SUPREME COURT OF QUEENSLAND

CITATION:	*Mike Brennan Motors Pty Ltd v Aussie Car Loans Pty Ltd (t/a Aussie Car Loans) & Anor* [2010] QCA 174
PARTIES:	**MIKE BRENNAN MOTORS PTY LTD** ACN 010 944 322 (plaintiff/appellant) **v** **AUSSIE FINANCE PTY LTD (t/a AUSSIE CAR LOANS)** ACN 077 683 820 (first defendant/not a party to the appeal) **JOSEPH MARTINOVIC** (second defendant/respondent)
FILE NO/S:	Appeal No 9750 of 2009 Appeal No 10560 of 2009 BD 2846 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	16 July 2010
DELIVERED AT:	Brisbane
HEARING DATE:	18 March 2010
JUDGES:	McMurdo P, Chesterman JA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Appeals dismissed with costs.**
CATCHWORDS:	Appeal and new trial – Appeal - general principles – Right of appeal – When appeal lies – Other case – Delay – Excessive delay between completion of final addresses and publishing of reasons for decision – Effect of – Whether ground of appeal *Boodhoo v Attorney-General of Trinidad and Tobago* [2004] 1 WLR 1689, [2004] UKPC 17, cited *Cobham v Frett* [2001] 1 WLR 1775; [2000] UKPC 49, cited *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 209 ALR 568; [2004] FCAFC 189, cited *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22, cited

Mount Lawley Pty Ltd v Western Australian Planning Commission (2004) 29 WAR 273; [2004] WASCA 149, cited
NAIS v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 470; [2005] HCA 77, cited
R v Maxwell (1998) 217 ALR 452, cited

COUNSEL: P W Hackett for the plaintiff/appellant
G D Beacham for the second defendant/respondent

SOLICITORS: N R Barbi Solicitors for the plaintiff/appellant
Qld Law Group for the second defendant/respondent

[1] **McMURDO P:** The appeals should be dismissed with costs for the reasons given by Fryberg J.

[2] **CHESTERMAN JA**: I agree that the appeals should be dismissed with costs for the reasons given by Fryberg J.

[3] **FRYBERG J:** The appellant ("Motors") sued the respondent in the District Court for damages for breach of warranty of authority. It lost and was ordered to pay costs. It now appeals separately against the judgment and the order for costs.

The hearing at first instance

[4] Motors alleged that Mr Martinovic, purporting to act on behalf of a company called Aussie Car Loans Pty Ltd ("Aussie") made an agreement with it whereby Motors granted a licence to Aussie to occupy an office in a demountable shed at Motors' premises and to carry on its business of providing finance for the purchase of motor vehicles from that office. It alleged that Mr Martinovic did not have authority to make such an agreement on behalf of that company and sought damages of $84,000, calculated on the basis that had the company been bound by the agreement, it would have paid monthly licence fees of $7,000 for a year. Whether any such agreement was ever made was hotly in dispute.

[5] Because of the way the appeal was conducted, it is important to identify precisely the putative agreement which Motors alleged. In the statement of claim it pleaded:

> "2. In or about mid-December 2004, the plaintiff entered into an agreement with the second defendant as agent for and on behalf of [Aussie] ('the Agreement').
>
> …
>
> 3. The terms of the Agreement were inter alia as follows:
>
> (a) The plaintiff granted to [Aussie] a license to enter and occupy a certain area within the premises for the purpose of operating its business of providing loans to car buyers.
>
> (b) [Aussie] would pay the plaintiff a licence fee as follows:
>
> (i) the sum of $7,000 per calendar month payable in advance;
>
> (ii) the sum of $250.00 for each and every vehicle sold by the plaintiff which is the subject of a finance

arrangement with [Aussie] (payable within seven days of the sale of the vehicle).

(c) The term of the license was to be one year from the commencement date unless the plaintiff terminated earlier.

(d) [Aussie] had no right to terminate the Agreement.

4. The Agreement was partly oral and partly in writing:

PARTICULARS

(a) The written portion of the Agreement was contained in the draft Agreement prepared by the plaintiff's solicitor and provided by the plaintiff to [Aussie].

(b) The verbal *[sic]* component was a conversation between the said agent of the plaintiff and the said agent of [Aussie] in or about mid December 2005 which occurred at the premises of the plaintiff and in which [Aussie]'s agents, said words to the effect as follows:
'The written document represents the true terms of the Agreement, however I will not sign it. My word is good enough'."

The agent of Motors referred to in para 4(b) was Mr Brennan. Mr Martinovic admitted receiving the document, but otherwise denied the agreement. He alleged in his defence that he received it on behalf of another company, but did not persist with that allegation in his evidence.

[6] The delivery of the draft agreement (which was unusually one-sided) did not occur out of the blue. It was common ground that some such agreement had been under discussion between Mr Brennan and Mr Martinovic for some time. The trial judge made these findings, which were not challenged in the appeal:

> "[3] ... As at 2004 and early 2005, Mr Brennan and the second defendant, Mr Martinovic, had been friends for a number of years. They regularly played golf together and with others. Mr Brennan, through the plaintiff company, was in the business of selling used cars. Mr Martinovic, through Aussie Car Loans, was in the business of providing finance for the purchase of used cars. Over some period of time the two men had discussed in general terms doing business together. The idea was that the second defendant, through Aussie Car Loans, would have a presence on-site at the plaintiff's car yard and it was thereby envisaged that a greater than usual number of vehicles would be purchased through finance. The second defendant's business would, it was believed, profit from this. Similarly, it was believed that the plaintiff would also benefit because the second defendant's business would pay the plaintiff for facilitating the on-site exposure to the purchasers.
>
> [4] Ultimately, Mr Brennan and Mr Martinovic took the general discussions further. A lunch was arranged at the Kam Koon restaurant to discuss the terms of the deal between them. Present at this lunch were Mr Brennan, Mr Martinovic, Mr Fiteni and Mr Eastaughffe."

It was not clear on the evidence precisely when the lunch took place, but it seems to have been in November 2004.

[7] Mr Brennan's evidence was that an oral agreement was reached at that lunch; that he instructed Motors' solicitors to incorporate the terms of the oral agreement in a document; that the solicitors did so and produced the draft agreement referred to in the statement of claim; and that Mr Brennan handed that draft to Mr Martinovic. By his defence Mr Martinovic admitted that an oral agreement was reached at the lunch. He pleaded what he alleged were its terms:

> "(a) Advantage Aussie would provide a fulltime staff member ('the Finance Manager') to work at the plaintiff's premises;
> (b) The plaintiff would allow the Finance Manager to work from a demountable office to be located on the plaintiff's premises;
> (c) Advantage Aussie would fit out the demountable office with office equipment and furniture;
> (d) The Finance Manager would meet all the plaintiff's clients and receipt all moneys received from clients so that he would have an opportunity to promote the products of Advantage Aussie i.e. finance, insurance and warranty products;
> (e) The plaintiff would be paid $200 for each finance agreement written by the Finance Manager. It was later agreed that the plaintiff would receive $250 for each finance agreement written;
> (f) The arrangement would be on a trial basis for 90 days so that each party could evaluate the likely benefits or otherwise of having a long term agreement in place on similar terms;
> (g) It was eventually agreed that the arrangement would commence in the first week of March 2005."

Relevantly, the key difference between the parties was the presence or absence of any provision for a monthly fee of $7,000.

[8] The trial judge reviewed the evidence of the four men who attended the lunch meeting at some length. On the key point he expressed his conclusion as follows:

> "[46] Whilst none of the witnesses at the lunch meeting have a version entirely consistent with any other, of the persons at the lunch meeting and called to give evidence, not one agreed with the agreement alleged by Mr Brennan. In particular, no one supported Mr Brennan that there was an agreement that Mr Martinovic or the first defendant would pay a fixed fee at all, let alone a fixed fee of $7,000 per month for a period of 12 months. The evidence of those present at the lunch contradicted Mr Brennan as to any agreement by Mr Martinovic to pay a fixed fee per month. Whilst the plaintiff's Counsel seemed to be somewhat critical of Mr Fiteni, and notwithstanding that the plaintiff called him, cross examined him to some extent, I formed the view that Mr Fiteni was an honest witness, although his recollection of the discussions may have been less than perfect. Similarly, I have formed the view that Mr Eastaughffe was an honest witness, although, again, his recollection of the discussions may have been less than perfect. Mr Fiteni's evidence, in particular, is in substantial disagreement with that of Mr Brennan. It must be remembered that Mr Brennan had asked Mr Fiteni to

> accompany him to the lunch meeting to be, as it were, in Mr Brennan's corner. Mr Fiteni's evidence is at odds with that of Mr Brennan in relation to the fixed fee per month, the 'trial' period (the 'suck and see period') for the arrangement and his being present for a discussion between Mr Martinovic and Mr Brennan in relation to the draft agreement.
>
> [47] For reasons articulated above, I cannot accept Mr Brennan's evidence as to the alleged agreement. At the end of the day, on the evidence adduced in this trial, I cannot be satisfied as to precisely what agreement, if any, was reached between Mr Brennan and Mr Martinovic. Indeed, there is a real possibility that there was no meeting of minds."

In this Court, Motors did not dispute the finding that there was no agreement in the terms alleged by Mr Brennan reached at the lunch meeting. Indeed, it submitted that his Honour should have gone further and found that there was no agreement at all at that meeting.

[9] His Honour concluded:

> "[48] The plaintiff has failed at the threshold level. The plaintiff has failed to satisfy me to the required standard that there was an agreement made in the terms alleged by the plaintiff, and, in particular, the plaintiff has failed to satisfy me that as part of any agreement there was an obligation to pay to the plaintiff a fixed fee of $7,000 per month, whether for 12 months or at all."

[10] On behalf of Motors, Mr Hackett emphasised that the statement of claim did not rely on an oral contract made at the lunch meeting in late October or November, but on an agreement partly in writing and partly oral made in mid-December. The trial judge was plainly aware of that fact. He referred at some length to Mr Brennan's evidence about it. First was a passage from Mr Brennan's evidence in chief:

> "[8] In relation to the 'contract', Mr Brennan stated that he rang Mr Martinovic at Aussie Car Loans and dropped a draft agreement over to him at Aussie Car Loans at Underwood and left it with him. He stated that he then had a face to face discussion with Mr Martinovic, and that Mr Jeff Fiteni was also present:
>
> 'A: Yeah, face to face. Where myself and Jeff Fiteni were there where he said he wouldn't sign the agreement. His word was his bond …
> Q: Mr Brennan, did you discuss the terms of the document with Mr Martinovic at all?
> A: No, I don't believe I did.
> Q: Did he say anything to you about the terms of the document?
> A: No, he didn't. Just that he wouldn't sign it.'"

That evidence, given before lunch on the first day of the trial, did not support the pleaded case; there was no allegation that Mr Martinovic said words to the effect, "The written document represents the true terms of the Agreement." Moreover, Mr Fiteni gave evidence that he was not present.

[11] His Honour continued:

> "[9] Mr Brennan was still in evidence-in-chief over the lunch adjournment on the first day of the trial. After lunch the following evidence-in-chief was given:
>
> 'Q: Now at that meeting with Mr Martinovic, I understand you gave him the draft agreement?
> A: I did.
> Q: Could you tell His Honour what he did with it?
> A: *He read it; he agreed with what we had in there,* he wouldn't sign it saying that he didn't sign contracts. He doesn't have contracts on things. His word is his bond and knowing Joe for 10 years I accepted that.'"[1]

That gloss was compromised by his concession in cross-examination, "I thought I took it [to Mr Martinovic] but I could have had it couriered." If it were couriered, Mr Brennan could hardly have seen Mr Martinovic read it.

[12] The judge continued his analysis a little later in his reasons:

> "[14] In relation to the conversation about the draft agreement, the following evidence was given in cross-examination and in response to questions by me:
>
> 'Q: Are you sure that is what he said to you; 'I don't sign contracts, my word is my bond?'
> A: I am not 100% sure, 'I don't sign contracts', but he did mention some places he had where he hadn't signed contracts on where his word was just good enough. If he leased off Motorama or something he wouldn't need a contract because he'd known them for years.
> Q: He didn't specifically say words to you, 'I agree with all the terms of that agreement?'. He never said that to you?
> A: Not in those exact words, no.
> Q: He never actually said to you that he agreed with the document you had sent him?
> A: He didn't say he didn't agree with it.
> Q: No, but my question, sir, and it is a yes or no answer; he never said to you I agree with the terms in that written document?
> A: I agree with that.
> ...
> His Honour: No, tell us the conversation, Mr Brennan, please?
> A: The conversation would go something like this and I can't remember word for word because it is four years ago. I don't retain all those. Like, he's my mate. We do our deal pretty much on a handshake. The words would have gone, 'Yep, I am happy with that but I ain't signing your contract because I don't sign contracts'. Much like that. 'My word is good'."

---

[1] Emphasis added.

[13] Understandably, his Honour did not accept Mr Brennan's evidence on the question. He held:

> "[41] The plaintiff has its own credibility problems. Mr Brennan's evidence in relation to the delivery of the draft agreement to Mr Martinovic and the conversation with Mr Martinovic about the draft agreement, is implausible and inconsistent. The draft agreement contains clauses onerous to Mr Martinovic, which, on any version, were not discussed at the lunch meeting. I find it most improbable that, as asserted by Mr Brennan in evidence, Mr Martinovic read the draft agreement and expressed his agreement to the document. Indeed, despite Mr Martinovic's dishonest conduct in the course of this trial, I do accept generally his version of what transpired between Mr Brennan and him in relation to the draft agreement, although, I do accept that in the course of conversation with Mr Brennan, Mr Martinovic did express, ironically, that his word was his bond."
>
> [42] … Mr Brennan's expression of the conversation about the draft agreement showed that he was simply reconstructing the conversation, not recalling it."

In rejecting it he also referred to the evidence of Mr Fiteni and Mr Pinson.

[14] As the above passage suggests, Mr Brennan was not the only party with credibility problems. Of Mr Martinovic his Honour said, "The conduct of [his] case discloses a 'win at any cost' attitude by [him]. As far as Mr Martinovic is concerned, expedience took priority over truthfulness." His Honour's reasons for this finding were convincing; there is no present need to discuss them.

The appeal

[15] Motors submitted (citation omitted):

> "**Basis for Appeal**
>
> 41. The trial judge lost the benefit of seeing the witnesses in his credit determinations because of the passage of time taken to deliver judgment and did not refer to the relevant independent evidence that was consistent with the Appellant's version of the Agreement.
>
> 42. The trial judge from the reasons for judgment paragraphs [46] to [48] appears to have posed to himself the wrong question. In circumstances where an agreement between the parties was admitted but two of its terms were in dispute, the trial judge ought to have enquired whether the terms of agreement alleged by the Appellant were more probable than those alleged by the Respondent. That is the onus the Appellant had below."

It is convenient to deal with these two "bases for appeal" in reverse order.

The second basis for appeal

[16] In oral submissions, Mr Hackett (who also appeared for Motors at the trial) conceded that Mr Brennan's evidence was that he instructed his solicitors to put in

writing what he and Mr Martinovic had agreed and shaken hands on at the lunch.[2] Despite that evidence, he submitted:

> "I didn't conduct that case because I didn't think I had to, given the historical events whereby a subsequent document was reduced to writing, albeit consistent with Mr Brennan's oral evidence, and provided to Mr Martinovic. And the agreement for which I contended for was one that was oral, but in part evidenced in writing by the provision of the draft agreement, Mr Martinovic having read it and having said words to the effect, 'I've got your contract. I'm not going to sign it. My word is good enough.'"

[17] Mr Hackett's submission that his case at trial did not depend on any agreement reached at the lunch meeting is not borne out by the outline of submissions he provided to the trial judge (citation omitted):

> "4. The Plaintiff's claim arises out of an oral agreement made between Mr Brennan on behalf of the Plaintiff and the Second Defendant, Mr Martinovic and that agreement having been affirmed after it was reduced to writing. The fact of an oral agreement between the two men is not in dispute."

In any event, the difficulty inherent in conducting a case inconsistent with one's client's evidence is self-evident.

[18] The trial judge rejected Mr Brennan's evidence that a clause for a payment of $7,000 per month in addition to commission per car financed was agreed at the lunch meeting. No witness supported that evidence, and Mr Fiteni related the amount of $7,000 to the commission of $200 per vehicle for 35 vehicles per month. Motors does not now challenge that rejection. Having regard to the evidence, and in particular to Mr Brennan's evidence, it was perfectly proper for the judge to use that determination not only as part of the reason for doubting Mr Brennan's credibility, but also as evidence against the likelihood that his version of the mid-December meeting was correct. If Mr Martinovic had not agreed to pay $7,000 per month at the lunch meeting, it was unlikely that he would have agreed to a document which imposed such an obligation. The events of December 2004 should not be looked at in isolation. Motors cannot now depart from its evidence and the conduct of its case below. That is what one would have to do in order to find inconsistency between his Honour's reasons[3] and Motors' case as pleaded.[4]

The first basis for appeal: delay alone

[19] The ground of appeal founding the first basis for appeal was:

> "2.1 The trial judge took approximately 12 months to deliver his reasons for judgment which depend to a substantial degree on the credibility of the witnesses and failed to use or misused his advantage of seeing the witnesses."

Motors expressly did not abandon a contention that the delay alone was a sufficient ground for allowing the appeal. It simply made no written or oral submissions in support of such a contention.

---

2 See para [7] of his Honour's reasons.

3 Paras [47] and [48] of his Honour's reasons, [8] and [9] above.

4 Para [5].

[20] The trial took place on 14 and 15 August 2008 and a reserved judgment was delivered on 7 August 2009. The pleadings were, of course, in writing and there was a full transcript of the evidence. Nothing was put before us to explain the delay or to suggest that the parties or their legal representatives made any enquiry about it. A protocol adopted by the judges of the District Court provides that save in exceptional cases, where a judgment has been reserved, the judgment should be delivered within three months after the conclusion of the hearing.

[21] In *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs*, Gleeson CJ wrote:

> "5. Undue delay in decision-making, whether by courts or administrative bodies, is always to be deplored. However, that comfortable generalisation does little to advance the task of legal analysis when it becomes necessary to examine the consequences of delay. The circumstances in which delay, of itself, will vitiate proceedings, or a decision, are rare."[5]

And in *Expectation Pty Ltd v PRD Realty Pty Ltd* the Full Court of the Federal Court wrote:

> "Delay between the taking of evidence and the making of a decision is not, of itself, a ground of appeal, unless the judge could no longer produce a proper judgment or the parties are unable to obtain from the decision the benefit which they should."[6]

There is no reason to think that this is one of those rare cases. In the absence of written or oral submissions on behalf of Motors, any suggestion that the unexplained delay is by itself sufficient to warrant allowing the appeal should be rejected.

The first basis for appeal: the consequences of the delay

[22] That is not to say that delay is irrelevant. "A court of appeal, reviewing a decision of a primary judge, may conclude that delay in giving judgment has contributed to error, or made a decision unsafe."[7] There are a number of indicators which might lead to such a conclusion.[8] Issues or sub-issues may be overlooked in the reasons. Weight may be attributed to the demeanour of witnesses in the circumstances in which it might be expected that the memory of demeanour would have faded. It has been suggested that the judge may even respond, perhaps unconsciously, to psychological pressures to find the easiest result in order to end the delay.[9] In any appeal where there has been substantial delay in delivering a reserved judgment, considerations of this nature have to be borne in mind. Findings of fact unsupported by detailed reasons or based on findings of credibility will be particularly closely scrutinised.[10]

---

5 (2005) 228 CLR 470 at p 473; [2005] HCA 77.

6 [2004] FCAFC 189 at [69], citing *Boodhoo v Attorney-General of Trinidad and Tobago* [2004] 1 WLR 1689 at pp 1694 – 5; [2004] UKPC 17 at [11] – [12]. See also *Cobham v Frett* [2001] 1 WLR 1775 at p 1783.

7 *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at p 474.

8 See generally *Mount Lawley Pty Ltd v Western Australian Planning Commission* [2004] WASCA 149.

9 *Expectation Pty Ltd v PRD Realty Pty Ltd* [2004] FCAFC 189 at [74].

10 *R v Maxwell* (1998) 217 ALR 452, cited in *Expectation Pty Ltd v PRD Realty Pty Ltd*, above at [73].

[23] Not surprisingly, Motors did not criticise the trial judge's finding on credibility in relation to Mr Martinovic. It reserved its criticism for the finding about Mr Brennan. In assessing that finding in the light of the delay, it is important to remember that the issues in the case were not complex. The trial lasted only two days. The judge had a transcript of the proceedings and substantial written submissions from the parties.[11] Presumably he made notes. This is a case where the parties arguably could have applied to the judge for access to his notes,[12] but there is no sign that the parties sought such access. His Honour's finding on Mr Brennan's credibility ("problems") was based not on demeanour, but on objective criteria: "contemporary materials, objectively established facts and the apparent logic of events."[13] His reasons for that finding are convincing. Unless he has overlooked any significant evidence relevant to Mr Brennan's credibility, I would not depart from that finding.

[24] In the first basis for appeal, Motors submits that his Honour has done just that: he has failed to "refer to relevant independent evidence that was consistent with [Motors'] version of the agreement". The outline of submissions on behalf of Motors did not specifically identify the witnesses referred to. Rather it summarised the evidence of all of the witnesses "in the order in which witnesses appeared at the trial". Apart from Mr Brennan and Mr Martinovic, the witnesses were Mr Fiteni, Mr Eastaughffe, Ms Read, Mr Pinson and Mrs Strijland.

Mr Fiteni

[25] Motors submitted that there were two matters in Mr Fiteni's evidence "neither of [which] featured in the trial judge's determination of the matter". They were:

> "(a) First, there were two components of the discussion at the lunch meeting which Mr Brennan and the Respondent shook hands on. That is consistent with the Appellant's case and not the Respondent's even though he could not identify the precise amount of the second component;
>
> (b) Secondly, the Respondent told him he was not signing the draft Licence Agreement because his word was his bond. He was not challenged about making that statement. The impression it creates is that the contract was in order but that he did not sign it because his word was good enough."

[26] As to (a), it is simply not correct to say that the judge ignored the relevant part of Mr Fiteni's evidence. He referred to and quoted part of it in his reasons for judgment:

> "[16] Mr Fiteni's evidence-in-chief revealed that his recollections of the discussions at the lunch meeting were as follows:
>
> l. The arrangement was to be '$200 per finance transaction plus a percentage per deal'. 'It was initially $200 per finance deal so if there was 35 deals done that would be $7,000 plus a percentage of other commissions'.
>
> 2. Mr Fiteni had no recall of any discussion that a dollar amount was to be paid per month.

---

11 Those on behalf of Motors occupied 21 pages.

12 *Cobham v Frett* [2001] 1 WLR 1775 at pp 1779, 1783.

13 To adopt the words in *Fox v Percy* (2003) 214 CLR 118 at p 129.

> 3. In relation to duration of the agreement, Mr Fiteni stated, 'There was mention of a trial. But as for the term, we didn't discuss that term. There was going to be a basically - excuse my slang language - a suck it and see type trial'."

His Honour did not use the fact that Mr Fiteni recalled two elements of payment being discussed as corroborative of Mr Brennan's evidence, but that is hardly surprising. There were several reasons why he should not have done so. First, no other witness, not even Mr Brennan suggested that the lunch agreement included a term that there should be a percentage of other commissions paid. Second, Mr Fiteni was unable to elaborate on the percentage aspect because "that wasn't discussed in front of me". Third, Mr Fiteni's evidence was given in response to a question asking him about his recall of the conversation. His use of "initially" was in that context. It was not given as evidence of the arrangement finally reached.

[27] As to (b) also, it is not correct that the judge ignored Mr Fiteni's evidence:

> "[18] In relation to the draft agreement being delivered to Mr Martinovic, Mr Fiteni stated that he recalled Mr Brennan ringing him to say that he was going to get a contract dropped off to Mr Martinovic. Mr Fiteni further stated that he spoke to Mr Martinovic who told him that he had received a contract from Mr Brennan and that he had told Mr Brennan that he would not be signing a contract because his word was his bond. This conversation with Mr Martinovic was conducted over the telephone."

Mr Martinovic did not dispute the fact of that conversation. He also admitted saying to Mr Brennan in effect that he would not sign the draft agreement, his word was good enough. His Honour found accordingly. Motors' complaint really is not that this evidence did not feature in the judge's determination of the matter, but that he did not draw the inference from that evidence for which it contended, *viz* that Mr Martinovic had read the document and agreed with its terms. As Mr Hackett put it in his oral submissions, "He doesn't express any conclusion as to the significance of the words the respondent admitted saying to my client and Mr Fiteni ...".

[28] The words which Mr Martinovic admitted using might have implied his willingness to be bound by the terms in the document, but they might also have implied his willingness to be bound by the lunch agreement. In my judgment the evidence does not permit an inference to be drawn either way. The inference for which Motors contends was not open unless it was first accepted that Mr Martinovic had read the document and that his words meant either that its terms conformed with the lunch agreement or that any disconformity did not matter. In a number of respects the draft agreement did not conform with the lunch agreement; and his Honour had good reason to reject Mr Brennan's evidence that Mr Martinovic read through the document. As the passages quoted by his Honour showed, Mr Brennan had blown hot and cold in his evidence on the question whether Mr Martinovic had said that he agreed with the document. There were other problems in that evidence, referred to above.[14] For those reasons, the conclusion urged by Motors was not open.

---

[14] Paragraphs [10] – [13].

Mr Eastaughffe

[29] In relation to Mr Eastaughffe, Motors complained that the judge did not refer to the failure of the witness to give evidence about a trial period being agreed at the luncheon meeting. The omission was the result of neither side asking him about a trial period. He was called by the defence and it is legitimate to infer that had he been asked, nothing which he said in answer would have assisted the defence. It is not legitimate to infer that his answer would have favoured Motors. There is no challenge to the judge's assessment of him: "an honest witness, although … his recollection of the discussions may have been less than perfect". In these circumstances the omission could not have impacted significantly on the judge's finding.

Ms Read and Mr Pinson

[30] Motors did not identify any relevant evidence given by Ms Read and Mr Pinson to which the judge failed to refer.

Mrs Strijland

[31] Mrs Strijland was a solicitor employed by the solicitor for Motors. In relation to her evidence Motors submitted (citation omitted):

> "14. Neither the evidence of Mrs Strijland nor the contents of the documents she identified rated a mention in the Reasons for Judgment. Mrs Strijland's evidence highlights significant conduct entirely consistent with the Appellant's version of the Agreement. It also highlights conduct of the Respondent inconsistent with his case. Usually, the rational resolution of an issue involving the credibility of witnesses will require reference to, and analysis of, any evidence independent of the parties which is apt to cast light on the probabilities of the situation."

[32] His Honour did not overlook Mrs Strijland:

> "[34] Ms Strijland was called by the plaintiff, but it seems, at the request of the second defendant to question her in relation to disclosure."

Examination of the transcript shows that his Honour's surmise was correct. On the first morning of the trial Motors disclosed three invoices and a fax cover sheet allegedly sent by it to Aussie. Counsel for Mr Martinovic consented to the tender of those documents and other disclosed documents during the opening of Motor's case, on the basis that those documents would be strictly proved and Mrs Strijland would be called in relation to them. In her cross-examination and re-examination it emerged that she had seen the documents for the first time that day. She had previously requested them a number of times from her client and had been told that they had already been provided to her. That was not correct; Mr Brennan had in fact handed them directly to Mr Hackett who had placed them with a brief which he then had. They had not been accessed again until the morning of trial, when they were disclosed for the first time.

[33] None of that evidence could have enhanced Mr Brennan's credibility. There was no requirement for his Honour to refer to it in that context.

[34] Motors also complained that his Honour did not refer to five of the documents involving Mrs Strijland.

[35] The first document complained of was a diary note dated 30 November 2004 made by Mrs Strijland apparently setting out some of her instructions from Mr Brennan. Motors submitted in its outline of submissions that the terms of the draft agreement which the solicitors produced on the following day, the covering letter sending that agreement to Motors and a diary note dated 9 December 2004 recording that Mr Brennan had returned the draft and said it was "good as gold", were consistent with Mr Brennan's evidence and, by implication, enhanced his credibility. The first file note and the draft were produced according to the evidence between five and up to 30 days after the lunch meeting. As self-corroboration, their weight would at best be minimal. Perhaps that is why in oral submissions Mr Hackett eschewed any suggestion that the instructions given to the solicitor could be used to prove that Mr Brennan was right about what happened at the lunch meeting.

[36] Motors also relied on Mr Martinovic's alleged response to a letter of demand sent by its solicitors to Aussie on 21 June 2005. That letter asserted that Motors had made an oral agreement with a Mr Salatino, who was a director of Aussie. Motors submitted that Mr Martinovic's response was recorded in a diary note of a conversation between Mrs Strijland and Mr Martinovic on 24 June 2005:

> "Telephone out to Joe Martinovic returning his call on 0403 466 555. He said he spells his name Martinovic and I said that I needed his address so I could send a demand letter to him and he said his address is PO Box 3885, Loganholme, Queensland. He also said before he gets into a war about it he wants to see the agreement which was drafted up so he can think about his position in relation to it. I said I would send him a copy."

Motors submitted that the response implied an admission against interest in effect that the contract was contained in the draft agreement.

[37] Those documents and the events which they reflect do not constitute an admission against interest and do not enhance Mr Brennan's credibility, for several reasons:

(a) The telephone call was not in response to the letter. Mrs Strijland had telephoned Mr Martinovic on 22 June and left a message for him to call back ("LMTCB"). He did so on 24 June.

(b) The reason Mrs Strijland was calling Mr Martinovic was to get his address to send a demand letter to him; there is no evidence that he had received the letter of 21 June.

(c) There is no other evidence of what was said in the conversation. It would not be surprising if Mrs Strijland had mentioned the existence of the draft agreement to Mr Martinovic.

(d) Even if Mr Martinovic did receive the letter (and he would have done in the ordinary course of post), there are a number of innocent explanations which may be inferred for his request, inferences which are equally as open as that for which Motors contends.

(e) Mr Martinovic was not cross-examined about the conversation and it was not suggested to him that the reason he asked for a copy of the draft

agreement was that he knew it contained the true terms of his contract. His request for a copy was consistent with his claim that he had thrown the draft in the bin.

If anything, the documents have the opposite effect. The allegation in the letter of 21 June that the agreement was an oral agreement suggests that as at that date, Motors was relying on the lunch agreement. Mrs Strijland had drafted the written agreement and would have referred to it had her instructions been that it had been accepted by Aussie. Her reference in the letter to the wrong director does not negate that.

[38] In summary, his Honour did not fail to have regard to most of the evidence which Motors claims he overlooked, and none of it could have had a significant impact on his findings as to Mr Brennan's credibility. The second "basis for appeal" also fails.

[39] The findings at first instance were supported by and consistent with the evidence. No errors have been demonstrated and there is no reason to think that there has been a miscarriage of justice.

Order

[40] The appeals should be dismissed with costs.