SUPREME COURT OF QUEENSLAND

CITATION:	*Hansen & Anor v Patrick & Ors* [2018] QCA 298
PARTIES:	**ALLAN JOHN HANSEN** **(first appellant/first cross-respondent)** **BANCHICK PTY LIMITED** **ACN 011 006 018** **(second appellant/second cross-respondent)** **v** **ROBERT WILLIAM PATRICK** **(first respondent/first cross-appellant)** **KATHRYN LOUISE PATRICK** **(second respondent/second cross-appellant)** **FIREHOSE PTY LIMITED** **ACN 054 417 757** (third respondent/third cross-appellant) **PATRICK & HANSEN PTY LTD** ACN 010 883 708 (fourth respondent/fourth cross-appellant)
FILE NO/S:	Appeal No 1877 of 2018 SC No 800 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville – [2018] QSC 7 (North J)
DELIVERED ON:	30 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	11 October 2018
JUDGES:	Sofronoff P and Fraser and Morrison JJA
ORDERS:	**1. The appeal is allowed.** **2. A retrial is ordered.** **3. The cross-appeal is dismissed.** **4. Parties to file submissions about costs by 4 pm Friday 9 November 2018, to be determined on the papers.**
CATCHWORDS:	APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – where the appellants' claim for damages for fraud, negligent misstatement, breach of fiduciary duty and contraventions of the *Trade Practices Act* 1974 (Cth) was dismissed – where the first appellant alleged that he sold his interests in the

fourth respondent and a related unit trust in reliance upon representations made by the first respondent as to the value of certain pieces of land owned by their jointly owned company – where the learned primary judge rejected the entirety of the first appellant's evidence given at trial – where his Honour found that the first appellant had attempted to deliberately deceive the court – where no submission was made by counsel for the respondents at first instance that the first appellant had given his evidence dishonestly or had committed perjury – where the findings of dishonesty on the part of the first appellant were erroneous – whether the erroneous findings as to the first appellant's dishonesty were essential links in the learned trial judge's reasoning, such that his Honour's orders ought to be set aside

APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – where the cross-respondents alleged, at trial, that part of the purchase price had been withheld by the cross-appellants in order to meet a tax liability – where the cross-appellants' plea admitted that the money had been retained and did not put in issue that the liability had been met – where the learned trial judge raised a question with the parties, after the evidence had concluded, concerning the identity of the proper parties to the claim for the withheld sum – where the first cross-respondent and second cross-respondent executed a deed, with the effect that the right to recover the money was assigned to the first cross-respondent, after the evidence had finished and sought to reopen the case in order to tender the deed – where the learned trial judge granted leave over the objection of the cross-appellants – whether the learned trial judge erred in the exercise of his Honour's discretion in allowing the case to be reopened and for the deed to be tendered

Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34, cited
Browne v Dunn (1893) 6 R (HL) 67, discussed
Ghazal v Government Insurance Office of New South Wales (1992) 29 NSWLR 336, cited
Jones v National Coal Board [1957] 2 QB 55; [1957] EWCA Civ 3, cited
Kuhl v Zurich Financial Services Australia Ltd (2011) 243 CLR 361; [2011] HCA 11, applied
MWJ v The Queen (2005) 80 ALJR 329; (2005) 222 ALR 436; [2005] HCA 74, cited
Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 67 ALJR 170; [1992] HCA 66, cited
Vasiliopoulos v Dosanjh (2008) 84 BCLR (4th) 45; [2008] BCCA 399, cited

COUNSEL: D A Savage QC, with A L Raeburn, for the appellants/cross-respondents

J A Griffin QC, with A J Moon, for the respondents/cross-appellants

SOLICITORS: Connolly Suthers Lawyers for the appellants/cross-respondents
Roberts Nehmer McKee Lawyers for the respondents/cross-appellants

[1] **THE COURT:** After a trial, North J dismissed the appellants' claim for damages for fraud, negligent misstatement, breach of fiduciary duty and contraventions of the *Trade Practices Act* 1974 (Cth). His Honour gave judgment in favour of the first appellant in respect of his claim against the first respondent and the fourth respondent for $749,145.04 for money had and received. The appellants appeal against the dismissal of their claims and the first and fourth respondents' cross-appeal against the judgment for $749,145.04. The respondents have also filed a notice of contention to support his Honour's orders dismissing the appellants' claims.

[2] The appellants' appeal is based upon several grounds but, in the result, it is only necessary for us to consider the first ground.

> "The learned primary Judge erred in fact and in law in finding that the Plaintiffs' case was based upon the deliberately false evidence of the First Plaintiff when that matter was never put to the First Plaintiff at trial by the Defendants' nor raised by the court with the parties at the trial and was not in any event open such finding not satisfying the requirements set out in *Briginshaw -v- Briginshaw* (1938) 60 CLR 336 or *Rejfek -v- McElroy* (1965) 112 CLR 517."

[3] The proceedings arose out of a partnership that began in 1986 between the first appellant, Mr Allan Hansen, and the first respondent, Mr Robert Patrick. Mr Hansen's field was earthmoving. Mr Patrick's area of expertise was land development and sales. They began to conduct a business together in which each partner devoted himself to his particular area and in this way they improved, developed and sold land. In 1988 the partners adopted a different legal structure under which to conduct their business, that of a jointly owned company that conducted the business in its capacity as a trustee of a unit trust. The former partners arranged for the units in the trust to be held by their respective companies. Together they owned and controlled the trustee. For the purposes of this appeal it is unnecessary to consider the structure in greater detail than that.

[4] Eventually, Mr Hansen and Mr Patrick decided to part ways. By two contracts, executed on 13 February 2004, Mr Hansen's share in the trustee and his indirect holding in the unit trust were transferred to Mr Patrick. The total contract price was $365,592.00.

[5] In 2006 Mr Hansen commenced proceedings against Mr Patrick.[1] He alleged that he had entered into the contracts in reliance upon representations that Mr Patrick

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[1] Mr Hansen's company that held the unit in the trust was also a plaintiff as were Mr Patrick's wife, his unit-holding company and the corporate trustee itself, but it is not necessary in this appeal to have regard to their roles. It is convenient to treat Mr Hansen and Mr Patrick as though they were the only parties.

had made to him about the value of certain pieces of land owned by their jointly owned company. This land constituted a very significant part of the value of the business and, therefore, the value attributed to this land was material to the contract price. Mr Hansen alleged that Mr Patrick had made the representations fraudulently. He also pleaded causes of action under the *Trade Practices Act* 1974 and causes of action alleging breaches of fiduciary duty by Mr Patrick and by his wife. He sought a judgment for over $2 million by way of compensation for his loss.

[6] Mr Hansen alleged in his pleadings, and gave evidence at the trial, that the proposal that Mr Patrick should buy him out had come from Mr Patrick. He said that on 23 January 2004 the two of them had met at the Rising Sun Hotel in Townsville where Mr Patrick had induced Mr Hansen to sell his interest by telling him lies about the values attributable to the pieces of land. Mr Hansen said in his evidence that he had devoted himself to the earthmoving side of the business and had little knowledge of or familiarity with the land development part of the business. For this reason, he said, he had to rely upon Mr Patrick's word about the worth of the land. Mr Hansen said that Mr Patrick had told him that demand for land had been slow, that in the previous four to five months there had only been a single telephone call inquiring about their company's land and that the contract price would have to reflect these unfortunate facts and that, in addition, a discount of $5,000 per allotment would have to be applied to take into account the cost of Mr Patrick's having to hold the land for some years until the market improved. Mr Hansen alleged that he had been told that a certain contract of sale of a piece of land had fallen over. He was told that another particular allotment was worth $700,000 and that another was worth $320,000.

[7] In his statement of claim Mr Hansen alleged that these representations were false to the knowledge of Mr Patrick. Demand was not slow and was actually increasing. To show this, he particularised over 90 sales of land that, he claimed, were the subject of separate contracts. He alleged that the value of the three lots whose values had been particularised by Mr Patrick was, in fact, substantially greater. He alleged that the particular contract that Mr Patrick had said had fallen through had been replaced by a new contract.

[8] Mr Hansen also alleged in his pleading that Mr Patrick had opened bank accounts secretly and had used them to siphon partnership money.

[9] Mr Patrick's defence to these allegations was nothing less than an entire denial. He said that no meeting of the kind alleged by Mr Hansen had ever taken place. Rather, in October 2003, Mr Hansen had caused his secretary, Ms Sue-Ellen Bannister, to call Mr Patrick to tell him that Mr Hansen wanted to buy him out of the company. Mr Patrick told her that he was not interested in selling but that he was interested in buying. On 16 October 2003, said Mr Patrick, Ms Bannister handed him Mr Hansen's written estimate of the value of the company's land. On 22 October Mr Patrick had responded with his own written estimate of values. They had indeed met at the Rising Sun Hotel but this was on a date in November 2003 and not in January 2004, said Mr Patrick. Mr Hansen had invited Mr Patrick to meet him there and they had met and discussed their respective estimates of value. Mr Patrick offered to buy out Mr Hansen's interest in the business upon the basis that the "Innes Estate" residential land was valued at $400,000, the "Innes Estate" shopping complex was valued at $300,000, "Brenton Circuit" was valued at $600,000 and

"Reward Court" was valued at $150,000. A few days later Mr Hansen phoned him and agreed to sell on that basis. Thereafter, he said, they engaged the company's accountants to do the work to bring their agreement into fruition. Accordingly, on 25 November 2003 Mr Patrick met with the accountants and on 1 December 2003 Mr Hansen did likewise. The accountants advised each of them that it was necessary to agree a "cut-off date" after which the benefits and obligations attaching to the business would be regarded as belonging to Mr Patrick, the purchaser. The date so specified by the accountants and agreed to by the partners was 30 November 2003. Mr Patrick said that the accountants had also advised him to open accounts to deal with moneys received or paid after the cut-off date as the putative purchaser and that he had done so.

[10] Mr Patrick denied that there had been any meeting with Mr Hansen on 23 January 2004 or that he had made any of the representations alleged against him except for two of them. He admitted that he had told Mr Hansen that a certain contract had been terminated. He also admitted saying that demand had been slow.

[11] Mr Hansen gave evidence at a trial before North J that began on 9 September 2015 and continued for seven days. It ended after further addresses by counsel in April 2016. His evidence in chief was largely consistent with his pleaded case. However, during cross-examination by Mr Griffin QC, who appeared for Mr Patrick both at the trial and on the hearing of this appeal, problems began to emerge in the plaintiffs' case. In his evidence in chief Mr Hansen had said that there had been no events in relation to the sale in 2003. He had repeated this in cross-examination. The proposal, he insisted, had first emerged in about the middle of January 2004 and had come from Mr Patrick. A facsimile sheet dated 16 October 2003 was put before Mr Hansen. It was said to have been written by his secretary, Ms Bannister, and the subject was stated as "Allan's Proposal". It attributed values to the Innes Estate, the shopping complex, Brenton, and Reward Court. Mr Hansen was then shown a set of facsimile sheets dated 22 October 2003 containing handwritten values of certain pieces of land. This appeared to be a reply from Mr Patrick addressed to the attention of "Allan".

[12] Mr Hansen denied having seen these documents before.

[13] Mr Hansen also denied having been advised by the company's accountants about the cut-off date of 30 November 2003. He said it was 6 February 2004. He was shown the minutes of a meeting of the directors of the company, including himself, at which the board had resolved to make a trust distribution in accordance with accounts prepared for the period 1 July 2003 to 30 November 2003. Mr Hansen maintained his denial of any knowledge about 30 November 2003 as a cut-off date. On his case, the latter date was, of course, before they had reached an oral understanding.

[14] Mr Patrick gave evidence consistently with his own pleaded case.

[15] The defence also called Mr Graham Wilson and Mr Gary Engel who were the company's accountants at the time. By reference to their time sheets it was apparent that the transaction had first been proposed in October 2003 and that the accountants had then been engaged to carry it out. The records show that several meetings had been held with them at which the proposed sale was discussed with Mr Hansen and Mr Patrick well prior to 23 January 2004. The accountants confirmed Mr Patrick's

evidence that it was they who had proposed a cut-off date of 30 November 2003 and it was they who had advised Mr Patrick to open the new accounts.

[16] The defence also called Ms Bannister. She identified the two facsimiles, one of which she had handed to Mr Patrick and was in her handwriting, and one of which had been received from him and was in his handwriting. She confirmed that she had been asked by Mr Hansen in 2003 to put the original proposal to Mr Patrick to buy Mr Patrick's interest. She explained that she and Mr Hansen had undertaken a great deal of work to identify land belonging to the company and that Mr Hansen had then worked with company records to attribute values to each piece of land. He had used the prices being asked for various lots being offered for sale by the company. Upon Mr Patrick's response of 22 October 2003 being received, she said, Mr Hansen had undertaken calculations to make his own assessment of Mr Patrick's estimates.

[17] The evidence of these three independent witnesses was not challenged.

[18] The gulf between the two versions of events was very, very wide. One of them was supported by the evidence of seemingly independent witnesses and by contemporaneous documents. The other found no support in any documents or in the evidence of any independent witnesses.

[19] North J found that both Mr Hansen and Mr Patrick were experienced and astute businessmen. He found that by late 2003 they were no longer on good terms. He observed he could not draw any view about the reliability of their evidence from their demeanour.[2] His Honour went on:

> "[50] …But the time elapse between the events of late 2003 and early 2004 and trial must have affected the reliability of the memory of both, indeed all the witnesses relating to the events. To a greater or lesser extent each witness relied, in order to refresh memory, upon contemporaneous documents. But the documentary trail is in a sense fragmentary. I am not suggesting documents have been deliberately withheld or destroyed, but from them alone it is not possible to reliably reconstruct in detail the content of discussions between or involving Hansen or Patrick. Further, apart from events such as meetings with accountants and the settlement meetings in February 2004 the documents offer at best limited assistance in determining when or where meetings occurred between Hansen and Patrick. Nor do the telephone records offer significant, let alone decisive, assistance."

[20] His Honour then observed that Mr Hansen had, on six occasions, denied that anything relevant to the sale of his interest had happened in 2003 but that the evidence of Mr Patrick, Messrs Wilson and Engel and Ms Bannister contradicted those denials. His Honour then said:

> "[51] …Ultimately for reasons I will shortly explain, I have concluded that the evidence of Hansen should be rejected entirely, not only on the issue of when discussions and negotiations leading

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2 [2018] QSC 7 at [50].

> to the sale took place but also his evidence of the content of the discussions including what he was told and what he was not told and any assertion that either he relied upon anything that Patrick told him or that what he was told induced him or his company to enter into and sell the land interests to Patrick."[3]

[21] His Honour then discussed the evidence of Messrs Wilson and Engel, the corroboration given by their time sheets and his acceptance of their evidence. Similarly, he dealt with Ms Bannister's evidence and said that she was an impressive witness. His Honour found that the transaction originated and developed in the way that those witnesses, as well as Mr Patrick, had related.

[22] For Mr Hansen it was submitted at trial that even if the meeting at the hotel had taken place in November 2003, as Mr Patrick asserted, it was nevertheless open for North J to find, and that he ought to find, that the fraudulent representations had, in fact, been made to him. The submission was repeated in this appeal. As to this submission, North J said:

> "[55] …But Hansen's evidence cannot be viewed as merely based upon a mistaken recollection of dates. At several levels his evidence and reliability is undermined. He was wrong when he insisted the meeting at CE Smith on 1 December 2003 was only about his BMW. His evidence was false when he denied any knowledge of the document of 16 October 2003. Sue-Ellen Bannister's evidence is that it was Hansen who told her what to put in the document of 16 October 2003 and that he was with her when she wrote it. Moreover the document and the evidence of Patrick and Bannister shows that he then had decided to sell and that he was confident enough of his knowledge of the value of the land holdings to put a value on them for the purposes of his offer. The evidence of Bannister was that Hansen kept himself informed of the land holdings, the contracts, settlements and payments. By his own admission he had long experience in land buying and selling. The evidence of Bannister confirms that the information necessary to make an informed decision about the land holdings and values was at his office at Hogan Street. Further Bannister's evidence confirms that Hansen knew of the files and records and he went through them with her to ascertain the position and value.
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> [56] In evidence Hansen was at pains to present himself as ignorant of the affairs of the fourth defendant in so far as they concerned the land holdings, sales and values and in that context to be reliant upon Patrick and at a distinct disadvantage to Patrick. This evidence was, in my view, false and part of a deliberate attempt by Hansen to create a false impression and to deceive the court.

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3 *supra*, [51].

> [57] For these reasons the evidence of Hansen is revealed as being not only unreliable but also deceptively false. I reject his evidence. I do not accept his evidence that Patrick made the representations alleged in the further amended statement of claim. Nor am I prepared to infer that Hansen relied upon anything Patrick might have said to him in deciding to commit to and to settle the transactions in February 2004. Hansen made his own assessment of values in the 16 October 2003 document. He had the experience to make such an assessment. He had access to all the records necessary to make an assessment and he had resort to them. He well knew the nature of and the values of the land assets owned by the fourth defendant. On the evidence of Bannister, he and Bannister went through the records to check matters after receipt of the fax of 22 October 2003. Further Hansen, as an experienced business man, must have known that the proposal concerning values in the document of 16 October 2003 must have put a cap upon the "price" to be attributed to the land."
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> (Footnotes omitted)

[23] This passage shows that the first substantial step in North J's process of reasoning was–the conclusion in paragraph [51] that the entirety of Mr Hansen's evidence should be rejected because, as stated in the foreshadowed explanation in paragraph [56], Mr Hansen had been guilty of "a deliberate attempt … to create a false impression and to deceive the court" and his evidence was "not only unreliable but also deceptively false". That conclusion permeates his Honour's analysis. For example it is reflected in the conclusion in paragraph [55] that Mr Hansen's denial of knowledge of the facsimile of 16 October 2003 was not merely unreliable but that "his evidence was false". Paragraph [51] and [56] make it clear that his Honour's findings that Mr Hansen deliberately attempted to deceive the Court also influenced the rejection of the claim that Mr Hansen and his company executed the contracts in February 2004 in reliance upon the alleged representations.

[24] These findings also played a part in his Honour's reasoning about the claim based upon Mr Patrick's breach of fiduciary duty. His Honour held that Mr Patrick did not owe Mr Hansen a fiduciary duty. His Honour said:

> "[75] In the particular and perhaps rather unusual circumstances that apply in the case of this closely held company I am not persuaded that Patrick had a special opportunity to exercise power or discretion or to otherwise act or withhold information to the detriment of Hansen nor am I prepared to conclude that Hansen was vulnerable to such abuse by Patrick by reason of his position as a shareholder. The findings and observations I made earlier in these reasons are applicable upon this issue. I need not repeat them. I hold that Patrick did not owe Hansen a fiduciary duty of the nature or in the circumstances as alleged by the plaintiffs."
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> (Footnotes omitted)

[25] The "findings and observations" to which his Honour referred were identified in a footnote as being those which culminated at paragraphs [56] and [57] quoted above.

[26] Thus, the finding that Mr Hansen set out to deceive the court by giving false evidence was part of the foundation for his Honour's decision to dismiss the proceeding based upon the pleaded representations. The problem is that this allegation had not been made by the defendants and no such allegation had ever been put to Mr Hansen in cross-examination. The accuracy, correctness and reliability of Mr Hansen's evidence was certainly in issue in the trial; but the proposition that he had set out to fabricate a false case, to deceive the court and to perjure himself were not in issue before his Honour.

[27] In *Browne v Dunn*[4] Lord Herschell explained that cross-examining counsel who intends to submit that a witness "is not speaking the truth on a particular point" must ask questions "showing that that imputation is intended to be made". Counsel must put to the witness "the circumstances which it is suggested indicate that the story he tells ought not to be believed". If counsel intends to "impeach a witness" the witness must be given the opportunity of making an explanation.

[28] The rule in *Browne v Dunn* constrains counsel not judges.[5] The rule is one about fairness to witnesses and about the utility of evidence. It is a rule that limits the scope of submissions that counsel may make to a judge. If counsel fails to give a particular witness an opportunity to meet a factual proposition by neglecting to cross-examine the witness about it, then, among other possible consequences, that counsel might not be permitted to invite the judge to make a finding based upon that proposition even if there is evidence to prove it.

[29] Although the rule is not about judges, a breach of the rule may influence a judge's decision.

[30] In some cases the judge will be handicapped in making such a finding because evidence that might have borne upon the correctness of such a finding has not been elicited because of the failure to cross-examine.[6] Also, the failure to cross-examine might have affected the weight of evidence that has been elicited. Whether it is open to make such a finding when the rule has been breached will depend upon the facts of the case.

[31] Most cases in which a judge rejects a witness's evidence do not involve a finding that the witness is a liar because most witnesses whose evidence is rejected are not liars. Also, barristers are seldom compelled to make, or are justified in making, such allegations.

[32] It may be taken that counsel has had access not only to the brief but also to all of the available information short of evidence itself that might bear upon the credit of a witness. Those instructions and that information may lead counsel to conclude that such an imputation is not justified. There is a conventional assumption that members of Australian society do not ordinarily engage in fraudulent or criminal conduct. So barristers do not very frequently make an allegation of deceitful conduct and courts do not lightly make a finding on the balance of probabilities that

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4 (1893) 6 R (HL) 67 at 70-71.

5 *Vasiliopoulos v Dosanjh* [2008] BCCA 399 at [34]-[37].

6 *Ghazal v Government Insurance Office of New South Wales* (1992) 29 NSWLR 336 at 345-346 per Kirby P.

a party to civil litigation has been guilty of such conduct.[7] That is to be expected and occasions when such allegations are raised are rarer than might commonly be expected.

[33] Even in cases in which counsel's instructions justify taking this extreme step, forensic considerations may dictate not taking it. Allegations of perjury carry with them the burden of the *Briginshaw* standard[8] and this itself may be a sound forensic reason to keep one's case below that threshold in order to avoid it. What is more, raising cases to the level of allegations of dishonesty makes them hard to settle. Experienced lawyers know all this. Perhaps for these reasons, or perhaps for other reasons, Mr Griffin QC, a counsel of very great experience, did not put to Mr Hansen that he was a liar.

[34] If, after having had the advantage of considering all of this material, and having had the opportunity to consider whether the falsity of a witness's evidence is due to actual dishonesty or some reason short of dishonesty, counsel has chosen to refrain from raising an allegation of perjury or other dishonesty, it is a very, very great step for a judge to make a finding of that kind.

[35] There is another way in which a breach of the rule in *Browne v Dunn* may affect a judge's reasoning. In *Jones v National Coal Board*,[9] Denning, Romer and Parker LJJ said:

> "There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the judge … No cause is lost until the judge had found it so; and he cannot find it without a fair trial, nor can we affirm it."

[36] The rules of procedural fairness confer a right upon a party to a proceeding to be given fair notice of any finding that might be made that might affect the outcome of the case. This does not depend upon whether or not the finding might impeach that party's integrity; but a finding that will have such an effect is, *a fortiori*, one that should only be made after giving a fair opportunity to respond. To this may be added the further reason that judges, better than most, appreciate that findings made with the authority of a judge can have very grave personal consequences beyond the case at hand. They may have lasting professional, business or personal consequences for the person directly affected and for unknown others. In *MWJ v The Queen*,[10] Gummow, Kirby and Callinan JJ said that one corollary of the rule was that judges should, in general, abstain from making adverse findings about parties and witnesses in respect of whom there has been a failure to comply with the rule.

[37] If such findings have been sought by a party after that party has failed to comply with the rule, a very good reason must be demonstrated why the finding ought nevertheless be made. If such allegations have neither been put nor sought, it would be a rare case indeed in which it would be fair, and therefore in which it would even be open, for a judge to make it.

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7 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171 per Mason CJ, Brennan, Deane and Gaudron JJ; see also *Helton v Allen* (1940) 63 CLR 691 at 701 and *Rejfek v McElroy* (1965) 112 CLR 517 at 520-522; *G v H* (1994) 181 CLR 387 at 399.

8 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

9 [1957] 2 QB 55 at 67.

10 (2005) 222 ALR 436 at [39].

[38] In *Kuhl v Zurich Financial Services Australia Ltd*[11] it was held that that a trial judge erred by finding that the plaintiff had suppressed evidence without giving the plaintiff an opportunity to deal with that criticism. With appropriate adaptations to reflect the even more serious criticism of Mr Hansen, we would adopt as applicable in this appeal the following passages in the majority reasons of Heydon, Crennan and Bell JJ:

> "The rule in *Jones v Dunkel* permits an inference, not that evidence not called by a party would have been adverse to the party, but that it would not have assisted the party. But the conclusion by the trial judge that the plaintiff – a party-witness – deliberately withheld evidence reflected a stronger reaction. It operated as a finding that there had been an admission. It could be inferred that the evidence was withheld, in breach of the witness's duty to tell the whole truth in answer to the question, because the plaintiff was conscious that success in the litigation would be rendered impossible or less likely if the material withheld were revealed."[12]
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> "It is not sound judicial technique to criticise a party-witness for deliberately withholding the truth in a fashion crucial to a dismissal of that party's claim unless two conditions are satisfied. First, reasons must be given for concluding that the truth has been deliberately withheld. Secondly, the party-witness must have been given an opportunity to deal with the criticism."[13]
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> …
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> "*The lack of warning*. The second condition is more controversial. … There is thus no general duty on a judge to advise the representatives of the parties of what they can see for themselves, namely the demeanour of the party-witness in the witness box. Nor, a fortiori, is there a duty on a judge to advise the parties that the party-witness's evidence is not adequate to make out the case of that party-witness. But there was held to be a breach of the duty of procedural fairness where a party claiming compensation for injury was held to have feigned or exaggerated her symptoms although this had not been suggested in cross-examination and the response disavowed that possibility.
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> If, in the present case, the first respondent had submitted in final address that the plaintiff had answered his own counsel's questions in chief about how his arm had been drawn into the vacuum hose by deliberately concealing material adverse to his case and favourable to the first respondent's – an allegation not of inadequacy in evidence but of suppression of evidence supporting an inference that the plaintiff knew his case was bad – a breach of the rule in *Browne v Dunn* would have taken place."[14]

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11 (2011) 243 CLR 361.
12 (2011) 243 CLR 361 at 385 [64].
13 (2011) 243 CLR 361 at 386 [67].
14 (2011) 243 CLR 361 at 387 [69], [70].

…

> "An allegation in final address that the plaintiff suppressed evidence would be in substance a suggestion that he was not speaking the truth and ought not to be believed: for he had been asked in effect to describe the whole of what he observed and remembered about what happened when the hose was handed back towards him, and the allegation would be that he had failed to speak the truth by deliberately not describing the whole of what he remembered, but suppressing unfavourable parts of it. So to allege would have been to "impeach" the plaintiff as a witness. The remedies might have included a refusal by the judge to accept or entertain the submission, and a recall of the plaintiff to the witness box to deal with the allegation.
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> Now if it was not open to counsel for the first respondent to make the postulated allegation, how can it have been open to the trial judge, without warning, to incorporate into his reasons for judgment a finding to the same effect as the allegation?
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> For those reasons the second condition referred to ought to have been satisfied before the trial judge made the criticism he did."[15]
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> …
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> "There was no point in the trial judge mentioning his conclusion that the plaintiff's evidence was not frank and complete unless it played a role in his decision adverse to the plaintiff. In the absence of any challenge from the cross-examiner to the frankness and completeness of the plaintiff's evidence, it was incumbent on the trial judge, if his conclusion that the plaintiff had not been frank and complete was to play a role in his decision adverse to the plaintiff, to make the challenge himself. Perhaps the criticism in the judgment did not occur to the trial judge until after the plaintiff had left the box, or until after the hearing had concluded and before the judge's reserved judgment was given. It remained necessary either to recall the plaintiff or to have no regard to that aspect of the plaintiff's evidence."[16]
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> (Footnotes omitted.)

[39] In this case, the documents in evidence and the testimony of witnesses whose independence and honesty were not challenged presented Mr Hansen with apparently formidable obstacles to the acceptance of his evidence, or at least parts of it. However, the defence did not put forward that Mr Hansen had concocted his whole story. If such an imputation had been made, it might have drawn a response that, for example, any errors found by the trial judge in Mr Hansen's evidence were explicable by faulty memory rather than deliberate invention. Counsel might then have developed arguments in support of their competing contentions. There was no issue of that kind joined between the parties. No question was put to Mr Hansen that expressed or implied that he was a perjurer and no circumstances said to support

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15 (2011) 243 CLR 361 at 387-388 [69]-[73].

16 (2011) 243 CLR 361 at 389 [75].

any such imputation were put to him. Consistently with the conduct of the defence, the defendants did not invite the learned trial judge to find that he was a perjurer. Mr Hansen had no reason to think that he had to defend himself against the possibility that the judge might make such a finding. Yet, his Honour made such findings. On the hearing of this appeal Mr Griffin QC rightly and naturally did not seek to maintain these findings.

[40] The court cannot assume that the adverse credit findings did not add anything to North J's rejection of the reliability of Mr Hansen's evidence. In rejecting Mr Hansen's case at trial that he should succeed even if he was wrong about the date when the fraudulent misrepresentations were made, North J evidently drew from his credit findings the inference that Mr Hansen appreciated that the truth would harm his case.[17] That North J relied upon the findings in that way is suggested by the passages we have quoted and the fact that otherwise there was no apparent point in finding that Mr Hansen's evidence was not merely unreliable but was also a deliberate attempt to deceive the court.[18]

[41] The findings were erroneous and cannot stand. Because, as we have explained above, these findings constituted essential links in his Honour's chain of factual reasoning to judgment, his Honour's orders dismissing the appellants' claims must be set aside. This court, not having seen and heard the witnesses give evidence, is not in a position to make its own findings about the many factual disputes revealed by the evidence at the trial. Both parties agreed that if the appellants succeeded on this basis there would have to be a retrial and accordingly that will be one of the orders that we will make.

[42] Having regard to this conclusion it is not necessary to consider the respondent's notice of contention which could not, on its own, sustain the judgment in the face of the court's reasons for setting it aside. It is not necessary to deal with it further.

[43] The respondent also cross-appealed against the order giving the first plaintiff judgment for $749,145.04. The point arises simply enough. It was common ground between the parties that part of the purchase price was retained by the purchasers of the shares and units in order to ensure that tax liabilities for which the vendors might be liable could be met. The plaintiffs pleaded as follows:

> "31. Additionally, at the time of settlement, Patrick and/or his associated entities and/or Patrick & Hansen Pty Ltd withheld the sum of $344,285.84 from Hansen and/or Banchick Pty Ltd against Hansen and/or Banchick Pty Ltd's taxation liability on the sale. Hansen and/or Banchick Pty Ltd having paid his/its/their taxation liability on the sale as assessed by the Australian Taxation Office, Hansen and/or Banchick Pty Ltd claim from Patrick and/or his associated entities, and/or Patrick & Hansen Pty Ltd the said retention money as money had and received, and/or wrongfully retained and/or withheld by Patrick and/or his associated entities and/or Patrick & Hansen Pty Ltd."

[44] The defendants' response in their defence was:

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17 (2011) 243 CLR 361 at 385 [64].
18 (2011) 243 CLR 361 at 389 [75].

> "22. As to paragraph 31 of the statement of claim, the defendants:-
>
> 22.1 admit that a sum of $344,285.84 was withheld at the time of completion on account of tax liability on the sale;
>
> 22.2 deny, on the basis that it is untrue and has no basis in fact or evidence, that there was any wrongful detention."

[45] It can be seen that the defendants' plea admitted that the money had been retained to meet a tax liability and it did not put in issue that the liability had been met. That being so, the plaintiffs were entitled to judgment. No defence to this claim on the merits was advanced at trial or on appeal. Indeed, as emerged in oral argument, the money retained was part of the purchase price. It would have been open to the appellants simply to sue for payment by reason of its character, leaving it to the defendants to justify how they could refuse to pay. In truth, there was no such justification. After the evidence had finished, North J raised a question with the parties concerning the identity of the proper parties to this claim. That confusion, or lack of clarity, was understandable in the context of a hard fought case in which the live issues concerned Mr Patrick's alleged fraud, a case in which liability for this particular sum was not in issue. In the result, the right to recover the money, whether it inhered in the first plaintiff or the second plaintiff, was assigned by deed by Mr Hansen and Banchick Pty Ltd, the only possible creditors, to Mr Hansen, the first plaintiff. In order to give effect to this deed, which was executed after evidence had finished, it was necessary for the plaintiffs to seek to reopen the case in order to tender the deed. The learned trial judge granted leave over the defendants' objection. That was an exercise of discretion in a matter of procedure. By cross-appeal the defendants challenge the correctness of that exercise of discretion. No error of fact or law has been identified in his Honour's reasons. Rather, the respondents simply assert that the decision was wrong. Consequently, no error has been shown in the exercise of discretion by his Honour. The cross appeal must be dismissed.