayment of debts including the \$165,000 advanced by the defendants to Calnan-Oldfield in August 2008, that advance remained credited to Mr Calnan in 2010.

74 It is not, of course, sufficient that I do not accept the defendants' case. The plaintiffs bear the onus of satisfying the court that Mr Gepp acted as agent of the defendants with their authority. There are some matters that remain unexplained, including the source of the interest payments after Calnan-Oldfield went into administration. But having regard to the matters which I find support the inference that Mr Calnan authorised Mr Gepp to borrow the money on their behalf, and my rejection of the defendants' explanation, I am satisfied that the plaintiffs have proved against the second defendant.

75 I am not satisfied that the plaintiffs have proved that Mr Gepp acted with Mrs Calnan's actual authority. Although she may have been aware of some arrangement between her husband and Mr Gepp, in my opinion that falls well short of demonstrating that she appointed Mr Gepp as her agent to secure the loan.

Conclusion

76 The plaintiffs are entitled to judgment against Mr Calnan for the principal advanced and unpaid. In an amendment to their claim, after the close of evidence, they seek as damages the interest they have paid on the sum advanced while it remains outstanding. I am satisfied they are entitled to that amount as damages for breach of contract, being the actual loss caused by Mr Calnan's failure to repay the loan within six months. The damages are subject to being reduced for amounts actually paid.

77 I will ask the plaintiffs to bring an order to reflect this conclusion.