SUPREME COURT OF QUEENSLAND

CITATION:	*MAM Mortgages Ltd (in Liq) & Anor v Cameron Bros & Ors*; *Piesse Investments P/L v W R Mortgage Services P/L & Ors* [2002] QCA 330
PARTIES:	**MAM MORTGAGES LIMITED (IN LIQUIDATION)** ACN 007 051 283 (first plaintiff/first appellant) **MELBOURNE ASSET MANAGEMENT NOMINEES PTY LTD (IN LIQUIDATION)** ACN 004 441 874 (second plaintiff/second appellant) **v** **CAMERON BROS (A FIRM)** BN 105 29 37 (first defendant/first respondent) **DAVID ALAN STUART CAMERON** (second defendant/second respondent) **RICHARD WILLIAM CAMERON** (third defendant/third respondent) **DAVID ALAN STUART CAMERON and WAVERLEY JOHN CAMERON as Executors and Trustees of the Estate of JOHN WALLACE CAMERON** (fourth defendant/fourth respondent) **HIH CASUALTY & GENERAL INSURANCE LIMITED** ACN 008 482 291 (third party/fifth respondent) **PIESSE INVESTMENTS PTY LTD** ACN No 070 985 581 (first plaintiff) **v** **W R MORTGAGE SERVICES PTY LTD** ACN 069 059 267 (first defendant) **WILLIAM HANRON REDMOND** (second defendant) **DASCAM PTY LTD (trading as CAMERON BROS)** ACN 010 758 335 (third defendant/first respondent) **DAVID ALLAN STUART CAMERON** (fourth defendant/second respondent) **HIH CASUALTY & GENERAL INSURANCE LIMITED** ACN 008 482 291 (third party/appellant
FILE NOS:	Appeal No 5334 of 2001 Appeal No 1901 of 2000

Appeal No 8454 of 2000
SC No 1562 of 1996

Appeal No 5363 of 2001
SC No 4031 of 1996

DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 September 2002
DELIVERED AT:	Brisbane
HEARING DATES:	17, 18 and 19 June 2002
JUDGES:	McPherson and Jerrard JJA and White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER:

In appeal no 5334 of 2001 in action no 1562 of 1996:

1. **The appeal by the plaintiffs is allowed.**
2. **The judgment and orders (save for the orders for costs made against the third party) given on 18 May 2001 and for the order on 24 May 2001 by which the first and second plaintiffs were ordered to pay the costs of the second defendant is set aside.**
3. **Judgment is given in favour of the plaintiffs against the first, second, third and fourth defendants for the sum of $900,000 with interest at 10% per annum.**
4. **As against the fourth defendant, judgment be levied on any of the assets of John Wallace Cameron deceased which shall hereafter come to the executors as fourth defendants to be administered by them.**
5. **The first, second and fifth defendants are ordered to pay the plaintiff's costs of and incidental to this appeal and the action.**
6. **Judgment is given in favour of the first and second defendants against the fifth defendant for the amount of the judgment including interest and costs given on this appeal in favour of the plaintiffs against the first and second defendants.**
7. **Judgment is given in favour of the third defendant against the fifth defendant by increasing the judgment given against the fifth defendant by the amount of the judgment including interest and costs given on this appeal in favour of the plaintiffs against the third defendant.**
8. **The fifth defendant be ordered to pay the costs of the first, second, third and fourth defendants of and incidental to this appeal.**

In appeal no 1901 of 2000 in action no 1562 of 1996:
The appeals and cross-appeals each of the plaintiffs and defendants against the orders of Douglas J made on 8 February 2000 are dismissed but with no order as to costs.

In appeal no 8454 of 2000 in action no 1562 of 1996
The appeals by the third and fourth defendant against the order for costs and the declaration made on 31 August 2000 and 7 September 2000 are allowed with costs, the order and declaration are set aside, and it is declared the third and fourth defendants are entitled to be indemnified by the third party under a policy of insurance numbered RESI/90/1097 together with the costs of and incidental to the hearing and determination by Douglas J on 31 August 2000.

In appeal no 5363 of 2001 in action no 4031 of 1996 (the Piesse action):
The appeal is dismissed with costs.

CATCHWORDS: APPEAL AND NEW TRIAL - APPEAL - GENERAL PRINCIPLES - INTERFERENCE WITH JUDGE'S FINDINGS OF FACT - FUNCTIONS OF APPELLATE COURT - WHERE FINDINGS BASED ON CREDIBILITY OF WITNESSES - GENERALLY - trial judge entitled to find facts based on rejection of evidence of witness - whether on appeal finding should be disturbed - whether new trial required to determined credibility

APPEAL AND NEW TRIAL - APPEAL - GENERAL PRINCIPLES - INTERFERENCE WITH JUDGE'S FINDINGS OF FACT - FUNCTIONS OF APPELLATE COURT - WHERE INFERENCES OF FACT ARE INVOLVED - WHERE FACTS NOT IN DISPUTE - whether Court of Appeal in as good position as trial judge to form an opinion

TRADE AND COMMERCE - TRADE PRACTICES AND RELATED MATTERS - CONSUMER PROTECTION - MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT - CHARACTER AND ATTRIBUTES OF CONDUCT - CAUSAL CONNECTION BETWEEN CONDUCT AND LOSS - whether material contribution of conduct to loss enough to prove loss caused by conduct under s 82 *Trade Practices Act* 1974 (Cwth)

APPEAL AND NEW TRIAL - APPEAL - PRACTICE AND PROCEDURE - QUEENSLAND - POWER OF COURT -

OTHER MATTERS - UNIFORM CIVIL PROCEDURE RULE 766 - whether orders can be made where particular respondent has not appealed particular decision

Fair Trading Act 1985 (Victoria), s 37
Insurance Contracts Act 1984 (Cth) s 21, s 28, s 54
Limitation of Actions Act 1974 (Qld)
Partnership Act 1891 (Qld) s 12, s 13, s 15, s 29(1)
Trade Practices Act (Cwth) 1974 s 52, s 82
Uniform Civil Procedure Rules 68, 69, 71, 74 and 76

Attorney-General v Simpson [1901] 2 Ch 671 at 713, applied
Austral Pacific Group Ltd (In Liq) v Airservices Australia (2000) 74 ALJR 1184, applied
Carrick v Armstrong [1969] Qd R 185, mentioned
Commonwealth v Verwayen (1990) 170 CLR 394, mentioned
Derry v Peek (1889) 14 AC 337, 374, mentioned
Devries v Australian National Railways Commission (1993) 177 CLR 472, applied
Gauci v Federal Commissioner of Taxation (1975) 135 CLR 81, applied
Gould v Vaggelas (1985) 157 CLR 215, discussed
Hansen v Marco Engineering (Aust) Pty Ltd [1948] VLR 198, referred to
Hanson v Wearmouth Coal Co [1939] 3 All ER 47, applied
Harris v Western Australian Exim Corporation (1994) 56 FCR 1, referred to
Henville v Walker (2001) 75 ALJR 1410, applied
Interchase Corporation Limited (In Liq) v FAI General Insurance Company Limited [2000] 2 Qd R 301, applied
John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503, mentioned
Lynch v Keddell (No 2) [1990] 1 Qd R 10, mentioned
Madden v Kirkegard Ellwood & Partners [1983] 1 Qd R 649, referred to
S J Mackie Pty Ltd v Dalziell Medical Practice Pty Ltd [1989] 2 Qd R 87, applied
Vakauta v Kelly (1989) 167 CLR 568, referred to
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514, discussed
Warren v Coombes (1979) 142 CLR 531, mentioned
Weldon v Neal (1887) 19 QBD 394, mentioned
Western Australia v Wardley Australia Limited (1991) 30 FCR 245, mentioned

COUNSEL:

Appeal Nos 5334 of 2001 and 1901 of 2000 and 8454 of 2000
J Sheahan SC, with D Kelly, for the appellants
J C Bell SC for the first and second respondents
G A Thompson SC, with A W Duffy, for the third respondent
B J Clarke for the fourth respondent
P Taylor for the fifth respondent

Appeal No 5363 of 2001
P Taylor for the appellant
J C Bell SC for the first and second respondents

SOLICITORS: Appeal Nos 5334 of 2001 and 1901 of 2000 and 8454 of 2000
MacGillivrays for the appellants
Freehills for the first and second respondents
Tutt & Quinlan for the third respondent
Morton & Morton for the fourth respondent
McCullough Robertson for the fifth respondent
Appeal No 5363 of 2001
McCullough Robertson for the appellant
Freehills for the first and second respondents

[1] **McPHERSON JA**: MAM Mortgages Limited in liquidation is the appellant in this appeal (no 5334 of 2001) against a judgment given in the Supreme Court dismissing its action no 1562 of 1996 as plaintiff claiming damages against the first to fourth defendants, now the respondents to the appeal, who were sued respectively as: (1) the firm of Cameron Bros; (2) David Cameron, (3) Richard Cameron, and (4) David and Waverley Cameron as executors of the late John Wallace Cameron. Stated broadly, David, Richard and John Cameron, who formerly carried on in partnership the business of valuers as the firm of Cameron Bros, were sued in the action for damages arising out of a valuation or valuations prepared for the use of MAM by the second defendant David Cameron in mid-November 1990. The fifth respondent to the appeal, which is HIH Casualty & General Insurance Ltd, was at and after that time the professional indemnity insurer of the firm of Cameron Bros. It was joined as a third party to the proceedings. There were in fact two plaintiffs, the second of which was the nominee of the first; but it is not in issue on the appeal that any rights of the second plaintiff inhered in the first plaintiff MAM, and it is convenient in these reasons to refer to MAM as if it were the only plaintiff in the action.

MAM Mortgage Investment business.

[2] MAM conducted what is described as a contributory mortgage investment business. It was incorporated in Victoria in 1988 as McKinley Mortgages Ltd and was originally associated with the Melbourne stockbroking firm of McKinley Wilson, who at first owned 60% of the capital with the remaining 40% being held by a Mr Keith Bulfin, who was the managing director. In August 1992 Mr Bulfin and a Mr Arthur Brown bought McKinley Wilson's share in MAM leaving Bulfin with 70% of the share capital. The manner in which the business was conducted was that Bulfin found persons wishing to borrow money on the security of mortgages of land and matched them with clients of MAM who wished to invest in mortgages in amounts commonly ranging from about $5,000 to $30,000 or more. The practice was to solicit funds by sending out circulars to prospective future investors giving details of a particular proposed mortgage loan, including the borrower's name, the amount to be lent, a description of the property to be mortgaged, and particulars of the valuation obtained by MAM in respect of it. If the investor decided to invest in that mortgage, a declaration of trust was executed by MAM acknowledging that it held the mortgage on trust for that investor in proportion to the amount contributed to the total sum lent to the borrower on the security of a mortgage over land of the borrower.

[3] The procedure adopted ought, if followed, have gone far to assure the safety of the amount invested, but it depended largely on the relationship between the total amount lent and the value of the property on which it was secured. In that regard, the appellant followed a practice of not lending more than 66% of the value of the property put forward as security as determined by competent valuers. Much therefore depended on the accuracy of the valuation obtained in respect of that property as well as on the honesty of those conducting the appellant's business. As to that, after the appellant was placed in liquidation in September 1994, Bulfin was convicted of a series of offences of fraud and sentenced to a term of imprisonment with respect to particular transactions entered into by the appellant other than those that are the subject of these proceedings.

The Cameron Valuation of 1990.

[4] The specific transaction out of which action 1562 of 1996 and appeal no 5334 of 2001 arose concerned a loan or loans made in December 1990 and January 1991 by MAM to three companies associated with two individuals Corbett and Jackson. The original loan was extended and increased by a further amount advanced in May 1991 to produce a total amount lent of some $2,640,000, of which two sums of $200,000 and $170,000 were deducted and retained by MAM as being due to it respectively as establishment fees and mortgagee's fees. Mortgages were given by the corporate borrowers, who were Austate Thoroughbreds Pty Ltd, Mordex Pty Ltd and Perlow Corrosion Control Pty Ltd, over properties in Queensland consisting respectively of the Commercial Hotel at Home Hill, an avocado farm at Tinana near Maryborough, and an industrial site at Carole Park. It was these properties that Cameron Bros were asked to value in November 1990.

[5] Before the money was lent, the second defendant David Cameron had on 16 November 1990 forwarded on behalf of Cameron Bros to MAM for the attention of Mr Bulfin valuations of the three properties in question certifying at 13 or 14 November 1990 the value of the hotel as $786,000, of the avocado farm at $1,777,000, and of the industrial land $1,921,250, making a total of $4,484,250. It was after receipt of those valuations that on 17 December 1990 the first and largest of the advances in an amount of $1,756,000 was made by MAM, which was followed by further advances up to and including 30 May 1991. It was not in dispute that, in carrying out their valuations in November 1990, the firm of Cameron Bros was negligent, or that their certifications of value were misleading and deceptive, or that the firm was in breach of their implied contractual obligation to have and to use reasonable skill and care. There was little or no dispute at trial or on appeal about the amount of damages recoverable. In dismissing the action, the trial judge assessed the total amount at "no more than $810,000", with simple interest to be allowed at 10% to the date of judgment. This figure was arrived after deducting from the total advanced by MAM the sum of $170,000 retained by MAM on 24 May 1991 on account of mortgagee's fees; and also after disallowing as not proved the sum of $90,000 advanced on 30 May 1991. Earlier in his reasons his Honour had, however, found that this sum of $90,000 had in fact been paid. When it is added to $810,000, the total loss comes to $900,000 (with interest at 10%), which is a figure arrived at after allowing for some $1.28 million recovered on subsequent realisation by sale of the three properties. On the appeal, no submissions were addressed to the question of these amounts as corrected, and it will therefore be assumed that these figures are not disputed.

MAM's reliance on the valuations.

[6] The total of $900,000 with interest would therefore have been the amount recoverable by the appellant MAM if, in the result, it had succeeded in the action in the court below. It failed, however, on the only other issue raised against its claim, which was that, in lending the sum of $2,640,000, it had not in fact relied or acted on the admittedly negligent or misleading valuations of 16 November 1990 prepared by Cameron Bros. On that issue, the appellant's witness at trial was Mr Bulfin, who had by then served his sentence and at the time of the trial was awaiting deportation to New Zealand. After reciting Bulfin's convictions and sentence arising out of his management of MAM, his Honour went on in his reasons for judgment to say that he was unimpressed by Mr Bulfin as a witness and to reject his evidence that he had relied on the accuracy and competency of the Cameron Bros valuation in November 1990 in making the subject loans. It was on that ground that the plaintiffs' action was dismissed at the trial.

[7] On appeal, Mr Sheahan SC, who, with Mr D A Kelly, appeared for MAM, challenged his Honour's conclusion on that issue. There are, in my opinion, really two steps involved. The first, which consists of a finding going to credibility, is embodied in his Honour's statement that he was "unimpressed by Mr Bulfin as a witness". It was a finding that, in the light of Bulfin's criminal activities in the management of MAM and his demeanour in the witness box, the learned trial judge was entitled to make. On the basis of authorities such as *Devries v Australian National Railways Commission* (1993) 177 CLR 472, such a credibility finding is not one that should be lightly upset on appeal and, despite MAM's forceful submissions to the contrary, I am not prepared to disturb it. The second step is the conclusion that there was no evidence on which it could be found that Bulfin or MAM had relied or acted on the Cameron Bros valuation or that it caused the loss and damage referred to. It is a conclusion that was reached by the trial judge by a process of inference from facts proved or not contradicted or not challenged at the trial, as to which an appellate court is in as good a position as the trial judge to form an opinion on the matter in issue: see *Warren v Coombes* (1979) 142 CLR 531.

[8] On this aspect of the appeal, MAM relied on a number of objective facts and circumstances which were said to demonstrate, independently of any question of the credibility of Bulfin at the trial, that MAM had succeeded in establishing that the Cameron valuation was a cause of its loss on the loan transactions entered into in December 1990. The evidence about those matters was proved by inference primarily from books and records inspected by the liquidator of MAM, who was Mr Wallace-Smith. Before considering them, it is convenient to begin by identifying what it is that MAM was bound to prove at the trial in order to recover the loss sustained. The question is complicated by the fact that MAM had available to it alternative causes of action at common law for negligent misstatement, for breach of contract, and for misleading conduct under s 52 of the *Trade Practices Act* 1974 or alternatively s 37 of the *Fair Trading Act* 1985 (Victoria). It is convenient to begin by directing attention to the claim under s 52 of the Act.

[9] In order to recover damages or compensation for contravening conduct under s 52 of the Act, s 82 requires that the claimant prove that it suffered loss "by" that conduct. In *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 525, Mason CJ said that the word "by" in s 82 should be understood as adopting the "common law practical or common sense concept of causation" as discussed in *March v Stramare Pty Ltd* (1991) 171 CLR 506, except to the extent that it was modified by the provisions of the *Trade Practices Act*. Since then the question has

been considered by the High Court on more than one occasion, of which the most recent is *Henville v Walker* (2001) 75 ALJR 1410. For present purposes it is enough to say that it is now established that a loss is, within the meaning of s 82, sufficiently proved to have been established "by" conduct contravening s 52 if the conduct in question "materially contributed" to that loss: see *Henville v Walker*, per Gaudron J § [60] at 1420; and §§ [70], [71], at 1422; and McHugh J § [106], at 1428, with whom Gummow J agreed § [153], at 1436.

[10] The judgments in that case also refer, by analogy with decisions concerning damages for the common law tort of deceit, to *Gould v Vaggelas* (1985) 157 CLR 215, 236, 250-251, where it was accepted that a representation need not be the sole inducing cause, so long as it plays some, even minor, part in contributing to the cause of action that results in loss. According to the reasons for judgment of Wilson J in that case, it is "a fair inference of fact" that a person was induced to enter into a contract by a representation if it is calculated to induce the representee to enter into that contract and he in fact does so. In relation to the tort of deceit, this appears to have been the law at least from the time of *Redgrave v Hurd* (1881) 20 Ch D 1, 13, 21, where it is so stated in the judgment of Jessel MR, as explained by Isaacs J in *Holmes v Jones* (1907) 4 CLR 1692, 1711-1712. In *Henville v Walker* (2001) 75 ALJR 1410, 1435, McHugh J in §[148] considered that, "arguably", once a plaintiff demonstrates that a breach of duty has occurred that is closely followed by damages, a prima facie causal connection is established, leaving it to the defendant to show that the plaintiff should not recover those damages. I would regard these statements with respect to deceit and misleading conduct as in general equally applicable to claims in negligence and for breach of contract arising, as they do here, out of the same factual matrix, which in this case includes the valuations given by Cameron Bros in November 1990.

[11] No doubt much depends on the nature of the representation and the particular circumstances in which it is made. In this instance, the valuations of 16 November 1990 were prepared by Cameron Bros with a view to their being acted on for the purpose, known to Cameron Bros, of inducing a loan to be made on the security of the land being valued. As such, they were plainly "calculated" to bring about the loan by MAM that in fact followed in December 1991. It follows as a matter of ordinary inference that the loan and the loss and damage that resulted from making those valuations were caused "by" the admittedly misleading character of the valuations unless there are reasons showing it not to be so. At the trial, his Honour drew the inference that such reasons were supplied by a number of facts and circumstances which he said showed that Bulfin "merely went through the procedures". "That is," his Honour continued:

> "… he ensured there were valuations on the file which could, he thought, support the loans if eventually there were problems. He did not care whether the valuation had been carefully, skilfully and diligently prepared. The fact is that he misappropriated existing investors' funds and by 19 March 1991 sought to remedy that situation by getting other investors to cover this particular loan.
>
> Mr Bulfin was indifferent to whether the valuation had been properly prepared or not. He did not rely on them. I am not prepared to go so far as to say that he knew, or believed, that they had been improperly prepared".

[12] The loan in this instance had some unusual features. In the first place it was initially intended to be a short-term loan designed to provide the borrowers with bridging finance for a period of only three months. Before it was made, it was not financed in the usual way by inviting investors to provide funds for it on the strength of a circular describing the borrowers, the amount of the loan, interest rate, property on which it was secured and details of the valuation obtained. A circular to that effect was prepared in December 1991, but was apparently not despatched. Instead, the loan was funded out of money in MAM's account at the bank. Although it was a trust account maintained for the purpose of receiving investors' funds and paying them interest on their contributions, it was also used for banking money, including fees or commissions, to which MAM was beneficially entitled. It was therefore not possible to say precisely who owned or was entitled to the mixed funds standing to the credit of MAM in the account, or in what amounts they were entitled. It was from those funds that the loan moneys were paid to the borrower.

[13] It is true that Bulfin might not have been concerned to rely on the valuations because the loan or loans were expected to be repaid within as short a time as three months. This, in the result is not what in fact happened. The time for repayment in March 1991 was extended and the amount lent was enlarged by a further advance or advances in May 1991 that were evidently intended to cater for interest accruing due on the funds in the bank account that were used to make the loan. It was, as the trial judge said, only then that MAM seriously set about obtaining investor acknowledgements and providing declarations of trust with respect to the mortgages obtained from the borrowers. Before then, his Honour considered, Bulfin had thought he could make a "quick killing" from the loan without any need to call on investors for further funds for this purpose. On that hypothesis, all of the prospective profit and fees received or receivable would be appropriated by MAM, in which Bulfin had the major stake, without bringing in and so sharing it with any outside investors.

Objective evidence of reliance.

[14] It is a legitimate inference that this may have been Bulfin's plan. It does not follow, however, that Bulfin was not or would not have been concerned about having security for the loan in property with a certified value. On the contrary, the larger MAM's interest in the loan, the greater its interest might be expected to be in having it properly secured. As it was, since at least some of the money in the trust account belonged to MAM beneficially, first drawings on that account would, according to the ordinary rule or presumption, fall to be debited first to MAM's own funds before resort was had to funds that were held in trust for individual investors. It was only when the possibility arose in March 1991 of the loan not being repaid on time that Bulfin sought to appropriate the loan and the mortgages, or part of them, to individual investors in the ordinary way. Until then, the prospective risk, as well as the anticipated profit, was attached to MAM. This made it objectively more rather than less likely that Bulfin would in making the loan have relied on the valuations provided by Cameron Bros.

[15] Quite apart from that consideration, there were other objective indicia that went to show that Bulfin in fact considered a proper valuation as a necessary and significant prerequisite to making the loan to the borrowers. In the first place, the hotel, farm and industrial properties had all been previously valued for the borrowers by Cameron Bros in 1989. When Bulfin wrote on behalf of MAM approving the loan "in principal" (*sic*) on 7 November 1990, his letter of that date to

the borrowers said that, before instructing solicitors to prepare documentation, "we will require to have updated valuation reports addressed to ourselves". The Cameron Bros valuations forwarded on 16 November 1990 satisfied that requirement. Before they were delivered, Bulfin had spoken by telephone to one of the Camerons Bros, probably David Cameron, and ascertained that that firm acted as valuers for other financial institutions including Westpac and Bank of Queensland, as well as confirming that he required the valuations to be updated. It was pointed out on appeal that, to some extent, this involved relying on evidence of Bulfin at the trial, who had been found to be unreliable; but his evidence on this point was not directly challenged at the trial, where it also emerged on cross-examination of Mr David Cameron that Cameron Bros was in fact a panel valuer for Westpac.

[16] In addition, as already mentioned, a circular or draft circular prepared for despatch to investors dated 19 November 1990 was later found by the liquidator among MAM's records. It described the loans as well as the valuations which had been placed on each of the properties by Cameron Bros. There was also a letter to a client Mr Graves dated 5 December 1990 seeking his investment in the loan and stating the value of the land and buildings as determined by Cameron Bros; and a further circular dated 3 January 1991 addressed to investors giving details of the properties and their values according to Cameron Bros, which showed that the ratio of loan to value in no case exceeded 66%. Whether or not these circulars were ever sent is not established by any evidence at the trial; but it is difficult to understand why, if the "quick killing" hypothesis is correct, they would have been prepared at all at any time before the loan began to look risky in mid-March 1991. Of course, it may all have been part of a long range plan by Bulfin to cover his tracks if, as it was said, "the balloon went up" or the auditors later inquired about the matter; but, if the intention always was to use investor funds in the trust account to make a quick investment and "killing" for MAM and Bulfin, it is difficult to see why Bulfin bothered to obtain registered securities over the properties supported by the valuations from Cameron Bros before the loan was made in December 1990.

[17] In my respectful opinion, the fact that the loans were made only after updated valuations were obtained, and proper securities were taken and registered, militates strongly against the hypothesis that MAM at Bulfin's behest entered into the transaction without regard for the Cameron Bros valuations provided on or about 16 November 1990. Indeed, there is a diary note (ex 7) dated 14 December 1990 made by the solicitor acting for MAM in Queensland of a pre-settlement telephone conversation with Keith Bulfin. It shows both the valuation and the loan figures for each property, and records Bulfin as saying "these amounts are OK". At the very worst for MAM, the available inferences for and against the conclusion that this valuation played at least a contributing (as distinct from no) part in the decision to lend the money are evenly balanced. In those circumstances, the fact that the loan followed so closely in time after obtaining the valuation raises an inference, which Mr Bulfin's general unreliability as a witness of truth is insufficient to displace, that the two were connected as cause and effect both within the meaning of s 82 of the *Trade Practices Act*, and also for the purpose of claims at common law for the tort of deceit and no doubt also for those based on negligent misstatement and breach of contract. The fact that Bulfin said in evidence that he had acted in reliance on the Cameron Bros valuation, and that he was a witness who was not believed, did not prove that he did not act on the valuations. Disbelief does not amount to positive evidence of what is disbelieved: *Gauci v Federal Commissioner of Taxation* (1975) 135 CLR 81, 87; *Steinberg v Federal Commissioner of Taxation* (1975) 134 CLR

649, 684, 694. In my opinion, the plaintiff MAM succeeded as a matter of inference in establishing that MAM acted on the valuations carried out for it by the defendants David Cameron and Cameron Bros in November 1990; and that these valuations, and the misleading or negligent statements they contained, caused MAM, in December 1990 and thereafter, to lend the money advanced on the security of the properties valued. To that extent, therefore, the appeal must be allowed by giving judgment for $900,000 with interest in favour of the plaintiffs against those of the defendants that have no other plea or defence against the plaintiffs' claim.

Claims for indemnity against HIH.

[18] In the form in which the action no 1562 of 1996 was originally instituted by writ issued on 23 February 1996 it was constituted as an action only against Cameron Bros (a firm) as first defendant and David Cameron as second defendant, in which both defendants were sued in negligence at common law. On 2 June 1996 a defence was delivered to the plaintiffs' statement of claim denying the allegation of negligence and simply putting the plaintiff to proof of its claim including the damages sought in the action. At that time, the defendants believed they had the benefit of an indemnity under the policy of insurance issued by HIH. However, after HIH had in 1998 given notice to the defendants declining to indemnify them under the policy, HIH was, on the defendants' application, joined as a third party to the proceedings on 14 July 1998. On 11 December 1998 HIH was given leave to defend the plaintiffs' claim against the defendants, and on 18 December 1998 it delivered a defence to that claim.

[19] HIH's defence raised as an answer to the action an allegation that the plaintiff had caused the loss it claimed "by its own negligence, or alternatively contributed to the loss by its negligence". This was the first time that such an issue had been raised in the action and it led the plaintiff to review the form of its cause of action against the two defendants. In consequence, the plaintiff applied and on 30 March 1999 was granted leave to amend its statement of claim against the two defendants by adding, as alternative bases for its action on the valuation, claims of breach of contract and of misleading conduct under s 52 of the *Trade Practices Act* 1974, or alternatively, s 37 of the *Fair Trading Act* 1985 (Victoria).

Joinder of further causes of action.

[20] The application for leave to join those causes of action raised potential questions of limitation under the *Limitation of Actions Act 1974*. In the case of breach of contract, the six year limitation period prescribed by that Act had accrued on or about 16 November 1990, when the valuations were delivered. This meant that the limitation period had not yet expired when the action was commenced by issue of the writ on 23 February 1996, and that it would not do so until November 1996. The period of six years had, however, expired by the time when it was sought to add the cause of action for breach of contract against the original two defendants in 1999. As regards the causes of action for misleading conduct, the limitation period, which was then three years, ran from the date when loss was first suffered, which was when the properties valued were realised by the plaintiff. In the case of the hotel, that date was 6 December 1994; in the case of the avocado farm, it was 10 February 1995; and, for the industrial land, it was 16 June 1995. This had the consequence that the period of limitation in respect of the causes of action for misleading conduct had also expired at the time that the application and the order for joinder of causes of action was made on 30 March 1999.

[21] At that time in 1999, the application for joinder of those causes of action was governed by O 32, rule 1, sub-rules (2) and (5) of the Rules of the Supreme Court 1990. The facts out of which the new causes of action arose were the same, or substantially the same, as those already pleaded by the plaintiff MAM in its statement of claim. In the result, Chesterman J, before whom the application came, preferred the broader approach exemplified in *Lynch v Keddell (No 2)* [1990] 1 Qd R 10, 16, to that adopted in *Adams v Shiavon* [1985] 1 Qd R 1, 6-7, and he accordingly gave leave to the plaintiff MAM to amend its statement of claim by adding both the claim in contract and the claims for misleading conduct despite the fact that the limitation period had expired. The application was opposed by the first and second defendants Cameron Bros and David Cameron, as well as by the third party HIH; but joinder of those claims was permitted, and there has been no appeal against the order permitting it to take place. After delivery of an amended statement of claim, the action then proceeded against those two defendants and the third party as one that involved alternative causes of action in negligence, contract and misleading conduct.

Joinder of further defendants.

[22] Early in 1997 the plaintiff had become aware that the firm of Cameron Bros, which was sued as the first defendant, had after 30 June 1991 no longer included Richard and John Cameron. In November 1990, when the valuations were prepared and delivered by David Cameron, the firm of Cameron Bros had consisted of David, his father John Cameron and his uncle Richard Cameron, who is now the third defendant in the action and the third respondent to appeals no 5334 of 2001 and no 1901 of 2000. So far as the claim in negligence is concerned, the second defendant David Cameron was personally liable for his own actions in preparing those valuations. Being his partners at that time, John Cameron and Richard Cameron were also responsible for David Cameron's negligence and misleading conduct by virtue of s 13 of the *Partnership Act 1891*, which makes a firm liable for the wrongful act or omission of a partner acting in the ordinary course of the partnership business. In that instance the liability of the partners is joint and several: see s 15 of the Act. As regards the cause of action in contract, the position was in some respects rather different. With respect to the claim in contract, every partner is, by virtue of s 12 of the *Partnership Act*, liable jointly with the other partners for all debts and obligations of the firm incurred while he was a partner; but, after his death, his estate is severally liable in due course of administration for those debts and obligations, so far as unsatisfied, subject only to prior payment of his separate debts. Section 12 therefore had the effect of rendering John Cameron and Richard Cameron jointly liable for the claim in contract because it was an obligation of the firm incurred as a result of David Cameron's lack of skill in carrying out their contractual obligation of preparing the valuations in November 1990, at a time when both John and Richard Cameron were still partners in the firm of Cameron Bros.

[23] The action against Cameron Bros as first defendant purported to be brought against that defendant pursuant to O 54, r 1, which, under the Rules as they then stood, permitted persons who were liable as partners to be sued in the name of the firm of which they were co-partners at the time of the accruing of the cause of action. Rule 7 of O 54 required in such a case that an appearance be entered by the partners individually in their own names, and, on a judgment given against the firm, O 54, r 10 allowed execution to issue against any person who appeared in the action in his own name. In fact, in instituting and proceeding with action no 1562 of 1996 against the firm of Cameron Bros, the requirements of r 7 of O 54 were in several

particulars not complied with. By that time, the partnership of Cameron Bros had already been dissolved on 30 June 1991, and after that date the business was conducted under the name Cameron Bros solely by Dascam Pty Ltd, which is an incorporated company controlled by the second defendant David Cameron. Order 54 does not authorise proceedings against a sole trader in the name of a firm. It requires when a partnership is sued in the firm name that appearances be entered individually by the members of the firm. Moreover, because the causes of action in negligence and for misleading conduct accrued at earliest on 6 December 1994, when the hotel property was sold, the institution of the action against Cameron Bros in the firm name was not authorised under O 54, r 1. That is so because r 1 of O 54 authorised an action against partners in the firm name only if they were partners "at the time of the accruing of the cause of action". See *Madden v Kirkegard Ellwood & Partners* [1983] 1 Qd R 649, 655-656. At all times on and after 30 June 1991, the firm of Cameron Bros had been dissolved, with the consequence that there was no longer any partnership between David, John and Richard Cameron at the time when the cause of action in negligence or for misleading conduct accrued or when the writ in action no 1562 of 1996 was issued and served.

[24] To add to these legal complications, John Cameron had died on 31 July 1996. By his last will, of which probate was granted on 11 September 1996, he appointed as his executors his widow Marion Cameron and his two sons Waverley John Cameron and the second defendant David Cameron. Waverley John Cameron was never a partner in the firm of Cameron Bros, but he is now, with David Cameron, named as the fourth defendant in action no 1562 of 1992 in which they are sued in their capacity as executors and trustees of the estate of John Cameron deceased. The usual probate notices inviting claims were advertised in August 1996, and by 30 June 1997 the estate of John Cameron had been fully administered as was shown by the evidence at the trial.

[25] It was in these circumstances that on 4 February 2000 the plaintiff MAM applied to Douglas J to join Richard Cameron as third defendant and the estate of John Cameron as fourth defendant in action no 1562 of 1996. On 8 February 2000, Douglas J delivered reasons in which he said he would grant the application, but subject to certain restrictions. Richard Cameron had consented to his being joined as third defendant and he has continued to maintain that attitude on this appeal. His Honour ordered that he be joined. The order for his joinder was made without imposing any qualification on the plaintiff's claim against him so far as it was based on negligence. However, in relation to the claims against him in contract and for misleading conduct, his Honour, acting under r 74(5) of the recently introduced Uniform Civil Procedure Rules of Queensland, ordered that the joinder be effective only from the date of the order, which was 9 February 2000. As regards the claim against the estate of John Cameron, his Honour said he proposed to make the same orders but said he would not pronounce them until after the solicitors for the estate had been given an opportunity of being heard. Shortly after the hearing on 9 February, there was another hearing before Douglas J at which solicitors for the executors appeared. They said then that they had no instructions to consent to the order sought, and on 11 February 2000 his Honour ordered that the estate of John Wallace Cameron be joined, but with the addition of the same qualification that, as regards the claims in contract and misleading conduct, the joinder should be effective only from that date of 11 February 2000. The effect of orders in that form was to enable the statute of limitations to be relied on as a defence to the plaintiff's claims in contract and for misleading conduct, but not to the claim in negligence. In

the result, the defence of the statute of limitations was successful in defeating both of those claims against Richard Cameron and John Cameron.

[26] Following these events, appeals or cross-appeals were instituted against these orders by: (1) the plaintiff MAM, in so far as the orders joining the third and fourth defendants in the claims in contract and misleading conduct limited their effect to 9 February 2000 and 11 February 2000, being the dates on which those orders were made; and also (2) by the third party HIH, in so far as the joinder orders in contract failed to limit the operation of those orders to those dates. In addition to those two parties, the fourth defendants, who were the executors of John Cameron deceased, sought an extension of time within which to cross appeal in the same terms as HIH against the order made against them on the ground of its failure to limit the claim in contract and misleading conduct to 11 February 2000. Nothing was, however, done to bring any of these appeals to a hearing before the trial of the action, and the appeals against the orders made on 9 and 11 February 2000 were not heard until the principal appeal against the judgment given at the trial was heard by this Court on 17, 18 and 19 June 2002.

The joinder rules.

[27] Those earlier appeals, as all of these proceedings may conveniently be designated, in appeal no 1901 of 2000 involve a consideration of rules 68, 69 and 74 of the UCPR, as well as s 82(2) of the *Trade Practices Act 1974*. Rule 68(1) authorises the court "at any stage of a proceeding: to order that:

> "(a) …
>
> (b) any of the following be included as a party -
>
> (i) a person whose presence before the court is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceedings;
>
> (ii) a person whose presence before the court would be desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceedings.

For reasons similar to those I gave in *Interchase Corporation Limited (In Liq) v FAI General Insurance Company Limited* [2000] 2 Qd R 301, 312, I would be inclined to doubt whether either Richard Cameron or the executors of John Cameron was or is a "necessary party" to the action no 1562 of 1996 by MAM against David Cameron or Cameron Bros as defendants. The basic difficulty is that the word "proceeding" appears to refer to the action as it stands before further parties are added: cf *Interchase v FAI* [2000] 2 Qd R 301, at 314. But that question need not be decided here because I am satisfied that the addition of Richard Cameron and John Cameron's executors is covered by Rule 69(1)(b)(ii). Their presence before the court is, at the very least, "desirable, just and convenient" to enable the court to adjudicate effectually and completely "upon all matters in dispute connected with the proceedings". In *Interchase v FAI* [2000] 2 Qd R 301, 312, 316, it was said both by Byrne J and by me that convenience alone cannot justify joinder; but Rule 69(1)(b)(ii) is now worded differently from the provisions of O 3, r 11 that were considered there. It is sufficient now if it is desirable, just and convenient to enable the court to adjudicate on all matters that are in dispute not only *in* the proceedings but *connected* with it. The question whether, as partners of Cameron Bros until 30 June 1991, those persons are liable to MAM for the valuations produced by David Cameron, whether negligently, misleadingly or in breach of contract, is clearly a

matter or matters "connected with" the proceedings by MAM against Cameron Bros and David Cameron, and it was and is desirable, just and convenient that those persons should be included in the proceeding so as to enable the court to adjudicate on their liability, if any, in contract or for misleading conduct.

[28] Having concluded that Richard Cameron and the executors of John Cameron were liable to be joined under Rule 69(2)(b)(ii), it is necessary to go next to Rule 69(2). It operates as an exception to Rule 69(1) by precluding the court from joining ("the court must not join") a party "after the end of a limitation period, unless one of the following applies". There follows a series of provisions in Rule 69(2) that are contained in sub-paragraphs numbered (a) to (g), of which MAM relies on (a)(iii), (e) and (g). It is convenient to begin with Rule 69(1)(e), which precludes joinder after the end of a limitation period unless:

> "(e) the new party is sued jointly with the defendant … and is not also liable severally with the defendant … and failure to include the new party may make the claim unenforceable".

As I have already said, the partners in Cameron Bros are only jointly liable for debts or obligations of the firm that were incurred while each of them was a partner: s 12 of the *Partnership Act*; but they are jointly and severally liable for wrongful acts and omissions done by a partner in the firm: ss 13 and 15 of the Act. In terms of Rule 69(2)(e), the "new party" in this instance is each of Richard Cameron and the executors of John Cameron. In contract they are sued jointly with the defendant David Cameron; but they are, if liable at all, "*also* liable severally with the defendant" David Cameron in negligence.

[29] The question then is whether failure to include them in the proceedings would make the claim, for which they are sued jointly in contract, "unenforceable" within the meaning of Rule 69(2)(e). This raises the question whether in an action in contract it is still necessary to join all joint promisors. Under the old law, the remedy for failure to join all joint co-promisors was by demurrer as to parties or by plea in abatement resulting in a stay of the action, which, in practical terms, made the claim unenforceable unless and until joinder of the missing party was effected. However, this old procedure was abrogated by the Judicature Act and Rules: see *Carrick v Armstrong* [1969] Qd R 185, 191-192. After a detailed discussion of the current status of the rule, Professor Glanville Williams in *Joint Obligations* §18, at pp 58-59, concludes, although with some specific qualifications, that joinder of joint co-promisors may still be technically necessary. It is, however, not for the plaintiff, but for the defendant, to raise an objection of non-joinder of a co-promisor, and neither of the existing defendants Cameron Bros or David Cameron has raised such an objection in the present case. It therefore seems to me that, without such an objection being taken, the absence from the original proceeding of either Richard Cameron or the executors of John Cameron was not apt to make the plaintiff MAM's contract with Cameron Bros "unenforceable". It follows that Rule 69(2)(e) does not in terms apply here, with the consequence that the court was not at liberty to join those persons as parties after the end of the contractual limitation period of six years which expired in November 1996.

[30] Rule 69(2)(e) was therefore of no assistance to the plaintiff MAM in its application for joinder in February 2000. The next provision to be considered is Rule 69(2)(a)(iii). It was available to MAM if either Richard Cameron or John Cameron was "a necessary party to the proceedings because:

(iii) the proceeding was started … against the name of the wrong person as a party …".

The proceeding against David Cameron was obviously not started against him in the name of the wrong person. Having himself produced the negligent or misleading valuations, he, if anyone, was personally responsible for them and for the ensuing loss, if any, that they caused. Was the action in negligence against Cameron Bros "a proceeding started … against the name of the wrong person as a party"? According to O 54, r1, read with the decision in *Madden v Kirkegard Ellwood & Partners* [1983]1 Qd R 649, 655-656, an action against the partners in the firm name was competent only if the partnership had not been dissolved at the date when the cause or causes of action accrued, which was at earliest in or about December 1994, when the hotel was sold. By then, the partnership had already been dissolved on 30 June 1991 and, after that date, the name Cameron Bros signified Dascam Pty Ltd and not the three individual partners who had previously traded under that name. The action against the firm of Cameron Bros in negligence was therefore brought "against the name of the wrong person as a party". It should have been brought against the individual partners David, Richard and John Cameron (or his executors) in their own names. If this had been done when the writ issued on 23 February 1996, the actions in negligence against those persons would not have been statute-barred.

[31] It follows that Rule 69(2)(a)(iii) did apply, and the court was not precluded by Rule 69(2) in February 2000 from joining Richard Cameron and John Cameron's executors as parties to the proceeding, provided always that each of them was a "necessary" party within the meaning of that Rule. As to that, I cannot see that either of them was a "necessary" party to the proceeding in as much as the action could readily have been instituted and pursued against David Cameron alone without any need to join his partners, each of whom was severally liable for those wrongs. But Rule 69(2)(a) does not say that the new party must be a necessary party to the proceeding "and" that one or more of subparas (i) to (iv) must be satisfied. What it says is that the new party is a necessary party *because* one of those succeeding subparagraphs of Rule 69(1)(a) is satisfied. In other words, it assumes that if Rule 69(2)(a)(iii) is satisfied *because* the proceeding was started against the name of a wrong person as a party, as it was here, then the right person or "new" party *is* a necessary party to the proceedings. It follows in my view that the requirement specified in Rule 69(2)(a)(iii) was satisfied.

[32] That, however, does not necessarily determine the issue in the appeals no 1901 of 2000 in action no 1592 of 1996. Rule 69(2) merely precludes the court from making an order for joinder after the end of the limitation period unless one of the conditions in paras (a) to (g) applies. It does not conclude the question of the terms (if any) to be imposed if the court determines that it has authority to exercise its power under Rule 69(1)(b) to order that a person be included as a party to a proceeding. That is a matter which, at least as regards an order including that person as a party, is left to depend on Rule 74. Rule 74(1) is introduced by prescribing steps to be taken if an order is made "changing or affecting the identity or designation of a party". An order that, in this instance, included Richard Cameron and John Cameron or his executors as parties to the proceeding was one that affected the identity or designation of Cameron Bros as a firm being sued because it produced the result that each of the partners of that firm was now being sued as a designated or identified individual rather than a firm consisting simply of Dascam Pty Ltd.

[33] Rule 74(4) and (5) then proceed to provide as follows:

> "**(4)** If an order is made including … a person as a defendant …, the proceeding against the new defendant … starts on the filing of the amended copy of the originating process.
>
> **(5)** However, for a limitation period, the proceeding against the new defendant … is taken to have started when the proceeding started against the original defendant … unless the court otherwise orders."

[34] Rule 75(5) is evidently intended to create an exception to the general rule in Rule 74(4), which is that the proceeding against the new defendant starts on the filing of the amended copy of the originating process. The exception engrafted by Rule 74(5) on to that general Rule is that, for the purposes of a limitation period, the proceeding against the new defendant is regarded as having started when the proceeding against the original defendant was started, which in this case was on 23 February 1996 when the writ in action no 1562 of 1996 was issued. The final words "unless the court otherwise orders" of Rule 74(5) nevertheless confer a discretion on the court to select some other date as the date on which the proceeding against the new defendant is to be taken as having started.

The limitation period.

[35] It was in the exercise of this discretion that Douglas J fixed the dates of the orders made on 9 and 11 February 2000 as the starting points of the proceedings in contract and for misleading conduct. That would mean that those causes of action would be effectively statute-barred, they having first accrued respectively in November 1990 (contract), and in or about late December 1994 (misleading conduct) when the hotel property was sold. By contrast, the claim in negligence was left to the operation of Rule 74(5), with the result that it was taken to have started when the writ issued on 23 February 1996, which was well before the limitation period for that cause of action expired in about December 2000. The reason given by his Honour for differentiating between the causes of action in that way was that the claim in negligence was, at the date when the application before him was heard on 8 February 2000, not statute-barred, and that it had been the genesis of the whole action, whereas the other two causes of action had been added out of time only by the order of Chesterman J made on 30 March 1999. Another reason his Honour gave was that, as regards the cause of action in contract and for misleading conduct, the defence of contributory negligence, which was raised by HIH as insurer in the third party proceedings contemplated against it by Richard Cameron if he was joined, would as a matter of law not be available to it in relation to either of those two claims, whereas it was available in the claim based on negligence. This would, his Honour said, in itself constitute a prejudice to the new defendants if they were joined outside the limitation period, and ultimately also to the insurer HIH, who would otherwise retain a prospect of defeating or reducing the plaintiffs' claim against them for damages in negligence if it was confined to one of negligence alone.

[36] Without necessarily indorsing all of his Honour's reasons, I can see no error in his Honour's conclusions or in the way in which he exercised his discretion under Rule 74(5). There were sound reasons of justice for saying that granting the plaintiff the indulgence it sought should not take place at the expense of the new defendants' right to protect themselves by pleading the statute of limitations. It is true that Richard Cameron was willing to consent to the order joining him and to do so

without the restriction on starting dates imposed on the orders for joinder in respect of the claim for breach of contract and misleading conduct. But Richard Cameron's apparent lack of concern, both then and now, about his joinder is explained by the fact that he had earlier entered into an agreement with the plaintiff MAM that he would assist it in pursuing its claim against the defendants on terms that it would not enforce any judgment it obtained against him. The practical, and no doubt the intended, result was to leave it open to the plaintiff to gain the benefit of the professional insurance policy issued by HIH in favour of the defendant firm Cameron Bros and the individual partners of that firm. His Honour was, in my view, entitled, in making the order as he did, to take account of the impact that those orders would have on the liability of HIH which had been given leave to defend the proceeding brought by the plaintiff MAM. As it was, the parties were content to conduct the trial of action no 1562 of 1996 on the basis of the orders made by his Honour on 9 and 11 February 2000, which makes it difficult to see why those orders should now be set aside.

Commencement of the action for misleading conduct.

[37] In relation to the orders made by Douglas J that are the subject of the appeals in no 1901 of 2000, two other matters were raised. One is related specifically to the claim of misleading conduct. By s 82(2) of the *Trade Practices Act 1974* (Cth) it is provided that an action under s 82(1) for loss or damage by conduct done in contravention of s 52 of the Act may be commenced at any time within a specified period, which was, at the relevant time, three years after the day on which the cause of action relating to the conduct accrued. As has more than once been said, the accrual date for that purpose was in or about December 1994. It was submitted by HIH that this meant it was not competent for a court acting under the provisions of Rules 69 to 74 of the UCPR in Queensland to make orders for joinder of parties that had the effect of altering the date of commencement of the cause of action specified in s 82(2) of the Act.

[38] On this aspect of the matter, the submissions of Mr Sheahan SC on behalf of the plaintiff MAM are that, in entertaining a claim under s 82(1) of the Act, the Supreme Court of Queensland was acting as a State Court exercising federal jurisdiction. In that character, the provisions of s. 79 of the *Judiciary Act 1903* (Cth) applied to it. Section 79 provides, so far as material, that:

> "**79**. The laws of each State … including the Court relating to procedure .. shall, except as otherwise provided by ... the law of the Commonwealth, be binding in all Courts exercising federal jurisdiction in that State … in all cases to which they are applicable."

In addition, s 80 of the *Judiciary Act* provides that, in so far as the provisions of the laws of the Commonwealth are

> "insufficient to carry them into effect .. the common law in Australia as modified by the statute law in force in the State … in which the court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with ... the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil … matters."

[39] The common law in Australia is or is said to be found in the decision of *Weldon v Neal* (1887) 19 QBD 394 establishing that an amendment to proceedings, including a joinder of further parties, will not be permitted if the statute of

limitations has already run in favour of a party sought to be joined. That decision has in Queensland and, I believe, in most other States been overruled or altered by local statute law in the form of the Rules of Court enabling parties to be joined after the statute of limitations has run in favour of that party. Rules 69 to 74, and specifically Rule 74(5) of the UCPR, are the operative statute law in Queensland. If a law of the Commonwealth provided to the contrary, it would, of course, prevail over those Rules to the extent of the inconsistency; but, although s 82(2) of the *Trade Practices Act* prescribes a period of limitation for the purpose of claims for loss or damage recoverable under s 86 of that Act, it does not specify the moment at which an action under s 82(1) is "commenced". To that extent, the laws of the Commonwealth or their provisions are "insufficient to carry them into effect", and the common law in *Weldon v Neal*, as modified by State statute law in the form of UCP Rules 69 to 74, and in particular Rule 74(5), is to be applied.

[40] This conclusion, or so Mr Sheahan submitted**,** is confirmed by the provisions of s 79 of the *Judiciary Act* which were considered by the High Court in *Austral Pacific Group Ltd (In Liq) v Airservices Australia* (2000) 74 ALJR 1184, 1188 11-13. Section 79 makes the State laws of procedure binding on a court exercising federal jurisdiction in the State "except as otherwise provided by … the laws of the Commonwealth". In *Western Australia v Wardley Australia Limited* (1991) 30 FCR 245, 266, it was held that the three year time limit in s 82(2) "is to be regarded as having a procedural character, being a condition of the remedy rather than an element in the right". The decision of the Full Court of the Federal Court in that case was applied by Chesterman J in this action when, on 30 March 1999, his Honour permitted the causes of action in contract and for misleading conduct to be added; in doing so, his Honour referred to the decision in *Harris v Western Australian Exim Corporation* (1994) 56 FCR 1, 9, in which Hill J took the same view as the Full Court.

[41] Persuasive though Mr Sheahan's submissions on this point appear to me to be, I consider it not to be necessary in this case to reach a final conclusion on their validity. Since *Western Australia v Wardley* was decided by the Full Court of the Federal Court, the question whether limitation provisions are to be regarded as procedural in character has been the subject of further consideration by the High Court in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 543-544; in addition, the Federal Court rules have been amended to incorporate relevant provisions of local State court procedural rules. There was no appeal against the decision of Chesterman J authorising joinder of the cause of action based on misleading conduct. The order made by Douglas J in February 2000 for joinder of the third and fourth defendants also permitted them to plead expiry of the limitation period in answer to the claim for misleading conduct. As events turned out that plea succeeded at the trial, and HIH is therefore in no worse position as potential indemnifier of the third and fourth defendants in respect of the claim against them for misleading conduct than it would have been if the order for joinder of those defendants had not been made at all. In these circumstances, a ruling on this question is not called for here and need not be made in order to dispose of this aspect of appeal no 1901 of 2000.

The death of John Cameron.

[42] The second of the two matters involved in the decision of Douglas J authorising joinder of the third and fourth defendants was raised in appeal no 1901 of 2000 by Mr Clarke of counsel, who appeared on behalf of the fourth defendant,

the executors of the late Mr John Cameron. As has been noticed John Cameron died on 31 July 1996 leaving a will of which probate was granted in the Supreme Court on 11 September 1996 following publication in August 1996 of the standard probate notices inviting claims from creditors. By at least 30 June 1997 his estate had been fully administered. It was only some two and a half years later on 4 February 2000 that the plaintiff MAM applied to join the executors in the action. Strictly speaking, what they did was to apply to join "the estate" of John Cameron deceased. As distinct from most continental European legal systems, our law does not recognise the estate of a dead person as having some form of quasi-corporate existence enabling it to be sued as a party: cf *L'Abbate v Collins & Davey Motors Pty Ltd* [1982] VR 28, 29. In applying to have the estate of John Cameron joined, the plaintiff or its legal advisers were, however, evidently utilising Rule 71 of the UCPR, of which Rule 71(2) speaks of naming as defendant the "Estate of" a deceased person who is identified, but once a personal representative is appointed, it is subject to Rule 71(3). Rule 71 applies where a defendant is dead at the start of a proceeding: see Rule 71(1), which was not yet the case here when the writ in this action originally issued on 23 February 1996, and, as is shown by a letter dated 14 March 1997 from the plaintiff's then solicitors to their client, the plaintiff was at that date aware from searches made of the Freehold Land Register that the estate of John Cameron had already been distributed by his personal representatives acting pursuant to the authority of the will of which probate was granted on 11 September 1996.

[43] In relation to these events, Mr Clarke's point is that, when the application to join the estate or the executors came before Douglas J on 3 February 2000, these matters ought to have been disclosed to his Honour, so as to ensure that the order, if any, for joinder of the executors as defendants was, in accordance with the law regulating the liability of executors, limited to damages payable out of the assets of the estate and that any judgment against them or any proceeding for its enforcement was also limited in that way. In fact, when the order was passed and entered and the amended statement of claim was delivered, the proceeding against what then became the fourth defendants was, possibly out of deference to the provisions of Rule 71(3), correctly directed to John Cameron's executors, but without incorporating, as it should have, the form of limitation referred to. As a result, Mr Clarke, who also appeared for those defendants at the trial, was given leave at the trial to deliver a defence that the estate was fully administered (*plene administravit*). On appeal, he informed the Court that at trial there was a suggestion by the plaintiff that they were going to prove that assets of the estate had been distributed even after notice of the claim had been given to the executors. This, as Mr Clarke submitted, would have transformed the proceeding against the executors into an action for a *devastavit*; but in fact no appropriate amendment to the pleadings was carried out and evidence adduced at the trial established that the estate had been fully administered. The only notice of which there was any evidence at the trial was a letter dated 27 February 1997, which was directed to Dascam Pty Ltd and to David Cameron, who was only one of the three executors of John Cameron; and both it and another letter dated 1 April 1997, which was directed to all three executors, failed to make it clear that the claim was distinct from the plaintiff's claim against Cameron Bros, which at that time signified Dascam Pty Ltd.

[44] In these circumstances, Mr Clarke, in his informative submissions on behalf of the executors on appeal, asked that the order made by Douglas J joining the estate or

the executors be varied to ensure that the appropriate limitation on the action against them be included in any order joining them as defendants. A cross-appeal against the order had been filed in appeal no 5334 of 2001; it was out of time; but, by an application filed on 14 June 2002, the fourth defendant asked for any necessary extension of the time within which to cross-appeal. Mr Clarke pointed out that the plaintiff MAM and the third party HIH had both been content to allow their appeals against the orders made by Douglas J to lie by until after the trial of the action, and that they were therefore not in a position to claim that they had been prejudiced by any delay on the part of the fourth defendant executors in lodging their cross-appeal. To this he added that the executors would be content if the order sought in para 3(a) of the notice of appeal filed by the plaintiff MAM on 14 June 2001 were to be made against the fourth defendant; that is to say that:

> "(a) any judgment in action 1562 of 1996 against the fourth defendant be levied out of the assets of the deceased John Wallace Cameron which shall hereafter come to hands of the fourth defendants as executors of the deceased to be administered."

Mr Clarke acknowledged that those assets might be capable of including the chose in action represented by the claim (if any) of John Cameron deceased to be indemnified under the professional negligence policy issued by the third party HIH. He opposed the making of the further orders claimed in para 3(b) of MAM's notice of appeal, which sought inquiries as to the value of the estate of the deceased and as to whether notice of MAM's claim was given, etc. He did so on the ground that no right to relief of that kind had been established at the trial. In my opinion, Mr Clarke's submissions are sound, and, as against the fourth defendants, the appeal no 5334 of 2001 by MAM should be allowed, but without costs, only to the extent in para 3(a) of its notice of appeal as set out above.

The allegation of dishonesty.

[45] It is necessary now to turn to the insurance questions raised in the third party proceedings against HIH. All four of the defendants claimed indemnity against HIH under a policy or policies of professional indemnity insurance issued by it in the years 1990/1991 to 1995/1996. In each of those years a policy was issued by HIH in terms that were recommended by the professional association of which as valuers they were members. In relation to the claim made by MAM against Cameron Bros and David Cameron in 1996 for damages flowing from the negligent valuations made in November 1990, the defendants' claim for indemnity was resisted by HIH on the ground that those valuations were not only negligent but had been dishonestly prepared by David Cameron. It was to enforce that indemnity that HIH was joined as a third party in the action no 1526 of 1996.

[46] In addition to those claims against the defendants, which arose out of David Cameron's valuations in 1990 of the three properties (hotel, avocado farm and industrial land), David Cameron had in 1995 also provided the valuations (exs 16 and 17) of the two other properties, which were the Pimpama land and the Mudgeeraba land. Again, it was claimed that he had done so negligently, in consequence of which he and Dascam Pty Ltd then trading as Cameron Bros were sued as defendants in action no 4031 of 1996 by the plaintiff Piesse Investments Pty Ltd (the **Piesse** action). When, in respect of that claim for damages for negligence, Dascam and Richard Cameron sought indemnity from HIH under the 1995/1996 professional indemnity policy, HIH resisted the third party proceedings against it on

the ground that the Pimpama and Mudgeeraba valuations had also been prepared dishonestly by those two defendants.

[47] In that action no 4031 of 1996, Fryberg J on 2 February 1999 made orders directing that three issues be tried in advance of other issues as preliminary questions (a), (b), and (c) in the action. It is not necessary to refer to the second of these questions; but the first and third were: (a) whether the defendants Dascam and David Cameron had, in preparing the Pimpama and Mudgeeraba valuations, failed to exercise reasonable care; and (c) whether the third party HIH was liable to indemnify Dascam and David Cameron under the insurance policy issued by it. Those questions in action no 4031 of 1996 were, by some procedural order, step or arrangement which has not been disclosed to us on this appeal, subsequently determined by Douglas J at the trial of action no 1562 of 1996, which is how the **Piesse** action no 4031 of 1996 came to be drawn into the trial of that action by MAM in which the judgment, now before us in appeal no 5334 of 2001, was given on 18 May 2001.

[48] In referring to the **Piesse** action no 4031 of 1996 in his reasons for judgment in action no 1562 of 1996, Douglas J said that Fryberg J had on 2 February 1999 made orders:

> "which, in effect, made the only issue in this action whether the valuations exs 16 and 17 [of the Pimpama and Mudgeeraba properties] which are the subject of that action [no. 4031 of 1996] were the product of reasonable skill and care on the part of Mr [David] Cameron. As the trial progressed it became clear that such an issue did not appear to be in dispute .. I am of the view that the valuations exhibits 16 and 17 are not the product of reasonable skill and care on David Cameron's part."

In the result, his Honour made a declaration to that effect, which has not been the subject of any appeal. What is, however, now challenged in appeal no 5363 of 2001 against the judgment given in action no 4031 of 1996 is the question of dishonesty on the part of David Cameron in relation to those valuations exs 16 and 17 of the Pimpama and Mudgeeraba properties. Having said as he did that, in effect, the only issue in action no 4031 of 1996 was whether those valuations were the product of reasonable skill and care on the part of David Cameron, his Honour nevertheless went on to say it was:

> "not possible … to seek to rely upon these valuations as support for a view that, if they were made dishonestly, so were the MAM valuations and vice versa … There is no relationship between the Piesse valuation and the MAM valuations. They were done at separate times and years apart. The second set of MAM valuations was done in 1990 and the Piesse valuations in 1995."

There can be no doubt of the correctness of this view. The honesty or otherwise of the valuations (exs 16 and 17) made by David Cameron or Dascam Pty Ltd of the Pimpama and Mudgeeraba land in 1995 is not relevant in or capable of determining the honesty or otherwise of the valuations made by David Cameron or Cameron Bros in 1990 that were the subject of action no 1562 of 1996 brought by MAM.

[49] However, the use that HIH seeks to make of the 1995 valuations exs 16 and 17 is, as will shortly be seen, as a platform for asserting that David Cameron's alleged

dishonesty in making them can be used to deny indemnity to the defendants Richard Cameron and John Cameron or his executors under the policy of insurance for the year 1995/1996 pursuant to which they claimed against HIH to be indemnified against their liability, if any, for the damages claimed by MAM in action no 1526 of 1996. Much, therefore depended on whether a finding of dishonesty would at the trial of action no 1562 of 1996 be made against David Cameron in respect of either 1990 or 1995 valuations. In an effort to have part of that question in action no 1562 of 1996 determined expeditiously, Richard Cameron and John Cameron's executors together with HIH applied to have certain questions of construction of the insurance policy decided in advance of the trial. The application was heard upon certain agreed or assumed facts and decided by Douglas J on 31 August 2000, which was only a few days before the trial of action no 1562 of 1996 began. In the result his Honour held that Richard Cameron and John Cameron's executors were not entitled to indemnity under the policy issued by HIH. His decision to that effect has been treated by both of those defendants and HIH as interlocutory only in its effect; but, in any event, it is the subject of appeal no 8454 of 2000 that is now before us. In addition, in appeal no 5363 of 2001, HIH also complains that his Honour ought to have, but did not, determine the second preliminary question in the **Piesse** action no 4031 of 1996, which was whether Dascam Pty Ltd and David Cameron had acted dishonestly in relation to the insurance policy.

[50] The insurance policy issued by HIH in 1995/1996, like that of 1990/1991, contains a general undertaking to indemnify the Insured against any claims (which is defined to include writs and demands for compensation made against the Insured) for breach of professional duty which are first made during the period of insurance by reason of any act, error or omission committed by the Insured and notified by it to the insurer HIH. The contract or policy in this instance was issued by HIH to Dascam Pty Ltd trading as Cameron Bros in 1995/1996, which was the year in which the claims were first made. The policy contains an exclusion providing that it shall not indemnify the Insured in respect of any claims made against them.

> "(d) brought about or contributed to by any dishonest [or] fraudulent … act or omission of the Insured"

[51] The primary question at trial therefore was whether the claims by MAM in action no 1562 of 1996 against the four defendants Cameron Bros, David Cameron, Richard Cameron and John Cameron were brought about by the dishonest or fraudulent act of David Cameron in preparing and publishing to MAM the valuations of the hotel, farm and industrial properties in November 1990. In his reasons delivered in action no 1526 of 1996 on 18 May 2001, his Honour found that there had not been any dishonesty or fraudulent act on the part of David Cameron in making or publishing those valuations. He summed up his conclusion by saying that "David Cameron was not dishonest in preparing those valuations in 1990" (or, indeed, some even earlier valuations in 1989). He also said:

> "His conduct was in my view, not such as would fit within the meaning of the word 'dishonesty' within the application of the law discussed above. The third party [HIH] has failed to prove that the dishonesty exclusion applies in this case."

[52] HIH's first complaint about the form in which the finding is expressed is that, at least in the passage quoted, it is not a distinct finding of dishonesty as such but is no more than a conclusion that HIH had failed to prove that David Cameron's conduct satisfied the dishonesty exclusion in the policy in the sense stated and

understood by the trial judge. Instead of holding, as his Honour should have done, dishonesty to mean an absence of honest belief in the truth or accuracy of the opinions given in the valuations (as in *Derry v Peek* (1889) 14 App Cas 337, 374, and *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579, per Gleeson CJ at 587-589), the learned trial judge had applied a statement adopted in the Full Court in *Crowe v Wheeler & Reynolds* [1988] 1 Qd R 40, 41-42, to the effect that "something in the nature of intentional deception or concealment" was required: *Lynch & Co v United States Fidelity & Guarantee Co* [1971] OR 28, at 37-38. It was, it was submitted, because of this error that his Honour had concluded that HIH had failed to prove that the dishonesty exclusion applied in this case.

[53] The first difficulty facing HIH on this appeal is that, even if it were to be accepted that his Honour had applied the wrong test of dishonesty in reaching his decision on the applicability of the exclusion provision in the policy, it would be difficult if not impossible for this Court to arrive at a different conclusion on the material before us. His Honour made no finding that David Cameron had, in making or publishing his valuations in 1990, entertained no honest belief in the truth or accuracy of his valuation opinion. A man's opinion is, as Bowen LJ once remarked, as much a fact as his digestion; but it is not often a simple matter to find that it is different from what he says it is, least of all in a case in which that opinion is directed to something as imprecise as the market value of land. Before doing so, one would ordinarily wish to have the advantage of observing the evidence and demeanour of the particular witness at trial. In the present case, therefore, his Honour's failure to make a finding about the honesty, or lack of it, of David Cameron is something that could be corrected only by ordering a new trial of that issue, which is not a part of the relief that HIH has sought on this appeal.

[54] Quite apart from that consideration, a finding that David Cameron was dishonest in the sense contended for would conflict with findings made by the trial judge in respects that are critical to the determination of that issue. On the subject of the credibility of David Cameron as a witness at the trial, what his Honour said was:

> "In the witness box he struck me as being a man who lacked guile. He appeared to me to be doing his best to tell the truth in difficult circumstances. I gained the impression that he was embarrassed by the fact that his incompetency was being showed up. His conduct was, in my view, not such as would fit the meaning of the word "dishonesty" within the meaning of the law as discussed above."

As a finding of credibility, the form in which his Honour stated it is perhaps not the conventional one of accepting a person as a witness of truth; but there can scarcely be any doubt that that is what his Honour meant to convey by what he said. It was a statement made in the context of a discussion of the matters that were identified by HIH as pleaded particulars of its allegation of dishonesty in relation to each of the valuations made in 1990. Those particulars were numerous, and in several instances his Honour found on the evidence before him that they were in various respects ill-founded.

[55] There is, in my opinion, no proper basis on which those findings are properly capable of being set aside on appeal. They were canvassed at great length in the course of a cross-examination by senior counsel that we were informed lasted some five days, and which, it is evident from the transcript was closely followed by his Honour at the time it took place. What is perhaps more important is that, when it

was put to David Cameron that he had carried out the valuations dishonestly, he denied having done so. His Honour plainly accepted his denial and, in giving judgment on 13 June 2001 in action no 4031 of 1996, the learned judge, in addition to declaring that the conclusions stated in the valuations exs 16 and 17 were not the product of reasonable skill and care on the part of the third defendant Dascam Pty Ltd and that it and the fourth defendant David Cameron should pay the costs of the plaintiff Piesse Investment Pty Ltd, also declared that the third party HIH was obliged to indemnify those defendants in respect of the claims of the plaintiffs and the first defendant WR Mortgage Services Pty Ltd pursuant to the policy of insurance referred to in those defendants' third party statements of claim against HIH. As to costs, he ordered that HIH pay those defendants' costs of the third party proceedings and that it indemnify those defendants in respect of the costs ordered to be paid by them to the plaintiff.

[56] It is therefore clear that the learned trial judge determined that there was, within the meaning of that policy, no dishonesty on the part of David Cameron or Dascam Pty Ltd in the preparation of the Pimpama and Mudgeeraba valuations exs 16 and 17 in action no 4031 of 1996. Without such a determination the declaration of liability on the part of HIH to indemnify under the insurance policy would not have been made. For the reasons already given, that determination and the findings that support it ought not to be disturbed. Appeal no 5363 of 2001 in action no 4031 of 1996 (the **Piesse** action) ought therefore to be dismissed with costs. Because, however, the plaintiff MAM in action no 1562 of 1996 did not succeed in recovering damages in that action, his Honour did not find it necessary to consider what he described as "the interesting and difficult insurance questions" that would otherwise have arisen on the third party proceedings against HIH in that action. Having regard to the conclusion reached earlier on this appeal no 5334 of 2001 that there should be judgment for the plaintiff in that action for $900,000 damages with interest and costs, it is necessary or desirable now to consider those insurance questions, which were fully argued before us on that appeal and also in appeal no 8454 of 2000.

The insurance issues.

[57] What now follows would be relevant only if HIH had succeeded in establishing dishonesty on the part of David Cameron, which both at the trial and on the appeal it has failed to do. For the period 30 June 1990 to 30 June 1991 Cameron Bros held a policy of insurance entitled "Professional Indemnity Insurance Policy for Members of the Real Estate Institute of Australia" numbered RESI/90/1097. Under this policy, the insurer HIH agreed to indemnify the partnership of Cameron Bros against claims for breach of professional duty as valuers. Clause 10 of the policy contains a "run-off cover" provision which states:

> "In the event of the insured ceasing to carry on the business as described herein, Underwriters will grant free run-off cover in respect to claims made after the date of cessation of business which relate to instances which occurred during the currency of the Policy.
>
> It is however understood and agreed that this Special Extension of cover shall only be granted in the following circumstances:
>
> (a) where notification of cessation of business has been provided to Underwriters' representatives, Steeves Lumley Pty Ltd within

twenty-eight days of cessation of business or the expiration of the current period of insurance, whichever is the latter;

(b) the insured completing and forwarding to Underwriters' representatives a renewal declaration each twelve months after notification of cessation of business has been given, specifically stating whether any claims have been made or that the insured is aware of any circumstances upon which a claim may be made against it;

(c) the insured giving to Underwriters' representatives immediate notification of any claim made or circumstances upon which a claim may be made against it; and

(d) the present Underwriters continuing as the professional indemnity insurer of the Real Estate Institute of Australia"

Counsel for the first and second appellants Richard Cameron and the executors of John Wallace Cameron, submitted to this court that their clients are entitled to indemnity under this "run-off" provision of the 1990/91 insurance policy even if David Cameron is found to have been dishonest.

[58] The insured under this policy was defined as "…company, individual or the partners of a firm as named in the Certificate of Insurance…". The Certificate of Insurance issued to Cameron Bros named the insured as "J W Cameron, R W Cameron and Dascam Pty Ltd t/as Cameron Bros". In the following year, after the retirement of John and Richard, the insured was named in the new Certificate of Insurances as "Dascam" from 9 July 1991. In his ruling on the preliminary question given on 31 August 2000 ([2002] QSC 288) Douglas J held that the run-off cover was not activated by the retirement of John and Richard because the intent of the policy was to insure the persons constituting the "Cameron Bros" together with the former partners. Logically, this reasoning would allow a business named the "Cameron Bros" to obtain exactly the same insurance as Richard, John and Dascam had, irrespective of who were the persons who comprised Cameron Bros and irrespective of their relationship to the partners who comprised Cameron Bros at the time the policy issued in 1990. The partnership of Cameron Bros was, however, determined by the retirement of Richard and John pursuant to s 29(1) of the *Partnership Act; S J Mackie Pty Ltd v Dalziell Medical Practice Ltd* [1989] 2 Qd R 90. The partnership between the three original members of the firm, who were the designated insured, then ceased to exist and a new business named Cameron Bros comprising only Dascam Pty Ltd began to operate. Giving effect to the ordinary meaning of "carrying on business", the partnership ceased to be in business because it then ceased to exist: see *Hope v Bathhurst City Council* (1980) 144 CLR 1, 8. Having no longer any financial interest in the business after the determination of the partnership, Richard and John Cameron no longer "carried on the business". The first requirement of clause 10 of the policy was therefore satisfied; that is to say, the insured ceased to "carry on business".

[59] The second requirement for the provision of "run-off" cover under the policy is that the insured provide a cessation of business notification within 28 days of the cessation of business. Cameron Bros complied with this requirement. In response to this notification, HIH on 9 July 1991 issued a new certificate of insurance

identifying the insured as Dascam. This exchange shows an intention to activate the run-off cover provisions on the retirement of the two partners Richard and John, and HIH was so informed by the notification sent by Cameron Bros to HIH. In these circumstances it cannot be correct to say that Cameron Bros as the insured under the 1990/1991 policy continued to carry on business or was regarded by HIH as doing so.

[60] John and Richard Cameron were also required by cl 10 of the policy to forward a renewal declaration every twelve months to the underwriters' representatives. His Honour held that the resulting agreement gave rise not to a continuing cover, but to an offer and acceptance involving successive contracts of insurance on a yearly basis. His Honour then determined that failure to provide those declarations was not an "omission to do something" required by the 1990 policy and so was therefore not subject to s 54 of the *Insurance Contracts Act 1984*. That section precludes an insurer from refusing to pay a claim by reason only of some act of the insured that occurred after the contract was entered into. On appeal HIH submitted that the 1990/1991 policy was not the contract providing run-off cover for the future. It was simply an entitlement to acquire annual insurance on terms so favourable that the cover was free. This entitlement would, according to HIH, only be available in certain circumstances that were spelled out in the 1990/1991 policy, which included the requirement to forward a renewal declaration.

[61] Upon considering the plain language of cl 10 of the policy, I am of opinion that no part of it can be considered an "option" as found by the trial judge, but that it formed a part of the contract entered into in 1990 and not simply an option for a continuing contract. The 1990/1991 run-off provisions are intended to provide professional indemnity cover to John Cameron and Richard Cameron for acts occurring during the currency of that policy despite their failure to file a renewal declaration each year. HIH submitted, however, that even so, the policy does not indemnify any of the original partners in Cameron Bros in respect of claims arising from dishonest acts allegedly committed by David Cameron. There are two answers to this submission.

[62] The first is that HIH agreed to indemnify Richard Cameron in a letter from its solicitors to Richard Cameron's solicitors dated 6 January 2000. In that letter, HIH agreed to indemnify Richard Cameron subject to the policy and to several conditions, which are that Richard was not involved in any alleged dishonesty; that Richard not seek to become a party to the action; and that HIH have full conduct of the proceedings against Richard. HIH further agreed to pay the reasonable costs involved in Richard Cameron's defence up to that date. In return, Richard was to submit to an interview with counsel for HIH concerning his knowledge of partnership affairs during the 1990/1991 year and his knowledge of the valuations given to MAM. HIH also asked that Richard disclose the extent of his assets. The letter was headed "Without Prejudice". Although the letter does not identify which of the possible policies Richard would be indemnified under, it may reasonably be assumed that, because HIH was concerned with acts occurring in 1990-1991, it was the 1990/1991 policy under which Richard was being offered indemnity by virtue of the "run-off" cover offered in that policy.

[63] The next step in the events was that on 4 February 2000 HIH confirmed by letter from its solicitors that it no longer intended to indemnify Richard Cameron in respect of claims against him by MAM. The letter offered no basis for rejecting

Richard's claim; in other words, it was not suggested that any of the conditions listed in the letter of 6 January 2000 had been breached. There is ample authority for the proposition that once HIH offered to indemnify Richard and he acted on that representation, HIH was estopped from later denying that indemnity: see, for example, *Hansen v Marco Engineering (Aust) Pty Ltd* [1948] VLR 198, 212. On that basis, HIH would be estopped from refusing indemnity to Richard Cameron. The letter of 4 February 2000 was, however, adopted by counsel for Richard Cameron not as an estoppel but to support a submission that HIH had by its letter of 6 January 2000 waived compliance with the duty of disclosure in accordance with s 21(2)(d) of the *Insurance Contracts Act.* It was said to operate as a waiver of a defence that HIH was not obliged to indemnify Richard Cameron because of David Cameron's failure to disclose his earlier dishonesty. See *Commonwealth v Verwayen* (1990) 170 CLR 394, 422,467-468, 473. Richard and John Cameron also claimed a right to indemnity as "innocent" employees and former partners under the policy issued to Cameron Bros for the years 1995/1996. This is not the subject of appeal no 8454 of 2000, but it forms part of appeal no 5363 of 2001 arising out of the **Piesse** action no 4031 of 1996. The claim for indemnity here is based on John and Richard Cameron's having been employees during 1996, which was the year when the claim was made by MAM against the Cameron Bros for valuations.

[64] There was a submission by HIH at the trial that the letter could not have referred to the 1995/1996 policy because the policy purported to have been terminated before the January letter, and the letter was incapable of reviving the policy. This was, however, not a case where the policy needed to be revived. That is so, first, because the policy existed at the time of the act giving rise to the claim and therefore the question of indemnity remained open at the time the letter was written and received; and secondly, because waiver may arise otherwise than out of contract as it did in *Vakauta v Kelly* (1989) 167 CLR 568, 573, 579, 588, where the question was whether a party to litigation with knowledge of the right to take objection, loses or waives his right to do so by failing to take the objection at the time when it is available. Here HIH was aware that there were allegations of dishonesty against David Cameron and, subject to Richard not being a participant in that dishonesty, it offered to indemnify Richard and so with full knowledge of the facts waived its right to rely on a defence of non-disclosure. On that footing, HIH by its January letter waived its right to deny indemnity to Richard Cameron whether under the 1990/1991 policy or under the 1995/1996 policy.

Disclosure of dishonesty.

[65] The second answer to the submission that neither Richard nor John is entitled to indemnity under the 1990/1991 policy is found in the policy itself. HIH claims that David Cameron performed dishonest valuations in 1989, and again with respect to the same properties in 1990. This is said to activate the duty of disclosure imposed by s 21 of the *Insurance Contracts Act 1984.* HIH submitted that if David Cameron's dishonesty had been disclosed before formation of the 1990/1991 contract, it would have refused to offer insurance cover for any acts of David Cameron and it would have made it a term of the 1990/1991 policy that a maximum insured limit of $1 million would apply. Although there were no submissions by John and Richard Cameron as to whether they would have accepted a policy on those terms, it is reasonable to suppose that, if they had been aware that David had admitted dishonesty, they might well have chosen not to continue in a business partnership with him.

[66] The 1990/1991 policy itself deals with the issue of disclosure in the following way:

> "**Proposal Completion Waiver Clause**
> Notwithstanding the provisions of Exclusion 5 this Policy will protect the interests of innocent members of the Insured (other than in the case of sole traders) in that the Underwriters will not void the Policy because of the failure of a person guilty of dishonesty of any description to disclose such dishonesty on the proposal form being the basis of this contract."

This provision operates as a waiver of the requirement that an insured provide full disclosure. The clause is plainly intended to protect innocent partners from claims arising from the dishonesty of others. It is not immediately apparent how this clause interacts with s 28 of the *Insurance Contracts Act 1984*. Section 28 provides that if a person who became insured failed to comply with the duty of disclosure or made a misrepresentation before the contract was entered into fraudulently, the insurer may avoid the contract. Section 28(3) permits the insurer, if not entitled to avoid the contract or not having done so, to assert that the liability of the insurer in respect of the claim is reduced to the amount that would place the insurer in the position it would have occupied if the failure or misrepresentation had not occurred.

[67] The only way in which s 28 can be read consistently with the provisions of the proposal completion waiver clause in this contract of insurance is that HIH will not avoid the contract for failure to disclose dishonesty so long as the dishonest person himself is not indemnified. In this case it would follow that only John and Richard Cameron, but not David Cameron, would be entitled to indemnity. HIH then submits that s 28(3) would apply to reduce the amount it is required to pay. Such a reduction would, however, only apply "where the person who became the insured … failed to comply with the duty of disclosure". The meaning of "person" in s 28 was discussed in *Fruehauf Finance Corporation Pty Ltd v Zurich Australian Insurance Ltd* (1990) 6 ANZ Insurance Cases 76,773). In this instance, only David could have failed to comply with the duty because John and Richard were not aware of any alleged dishonesty on his part. On this footing, it is only claims against David and not against other persons "who became the insured" that can be reduced in accordance with s 28(3). It follows that HIH may not avoid the policy, and may refuse to indemnify only the person who failed to disclose dishonesty, who is David Cameron and not Richard Cameron or John Cameron or his executors.

[68] The policy contained two other provisions which tend to support the view that the parties intended the innocent partners to be indemnified in respect of claims arising out of dishonest acts of a partner. They are the following Special Extensions:

> "2. **Dishonesty**
> It is agreed and declared that the Policy is extended to indemnify the insured in respect of claims for damages made against them for breach of Professional duty arising out of or contributed to by the dishonest, fraudulent, criminal or malicious conduct of employees, Directors or partners of the insured. Provided that the Policy shall not provide indemnity to any person committing or condoning such dishonest, fraudulent, criminal or malicious act."

The other provision is contained in the list of **Exclusions**:

> "This Policy of Insurance does not indemnify the insured in respect of:
>
> 5. Any claim brought about or contributed to by any dishonest, fraudulent, criminal or malicious act or omission of the insured or a Director or partner of the insured except as provided under Special Extension 2 hereof."

It is evident from Exclusion 5 that the exclusion for dishonesty of a partner is expressly qualified to the extent provided in Special Extension 2. That provision in turn expressly extends the indemnity under the policy for breach of professional duty arising out of or contributed to by dishonest conduct of a partner of the insured, such as Richard or John Cameron in this case, but not to the person committing the dishonest act, such as David Cameron. It follows that both Richard and John are entitled to be indemnified by HIH in respect of both the claims by MAM in action no 1652 of 2001 and by Piesse Investments Pty Ltd and W R Mortgage Services Pty Ltd in action no 4031 of 1996; and that is so whether or not David Cameron was dishonest or failed to disclose his dishonesty in his valuations in 1990 or 1995 the subject of either of those actions. There will accordingly be declarations to that effect in both actions.

The judgment against HIH.

[69] The only remaining question concerns a further appeal no 5364 of 2001 by HIH against a judgment for $179,122.44 with interest and costs obtained by Richard Cameron against HIH in action no 1562 of 1996. The judgment was given on 24 May 2001 for damages consisting of legal costs incurred by Richard Cameron arising out of HIH's repudiation of the policy of insurance issued to Cameron Bros. HIH did not at first appeal or seek to appeal against that decision. Instead, on 18 May 2001 it appealed only against the accompanying order for costs. Richard Cameron having applied to the Court of Appeal for security for costs of that appeal, it was pointed out by the Court on the hearing of that application on 27 February 2002 that an appeal against costs only is, by force of s 253 of the *Supreme Court Act 1995*, incompetent unless leave of the trial judge has been obtained. Richard Cameron's application was at the request of counsel for HIH adjourned to enable him to obtain instructions whether HIH would attempt to obtain such leave or to enlarge its appeal to include an appeal against the judgment for $179,122.44.

[70] In the result, nothing was done by HIH to pursue its purported appeal in either of those two ways until in May 2002. Having heard nothing more, Richard Cameron applied to strike out appeal no 5364 of 2001, whereupon HIH applied to amend its notice of appeal to appeal against the judgment as well as the order for costs. That application came before a Court of Appeal (McPherson JA, Mackenzie and Atkinson JJ) on 31 May 2002, which refused HIH's application for leave to amend and struck out its appeal no 5364 of 2001 with costs. The effect of that decision was to dispose of that appeal including the application to amend HIH's notice of appeal in that appeal. It may incidentally also have disposed of a notice of contention filed by Richard Cameron seeking an order that, in the event of MAM succeeding in its appeal no 5334 of 2001 for damages for $900,000 against the Camerons and Dascam Pty Ltd, HIH was bound to indemnify Richard Cameron in respect of any judgment and costs given against him on appeal.

[71] Convenient though it may often be for the Court to have the advantage of such a notice of contention on the hearing of the appeal, there was in my opinion strictly no requirement for any such notice. Rule 766, and in particular Rule 766(6), expressly invests this Court on appeal with power to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require in favour of a respondent although that respondent may not have appealed from the decision. In this respect Rule 766(6) is simply a rescript of the provisions of O 70, r 11 of the *Rules of the Supreme Court 1900*, which in turn had its genesis in the English Rules of Court. That rule has been held to authorise the giving or making on appeal of the appropriate judgment, order or declaration that ought to have been made below in favour of a respondent despite the absence of any appeal by him. See *Attorney-General v Simpson* [1901] 2 Ch 671 at 713, 720; *Hanson v Wearmouth Coal Co* [1939] 3 All ER 47, 55. The appropriate declarations in favour of the respondent Richard Cameron and the executors of John Wallace Cameron will therefore be made in this instance. Both for that reason and because the attempt by HIH to appeal against the judgment for $179,122.44 has already been dismissed by this Court on 31 May 2002, the further attempt by HIH by filing yet another cross-appeal on 14 June 2002 with an accompanying application to enlarge the time for doing so must also be dismissed with costs. It may in passing be added that, despite the opportunity to do so provided on and after the hearing on 27 February 2002, there has never at any time been any explanation why that appeal was not pursued in the time allowed by the Rules or at any time since that date. That in itself is a sufficient reason for refusing leave to do so at this late stage of the proceedings.

Orders.

[72] In the light of the conclusions reached in these reasons, the appeals should disposed of as follows:

[73] In appeal no 5334 of 2001 in action no 1562 of 1996:

1. The appeal by the plaintiffs is allowed.

2. The judgment and orders (save for the orders for costs made against the third party) given on 18 May 2001 and for the order on 24 May 2001 by which the first and second plaintiffs were ordered to pay the costs of the second defendant is set aside.

3. Judgment is given in favour of the plaintiffs against the first, second, third and fourth defendants for the sum of $900,000 with interest at 10% per annum.

4. As against the fourth defendant, judgment be levied on any of the assets of John Wallace Cameron deceased which shall hereafter come to the executors as fourth defendants to be administered by them.

5. The first, second and fifth defendants are ordered to pay the plaintiff's costs of and incidental to this appeal and the action.

6. Judgment is given in favour of the first and second defendants against the fifth defendant for the amount of the judgment including interest and costs given on this appeal in favour of the plaintiffs against the first and second defendants.

7. Judgment is given in favour of the third defendant against the fifth defendant by increasing the judgment given against the fifth defendant by the amount of the judgment including interest and costs given on this appeal in favour of the plaintiffs against the third defendant.

8. The fifth defendant be ordered to pay the costs of the first, second, third and fourth defendants of and incidental to this appeal.

[74] In appeal no 1901 of 2000 in action no 1562 of 1996, the appeals and cross-appeals each of the plaintiffs and defendants against the orders of Douglas J made on 8 February 2000 are dismissed but with no order as to costs.

[75] In appeal no 8454 of 2000 in action no 1562 of 1996 the appeals by the third and fourth defendant against the order for costs and the declaration made on 31 August 2000 and 7 September 2000 are allowed with costs, the order and declaration are set aside, and it is declared the third and fourth defendants are entitled to be indemnified by the third party under a policy of insurance numbered RESI/90/1097 together with the costs of and incidental to the hearing and determination by Douglas J on 31 August 2000.

[76] In appeal no 5363 of 2001 in action no 4031 of 1996 (the **Piesse** action), the appeal is dismissed with costs.

[77] **JERRARD JA:** I have read and respectfully agree with the reasons for judgment and proposed orders of McPherson JA, adding only the following observations.

[78] The reasons for judgment of the learned trial judge show that when considering if HIH could claim against David Cameron the benefit of a clause excluding an indemnity in respect of any claim brought about or contributed to by any dishonest (or) fraudulent act or omission of the insured, the learned judge focused in his reasons for judgment upon whether dishonesty in David Cameron had been established. In so focusing, the learned judge reflected the pleadings by HIH which alleged dishonesty in David Cameron, and which provided lengthy particulars of the facts and circumstances from which it was contended that dishonesty on his part was to be inferred. Those pleading contended he had no genuine belief in the accuracy of the valuations, and pleaded that the valuations were dishonestly prepared, rather than that they were fraudulently prepared.

[79] Although HIH may complain now about this focus on "dishonesty", it is unsurprising that the judgment reflected the pleadings. Whether HIH choose to describe David Cameron's conduct as fraudulent or as dishonest, either way HIH had to establish (as the learned judge declared in paragraph 44 of his reasons) that David Cameron had no honest belief in the accuracy of his valuation. That finding was not made. It was certainly one very much open to the learned judge to make, but after extensive cross examination the judge instead made findings of credit in David Cameron's favour. Those findings in his favour would have been equally available had HIH focused in its pleadings, or in its presentation, upon whether fraudulent acts by David Cameron had brought about the claims against him. Had HIH done so, it still would have been necessary for it to establish the absence of honest belief in the accuracy of those valuations. (*Derry v Peek* (1889) 14 AC 337). It clearly suited HIH to use the appellation of dishonesty, since if dishonesty in David Cameron was established, HIH had established the first matter necessary to

its plea that the third and fourth defendants had not disclosed David Cameron's dishonesty to HIH.

[80] **WHITE J:** I have read the reasons of McPherson JA and agree with his Honour's analysis of these numerous appeals and cross-appeals and the orders and declarations which his Honour proposes. I wish only to make some comment on the MAM appeal in action No. 1562 of 1996 (Appeal No 5334 of 2001).

[81] Central to MAM's success at trial was a finding that it relied on the valuations prepared by David Cameron before advancing the loan moneys. Mr Bulfin was, for these purposes, MAM. Douglas J said of him at [29] and [30]:

> "The plaintiff relied solely upon the evidence of Mr Bulfin to establish that but for the Cameron valuations there would not have been any loan at all.
>
> Mr Bulfin was charged and convicted of crimes to do with his management of MAM and its subsidiary companies. He went to gaol. He has served his term. Commonsense tells one that he is, in those circumstances, highly unlikely to, at this stage, say anything other than that he relied upon Cameron's MAM valuations as to their accuracy and competency and that but without the production of those valuations the loans would not have been made. I was unimpressed by Mr Bulfin as a witness. I thought that he went to great lengths to ensure that the court would believe that he did everything according to the book. This is hardly consistent with his conduct in relation to the matters with which he was charged and convicted."

[82] MAM did not rely solely upon the evidence of Mr Bulfin, as this part of the appeal demonstrates, but rather that it was possible to make an objective, commonsense finding in relation to causation which was not dependent upon the credit of Mr Bulfin. Particularly since *Abalos v Australian Postal Commission* (1990) 171 CLR 167 and *Devries v Australian National Railways Commission* (1993) 177 CLR 472 appellate courts have been urged to exercise restraint in setting aside findings of fact made by a trial judge based on the credibility of witnesses.

[83] Counsel for MAM, as set out in [31] of his Honour's reasons below, submitted for a number of not insubstantial reasons why Mr Bulfin ought to be believed. His Honour was entitled not to be persuaded by those submissions. His Honour gave two reasons for declining to accept Mr Bulfin's evidence that he, on behalf of MAM, relied on the valuations. He said that it was "commonsense" that, in effect, a person who had been dishonest in past transactions would be highly unlikely to give truthful evidence in respect of other (unrelated) matters. In the second place his Honour said that Mr Bulfin went to great lengths to ensure that the court would believe that he did everything according to the book. Neither of these propositions was developed or much developed.

[84] In *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 Kirby J referred to a number of studies which cast doubt on the correctness of the assumption that a trial judge can tell the truth from falsehood, at [88] and footnote 109. His Honour pointed out that scepticism about the supposed judicial capacity to decide credibility on the appearance and

demeanour of a witness is not new. As long ago as 1924 Atkin LJ commented on the value of known facts over demeanour in *Societe D'Avances Commerciales (Societe Anonyme Egyptienne) v Merchant's Marine Insurance Co. (The Politana)* (1924) 20 Ll L Rep 140 at 152.

[85] This was recognised in *Devries* by Deane and Dawson JJ at 480:

> "Judges are increasingly aware of their own limitations and of the fact that, in a courtroom, the habitual liar may be confident and plausible, and the conscientious truthful witness may be hesitant and uncertain. In that context, it is relevant to note that the cases in which findings of fact and assessments of credibility are, to a significant extent, based on observation of demeanour have possibly become, if they have not always been, the exception rather than the rule."

[86] This is not to count at nothing the advantage enjoyed by the trial judge. An important advantage is that he or she hears and sees the whole of the evidence as it unfolds. Hesitations or apparent glibness in an answer cannot be conveyed adequately by the transcript. There are others which Kirby J has referred to at [89] and [90] in *Earthline*.

[87] As McPherson JA's analysis reveals, there was a not inconsiderable body of evidence independent of Mr Bulfin's testimony at the trial from which the inference could be drawn that MAM did rely on the valuations. Confining himself to an appreciation of Mr Bulfin as he presented in the witness box and his past criminal conduct was "too fragile" a basis for deciding about causation. Mr Bulfin's testimony should have been tested against a known body of largely uncontested evidence which supported the conclusion that, notwithstanding the unfavourable impression which he created, the valuations had relevantly caused the loss.