SUPREME COURT OF QUEENSLAND

CITATION:	*Reynolds & Anor v Aluma-Lite Products Pty Ltd* [2010] QCA 224
PARTIES:	**ROSS MACKENZIE MAX REYNOLDS AND MARGO LOGAN REYNOLDS** (plaintiffs/appellants) **v** **ALUMA-LITE PRODUCTS PTY LTD** ACN 009 843 832 (defendant/respondent)
FILE NO/S:	Appeal No 14624 of 2009 SC No 7589 of 1997
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 August 2010
DELIVERED AT:	Brisbane
HEARING DATE:	3 August 2010
JUDGES:	McMurdo P and Muir and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be dismissed with costs;** **2. The respondent has leave to make submissions that an order for costs be made against a non-party in accordance with para 52 of Practice Direction 2 of 2010;** **3. The non-party is to file and serve any submissions in response within seven days of receipt of the respondent's submissions.**
CATCHWORDS:	TORTS – TROVER AND DETINUE – POSSESSION OR RIGHT TO POSSESSION – ACTUAL POSSESSION – appellants in default under real estate mortgage – appellants forced to vacate property – appellants moved equipment on to a road reserve, obstructing access to the property – third party held Bill of Sale over the equipment – respondent caused equipment to be moved from road reserve – appellants claimed respondent unlawfully refused to return equipment, despite demands by the appellants – appellants claimed damages for lost income – whether appellants had abandoned the equipment – whether appellants had right to immediate

possession of the equipment – whether appellants had right to claim in detinue – whether appellants entitled to damages for consequential losses

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE FINDINGS BASED ON DOCUMENTARY EVIDENCE – appellants and respondent executed crop lien and stock mortgage as security for real estate mortgage – respondent exercised power of sale over crop and stock when appellants defaulted under mortgage – respondent tendered statement of account listing income received by respondent – primary judge accepted statement of account and increased the judgment debt – whether primary judge erred in finding document correctly listed all income received – whether respondent failed to properly account for proceeds of sale – whether primary judge erred in increasing the judgment debt

MONEY – PAYMENT – APPROPRIATION OF PAYMENTS – IN GENERAL – respondent claimed for principal in an amended defence – whether respondent had irrevocably appropriated certain proceeds of sale to principal rather than interest – whether presumption that receipts are applied to interest in priority to principal rebutted by conduct of parties

Equuscorp Pty Ltd & Anor v Glengallan Investments Pty Ltd [2002] QCA 380, cited
Expectation Pty Ltd v PRD Realty Pty Ltd (2004) 140 FCR 17; [2004] FCAFC 189, cited
Falk v Haugh (1935) 53 CLR 163; [1935] HCA 35, cited
General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd [1963] 1 WLR 644, cited
Sellars v Adelaide Petroleum N/L (1994) 179 CLR 332; [1994] HCA 4, cited
Tabet v Gett (2010) 84 ALJR 292; [2010] HCA 12, cited

COUNSEL: F L Harrison QC, with J P O'Regan, for the appellants
B O'Donnell QC, with K Boulton, for the respondent

SOLICITORS: Shand Taylor for the appellants
Ellison Moschella for the respondent

[1] **McMURDO P:** The appeal should be dismissed with costs. I agree with Muir JA's reasons and proposed orders.

MUIR JA: Introduction

[2] The appellants owned a grazing property on the Condamine River south-east of Warwick known as "Condamine Ponds". The property was an amalgamation of their original holding, also called "Condamine Ponds", and two subsequently acquired properties, "Kingsley" and "Milton". In 1994, the appellants borrowed

money from the respondent, the repayment of which was secured by a mortgage over the property and a Bill of Sale over certain farm equipment. The appellants defaulted under the mortgage and on 14 March 1996 it was ordered that the respondent recover possession of the property and pay the appellants $1,750,000 and interest at the daily rate of $635.62 from 1 March 1996 until payment. When a bailiff physically took possession of "Condamine Ponds" on 5 October 1996, the appellants were in occupation. They were given three days to vacate.

[3] On about 5 October, the appellants moved a large quantity of farm equipment and vehicles onto a strip of land over which the appellants held a road licence which gave vehicular access from a public road into the property and, in particular, to the homestead and other major buildings on "Condamine Ponds". For convenience, like the primary judge, I will refer to this strip of land as "the road licence". The purpose of the appellants was to make vehicular access to the homestead and the part of the property which included the major buildings very difficult, if not impossible. That objective was achieved. This exercise on the part of the appellants was referred to in evidence and in the reasons of the primary judge as the "blockade".

[4] Included in the machinery placed on the road licence were a D7 bulldozer, a D4 bulldozer, a John Deere 4630 tractor, a John Deere 2010 tractor and a harvester ("the Equipment"). The primary judge held, by implication, that the Equipment was moved onto "Condamine Ponds" from the road licence. In the statement of claim before the primary judge, the appellants alleged that they were entitled to immediate possession of the Equipment and that the respondent had unlawfully refused to return it, despite demands by the appellants, causing the appellants loss and damage. They claimed damages for detinue calculated on the basis of an annual loss of $264,800 from 7 October 1996 until the trial of the proceeding being income forgone by the appellants through their inability to use the Equipment in a harvesting-earthmoving business.

[5] The primary judge dismissed the detinue claim on the basis that the appellants had abandoned the Equipment and that, in any event, RWL Wilson Pty Ltd, which held a Bill of Sale over the Equipment, had the right to immediate possession of the Equipment, depriving the appellants of a right to claim in detinue. The primary judge also held that the appellants had failed to prove that they had suffered any damages through the alleged wrongful withholding of the Equipment.

[6] The appellants' claim was dismissed and it was declared that as at 13 October 2008 the amount owing by the appellants to the respondent secured by the mortgage was $1,338,262.29, comprised of $588,656.18 capital and $749,606.11 interest.

The grounds of appeal

[7] The appellants appealed against the primary judge's orders. The grounds agitated on the hearing of the appeal in relation to the appellants' detinue claim were that the primary judge erred in:

(a) finding that the appellants had ceased to have actual possession of, or had abandoned the Equipment, by leaving it behind at the beginning of October 1996;

(b) finding that the appellants lacked the possessory rights required to sustain a cause of action in detinue;

(c) concluding that to obtain damages for consequential losses, the appellants had to show:
   (i) that the Equipment had normally been hired out by them for profit in the course of their business; and
   (ii) that the respondent must have used the Equipment for its own purposes during the two years it was in possession.
(d) concluding that the above test had not been satisfied; and
(e) finding that the appellants were not entitled to consequential damages under their detinue claim.

[8] Other grounds advanced by the appellants were that the primary judge erred:

(a) by concluding that acceptance by him of the respondent's statement of account (Exhibit 82) increased the judgment debt by $25,000;
(b) in finding that the respondent had satisfied its duty to account to the appellants with respect to the sale of grain on the properties and in finding that Exhibit 82 correctly listed all the income received by the respondent; and
(c) in finding that the respondent had satisfied its duty to account to the appellants with respect to cattle on the property and in accepting that Exhibit 82 correctly listed all the income in that regard received by the respondent.

[9] On the appeal counsel for the appellants advanced another argument which was not within the grounds of appeal. It was that the primary judge erred in not concluding, by reference to a claim for principal of $859,000 in the further amended defence filed on 7 October 2008, that the presumption in *Falk v Haugh*[1] that receipts are applied to interest in priority to principal, had been rebutted by the conduct of the parties. The other way in which the contention was put was that, by the 7 October 2008 pleading, the respondent had irrevocably appropriated certain proceeds of the sale of the properties to principal rather than interest.

The primary judge's findings on credibility

[10] Many of the issues for determination on the appeal involve challenges to the primary judge's findings of fact based on his assessment of the credibility of witnesses, particularly that of Mr Reynolds. Mrs Reynolds did not give evidence. The primary judge said in relation to Mr Reynolds' evidence:[2]

> "[12] Most of the relevant events occurred more than 12 years before the hearing of the trial. In assessing the credit (where necessary) of witnesses, I have taken into account the inevitable decay in recollections that such a length of time can engender. Some witnesses, not surprisingly, had little clear recollection of what was said or by whom at the relevant time and others were sufficiently uncertain to render their evidence of little assistance.
>
> [13] It was obvious, though, that the events of the mid to late 1990s spawned a substantial degree of ill will and rancour between Mr Reynolds and John Williams, a director of Aluma-Lite at some of the relevant times and the person most involved on

---

1 (1935) 53 CLR 163.

2 *Reynolds & Reynolds v Aluma-lite Products Pty Ltd* [2009] QSC 379.

behalf of the defendants. This bitterness was obvious in the way in which both Mr Reynolds and Mr Williams responded to some questions in cross-examination and in the way in which Mr Reynolds, in particular, took opportunities to embellish his recounting of events in order to present them in what he must have thought was the most favourable light for the plaintiffs.

[14] On matters going to the issues on the pleadings, Mr Reynolds was a witness who was reluctant to make any concessions in evidence, no matter how reasonable or appropriate they might have been. On some occasions he deliberately gave answers which were not responsive and were framed in a way which, he apparently thought, would assist his cause.

[15] On issues such as the climatic and economic circumstances and the condition of the properties in 1996/97, I do not accept Mr Reynolds. On those matters I prefer the evidence of other witnesses, especially Mr Kirkwood.

…

[18] There were other examples where his evidence conflicted with witnesses such as Mr Kirkwood and Mr Nilon. Mr Nilon, a valuer, took notes of what he was told by Mr Reynolds and I accept that he is accurate in his recollection. Mr Kirkwood, who eventually bought Condamine Ponds, part of Kingsley and part of Milton, also gave evidence of the condition of the properties. He impressed me as someone who was reliable, knowledgeable and impartial. His evidence was consistent with other verifiable facts. Where Mr Reynolds' evidence conflicts with either that of Mr Nilon or Mr Kirkwood, I prefer their evidence. **In general, unless Mr Reynolds' evidence is confirmed by some other, reliable evidence, I have not relied on what he said.**" (emphasis added)

[11] In paragraphs [16] and [17] of his reasons, the primary judge gave examples of difficulties which he perceived in Mr Reynolds' evidence.

Findings in relation to damages for detinue

[12] The primary judge held that in order to succeed, the appellants had to establish two things:[3]

"[106] What the [appellants] seek is to have the [respondent] pay for the profits which the [appellants] they say they lost because of the detention of the goods. The [appellants] say that they would have made those profits by hiring out the equipment for earthmoving or for harvesting work. In order, though, for them to succeed in that claim, the plaintiffs must establish two things:

(a) That the machinery which was denied them was machinery which had normally been hired out by them for profit in the course of their business; and

---

3 *Reynolds & Reynolds v Aluma-lite Products Pty Ltd* [2009] QSC 379.

(b) That Aluma-Lite must have used the equipment for its own purposes during the two year period it was not in the [appellants'] possession." (footnote deleted)

[13] He found that the appellants had not established either of those matters and then found:[4]

"[108] There are other, more compelling, reasons for concluding that the plaintiffs have not established any damages. In order for a plaintiff to recover in respect of a loss of profits claim in the circumstances of this case, it would have been necessary for the Reynolds to have put Aluma-Lite on notice of the facts which would result in the Reynolds losing the profits claimed. In other words, the plaintiffs would have had to have informed Aluma-Lite of their intention to use the machinery to make a profit and that they would suffer a loss if not allowed to obtain possession. Of course, in this case, the defendant would be taken to have understood that the machinery had been used in the operation of the grazing and farming engaged in on Condamine Ponds but not (as was not the case anyhow) that the machinery was used for profit making ventures.

[109] Secondly, the plaintiffs could not have used the machinery as they did not have a farm on which to use it.

[110] Another matter of difficulty for the plaintiffs is that to engage upon a venture of hiring out machines would have required at least some expenditure on their part. At the relevant time, the plaintiffs were completely incapable of obtaining any finance and were in debt to the defendant for $1,750,000. The capacity of the plaintiffs to engage in any such work would, in my view, have to be regarded as non-existent." (footnotes deleted)

Consideration of the detinue claim

[14] The respondent argues that the primary judge's findings in respect of damages are fatal to the appellants' detinue claim, as the only loss claimed was the loss of profits the appellants would have made had they hired out the Equipment for income-producing purposes. An essential element of the tort of detinue is the suffering of loss by the plaintiff.[5] Consequently, if the primary judge's finding that no loss was proved is sustained, the detinue claim must fail. It was submitted by counsel for the respondent that the only evidence called by the appellants in support of this claim was that of Mr Reynolds. He gave evidence to that effect but, as appears from the above, that evidence was not accepted by the primary judge.

[15] The appellants rely on evidence given by Mr Reynolds to the following effect. In respect of each item of the Equipment he made enquiries as to available work and the relevant fees or charges. He had previously hired out equipment but that he did

---

4 *Reynolds & Reynolds v Aluma-lite Products Pty Ltd* [2009] QSC 379.

5 *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 1 WLR 644 and *Tabet v Gett* (2010) 84 ALJR 292 at [47].

that less often as "Condamine Ponds" became larger, requiring him to devote more time to farming his own land. Mr Reynolds' evidence was supplemented by the evidence of third parties regarding the availability of work. There was evidence from some of these witnesses that they would have engaged Mr Reynolds' services if he had had machinery to use.

[16] It was submitted by counsel for the appellants that the primary judge erred in finding, in paragraph [105], that Mr Reynolds' actions were inconsistent with his evidence that he wanted to hire out the Equipment. In this regard it was said that when the Equipment was recovered in late 1998 it needed to have money spent on it to make it useable for hire but had the appellants received the Equipment in good condition they would have been able to hire it out without any additional expenditure and earn income. The primary judge, it was contended, thus erred in his conclusion in paragraph [105] that the failure to hire out the Equipment after its recovery was inconsistent with the damages claim. In oral submissions, counsel for the appellants made the point that once the appellants had lost "Condamine Ponds", the only possible use for the Equipment was that claimed in the statement of claim.

[17] Counsel for the appellants submitted that because of a delay of over a year between the close of oral evidence on 30 October 2008 and the delivery of judgment on 27 November 2009, the primary judge's findings of fact should be treated with caution and subjected to more intense scrutiny than would otherwise be appropriate.[6] The argument was developed as follows. The delay in the delivery of the judgment weakened the advantage gained from hearing and seeing the evidence unfold in a coherent manner. After a significant delay such as the subject one, it was incumbent on the primary judge to engage in a more comprehensive statement of the relevant evidence than would normally be required in order to demonstrate to the parties and the public that the delay had not affected the decision. In the absence of such a delay, an appellate court is entitled to assume that the mere failure to refer to evidence does not mean that it had been overlooked or that unexplained conclusions have been affected by error. No such assumptions can be made where the delay is significant.[7] The volume of evidence which required consideration compounded the problems arising from delay. There were 13 days of oral evidence and over 100 exhibits.

[18] It was submitted also that the reasons contained a number of inconsistent findings and conclusions and that the primary judge had failed to deal with some of the evidence and issues raised by the parties. These matters, it was argued, further evidenced the need to treat the primary judge's findings with caution. Three of these matters are dealt with later when the grounds relating to accounting for grain and stock are addressed. The remaining complaint was that the judge, having found that: the appellants owned the road licence; that it was not subject to the respondent's securities, and that the appellants had left the Equipment on it to make vehicular access to "Condamine Ponds" difficult, erroneously held that the Equipment ceased to be in the appellants' possession when they left it on the road licence.

[19] After the bailiff seized the harvester and the two tractors on 31 October 1996, they were moved from the road licence onto "Condamine Ponds". The two bulldozers and a considerable quantity of other machinery remained on the road licence until early July 1997. The part of "Condamine Ponds" on which the tractors and harvester

---

6 *Equuscorp Pty Ltd & Anor v Glengallan Investments Pty Ltd* [2002] QCA 380 at [17] -[18].

7 *Expectation v PRD Realty Pty Ltd* (2004) 140 FCR 17 at [72].

were located was sold. The contract of sale settled on 5 June 1997. Threatened with legal action by the purchaser, the respondent caused the Equipment to be removed from "Condamine Ponds" and the road licence onto the part of "Condamine Ponds" known as "Kingsley" between 7 and 11 July 1997.

[20] On 29 October 1996 the solicitors for the respondent wrote to the directors of RWL Wilson requesting evidence of their Bill of Sale and of the sums advanced under it. On 5 December 1996 Mr J Williams, one of the respondent's directors, wrote a lengthy letter of complaint to Mr Wilson, a director of RWL Wilson, alleging that Mr Wilson had allowed the blockade to continue by refusing to remove the machinery on the road licence, even though he was quite capable of removing it. The letter concluded:

> "… In the name of sanity and good sense please admit that you allowed the blockade and are responsible for the damages caused by it and are prepared to, at your expense, remove the items that are cluttering the sheds as nominated by us."

[21] On 12 November 1996 the acting sheriff signed a document which gave notice to the appellant that RWL Wilson had claimed, inter alia, the Equipment which the sheriff had taken in execution. It called on the respondent to admit or dispute RWL Wilson's title to the Equipment. The solicitors for RWL Wilson wrote to the solicitors for the respondent on 21 November 1996 stating that as the respondent had failed to admit or dispute RWL Wilson's claim, they had requested the sheriff to take out an interpleader summons. On the same day, the respondent's solicitors advised RWL Wilson's solicitors that the respondent would admit RWL Wilson's claim but that the respondent claimed a possessory lien "over the relevant machinery for monies outstanding due to recent mustering of [RWL Wilson's] cattle". The letter stated that the respondent was considering its position with respect to a claim for damages against RWL Wilson for refusing to remove the machinery during the blockade.

[22] Mr Koremans, an employee of Elders, Warwick, the agents appointed by the respondent to sell "Condamine Ponds", wrote to Mr Wilson on 26 November 1996 asserting that Mr Wilson had been complicit in the blockade and that it had delayed the sale of "Condamine Ponds". The solicitors for the respondent wrote to RWL Wilson's solicitors on 28 November 1996 giving details of the moneys which the respondent asserted were secured by the possessory lien.

[23] In a letter of 6 December 1996 to RWL Wilson's solicitors, Mr Williams complained that he had received a telephone call from Mrs Reynolds. He said that if RWL Wilson wished to make arrangements concerning the items subject to the Bill of Sale, Mr Wilson should contact the respondent directly. The letter alleged that the appellants were untrustworthy and that the respondent would not deal with them or allow them on or near the property. It was asserted that the Equipment had been "abandoned" for over two months, that Mr Wilson had failed to contact the respondent concerning it and that any arrangements would have to be approved by and acceptable to Elders, the respondent and the caretaker on the properties.

[24] In a letter of 14 January 1997 to Mr Wilson, Mr Williams complained that the items the subject of the RWL Wilson's Bill of Sale were "still causing [him] nuisance and damages and … detracting from the presentation of the property". Mr Wilson was asked to advise his "intentions" regarding these items (excluding the two tractors

and header). It seems that the two tractors and the header, although allegedly used in the blockade, were no longer on the road licence.

[25] Mr Wilson sent a placatory fax to Mr Williams on 16 January 1997 stating:

> "… We have to hand yours of 14 January and note that you have returned from overseas. We trust you had a successful trip and now look forward to working with you to remove the machinery that you request from Condamine Ponds.
>
> We have arranged for Warren Smith phone 074 637 379 and Myrtle Wagner 076 644 285 to act as agents for the removal of the machinery to commence at 9am on Monday next 20 January. We trust this date is suitable to your people to enable an efficient operation.
>
> Please confirm that the time is suitable to you so that the program works effectively without inconvenience to anyone.
>
> We trust that you have a successful marketing program in hand for the sale of Condamine Ponds in the best interests of all parties."

[26] Mr Wilson received an angry response the next day. Mr Williams asserted that: he had never been away, he had contacted Mr Smith; Mr Smith had said that he had been phoned by Mr Reynolds but that he had never heard of Mr Wilson; the caretaker was directing operations and that items had to be removed in the sequence directed by the caretaker. He stated that he was concerned that the eyes would be "picked out" of the machinery and that he would be left with a mess. The aggressive and dogmatic tone of the letter was generally maintained by Mr Williams in subsequent correspondence.

[27] The proposed removal of the machinery did not take place. Mr Williams was not satisfied that his conditions would be met. He concluded that Mr Smith was the agent of the appellants and not of RWL Wilson and demanded proof of Mr Smith's agency in a letter of 23 January 1997.

[28] Mr Wilson lost patience and in a fax to Mr Williams of 29 January 1997 accused Mr Williams of "still being stupidly obstructionist and obviously wasting everyone's time with apparently no intention of allowing the machinery not subject to [the respondent's] mortgage to be collected in any sensible manner …".

[29] Mr Wilson stated in the fax of 29 January 1997:

> "… Surely it is in everyone's interest to competently handle all these matters to achieve a successful sell off without waste and silly bickering.
>
> Please be reasonable in advancing the necessary matters is (sic) a responsible and sensible manner and we are certainly willing to assist where we can."

[30] The respondent's solicitors wrote to Mr Wilson on 15 April 1997 stating that if the machinery was not removed within 14 days, the matter would be referred "to the Public Trustee for unclaimed goods whereupon the Public Trustee shall collect same and attend to auctioning". RWL Wilson and the respondent failed to reach agreement as to how and in what manner the machinery would be removed.

[31] On 24 June 1997 RWL Wilson confirmed in a letter to the respondent's solicitors that Mr Smith had been appointed its agent for the removal of the items subject to the Bill of Sale. One of the points of contention between Mr Wilson and Mr Williams was the respondent's intimation that any costs associated with removal of the chattels incurred by the respondent had to be reimbursed before the machinery was taken. Such costs were put at $10,105.66 in a letter from the respondent's solicitors to RWL Wilson's solicitors of 25 July 1997. In that letter, the respondent's solicitors advised that some machinery had been removed to Kingsley. In a later letter the respondent's solicitors advised that the removal was required by the purchaser of part of the properties. In April, May, June, July and August 1997 the solicitors for the appellants and the respondent exchanged correspondence concerning items of property on and about the properties which the appellants asserted were not covered by the respondent's security and concerning the removal of the Equipment from "Condamine Ponds". Also discussed was the contract of sale of part of "Condamine Ponds". Included in the correspondence were letters from the appellants' solicitors alleging that the respondent was frustrating attempts by the appellants to remove the Equipment.

[32] After months of correspondence, much of it overwrought, failed to result in an agreement concerning the removal of the Equipment the respondent offered to enter into an agreement with the appellants and RWL Wilson for the removal of the Equipment and other plant and machinery. By letter of 8 March 1998 the respondent notified that it had abandoned its requirement that the costs of removal of the Equipment be paid. In February and March 1998 the parties and RWL Wilson carried on negotiations for an agreement concerning the removal of the Equipment. On 14 August 1998 the respondent, in proceedings commenced by the appellants in the Supreme Court, applied for an order that machinery, including the Equipment, be sold by the Public Trustee at auction and that the proceeds be paid into court. The appellants and RWL Wilson were served with the application. On 27 August 1998 it was ordered, by consent, that the Equipment be removed by the appellants and/or RWL Wilson within five weeks of the date of the order.

[33] The Equipment, with the exception of the harvester, was finally removed in September 1998 by the appellants and RWL Wilson to another property where it remained in the open for approximately a year. It was then removed to another property where it remained for about three years in the open before being taken to a third property. The harvester went directly to the third property from the first.

[34] Mr Reynolds examined the Equipment "briefly" when it was taken from Kingsley and noticed that there were parts missing. He made a detailed list of missing parts when the Equipment was next examined in "probably 2003". The Equipment remained in the open in the third location at the time of the trial. No request for or demand in relation to missing parts was made until such a demand was included in the third amended statement of claim delivered in August 2005.

[35] After the appellants vacated "Condamine Ponds" they returned on a number of occasions and removed items of machinery and plant. If, as the appellants assert, they wanted the Equipment for use in a money-making enterprise, it is remarkable that the two bulldozers were left on the road licence until early July 1997. It is even more remarkable that despite the lengthy, considered correspondence between the parties, including threats from time to time by the respondent to have the Equipment

and other machinery sold, there was no mention in the correspondence or by the appellants of any need for or desire to use the Equipment.

[36] Mr Reynolds gave evidence to the effect that he overheard a telephone conversation between his wife and Mr Williams in which, "It was raised about the harvester, that we wanted to use the harvester for contracting at that particular point at that conversation". Mrs Reynolds was not called as a witness and the failure for her to be called was unexplained. Mr Williams' account of this conversation was inconsistent with Mr Reynold's version and Mr Reynold's version was not put to Mr Williams in cross-examination. Having regard to the primary judge's credibility finding, he was not obliged to accept this evidence.

[37] Despite what I perceive to be a generally obstructionist, unpleasant and aggressive stance taken by the respondent in relation to the return of the Equipment, the appellants' conduct in relation to the removal of the Equipment is not suggestive of the existence of any particular need for the Equipment by the appellants. It may be, as the appellants suggest, that they were hampered by a shortage of funds. But in this regard they had the benefit of the support and cooperation of RWL Wilson.

[38] It is said that by the time the Equipment was recovered it was in need of repair and there were missing parts. But the evidence did not establish that the Equipment was in good condition when moved onto "Condamine Ponds". The harvester was 20 years old in 1996. The D4 bulldozer was then about 46 years old, the D7 bulldozer at least 20 years old and the two tractors were at least 16 years old. Mr Reynolds accepted in his evidence that the machines would deteriorate if left exposed to the elements. He showed little interest in their condition or restoration. One would have thought also that if there was any real prospect of the appellants being able to make money by use of the Equipment they would have taken more effective measures to gain possession and, in particular, brought an application to the Court of the nature ultimately brought. It would have been surprising also that Mr Reynolds did not investigate ways in which the Equipment could be restored.

[39] The appellants' lack of funds was discussed in paragraph [110] of the reasons, where the primary judge found that the appellants were "completely incapable of obtaining any finance". He referred to the appellants' indebtedness to the respondent and concluded that the appellants lacked the capacity to engage in a business of hiring out machines. The submissions on behalf of the appellants cast no doubt on those findings. They are supported by the evidence.

[40] Consequently the findings of the primary judge received ample support from the evidence. In particular, the objective facts suggested that it was unlikely that the appellants wanted the Equipment for money making purposes. At best for the appellants on the state of the evidence, one can only speculate that they may have derived a profit from the use of the Equipment if they had managed to regain possession of it earlier. That is insufficient to establish loss.[8] This also deprives the appellants' argument based on delay in giving judgment of much of its efficacy. In this regard it is appropriate to note that the delay, or at least the major part of it, was attributable to the conduct of the parties and other matters largely beyond the control of the primary judge.

[41] For the above reasons the appellants' claim for damages for detinue must fail. It is therefore unnecessary to consider the other errors of law relied on by the appellants.

---

[8] See *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 364 per Brennan J in a passage referred to with approval by Gummow ACJ in *Tabet v Gett* [2010] HCA 12 at para [54].

The primary judge erred in failing to conclude that the respondent failed to account to the appellants for at least 124 cattle

[42] Exhibit 82 was a calculation by the respondent of the principal moneys outstanding as at 13 October 2008. It commenced with an opening balance on 9 February 1996 of $1,750,000 and recorded receipts and outgoings, including interest on the principal sum, between 9 February and 13 October 2008. Included in the receipts were proceeds of the sale of livestock and grain. The primary judge held that "… the process used in creating Exhibit 82 (as described in evidence by Mr Williams) was appropriate and that amounts recorded are accurate". The appellants submit that Exhibit 82 fails to account for the proceeds of sale of at least 124 head of cattle.

[43] The appellants refer to the evidence of Mr Koremans to the effect that when he mustered the cattle on the properties in late October 1996 he made a list of the cattle mustered, and that he later noted on the list the dates of sale of the cattle. There are 133 head referred to in the list which do not carry a notation indicating that they were sold. Mr Koremans was asked in cross-examination by reference to his muster list if it represented "properly the dates when the particular beast were (sic) sold?" He was also asked, "Are they the only beasts that were sold, the ones that have 'sold' beside them?" He responded in the affirmative.

[44] This exchange then occurred:

> "What happened to the balance?-- The balance were kept there until their condition had improved and ready to be sold. They were not in a condition to be sold at the time.
>
> All right. Well, let's go through that. When do you say the stock was sold?-- 24-----
>
> So that we're clear about this, you were the agent for the purposes of selling the stock, weren't you?-- Yes.
>
> Yes. When do you say the stock was sold?-- Four months after the initial muster.
>
> …
>
> Are these your notations down the right-hand side as to when the beasts were sold?-- They are.
>
> You counted the beasts off and you sold the beasts?-- Yes.
>
> So these are then the only beasts that were sold off this property; is that what you're saying?-- Yes."

[45] Mr Koremans gave evidence that he did not act as the agent for the sale of the cattle and that they were sold through another stock and station agent. Mr Williams gave evidence that all proceeds from the sale of cattle by the respondent had been accounted for in Exhibit 82. That evidence was unchallenged. Counsel for the respondent submitted that the effect of the above evidence was that Mr Koremans was saying that the animals which did not have "sold" beside their name in his muster notes had not been in a condition to be sold at the time. Rather, they were to be kept until their condition improved and they were ready to be sold. It was further submitted that he did not say, and that it was not put to him in cross-examination, that the un-noted cattle had never been sold or had been disposed of by the respondent in some other way.

[46] It seems to me that there is ambiguity in Mr Koremans' evidence. The initial part of the lengthy passage from the evidence quoted above supports the respondent's contentions, while the latter part offers support for the appellants' position. The respondent put in evidence the sales accounts of the selling agents, McDougall & Sons, as well as weigh bills in respect of the stock sold. The weigh bills were reconciled with the sales records. Counsel for the respondent submitted that there was a body of evidence that all the cattle on the property were sold prior to the mortgagee auction. Three references to evidence were provided. Two of these were to evidence of Mr Koremans which did not support the contention. The evidence of Mr J Williams, which was not challenged in cross-examination, did support the contention.

[47] There was thus adequate evidence to justify the finding under challenge and it has not been established that the primary judge erred in that regard.

The primary judge erred in finding that the respondent had satisfied its duty to account to the appellants with respect to the sale of grain on the properties

[48] In relation to the dispute over accounting for grain, the primary judge held:[9]

> "[116] Both with respect to the grain and the livestock there were considerable problems with obtaining accurate records. This was a function of a number of events, not the least of which was the time which had elapsed since the events in question.
>
> [117] The grain the subject of dispute was contained in five silos on the property. One of the silos contained wheat which had rotted and was of no value. No claim is made with respect to it. The other silos contained sorghum, maize and barley. The eventual claim for grain made in the plaintiffs' written submission amounts to some $21,500. Considering the amount claimed, the time taken for this matter to be debated during the trial was extraordinary. Further, it was not surprising, given that these events took place about twelve years before the trial that witnesses' recollections were not particularly strong and that documents had been either destroyed or were missing.
>
> …
>
> [122] Whether there is or should be an equitable lien in favour of the defendant is unnecessary to decide. The defendant called evidence to establish that it sold the grain in the silos, apart from the 10 tonnes of wheat which had rotted.
>
> [123] Peter Henry, a grain trader, gave evidence that in 1996 and 1997, he bought grain from the Condamine Ponds property. He recalled buying grain from the defendant while it was the mortgagee in possession. Not surprisingly, his original records of the purchase and then sale of that grain were destroyed some time ago, at least seven years after they were brought into existence. However, he was asked to give a statement to police in October 2002 and in providing that statement he had access to his business records for the

---

9 *Reynolds & Anor v Aluma-lite Products Pty Ltd* [2009] QSC 379.

relevant period. He said that those records were complete so far as the collection of grain from Condamine Ponds on the instructions of the defendant was concerned.

[124] I accept the evidence that all the grain that was in the silos when Aluma-Lite went into possession was sold to Peter Henry. That conclusion is supported by the evidence of John Williams and of Mr Cook who was Aluma-Lite's agent on the property for at least part of the time after the plaintiffs moved out.

[125] Other evidence was given by witnesses such as Mr Reynolds and Mr Koremans, but they could only give estimates as to the amount of grain available to be sold; whereas Mr Henry's evidence was based on documents created for the purpose of the sale and transmission of the grain from the property. All the grain which was sold to Mr Henry was sold, at the latest, by 25 January 1997. There are some instances in which Mr Cook recorded grain leaving the property and for which there is no record by Mr Henry for the same day. In each instance, though, there is a record for a day shortly after which, I find, sufficiently accounts for the early removal.

[126] I am satisfied that the evidence from Mr Henry was the most accurate evidence available and that the defendant, so far as it was required to, has shown that it accounted to the plaintiffs for the sale of the grain by way of reducing the amount otherwise payable by the plaintiffs to the defendant."

[49] It is contended that, particularly having regard to the delay in delivering judgment, the primary judge failed to explain adequately why he preferred the evidence of Mr Henry. It is submitted that he erred in finding that Mr Henry's evidence was the most reliable, given:

(a) the admitted inaccuracy of Mr Henry's record; and
(b) its inconsistency with the evidence (based on contemporaneous records) of Mr Koremans, Mr Cook and Mr Boal.

[50] Counsel for the appellants submitted that the state of the relevant evidence was as follows. Mr Henry's evidence was that he bought 159 tonnes of sorghum, 25.6 tonnes of maize, 121.64 tonnes of wheat and 27.38 tonnes of barley. Mr Koremans' evidence, based on his contemporaneous notes, was that there were three half-full and one full 100 tonne silos when he inspected the property after eviction. The total tonnage was 250 tonnes. Mr Boal's evidence, based on his invoice for harvesting the crop in late 1996 at the time the appellants vacated possession, was that Mr Henry bought 37 tonnes of barley and 198 tonnes of wheat. Mr Cook's diary notes show that there were deliveries of grain on dates not accounted for in Mr Henry's evidence.

[51] Mr Henry gave a written statement to police in October 2002, which was compiled from then available business records. He was able to cross-reference the purchases recorded in this statement to each of the purchase orders in Exhibit 105.[10] His

[10] A list of purchase orders shown to Mr Henry in examination-in-chief.

evidence was that the purchase orders in Exhibit 105 included all the grain collected by him from "Condamine Ponds" at the respondent's request. The finding that all the grain in the silos when the respondent took possession of "Condamine Ponds" was sold to Mr Henry, was supported by the evidence of Mr J Williams and Mr Cook.

[52] The evidence of Mr Koremans, Mr Cook and Mr Boal was given about 12 years after the event and either based on a visual estimation or on what they had been told.

[53] The inaccuracy in Mr Henry's evidence referred to by counsel for the appellants does not go to the reliability of his evidence generally. The cross-examination of Mr Henry was brief and restricted to the amount of a Department of Primary Industries levy on sales of grain. The cross-examination established that by a mistaken positioning of a decimal point, Mr Henry had deducted $2,710 rather than $27.10 on account of a levy. There was thus no good reason why Mr Henry's evidence on grain quantities and sales should not have been accepted. The appellants have failed to show any error in the primary judge's findings in respect of this ground of appeal.

The alleged error in relation to the inclusion of $25,000 in Exhibit 82

[54] The argument advanced by counsel for the appellants was as follows. In its further amended defence the respondent pleaded that on 14 March 1996 it had obtained judgment for a debt of $1,750,000 plus interest at the rate of $635.62 per day from 1 March 1996. It did not plead that the parties subsequently agreed to vary the amount of the judgment debt such that the varied debt could be recovered pursuant to the orders of 14 March 1996. That, however, is what the respondent purported to do by inserting $25,000 in Exhibit 82.

[55] The claim for the $25,000 was within the scope of the pleadings. The appellants sought an order for account. Exhibit 82 was the account contended for by the respondent. The $25,000 included in it was the sum agreed to be paid by the appellants to the respondent under a deed of settlement. Evidence was led about the $25,000, without objection, from Mr Reynolds and Mr D Williams, a director of the respondent. Also, during the trial, the defence and counterclaim were amended to allege that as at the first day of the trial the net balance of the judgment debt was $1,273,034.92, a sum calculated in accordance with Exhibit 82 by reference, inter alia, to the sum of $25,000. Finally, it was not argued on the trial that the inclusion of the $25,000 was outside the scope of the pleadings. This ground of appeal has not been made out.

The appropriation argument

[56] The respondent claimed in its further amended defence and counterclaim that as at 7 October 2008, approximately $859,000 of the judgment debt remained outstanding. Exhibit 82 claimed that $1,338,262.29 was outstanding as at that date. It was submitted that the pleading, which was superseded by the time of the trial, constituted an appropriation of receipts on account of moneys owing by the appellants to the respondent to principal rather than interest. This was not a point raised by the appellants at first instance. Neither Mr Williams nor any other witness was cross-examined in relation to it and as it was not pleaded, the respondents adduced no evidence relevant to it. It is too late to raise the point now. It if had been raised in a timely way it may have been possible for the respondent to call evidence relevant to it.

[57] The matters just discussed are sufficient to dispose of this point. There is another difficulty, however. Clause 7 of the mortgage provided that payments by the mortgagor to the mortgagee were to be appropriated first to interest and then to payment of capital and other moneys due and owing under the mortgage. Under the proviso to the clause, if "in the opinion of the mortgagee" the security provided by the mortgage was, or appeared to be, insufficient to extinguish the indebtedness of the mortgagor to the mortgagee, the mortgagee had the right to elect by notice in writing to appropriate moneys to principal in priority to interest. There is no evidence that any such election was made by the mortgagee and thus any appropriation of moneys to principal ahead of interest would have been in breach of clause 7. Clause 13.2 also provided, subject to the election under clause 7,[11] that all money received by the mortgagee in exercise of its power of sale, was to be applied in satisfaction of interest and then in satisfaction of principal, costs and other moneys due and owing.

Conclusion

[58] For the above reasons, the appellants have not made out any of their grounds of appeal. It is therefore unnecessary to deal with the respondent's notice of contention. I would order that the appeal be dismissed with costs. In that event, the respondent has asked to be given an opportunity to apply for an order for costs to be made against a non-party. It should be given an opportunity to make those submissions in accordance with para 52 of Practice Direction No 2 of 2010. Any submissions by the non-party in response should be lodged with the registry and served within seven days of receipt of the respondent's submissions.

ORDERS:

1. The appeal be dismissed with costs;
2. The respondent has leave to make submissions that an order for costs be made against a non-party in accordance with para 52 of Practice Direction 2 of 2010;
3. The non-party is to file and serve any submissions in response within seven days of receipt of the respondent's submissions.

[59] **CHESTERMAN JA:** I agree that the appeal should be dismissed with costs, for the reasons given by Muir JA.

---

[11] Clause 7 was erroneously referred to as clause 5 in clause 13.2(b).