

# SUPREME COURT OF QUEENSLAND

CITATION: *Kline v Hayes* [2004] QCA 71

PARTIES: **GRAYDON RUSSELL KLINE**  
(plaintiff/appellant)  
**JOSEPHINE DENISE KLINE**  
(plaintiff)  
v  
**JOANNE LEIGH HAYES**  
(defendant/respondent)  
**DAVID J TALLENTIRE**  
(defendant)

FILE NO/S: Appeal No 7541 of 2003  
DC No 3837 of 2001

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 19 March 2004

DELIVERED AT: Brisbane

HEARING DATE: 5 March 2004

JUDGES: McPherson and Davies JJA and McMurdo J  
Separate reasons for judgment of each member of the Court,  
each concurring as to the orders made

ORDERS: **1. Appeal dismissed**  
**2. Appellant to pay the respondent's 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 – PARTICULAR CASES – whether trial judge misused opportunity to assess credibility by not giving due regard to objective facts

*Abalos v Australian Postal Commission* (1990) 171 CLR 167, cited  
*Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842, cited  
*Devries v Australian National Railways Commission* (1993) 177 CLR 472, cited  
*Fox v Percy* (2003) 77 ALJR 989, cited  
*Jones v Hyde* (1989) 63 ALJR 349, cited

COUNSEL: D J Kelly for the appellant  
G M Egan, with C Wiltshire, for the respondent

SOLICITORS: Tucker & Cowen Solicitors for the appellant  
Bennett & Philp Solicitors for the respondent

- [1] **McPHERSON JA:** I agree with the reasons for judgment of McMurdo J, which I have had the advantage of reading. The appeal should be dismissed with costs.
- [2] **DAVIES JA:** I agree with the reasons for judgment of McMurdo J and with the order he proposes.
- [3] **McMURDO J:** In November 2000, the appellant, Mr Kline, paid amounts totalling \$150,000 to the respondent, Ms Hayes. He intended the money paid to be invested in foreign currency futures trading through a company called Windsor Ltd, which carried on business in Spain. Ms Hayes says that she caused \$150,000 to be so invested but that the investments failed and Mr Kline's money was lost.
- [4] Mr Kline sued Ms Hayes in the District Court. He claimed to recover \$150,000 on three alternative bases. The first of those, which he has since abandoned, was that his payments were a loan to Ms Hayes which she had not repaid. Secondly, he claimed that he lost his money through negligent misstatements made by her to him as to the risk or otherwise of such investments. Thirdly, he claimed that the same statements were misleading or deceptive. His original claim in that respect relied upon the *Fair Trading Act 1989 (Qld)* but his case was broadened to include an alleged contravention of s 52 of the *Trade Practices Act 1974 (Cth)*.
- [5] In essence, he said that Ms Hayes held herself out as having considerable experience and expertise in business of this kind and that she told him, in effect, that these investments were risk free and that he would double or triple his money within a few weeks. Her case was that she did not hold herself out as particularly experienced or expert, and she did not in any sense tell him that the investments were risk free or that he would be likely to achieve those rates of return. Accordingly, the trial judge had to resolve the conflict between their respective versions which required an assessment of the credibility of each party. His Honour preferred the evidence of Ms Hayes and dismissed the claims.
- [6] As is conceded on Mr Kline's behalf, the trial judge's findings, depending as they did to a substantial degree on the credibility of witnesses, must stand unless it can be shown that the trial judge "has failed to use or has palpably misused his advantage" or has acted on evidence which was inconsistent with facts incontrovertibly established by the evidence, or that the decision at trial was "glaringly improbable" or "contrary to compelling inferences in the case".<sup>1</sup>
- [7] The principal challenge to the judgment comes from the contention that the evidence showed that Ms Hayes dealt with Mr Kline's money differently from his instructions, and that she used at least much of it to reduce her overdrawn bank balance or to pay for foreign currency trading of her own. It is said that a failure to

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<sup>1</sup> *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842 at 844; *Jones v Hyde* (1989) 63 ALJR 349 at 351-353; *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 179; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479; *Fox v Percy* (2003) 77 ALJR 989 at 994-995

appreciate those matters affected the trial judge's assessment both of her credibility and the inherent likelihood or otherwise of the respective versions.

- [8] Before discussing this alleged misapplication of Mr Kline's funds, it is necessary to summarise the circumstances of the parties and of these transactions. Mr Kline was educated to Grade 11, after which he began six years of service in the Army. On leaving the Army, he and his wife bought a food manufacturing business on the Gold Coast, which was unsuccessful and was sold after about nine months. He then worked as a chef for about seven months before spending a couple of years undertaking a course in the hospitality industry before returning to his work as a chef. He was also involved in some profitable house building with a friend who was a registered builder. By the middle of 2000, his assets, owned jointly with his wife, were said to be worth between \$500,000 and \$600,000, he had no debts and he had an approved but undrawn overdraft facility of \$150,000.
- [9] By 2000, Mr Kline had known a Mr Murray for about eighteen months. Mr Murray was a motor mechanic but he and some others were interested in a proposal to sell skin care products under the name NATRAL. Mr Murray persuaded Mr Kline to become involved as the manufacturer of these products and it was through this venture that Mr Kline met Ms Hayes. Her involvement was as an investor and a procurer of finance for that business. In that context, Mr Kline met Ms Hayes at her house on 20 September 2000.
- [10] Ms Hayes had been a finance broker, acting on behalf of applicants for finance from banks and other institutions. According to her evidence, she had consistently saved from her earnings since about 1980 so that by 1998 she had savings of about \$250,000. She said that she was then advised to settle her savings on a trust to be established offshore. Her evidence was that by October 2000 she had approximately 350,000 US dollars in various overseas bank accounts. There was no suggestion that Mr Kline was told of her offshore wealth, but it is relevant in a way which I shall explain below. Following the September meeting, Mr Kline caused a company to be incorporated or acquired which would manufacture the product NATRAL. He engaged an engineer to develop the required machinery and, as his Honour found, the expenses of the NATRAL manufacturing proposal made it likely that Mr Kline would need his overdraft facility.
- [11] In October 2000, Ms Hayes began transacting with Windsor Ltd, appointing it as her broker for trading in foreign currency options. An account was opened with Windsor on 23 October 2000 when she caused USD4,976.92 to be telegraphically transferred to begin her trading. The course of that trading appears from Windsor's statement of her account. According to that statement, her trading continued until 23 January 2001 when her then credit balance of USD8,625 was returned to her. Her business was conducted through Windsor in US dollars.
- [12] Mr Murray had known Ms Hayes for some time. She discussed with him her trading through Windsor, and he became interested in doing the same. In consequence of their discussions, he paid \$20,000 to her, which he banked to her account with Colonial State Bank on 31 October 2000 for her to invest through Windsor on his behalf. Mr Murray gave evidence that Ms Hayes told him that his money "would more than likely double", and that when he asked what were the chances of him losing his money, she said that "because of [their] friendship for such a long time that there would be no risk with [him], she'd take care of [him]".

The trial judge found Mr Murray to be “in many ways an unsatisfactory witness” because he was vague and imprecise, rather than because he was deliberately giving inaccurate evidence. Ultimately, his Honour appears to have accepted that there was a statement to Mr Murray as to his investment being “guaranteed” in the sense that Ms Hayes would guarantee any shortfall, but his Honour made no finding accepting Mr Murray’s evidence that she told him that he would double his money.

- [13] The friendship between Mr Kline and Mr Murray then led to some discussion between them about Ms Hayes’ currency trading, which in turn led to Mr Kline telephoning her on the morning of 31 October 2000. The substantial contest between the parties was as to what was said between them on that day and the few days following. Mr Kline’s evidence was that Ms Hayes said that there was no risk from such investments and that he would make a “packet”. He said that he told her that he could not afford to lose, to which she responded by saying that he would not lose and that he would double or triple his money. On her version, she neither told him it was risk free nor said that he was guaranteed a profit. His Honour found that she then sent to Mr Kline a copy of Windsor’s written advice as to the inherent and high risks of these investments. Mr Kline was also sent a fax dated 1 November 2000 from Windsor which included the same document. This disclosed to anyone who read it that investment in foreign currency options was very risky. It warned that the foreign currency prices may fluctuate in accordance with developments “which cannot be predicted or reasonably foreseen”, that the investor’s risk of loss was high and that this investment was not suitable for all investors, in that studies had shown that more than 80% of small investors ultimately lost money. It cautioned:

“Only investors who appreciate and understand the risks involved and the nature of foreign currency options trading should invest. Any additional funds added to your account should be discretionary capital set aside strictly for speculative purposes. All funds used for this type of speculation should only be disposable income so that a loss of part or all of this money will not affect your lifestyle.”

- [14] Mr Kline agreed that he received this fax from Windsor, at a fax machine at a friend’s house close to midnight on 1 November, when he then signed a form of agreement with Windsor and faxed it back. Earlier on that day, he had paid \$100,000 to Ms Hayes for investment through her Windsor account, and he said that his agreement with Windsor for his own account was for any further trading. The trial judge made no finding that Mr Kline did or did not read the risk disclosure statement. His Honour did reject his claim that Ms Hayes told him to ignore any cautionary advice from Windsor. Ultimately, his receipt of this material was not fatal to his case, for if his version was otherwise probable, he could well have ignored Windsor’s warnings in his haste to seize the opportunity as urged by her.
- [15] Mr Kline made two payments to Ms Hayes, the first being \$100,000 paid on 1 November and the second being \$50,000 paid on 7 November. Each payment was by a transfer to an account with Colonial State Bank in the name of Ms Hayes and a Mr Tallentire. That was effectively an overdraft account with a limit of \$113,000. It was from that account that Ms Hayes paid (by telegraphic transfer) any money to Windsor for trading. Copies of the bank statements from 3 October to 1 December 2000 were tendered, as were statements of the accounts with Windsor for Ms Hayes and another Windsor client, Mr Nuss. From those documents, and other

documentary evidence kept by Colonial, the relevant movements of any money through Ms Hayes' bank account to Windsor can be identified. It is submitted that this documentary evidence, once understood, incontrovertibly demonstrates that Ms Hayes used Mr Kline's money to pay for her own trading for which she was already liable to Windsor when she received Mr Kline's money, rather than for trading on his behalf.

- [16] On 31 October, her bank account was \$84,728 overdrawn. On her account with Windsor, there was a debit balance of USD43,772.76. At that time one US dollar was worth approximately two Australian dollars. Her debit balance with Windsor represented the cost of a transaction on her behalf on 27 October. Her Windsor account was put into credit by a telegraphic transfer to Windsor of USD44,705.25 on 3 November. She was able to make that transfer, at least from this bank account, only with the benefit of Mr Kline's deposit of \$100,000 on 1 November. This shows, it is argued, that Ms Hayes used Mr Kline's \$100,000 to pay for her own trading.
- [17] On the day she brought her Windsor account into credit (3 November) there was further trading on that account at a cost of USD45,062.50. Her evidence was that at the time that she acquired those options, which I shall call the 3 November options, she regarded them as entirely her own trading and not in whole or in part trading on someone else's behalf.
- [18] The 3 November options left a debit balance in her Windsor account of USD44,130.01, which she paid by telegraphic transfer to Windsor on 8 November (in an amount of USD44,255.70). This payment caused her bank account to be approximately \$56,000 overdrawn. It would have been then \$106,000 overdrawn, and close to the overdraft limit of \$113,000, but for Mr Kline's second payment of \$50,000 on 7 November. It is argued that this shows that Ms Hayes procured Mr Kline's second payment so as to be sure of paying for her 3 November options.
- [19] After the 3 November options, there was no further trading on her own Windsor account until 4 December. But in the meantime, she made two transfers from her bank account to Windsor for the credit of Mr Nuss. On 10 November, she transferred USD24,975 (at a cost of AUD48,058.07) and on 15 November she transferred a further USD24,975 (at a cost of AUD48,457.71). The Windsor statement of account for Mr Nuss shows that these payments reduced his debit balance from USD94,017.21 (as at 3 November) to USD40,279.43. His debit balance as at 3 November was the consequence of certain transactions on his behalf on that date to the extent of approximately USD94,000. It appears then that these two payments from Ms Hayes partly paid for those transactions.
- [20] Ms Hayes' evidence, as accepted by the trial judge, was that Mr Kline's \$100,000 payment was used for investments through Mr Nuss, and specifically for a share of his transactions of 3 November. So her payments to the credit of his account on 10 and 15 November, which totalled AUD96,505.78, were said to have been payments made on behalf of Mr Kline from his initial payment of \$100,000 (notwithstanding the difference of about \$3,500). This version had the support of Mr Nuss' evidence. He said that he undertook his trading on 3 November only after speaking to Ms Hayes who told him that she had an acquaintance who wanted to "do a trade" to the extent that USD50,000. On his evidence, and that of Ms Hayes, she asked him to trade on this person's behalf as favour to Ms Hayes, and that he did so on 3

November. His trading on that day was at a cost of nearly twice the amount to come from this “acquaintance”, but he regarded the transactions as ones partly for him and partly for the acquaintance. He was not given the name of this acquaintance, and he was prepared to transact this business on 3 November without the benefit of the acquaintance’s money, which of course he did not receive until Ms Hayes made the payments to the credit of his account a week or more later. Those transactions resulted in a complete loss, which Ms Hayes says was the fate of Mr Kline’s first payment.

- [21] Ms Hayes’ evidence as to his second payment, which again the trial judge accepted, was that the \$50,000 was applied for a share of her 3 November options. These transactions also resulted in a complete loss of the monies invested. I have mentioned that when she acquired these options on 3 November, she intended that they would be for her benefit. Her case is that when she subsequently spoke to Mr Kline about his investing (through her) this further \$50,000, they agreed that it would be appropriated to a share of her 3 November options, rather than being used for some future transaction. He disputed this, saying that on 6 November she rang him urging him to invest further, but that she made no reference to his \$50,000 being kept by her for a share of some existing transaction. The case which was accepted by the trial judge then was that Ms Hayes was quite prepared to assign the benefit of her 3 November options which only a few days earlier she had seen fit to acquire for herself. There appears to have been no record which she then made of how much of the 3 November options represented what was still hers. The position was yet more complicated by her case that Mr Murray was also given interest in her 3 November options for his payment of \$20,000 to her. Her version as to the agreed use of this second payment does not appear to be especially probable.
- [22] The evidence constituted by Ms Hayes’ bank statements and the Windsor account statements, at least if taken alone, could well ground a strong suspicion that Ms Hayes was keen to receive Mr Kline’s money to meet other commitments. As I have mentioned, she had insufficient credit upon this overdraft facility to pay her Windsor account as it stood on 31 October. As at 7 November, her bank account was \$35,000 in credit, but only after she had received Mr Kline’s \$50,000 deposit and at a time when she was yet to make any payment on his behalf for his \$100,000 payment to her. In other words, the bank statements indicate that she needed his \$50,000 payment if she was to be able to account for his \$100,000 payment and, at the same time, pay for her own 3 November trading.
- [23] Taken alone, this documentary evidence supported the probability of Mr Kline’s version, because it indicated circumstances from which Ms Hayes would wish to strongly advocate the merit of these investments. But ultimately this evidence did not make her version incredible, and nor can it be said that his Honour overlooked or misunderstood it. It had to be considered, of course, with the rest of the evidence, of which three matters should be mentioned. Firstly, two faxes from Ms Hayes to Windsor dated 1 November 2000 show that she was on that date attempting to acquire options expressly on behalf of Mr Kline. They indicate that she then intended to invest his \$100,000 which she had received that day for distinct transactions of his, rather than at all times intending to use his payment simply to bring her own Windsor account into credit. Secondly, there was Mr Nuss’ evidence of her request on or shortly before 3 November that he acquire options to the extent of USD50,000, (i.e. approximately AUD100,000) on behalf of an acquaintance. Again, that is more consistent with her wanting to invest his money for his benefit

than her always intending to use it for her trading. Thirdly, there was her evidence that she held substantial sums deposited in overseas bank accounts, on which she was able to draw to meet her own trading commitments without the need for Mr Kline's money. In that respect, her bank statements showed a direct deposit to her Colonial account on 14 November in an amount of \$54,517.73 from an entity called Atlas Securities, which she said represented a transfer of some of her overseas funds to this account. That deposit allowed her to transfer \$48,457 to Mr Nuss' Windsor account the following day. Apart from the fact that Ms Hayes had an Australian bank account which was substantially overdrawn, although within its permitted limit, there seems to have been no evidence which made unlikely Ms Hayes' claim to substantial overseas funds. With the real possibility that she had funds available beyond her Colonial account, Mr Kline's argument becomes much less persuasive. At least if she had such other funds, she did not need Mr Kline's money for her own trading, and she was not on that basis likely to have strongly urged him to invest.

- [24] The submissions for Mr Kline, both on appeal and at trial, have alleged that Ms Hayes misappropriated Mr Kline's money by dealing with it in the way which I have described. That was a submission directed not only to the likelihood that she strongly encouraged Mr Kline's investment, but also as an attack upon her credibility generally. However, there was no suggested agreement that she should keep Mr Kline's payments separate from her own monies, and had he given thought to the matter, Mr Kline would have realised that by paying to her bank account, he would cause his monies to be commixed with hers. At no stage in these proceedings was there a claim for breach of trust.
- [25] The appellant's submissions raise matters which show that in this case, not everything pointed to the respondent's version as being the more probable one. But the decision is not glaringly improbable, and nor is it demonstrated that his Honour misunderstood the evidence, particularly in relation to the movements of money upon which this appeal so heavily relies. The decision is not inconsistent with the incontrovertible facts of the case. Undoubtedly, Mr Kline was very optimistic in making his payments, but that could well have come from his discussion with Mr Murray, and Mr Murray's beliefs about Ms Hayes' business acumen, rather than from what Ms Hayes actually said to Mr Kline.
- [26] The trial judge's conclusions are not shown to have been erroneous, and the appeal should be dismissed, with the appellant ordered to pay the respondent's costs.