DISTRICT COURT OF QUEENSLAND

CITATION:	*Kimber & Anor v Kimama Holdings Pty Ltd Trading as Visual Diversity Homes (ACN 106 627 829)* [2020] QDC 203
PARTIES:	**COLIN GRAHAM KIMBER AND LYNETTE MARY MANWARING** (appellants) **v** **KIMAMA HOLDINGS PTY LTD TRADING AS VISUAL DIVERSITY HOMES (ACN 106 627 829)** (respondent)
FILE NO/S:	3611/19
DIVISION:	Civil
ORIGINATING COURT:	Brisbane Magistrates Court
DELIVERED ON:	28 August 2020
DELIVERED AT:	Brisbane
HEARING DATE:	19 June 2020
JUDGE:	Byrne QC DCJ
ORDER:	**1. Appeal allowed.** **2. The orders made in the Magistrates Court at Brisbane on 9 September 2019 are vacated.** **3. The matter, comprising the claims and counter-claim, is remitted to the Magistrates Court at Brisbane for re-hearing.** **4. The appellants are to file and serve no later than 2.00pm on Friday 4 September 2020 an outline of submissions on the issue of costs, limited to no more than four pages, with a view to the issue being determined on the papers.** **5. The respondent is to file and serve a response, if any, no later than 2.00pm on Friday 11 September 2020, such response to also be limited to no more than four pages.** **6. Any reply by the appellants is to be filed and served no later than 2.00pm on Tuesday 15 September 2020, such reply to be limited to no more than three pages.**

CATCHWORDS: MAGISTRATES – APPEAL AND REVIEW – QUEENSLAND – APPEAL – where the trial concerned a breach of contract dispute – where an objection was upheld during cross-examination disallowing questions put to a witness regarding credit – whether the learned Magistrate erred in fact and law by limiting the cross-examination – whether the learned Magistrate erred in fact and law by entering judgment for the plaintiff – whether the learned Magistrate erred in fact and law in dismissing the counter-claim

Cheques Act 1986 (Cth), s 76
Domestic Building Contracts Act 2000 (Qld) (repealed), s 53 s 66
Domestic Building Contracts Regulations 2010 (Qld) (repealed), reg 4, reg 5
Evidence Act 1977 (Qld), s 20
Magistrates Courts Act 1921 (Qld), s 45(1)
Uniform Civil Procedure Rules 1999 (Qld), r 149, r 150, r 165, r 785, r 765, r 770
Uniform Civil Procedure Rules 2005 (Nsw), r 51.53

Allesch v Maunz (2000) 203 CLR 172
Balenzula v De Gail (1959) 101 CLR 226
Chaina v Alvaro Homes Pty Ltd [2008] NSWCA 353
Coal and Allied Operations Pty Ltd v AIRC (2000) 203 CLR 194
Fox v Percy (2003) 214 CLR 118
Goldsmith v Sandilands (2002) 190 ALR 370; [2002] HCA 31
Hally v Starkey & Anor; ex parte Starkey [1962] Qd R 474
McDonald v Queensland Police Service [2018] 2 Qd R 2612
Nicholls v The Queen (2005) 219 CLR 196
Nobarani v Mariconte (2018) 359 ALR 31; [2018] HCA 31
R v Lawrence (2001) 124 A Crim R 83
Robinson Helicopter Company Inc v McDermott (2016) 90 ALJR 679
Seltsam Pty Limited v Ghaleb [2005] NSWCA 208
Stead v State Government Insurance Commission (1986) 161 CLR 141
UCAR v Nylex Industrial Products Pty Ltd (2007) 17 VR 492
Wakeley v The Queen (1990) 64 ALJR 321
Western Australia v Watson [1990] WAR 248

COUNSEL: Mr. N.H. Ferrett QC for the appellants.
Mr. K.W. Wylie for the respondent.

SOLICITORS: Aden Lawyers for the appellants.
Carter Newell Lawyers for the respondent.

Backround

[1] On 25 June 2014, the defendants/appellants contracted with the plaintiff/respondent for the latter to build a residence on land owned by them in Upper Coomera for an agreed price of $310,000.00. Some disputes arose in the course of construction and the appellants took possession of the property before paying the whole of the agreed price. By that time however, the respondent contends that further works had been performed under the contract and for which payment was owing. Further, it was contended that by taking possession of the property, the appellants were liable for payment of the full contract price even though the work had not been finished.

[2] The respondent commenced an action in the Magistrates Court claiming:

1. $109,420.00 (inclusive of GST) being monies owing for breach of contract, less an amount to take into account some minor uncompleted works as required by the contract,[1] and $15,190 representing "delayed damages" calculated under the terms of the contract.
2. Alternatively, $109,420.00 (inclusive of GST) claimed on a *quantum meruit* basis.
3. Alternatively, $109,420.00 (inclusive of GST) claimed on an unjust enrichment basis.
4. Damages pursuant to s 76 of the *Cheques Act* 1986 (Cth).

Interest was also sought on each claim.

[3] The appellant defended the action and also counter-claimed seeking:

1. Damages for breach of contract, quantified at $74,412.69.
2. Alternatively, damages in the same amount for performance of negligent building works.
3. Alternatively, damages in the same amount for breach of contract, and more specifically breach of statutory warranties applying to the contract.

Interest was sought on those claims also.

[4] The action was heard by an acting Magistrate in Brisbane over two days. In a reserved judgment her Honour found for the respondent on the basis of its primary claim, less the claim for delayed damages which was not pursued at the hearing. The reasons were delivered on 6 September 2019 and judgment calculated and entered on 9 September 2019. In the end, judgment was entered in the amount of $109,420.00 plus interest in the sum of $29,300.30 and the appellant was ordered to pay the costs of the respondent on the standard basis. The counterclaim was dismissed.

---

[1] This minor variation was not pleaded in the third amended statement of claim, but is contained in the respondent's written submissions delivered below.

[5] Her Honour did not consider the further alternative bases pursued by the respondent.

[6] As a consequence of finding for the respondent on its principal claim, her Honour found that the counter-claim necessarily failed.

[7] The appellants appeal on the following grounds:

1. The learned Magistrate erred in fact and law by limiting the cross-examination of Daniel Smith, including as to invoices allegedly issued by Perrotts Cartage Pty Ltd trading as Coast Cat Excavations.
2. The learned Magistrate erred in fact and law by entering judgment for the plaintiff for the amount of $109,420.00.
3. The learned Magistrate erred in fact and law in dismissing the counter-claim.

[8] The appellants in effect seek an order for a re-hearing in the Magistrates Court, with consequential orders concerning the costs ordered below and the costs in this Court.

[9] The consequence of a favourable finding on the first ground is that the other two grounds must necessarily succeed, and vice versa. Queens Counsel for the appellant, who did not appear below, informed me that the express purpose of the third ground was to ensure that if the appeal succeeded and the matter was returned for a re-hearing, the counter-claim would form part of that re-hearing.

Nature of the appeal

[10] An appeal from the decision of the Magistrates Court lies to this Court "*as prescribed by the rules*".[2] UCPR, Chapter 18, Division 3, Part 3 applies to appeals of this nature. By dint of r 785, r 765(1) also applies to this appeal and hence the appeal is by way of re-hearing. In an appeal of that nature, it is necessary for me to consider all the evidence and make up my own mind about the effect of it, particularly where any inferences are to be drawn from primary facts.[3] I must give recognition to the fact the Magistrate had the advantage of seeing and hearing the witnesses in the evaluation of credit and in assessing the feeling of the case.[4] The onus is on the appellants to show there is some error in the decision under appeal.[5]

[11] The respondent submits, and I accept for reasons that will become apparent, that r 770 of the UCPR applies as the challenged ruling amounts to a rejection of evidence. Accordingly, even if I am satisfied that the Magistrate erred in curtailing cross-examination by her ruling, I cannot order a re-trial unless satisfied that a substantial wrong or miscarriage has been occasioned by the error.

---

2 Section 45(1) of the *Magistrates Courts Act* 1921.

3 *Fox v Percy* (2003) 214 CLR 118 at [22] – [25]; *Robinson Helicopter Company Inc v McDermott* (2016) 90 ALJR 679 at [43], [57]; *McDonald v Queensland Police Service* [2018] 2 Qd R 2612 at [47].

4 *Fox v Percy* (2003) 214 CLR 118 at [22]; *McDonald v Queensland Police Service*, ibid.

5 *Allesch v Maunz* (2000) 203 CLR 172 at [23]; *Coal and Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194, [14]; *McDonald v Queensland Police Service*, ibid.

[12] In this appeal, the appellants do not challenge any findings of fact on the basis of the evidence that was adduced. The argument is that cross-examination of a particular witness, Dan Smith, was erroneously curtailed by the Magistrate and as a result a substantial wrong or miscarriage has occurred. In effect, it is contended that different findings may have been made if cross-examination was not curtailed, and that should be remedied by the granting of a re-hearing.

Factual background

[13] The lack of any contest on factual matters will allow me to deal with a summary of the factual findings more briefly than would otherwise have been the case.

[14] The standard form contract was entered into on 25 June 2014. It provided for the construction of a house at a nominated address. The work to be completed was "*as per plans and specifications*"[6] which included some preparatory works such as earthworks, although there was some dispute about the need and extent of this at trial.

[15] It is uncontentious that the appellants were keen to take possession of the premises prior to Christmas. The contract provided that the works must reach "*practical completion*" within 121 days "*from slab*", with a further allowance of three weeks for Christmas shutdown and, additionally, any rain days. Anthony Smith, the managing director and building licence holder of the respondent testified, and the Magistrate accepted, that as events transpired the contractual date fell around 14 February 2015.[7]

[16] The contract required that progress payments be made in accordance with Part A, Schedule 2 of the contract, which reflected the requirements of s 66 of the now repealed *Domestic Building Contracts Act* 2000 (DBCA), unless the parties agreed to a different plan of progress payments. On the face of the contract, such an agreement had been reached and Part B, Schedule 2 was completed in these terms:

Stage	Percentage	Amount
Deposit	5%	$15,500
Earthworks	10%	$31,000
Slab	15%	$46,500
Frame	15%	$46,500
Enclosed	30%	$93,000
Fixing	15%	$46,500

6 Appeal exhibit 2, [4].
7 Ts 1-39, ll 27-37; Judgment, p 17, first full paragraph.

Practical Completion	10%	$31,000
Total	100%	$310,000

[17] However an agreement to use Part B, Schedule 2 was only binding if the requirements of Regulations 4 and 5 of the now repealed *Domestic Building Contracts Regulations* 2010 (DBCR) were complied with.

[18] There was an issue at trial whether Part B was validly agreed to, and hence whether the contract, in its express terms, was enforceable.

[19] Clause 4 of the general conditions of the contract effectively required the owner (in this case, the appellants) to make progress payments within five days of receipt of a progress claim based on the stage reached of Schedule 2, apart from the deposit which was payable upon signing the contract.

[20] It is notable that although the stages have defined meanings, proof of expenditure to the quantum of the progress claim is not required either before or after the progress claim can be or is issued. What is required is that work is performed to satisfy the defined meaning, regardless of the value of that work.

[21] Although in fact there are some slight variations, it is sufficient to say that each of the first three stages were paid in full and (more or less) on time, including for the Earthworks stage.

[22] There was some dispute about payment for the Frame stage, but it was eventually paid by cheque in the sum of $50,000. This left the appellants slightly in credit, but that is of no moment for present purposes. That cheque was one of three cheques left by Mr Kimber with the respondent, respectively for $50,000, $60,000 and $70,000. They were left after Anthony Smith expressed to Mr Kimber his concerns about further payments being made in accordance with the contract and in the course of the dispute as to the payment for the Frame stage. There was dispute at trial regarding what was said about when they should be presented, but that is of no real moment for the purposes of this appeal.

[23] There then followed a dispute about whether the progress claims for the Enclosed and Fixing stages should be paid. After discussions, the $60,000 cheque was presented and honoured, representing partial payment of the progress claim for the Enclosed stage. Later the $70,000 cheque was presented for payment, in an attempt to satisfy the balance of the progress claim for the Enclosed stage and for almost all of the progress claim for the Fixing stage, but it was dishonoured. Work ceased on the site on about 23 December 2014 when that cheque was dishonoured, and some but not all of the work comprising the Practical Completion stage had been completed at that time.

[24] The respondent issued a notice to remedy the breach on 12 January 2015, but the breach (the non-payment) has not been remedied.

[25] On 24 March 2015 the appellants took possession of the property whilst the balance of the progress claim for the Enclosed stage and the whole of the progress claim for the Fixing stage remained unpaid.

The judgment and the proceedings below

[26] Somewhat counterintuitively, it is convenient to summarise the judgment below and then consider the events in the course of the hearing that are the subject of complaint in this appeal.

[27] As expressed earlier there is no challenge to any of the factual findings by the Magistrate which was based on the evidence that was received.

[28] Part of the appellants' case at first instance was that Part A, Schedule 2 should have been found to have applied because sufficient reason to depart from Part A had not been shown and secondly that, in any event, the inclusion of the Earthworks stage in Part B (which would not have been in Part A) was not allowable because the respondent had not first obtained "*foundations data*" as required by s 53 of the DCBA.

[29] On this dispute, the Magistrate considered the testimony of Mr Anthony Smith and his brother Mr Dan Smith for the respondent. As noted earlier Anthony Smith was the managing director of the respondent. Dan Smith was the construction manager. Her honour also considered the testimony of Mr Kimber, one of the appellants.[8] Broadly speaking, she accepted the evidence of both Smith brothers over that of Mr Kimber. Although she expressly found Anthony Smith to be a credible witness,[9] and did not make any such express finding concerning Dan Smith, I consider that a reading of the reasons shows that she accepted his evidence and hence must have formed a favourable view of his credibility as a witness.

[30] In reliance on that evidence her Honour found that action had been undertaken which amounted to obtaining foundations data, as defined.[10] That finding, together with another which did not rely on the evidence of either Smith brother led to a conclusion that the reliance by the respondent on Part B, Schedule 2 of the contract was valid.[11]

[31] The appellants also contested below the legitimacy of the progress claims for each of the Frame and Enclosed stages; contending that each had been issued prior to completion of the respective stage and hence were unenforceable.

---

8 Judgment pages 4 to 7.
9 Judgment page 7, second full paragraph.
10 Judgment page 7, last paragraph.
11 Judgment page 8, paragraph 7.

[32] Her Honour found for the respondent on both arguments, relying almost solely on the evidence of Dan Smith for the Frame stage argument,[12] and on the combined effect of the testimony of both Smith brothers for the Enclosed stage contest.[13]

[33] There is no other express reliance on the testimony of Dan Smith in the reasons for judgment.

The impugned cross-examination

[34] The passage of cross-examination which forms the basis of the principal ground of appeal is concerned with two invoices from Coast Cat Excavations (CCE), which had been disclosed to the appellants by the respondent pre-trial. It is not perfectly clear from the record but it seems that they purported to reflect work done at the Earthworks stage referred to in the contract. As will become apparent the appellants' contention is that they were not authentic. No one from CCE was called to testify at the trial, and the invoices were never put into evidence.

[35] In the third further amended statement of claim (3FASOC), and in relation to the Earthworks progress payment the respondent relevantly pleaded, first that on 4 September 2014 the respondent had reached the Earthworks stage of construction and secondly that on the same date it issued a progress claim for those works.[14] In reply (in the Further Amended Defence to the 3FASOC ("FAD")) the appellants pleaded a non-admission to both those pleadings with a further averment in the latter case admitting the claim was issued but saying that the claim exceeded the Schedule in the DBCA, and that it was excessive given what was reasonably anticipated at the time of contracting because the site preparation was minimal.[15] The non-admissions attracted the application of r 165(2) of the UCPR.

[36] As noted above, the respondent also pleaded a claim in *quantum meruit*. In relation to that alternate claim, the appellants pleaded firstly a denial on the basis that the relations between the parties was governed by the contract, as modified by statute.[16] Alternatively, they pleaded a non-admission because the allegations lacked sufficient particularity to permit an admission or denial.[17] Further and in the alternative, they pleaded a denial of the allegations because they were untrue on the basis that the respondent had not pleaded an entitlement at law to be paid any further amount and a further averment that the outstanding amount is not a reasonable sum for the services in addition to the amounts previously paid.[18] Again, the non-admission attracted the application of r 165(2) of the UCPR.

---

12 Judgment page 9, third paragraph.
13 Judgment page 10, paragraphs 7, 8 and 12.
14 Paragraphs 5C and 5D of the 3FASOC.
15 Paragraphs 4A and 4B of the FAD.
16 Paragraph 19A of the FAD.
17 Paragraph 19B of the FAD.
18 Para 19C of the FAD. Notably, the second alternative pleading in the further averment referred only to an "outstanding amount".

[37] Anthony Smith was the first to be cross-examined. The questioning about the invoices was generally about procedures and responsibilities, and he was not shown them. He indicated that he and Dan Smith predominantly dealt with CCE depending on what stage the invoice is at, that the "*data input girl*" would receive the invoices from CCE and that she was supervised by (his wife) Kristie, who in turn was responsible for the maintenance of the books and records of the company.[19] He went on to explain that invoices from CCE were frequently inaccurate.[20]

[38] Dan Smith was the next to be cross-examined. Relevantly, he stated he did not know how incoming invoices were processed as it was "*not my department*", and that Kristie (Smith) was in charge of that.[21]

[39] Two CCE invoices were placed before him. He testified that he had seen CCE invoices before, but had never seen those he was shown. He said he had no reason to doubt that CCE was used on the appellants' site, as invoiced, but he did not see it done.[22] He was taken to an apparent irregularity with the invoices, namely that the one with the later date had an earlier invoice number. When asked if that struck him as unusual in any way, he replied "*Not for Coast Cat*".[23]

[40] After some further short cross-examination involving some matters that were apparently designed to show irregularities in the nature of the invoices, the cross-examiner said the following:

> "*Now what is going to be said later is that these invoices – which were disclosed by Kimama, are purportedly from its files, are invoices which were not issued by Coast Cat Excavations*."

[41] It is unclear from the transcript whether this was intended to be a statement or a question. In any event, it induced an objection. The essence of the objection was that, as perceived by Counsel for the respondent, the cross-examiner was, or was about to, allege fraud and/or illegality where that had not been pleaded, and hence was in breach of r 149(1)(c) of the UCPR.

[42] Regrettably the Magistrate upheld the objection before hearing from Counsel for the appellants, however immediately corrected the position when she realised her mistake.

[43] The response to the objection was, with respect, imprecise and difficult to follow. However what does emerge from it is the appellants' assertion that, it was assumed, the Court was going to be asked by the respondent on the *quantum meruit* case,[24] to accept that people's recollections of what occurred in relation to earthworks were

---

19 Ts 1-108, l 43 – T1-109, l 9.
20 Ts 1-110, ll 1-43.
21 Ts 2-62, l 43 – T2-63, l 10.
22 Ts 2-63, ll 35-37.
23 Ts 2-64, l 8.
24 At T2-66, l 25, the phrase "point of merit case" appears. That must be a mistranscription. It is obviously a reference to the *quantum meruit* case.

accurate, and also that the records of the business were reliable and should be accepted for the truth of their content.[25] The Court was informed that a person who purports to issue the invoices (presumably meaning from the face of them) had been summonsed and was available to testify to the effect that the invoices "*aren't theirs*".[26] The submission at a later point referred to the appellants' entitlement to test the evidence and "*then make submissions with respect to the credibility of the documents relied upon*".[27]

[44] In the course of the argument, the Magistrate allowed the parties to be heard in turn on more than one occasion each. This did not help clarify the objection, or the reply to it. Counsel for the respondent maintained his opposition on the basis that any allegation of fraud or illegality had to be pleaded. Counsel for the appellants made further submissions that again are a little difficult to follow but seem to be able to be summarised that his client was entitled to rely upon these matters as going to issues of credibility without having pleaded them as an affirmative case. For example, at one point he submitted:

> "*The rules of UCPR 149 and 150 don't have anything to do with that, it would just make cross-examination useless if you have to come and – every time you were going to make an allegation of dishonesty or lack of credibility or anything like that oh I have to go and plead it. Of course I don't have to do that your Honour*".[28]

[45] After a further reply by Counsel for the respondent which referred to para 19C of the FAD, referred to earlier herein, the Magistrate upheld the objection.[29] Unfortunately she did not attempt to clarify the submissions which had been made, nor did she give any reasons for upholding the objection. Nor was she asked to provide any reasons.

[46] Kristie Smith testified after Dan Smith. In cross-examination she was not asked any question about the invoices the subject of the objection during Dan Smith's evidence. Counsel for the appellants indicated at the conclusion of her testimony:

> "*COUNSEL:* *There would have been further questions for Ms Smith but I assumed that your Honour's ruling with respect to the questioning that was being pursued with Mr Daniel Smith would have applied equally to Ms Smith.*
>
> *BENCH:* *Yes.*"[30]

---

25 Ts 2-66 ll 21-27.
26 Ts 2-66 ll 31-36.
27 Ts 2-66 ll 34-45.
28 Ts 2-67 ll 41-45.
29 Ts 2-68 l 21.
30 Ts 2-90 ll 22-27.

The parties' contentions

[47] The appellants argue that they were denied natural justice (or procedural fairness) by the erroneous decision to uphold the objection to the cross-examination. They rely on observations of the High Court in *Stead v State Government Insurance Commission*[31] to support a submission that although the intended cross-examination went only to the credit of the witness, the possibility of a different finding had the cross-examination been allowed to continue cannot be discounted, and hence a new trial should be ordered.

[48] In their written outline, the appellants also argued that the questioning was relevant to the *quantum meruit* claim and hence should have been allowed. Queens Counsel for the appellants in the appeal, who was not involved in the completion of the written outline, did not pursue that argument in oral submissions.

[49] The respondent contends that the true purpose of the cross-examination was not to discredit Dan Smith but to form part of an unpleaded case that the earthworks said to have been performed were in fact not. As such, it is submitted that the objection was properly taken. In any event, it is submitted that in circumstances where Dan Smith had plausibly denied any relevant knowledge of dealing with the invoices the Magistrate was correct to uphold the objection as nothing useful could have been gained by pursuing the line of questioning. Finally it is submitted that if her Honour erred in curtailing the cross-examination, more than the mere rejection of the evidence is required before the appeal can succeed; the appellant must demonstrate that the error occasioned some substantial wrong or miscarriage pursuant to r 770 of the UCPR.

Consideration

Did the Magistrate err?

[50] The plaintiff's objection to the line of questioning on the basis that the defendant was trying to support an unpleaded case was understandable in the dynamics of a trial. It was also correct if the intention was to rely on the suggestion of falsified documentation as proof of the fact in pursuit of a primary issue, but it was not. Whilst the reply to the initial objection was not burdened by clarity, it was sufficiently expressed in my view that the purpose of the cross-examination was to go to credit only. It remains unclear to me if counsel was expressing himself in terms that the credit issue related only to the plaintiff's *quantum meruit* case or not, but little turns on that as once admissible as to credit on any basis, it could be used to assess credit on all bases.

[51] Regardless of the cross-examiner's intention, the evidence was of course only admissible if in fact it was relevant, or potentially relevant, to the credit of that or any other witness.

---

31 (1986) 161 CLR 141 especially at [145]-[146].

[52] According to the cross-examination which was conducted, there were objective features of the invoices, which were curious. They do not appear to me to be so odd as to have compelled exploration, but exploration could reasonably have been undertaken and it was a matter for the appellants whether they wished to pursue it by pleading it as a primary issue, or have it dealt with as a collateral issue only.

[53] Counsel chose to accept the answers from Anthony Smith at face value, and thereby chose not to show him the invoices. Whilst Counsel chose to reveal an aspect of his instructions covering the invoices in the cross-examination of Dan Smith, it cannot be assumed that he revealed all of his instructions. In my view he was entitled to pursue the topic with Dan Smith further than he was allowed to. It may have been that it did not bear fruit, but I simply cannot know. Further I am unable to see why the topic could not be pursued with Kristie Smith, the person who on the weight of evidence adduced was primarily responsible for the maintenance of the plaintiff's business records. At the least, there may have been contradictory evidence adduced requiring a resolution that could well have affected assessments of credit. Counsel understood that the impugned ruling precluded him from pursuing the line of enquiry with her, and the Magistrate confirmed the correctness of that understanding.

[54] There was no certainty that cross-examination would prove fraud or illegality on the part of any or all of the witnesses but the defendants were entitled, in my view, to cross-examine at large. Experience shows that often cross-examination appears to be covering barren territory, but that is not a reason of itself to preclude Counsel continuing to try to find an orchard of fruit, or at least not in the early stages of the line of enquiry.

[55] The respondent's submission that the true intent was to use the evidence as proof of an unpleaded allegation is of no moment. If the evidence was admissible as potentially affecting the assessment of credit, it was admissible for that purpose regardless of any other intention. The fact that the appellants apparently had available a witness to call to say that the invoices were not issued by CCE supports the plaintiff's contention, but the reality is that, via the application of either or both of the collateral evidence rule, to which I shall turn shortly, and r 165 of the UCPRs, that witness could never have been called. In my view the availability of the witness is an unnecessary distraction. It is the use to which the evidence can be and is put by the decision-maker that is important, not any intended use by a party.

[56] After hearing the response to the initial objection, the appellants maintained their objection on the basis that the allegation must be pleaded, pursuant to rr 149 and 150 of the UCPR. Reliance on those rules was maintained in this Court if the cross-examination was directed to a primary issue in the case, but not in supporting an argument against admissibility if only admissible as to credit.

[57] In my view, rr 149 and/or 150 of the UCPR did not require the allegation to be pleaded before it could be explored as a collateral issue. Those rules are found

within Ch 6 of the UCPR which deals with the pleadings and requirements to define the primary issues in dispute. I could not locate any authority requiring that collateral issues coincidentally raising fraud or illegality must be specifically pleaded before the topic can be pursued as a credit issue in cross-examination, and the plaintiff has not cited any such authority.

[58] As noted earlier, her Honour upheld the objection without providing any reasons, nor asking Counsel to clarify any issues or submissions. Questions of that type may have allowed some insight into her reasoning. The result is that I must glean why the objection was upheld from the bare record.

[59] It can be accepted that if the objection was upheld on the basis that the cross-examination went solely to proof of an unpleaded primary issue alleging fraud or illegality, it was a correct decision. But that was not the basis on which it was said to be admissible and, for the reasons outlined above, I accept that the stated basis was a legitimate line of enquiry which was admissible, or potentially so, as going to credit.

[60] If the objection was upheld on the basis that, although the answers would only be admissible as going to credit, rr 149 and 150 of the UCPR required the issue to be specifically pleaded, that in my view was an error for the reasons outlined above.

[61] Those two alternative bases appear to me to be the only bases upon which the objection could have been upheld, given the basis for the objection revealed in the transcript and which was apparently accepted.

[62] Nonetheless respondent argues that her Honour was correct in upholding the objection, even if the cross-examination went solely to credit, given that what had been adduced from the Smith brothers meant that the topic was effectively exhausted with Dan Smith. The plaintiff refers to a passage from *Hally v Starkey & Anor; ex parte Starkey*[32] ("*Hally v Starkey*") and s 20 of the *Evidence Act* 1977 in support of the submission.

[63] Notably, her Honour's ruling precluded any further cross-examination on the topic only shortly after the line of enquiry commenced. The power contained in section 20 of the *Evidence Act* 1977 is broadly stated, but must be exercised in a principled manner. It is usual to allow cross-examiners considerable latitude in the conduct of their cross-examination[33] and for good reason. The presiding judicial officer knows what is contained in the pleadings but not what else is in Counsel's instructions. For that reason the judicial officer can only guess as to relevance, at least early in the pursuit of the line of enquiry in cross-examination. The power to regulate cross-examination in s 20 of the *Evidence Act* 1977 is properly exercisable in a case such

---

32 [1962] Qd R 474 at 478.

33 *Wakeley v The Queen* (1990) 64 ALJR 321 at 325, 1st Col E–F; *Hally v Starkey*, *supra* at 478.

as this only when the true extent of the relevance has been ascertained. In this case, in my view, it was too early to do so.[34]

[64] Further, the ruling precluded any questioning of Kristie Smith on the topic which, separately to the issue of the providence of the invoices may have revealed inconsistencies in the testimony of either or both of the Smith brothers, thereby requiring resolution before findings of credit could have been determined.[35]

[65] As the evidence would have gone to credit only, it was directed to a collateral issue. Contrary to a query raised by me in the course of oral submissions, continuation of the line of questioning would not have breached the collateral evidence rule, sometimes called the finality rule.

[66] The rule has been described in this State as a "*case management rule and it ought to be left to the trial judge to determine the sufficiency of the relevance of the evidence proposed to be adduced to test the witness's credit*".[36] However a majority of the High Court has subsequently declined to recast the rule as a guide to discretionary case management rather than a rule of law.[37] Nonetheless the exceptions to the rule demonstrate that there is some flexibility in the rule to allow the justice of the situation to be met.

[67] The rule, even if strictly enforced, does not preclude pursuing a line of enquiry relevant to a collateral issue with a witness. It precludes calling another witness to impeach the first witness on that collateral issue.[38] Hence the regulation of the impugned cross-examination was governed by the principled application of s 20 of the *Evidence Act* 1977.

[68] It follows that, in my view, the magistrate erred in upholding the objection and thereby precluding further cross-examination of Dan Smith and any cross-examination of Kristie Smith on the topic, even if she appreciated that she was being asked to rule purely on a credit basis without the application of rr 149 and 150 of the UCPR.

[69] Accordingly, in my view, the magistrate erred in law in upholding the objection.

Should a new trial be ordered?

[70] As the erroneous ruling had the effect of improperly rejecting that prospective body of evidence from Dan Smith and/or Kristie Smith, r 770(2) of the UCPR applies and I cannot grant a new trial unless I consider that some substantial wrong or miscarriage occurred as a result of the ruling. This test was not new with the advent

---

34 In this respect the present matter bears similarities to *Wakeley v The Queen, supra* at 321, 2nd Col E.
35 *cf Hally v Starkey*, *supra* at 479.
36 *R v Lawrence* (2001) 124 A Crim R 83 at 99.
37 *Nicholls v The Queen* (2005) 219 CLR 196.
38 *Nicholls v The Queen, supra* at [248]; *Goldsmith v Sandilands* (2002) 190 ALR 370; [2002] HCA 31 at [3], [32]–[34], [37].

of the UCPRs; it has been a requirement for many years.[39] Older authorities are clear that whilst mere error is an insufficient basis to justify interfering with the finality of a judgment, it is not an overly onerous standard to prove that the error caused a substantial wrong or miscarriage.[40]

[71] It has long been accepted that an improper curtailing of a line of cross-examination can amount to a denial of procedural fairness; such is the importance of the right to cross-examination, especially in a criminal trial. The fact that it involved a rejection of evidence also brings it within the scope of r 770(2) of the UCPR. The High Court has recently considered the approach to be taken to the issue of ordering a new trial, where the New South Wales analogue of r 770 of the UCPR applied, in *Nobarani v Mariconte*.[41] Although the error here was of a different type to that involved in *Nobarani*, the principles as to the ordering of a new trial remain the same. In that case the governing rule was r 51.53 of the New South Wales UCPR, a broad analogue of r 770 of the Queensland UCPR. One of the differences in drafting meant that a denial of procedural fairness also would not result in an order for a new trial unless it appeared that some substantial wrong or miscarriage had been occasioned. In that case the whole of the Court stated:

> "*The denial of procedural fairness will cause a substantial wrong if it deprived the affected person of the possibility of a successful outcome. Unless the other party can show some reason for the exercise of discretion not to order a new trial the power will be exercised to order a new trial.*"[42] [underlining added]

[72] In my view, "possibility" must refer to a real possibility as opposed to something merely remote, theoretical or fanciful. Counsel for the appellant conceded that to be the case.[43] The onus falls on the respondent in an appeal to show that there is no possibility of a different outcome had the error not occurred.

[73] In reaching that conclusion the High Court cited an earlier authority, the one which the appellant also relies upon, namely *Stead v State Government Insurance Commission*.[44] Although the passage relied upon by the appellant differs from that cited in *Nobarani*, the two are consistent.

[74] Prior to the passage cited by the appellants, the Court noted that an appellate court will not order a new trial if it would invariably result in making the same order as that made by the judge at the first trial.[45] The passage cited by the appellant is as follows:

---

39 See for example *Balenzula v De Gail* (1959) 101 CLR 226, 236.

40 See for example *Balenzula v De Gail, supra* at 232, 236 - a case where the evidence relevant to the fact in issue was wrongly excluded - and *Hally v Starkey, supra* at 480 - a case where the cross-examination as to credit was wrongly disallowed.

41 (2018) 359 ALR 31; [2018] HCA 31.

42 *Nobarani, supra* at [39].

43 1-17, ll 42-45.

44 (1986) 161 CLR 141.

45 *Stead, supra* at 145.

> "*Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a Court of Appeal to conclude that compliance with the requirements of natural justice could have made no difference. ... when the Full Court is invited by a respondent to exercise those powers in order to arrive at a conclusion that a new trial, sought to remedy a denial of natural justice relevant to a finding of fact, could make no difference to the result already reached, it should proceed with caution. It is no easy task for a Court of Appeal to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome of the trial of an issue of fact. This difficulty is magnified when the issue concerns the acceptance or rejection of the testimony of a witness at the trial.*"[46]

[75] The respondent points to the fact that no evidence has been adduced on the appeal and no submissions directed to show how the real possibility was raised that a different outcome may have resulted if cross-examination had been permitted to continue. He points to four decisions of intermediate Appeal Courts to support his submissions, namely *Chaina v Alvaro Homes Pty Ltd,*[47]*Seltsam Pty Limited v Ghaleb,*[48] *UCAR v Nylex Industrial Products Pty Ltd*[49] and *Western Australia v Watson*.[50]

[76] I think it important when assessing the possibility of a different outcome to have regard to the nature of the error. Some errors will more readily permit a finding that there was no possibility of a different outcome if the error had not occurred than others.

[77] In two of the cases cited[51] there was found to have been a denial of procedural fairness occasioned by the presiding judge relying on observed conduct of a witness when not in the witness box, and without notifying the parties of his or her intention to take it into account. In *Chaina* the appeal was dismissed because the relevant comments in the judgment appeared to be gratuitous, and there was no reason to think that a different conclusion would have been reached about the witnesses' credibility and reliability without them.[52] In *UCAR* the appeal was allowed. The Court considered it unnecessary to consider an affidavit put on in an effort to explain the appellant's conduct, even though the Court accepted that it was admissible.[53] The Court applied *Stead* and held that it would be purely speculative

---

46 *Stead, supra at* 145-146.
47 [2008] NSWCA 353 especially at [29].
48 [2005] NSWCA 208 especially at [69]-[79].
49 (2007) 17 VR 492 especially at [75]-[84].
50 [1990] WAR 248 especially at 293-294.
51 *Chaina* and *UCAR*.
52 *Chaina, supra* at [64].
53 *UCAR*, *supra* at [84].

to say that there was no possibility of a different outcome if the appellant had been afforded the opportunity of responding to the adverse observations, which went to the appellant's credit which was a central issue in the trial.[54]

[78] In *Seltsam* the trial Judge, without notice, dealt with the case on a different basis than that on which the parties proceeded. By majority the Court allowed the appeal, but in my view the circumstances of the matter are so far removed from the present as to be of little assistance.

[79] *Watson* was a case in which cross-examination of the respondent as to credit was improperly curtailed, and so is potentially of application here. In fact, one of the three complaints[55] was that the curtailed cross-examination was concerned with a document obtained through pre-trial discovery, as was the case here. The relevant rule was in substance the same as r 770 of the UCPR.[56]

[80] The Court accepted that cross-examination should have been permitted to continue on all three topics. However the appeal was dismissed because the Court was not satisfied that a substantial miscarriage of justice had resulted. In so holding the Court observed that there was an inability to demonstrate the detriment given there had been "*a detailed, thorough and lengthy cross-examination of the respondent*".[57] The extent of the cross-examination before judicial intervention on each topic is illustrated in the course of the judgment.[58] This feature, from which an assessment of the possibility of a different outcome can properly be undertaken, stands in contrast to the present matter.

[81] Whilst evidence is admissible to prove why it is or is not possible a different outcome would have eventuated had cross-examination been allowed to continue, it is not necessarily required. I accept the appellants' submissions that it would have been unhelpful here as it would necessarily have been self-serving. Further I consider that the unpredictability of cross-examination means that one cannot comfortably predict what course that cross-examination will take. As the Court in *Wakeley* observed:

> "*Some of the most effective cross-examinations have begun by securing a witness's assent to a proposition of seeming irrelevance*."[59]

[82] In determining the existence or otherwise of the requisite possibility, I must have regard to the fact that the curtailed evidence went to credit and not to a primary issue in the trial. It seems to me the rejection of evidence going directly to a primary issue will more readily satisfy the test than evidence going to credit only.

---

54 *UCAR, supra* at [97]-[100].
55 Ground 20 at p 290.
56 Order 63, r 12(2) is outlined in the judgment at p 287, l 33.
57 *Watson, supra* at 293 to 294.
58 *Watson, supra* at 287 to 293.
59 *Wakeley, supra* at 325, 1st Col E.

Sometimes the issue of credit will be so minor and largely irrelevant that there was no possibility of a different outcome being achieved, on other occasions the credit issue will be important to the determination of the primary issues in the trial.

[83] I must also recognise that contrary to the respondent's oral submissions,[60] her Honour only decided on the respondent's primary claim of a breach of contract. She did not make findings on the alternate claims and so the possibility of different outcomes for the purposes of my assessment must only be assessed through the prism of the claim for breach of contract.

[84] I have earlier outlined the occasions of and context in which her Honour expressly noted Dan Smith's evidence in her judgment. It touched on areas where there was a dispute raised by Mr Kimber's sworn evidence. In light of that, I cannot accept the respondent's submission that her Honour found the Part B, Schedule 2 aspect of the contract had been validly entered into without having ruled on credit.[61] It is apparent that her Honour relied on Dan Smith's evidence, in part, for her findings concerning the Earthworks stage and the Enclosed stage, and almost solely in relation to her findings concerning the Frame stage. Significantly, given that the invoices the subject of the impugned cross-examination went to an issue concerned with the Earthworks stage, her Honour relied on Dan Smith's evidence in part to find that that stage had been completed (as opposed to the cost of it) and also to find that foundations data had been collected prior to entering into the contract. These were findings that were essential to determine the validity of the contract as entered. True it is that, in contrast to Anthony Smith, there was no express finding that Dan Smith was a credible witness, but the reasons read more generally allow the conclusion that her Honour did make such a finding, albeit unexpressed.

[85] In the end result, there was little cross-examination directed at Dan Smith's credit and so his evidence was able to be accepted relatively unchallenged by credit issues. In my view, there was a real possibility that his evidence may not have been accepted if credit issues had been ventilated and in turn different findings may have been made, especially in light of Mr Kimber's sworn evidence, on issues of substance to the ultimate findings. Put more correctly, the respondent has not satisfied me that there was not that real possibility

[86] I am comforted in this conclusion by recognising that the impugned ruling denied Counsel the opportunity to cross-examine Kristie Smith on the topic, as well as exploring any inconsistencies on the matters already explored with each of the Smith brothers. This was a further, albeit probably unintended, rejection of evidence in the trial. For reasons already mentioned, exploration of these matters with her could have raised adverse credit findings concerning the Smith brothers, and hence a different outcome on some of the central issues in the trial. There was no reason to have precluded this line of enquiry with her.

---

60 T1-21, ll 30-39.
61 T1-26, ll 21-38.

[87] Bearing all of those matters in mind, I am satisfied that there is a real possibility of a different outcome if cross-examination as to credit had been permitted to continue. To adopt the language used in *UCAR*, it would be speculative in all of the circumstances to hold otherwise.

[88] Accordingly, I am satisfied not only that relevant error has been established, but also that a new trial should be ordered.

Costs

It seems to me that the appropriate order as to costs on the appeal is that the respondent is to pay the appellants' costs of the appeal. However I have not heard submissions on the issue. The parties will be given that opportunity, in writing.

Orders

[89] The orders to give effect to these reasons are as follows:

1. Appeal allowed.
2. The orders made in the Magistrates Court at Brisbane on 9 September 2019 are vacated.
3. The matter, comprising the claims and counter-claim, is remitted to the Magistrates Court at Brisbane for re-hearing.
4. The appellants are to file and serve no later than 2.00pm on Friday 4 September 2020 an outline of submissions on the issue of costs, limited to no more than four pages, with a view to the issue being determined on the papers.
5. The respondent is to file and serve a response, if any, no later than 2.00pm on Friday 11 September 2020, such response to also be limited to no more than four pages.
6. Any reply by the appellants is to be filed and served no later than 2.00pm on Tuesday 15 September 2020, such reply to be limited to no more than three pages.