# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Robert Bax & Associates v Cavenham Pty Ltd* [2012] QCA 177 |
| PARTIES: | **ROBERT BAX & ASSOCIATES**<br>(appellant)<br>**v**<br>**CAVENHAM PTY LTD**<br>ACN 003 736 672<br>(respondent) |
| FILE NO/S: | Appeal No 11683 of 2011<br>SC No 14239 of 2009 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal<br>Miscellaneous Application – Civil |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 26 June 2012 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 16 May 2012 |
| JUDGES: | Holmes and Muir JJA and Martin J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. Refuse leave to amend the Notice of Appeal by the addition of grounds 14A and 14B; and**<br>**2. Appeal dismissed with costs.** |
| CATCHWORDS: | PROFESSIONS AND TRADES – LAWYERS – DUTIES AND LIABILITIES – SOLICITOR AND CLIENT – RETAINER – EXTENT OF RETAINER – where the respondent company lent approximately $2.2 million in a series of four transactions to a Gold Coast nightclub – where the respondent had been told that the borrower's solicitors would register a first mortgage over the lot purchased with the funds from the first loan, however this did not occur – where the respondent believed the loan agreement amounted to security – where the respondent's bank manager had retained the appellant to act for the respondent after the first loan transaction was complete – where the nightclub business was placed into receivership – where the appellant argued the retainer was of a limited clerical type – where the primary judge found that the appellant was obliged proactively to act generally in the respondent's interests which included advising the respondent about the need for legal protection against contingencies which may arise – where the primary |

judge found that the appellant breached the retainer – whether the primary judge's findings were correct on all the evidence

EVIDENCE – ADMISSIBILITY AND RELEVANCY – HEARSAY – IN GENERAL – ADMISSION IN EVIDENCE WITHOUT OBJECTION – where a letter dated 18 March 2004 was admitted as evidence at trial – where the appellant contended that the letter was hearsay and not admissible as proof of the retainer – whether the letter was admissible as proof of existence and content of the appellant's retainer

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – REASONABLE FORESEEABILITY OF DAMAGE – GENERALLY – RELATIONSHIP OF PROXIMITY – where the primary judge found that the appellant's breach caused the respondent's loss in respect of all the loans – where on appeal the primary judge was not shown to have erred – where an application to amend the notice of appeal was therefore made – whether the respondent's conduct was so unreasonable that the claimed losses could not be regarded as flowing from Mr Bax's conduct – whether the application to amend ought be allowed

*Amadio Pty Ltd v Henderson* (1998) 81 FCR 149; [1998] FCA 823, considered
*Calvert v Flower* (1836) 173 ER 172; [1836] EngR 433, cited
*Coulton v Holcombe* (1986) 162 CLR 1; [1986] HCA 33, followed
*Devries v Australian National Railways Commission* (1993) 177 CLR 472; [1993] HCA 78, considered
*Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22, followed
*Henderson v Amadio Pty Ltd (No 1)* (1995) 62 FCR 1; [1995] FCA 1300, considered
*Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* (1979 ) 143 CLR 134; [1979] HCA 2, considered
*Jones v Sutherland Shire Council* [1979] 2 NSWLR 206, considered
*Littler v Price* [2005] 1 Qd R 275; [2004] QCA 383, cited
*Macindoe & Anor v Parbery* (1994) Aust. Torts Reports 81-290, considered
*March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506; [1991] HCA 12, cited
*Pickersgill v Riley* [2004] PNLR 31; [2004] UKPC 14, cited
*R v LRG* (2006) 16 VR 288; [2006] VSCA 288, considered
*Re Lilley (dec)* [1953] VLR 98; [1953] VicLawRp 18, considered
*Reeves v Thrings & Long* [1996] PNLR 265, cited
*Ritz Hotel Ltd v Charles of the Ritz Ltd* (1988) 15 NSWLR 158, considered
*Roof & Ceiling Construction Co v SA Wigan & Co Pty Ltd* [1972] QWN 14, considered

*Smith v Bagias* (1978) 21 ALR 435, cited
*Sykes v Midland Bank Executor and Trustee Co Ltd* [1971] 1 QB 113, considered
*Tausz v Elton* [1974] 2 NSWLR 163, cited
*Walker v Walker* (1937) 57 CLR 630; [1937] HCA 44, considered
*Yates Property Corporation Pty Ltd (in liq) v Boland* (1998) 85 FCR 84; [1998] FCA 8, considered

COUNSEL: D J S Jackson QC, with R P S Jackson, for the appellant
K Wilson SC for the respondent

SOLICITORS: Brian Bartley & Associates for the appellant
Shine Lawyers for the respondent

[1] **HOLMES JA:** I agree with the reasons of Muir JA and the orders he proposes.

[2] **MUIR JA:**

**Introduction**

The respondent sued the appellant, Robert Bax, a solicitor, for damages for breach of his contractual and tortious duties in acting for the respondent in respect of loans made by the respondent in and between 2003 and 2005. The respondent succeeded in the action and judgment was entered for the respondent against Mr Bax in the amount of $1,477,420.20 plus costs. Mr Bax appeals against that judgment.

**The first loan transaction**

[3] The respondent was a trustee of a family trust. Its directors were Mr Michael O'Connor and his wife, Mrs Susan O'Connor. Mr Bax represented the appellant in three of the four relevant transactions. The first of the transactions, being the one in which the appellant did not act for the respondent, was described by the primary judge in his reasons as follows:[1]

> "On 5 March 2001 the [respondent] lent On the Park Management Pty Ltd the sum of $350,000, to enable that company to acquire lot 4 (in a building on Cavill Avenue). The [appellant] had not by then been retained. To provide the funds, the [respondent] had to obtain a line of credit from the Commonwealth Bank. Repayment of the sum advanced was required in three years, with simple interest payable monthly in arrears in the meantime at 12 per cent per annum.
>
> The [respondent] was entitled to a registered first mortgage over lot 4 under clause 9 of the loan agreement. Mr Allen of the borrower told Mr O'Connor that the borrower's solicitors would register that mortgage. That did not occur.
>
> In early 2003 the [respondent] moved its business to the Bank of Queensland, where Mr O'Connor dealt with a manager Mr Peter Lamb. Mr Lamb told Mr O'Connor that there was no registered first mortgage. Mr O'Connor informed Mr Allen of this, and Mr Allen

[1] Reasons at [6] – [9].

> said that his business partner Mr Sullivan would sort it out. Neither did that occur.
>
> In fact on 23 December 2002 the National Australia Bank had secured a registered first mortgage in its favour over that lot."

**The second and third loan transactions**

[4] In respect of the second and third loans, the primary judge's reasons state:[2]

> "In August 2003 Melba's [a nightclub under Mr Allen's ownership or control] sought a further $1.1 million from the [respondent], to acquire lots 1 and 3 in the same complex. Mr O'Connor applied for funds from the Bank of Queensland. The bank approved a loan to the [respondent] on 30 September 2003, with $725,000 to be drawn on 13 October 2003 (loan two) and the balance of $385,000 on 17 December 2003 (loan three). The loan was conditional on the [respondent's] taking first registered mortgages over lot 1 (loan two), lot 3 (loan three) and lot 4 (loan one).
>
> In early September 2003, Mr O'Connor had met with Mr Lamb, in relation to the requirements of the Bank of Queensland, in the context of the first loan, and Mr O'Connor accepted Mr Lamb's advice that the [respondent] should retain Mr Bax, the principal of the [appellant] firm of solicitors, to act in the transactions on the [respondent's] behalf. I infer that Mr Lamb rightly assessed that Mr O'Connor was out of his depth. The matter then proceeded on the basis that Mr Lamb, acting on behalf of the [respondent], would and did engage the [appellant].
>
> Mr Bax prepared the loan agreements and mortgages in relation to these two loans, and first mortgages over lots 1 and 3 were registered. (None was however registered in respect of loan one.) The advances occurred on 13 October 2003 and 17 December 2003 respectively. The agreements were for 12 month terms, with simple interest payable monthly in arrears in the meantime of 10 per cent per annum."

[5] In early September 2003, Mr O'Connor and Mr Lamb met Mr Sullivan and Mr Lamb inspected the properties to be provided as security for the moneys to be lent by the respondent. Mr Lamb advised Mr O'Connor that he needed a solicitor to act for him and suggested Mr Bax, "his best mate". Mr Lamb said that "Baxie" did all of his work. Mr O'Connor accepted the advice and proceeded on the basis that Mr Lamb would retain Mr Bax to act for him.

[6] Mr Lamb wrote to Cavenham on 30 September 2003 notifying the bank's approval of a loan facility of $725,000 to be drawn on 13 October 2003 (loan two) and a loan facility of $385,000 to be drawn on 17 December 2003 (loan three). The approval was conditional upon:

> "1. Written evidence of the private loan agreement detailing the interest payments to be received by Cavenham Pty Ltd as trustee for the MD O'Connor Family trust

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2 Reasons at [10] – [12].

2. Documentary evidence that Cavenham Pty Ltd as trustee for the MD O'Connor Family Trust has taken a first registered mortgage over the following properties: –

   - Lot 1 on BUP 103758
   - Lot 3 on BUP 103758
   - Lot 4 on BUP 103758".

[7] On 5 October 2003, Mr O'Connor faxed a copy of the loan agreement in respect of the first loan to the bank. On 9 October 2003, Mr Bax faxed real property searches of lots 1, 3 and 4 to Mr Lamb. Two of these documents had a search date of 9 October 2003. The third document showed a search date of 23 September 2003. The latter, which was in respect of lot 4, showed that National Australia Bank Ltd had a registered mortgage over that lot.

[8] Also on 9 October, Mr Bax emailed Mr Lamb requesting that he advise "the name of the mortgagors in respect of each lot". He said that he had "taken the liberty of using the Standard Terms Document 70314959", presumably for the mortgages, and confirmed the amount, interest rate and duration of the loans. The email recorded Mr Bax's understanding that Mr Lamb would be informing Mr O'Connor of his obligation to attend to the payment of stamp duty with respect to the mortgage.

[9] Also on 9 October, Mr Lamb emailed an employee of Mr Bax, Ms Isaac, informing her that he had completed company searches of Dell International Pty Ltd. He noted that "the sole director and shareholder is the group accountant". He said that this differed from the directorship of On the Park Management Pty Ltd and was something that he would point out to Mr O'Connor. Dell executed the mortgage in respect of lot 1 on 16 October 2003. The loan monies of $725,000 were advanced on 17 October 2003 before any mortgage over lot 1 had been stamped or registered. On 21 October 2003, Ms Isaac enquired of Mr Lamb in an email:

> "[Mr Bax] has asked if you require us to do anything further in this matter. Further we remind you that stamp duty is payable within a certain time period if you are intending to have the documents stamped."

[10] The response, sent on the same day, was "No, just hold fire at this stage".

[11] The evidence does not disclose when the loan agreement was signed. Dell's solicitors wrote to Cavenham on 29 October 2003 enclosing a mortgage and loan agreement which they said had been "duly executed" by their client. They requested that the documents be executed and returned as soon as possible so that they could "attend to lodgement and registration". The copy of the loan agreement in evidence in respect of loan two is undated. Except in respect of its specification of the principal sum, interest rate, duration of the loan and the property over which security was to be granted, it slavishly followed the wording of the loan agreement for lot 1, even to the extent of copying errors of grammar and punctuation.

[12] The mortgage over lot 1, under the heading "Description of debt or liability secured", stated:

> "The amount referred to in the Loan Agreement between the mortgagor and mortgagee where the mortgagor agrees that such amount be secured by this mortgage."

The mortgage was signed on behalf of Cavenham on 4 November 2003.

[13] The principal sum of $385,000 in respect of loan three was advanced on 20 January 2004. The mortgage over lot 3 was executed by Cavenham on 18 March 2004 and by Dell on 18 March 2004. The evidence does not disclose when the loan agreement for loan three was prepared or signed. It recites an agreement between Cavenham and Dell for the former to lend the latter $385,000 on or before 17 December 2003 and grant a first mortgage over lot 3. It also followed the wording of the loan agreement for lot 1.

[14] The mortgage in respect of lot 1 was re-executed by Dell on 2 March 2004 and by Cavenham on 18 March 2004. That would appear to have been done as a result of a Queensland Land Registry requisition. On 18 March 2004, Mr Lamb sent a letter to Mr Bax which stated:

> "**Cavenham Pty Ltd as trustee for the MD O'Connor Family Trust**
>
> Late last year, Michael O'Connor sought your professional advice as to the most effective method of protecting his interests in a private financing agreement between his family trust and Dell International Pty Ltd.
>
> I now enclose the following documents for your attention: –
>
> - Mortgage over Lot 3 on BUP 103758 (in duplicate)
> - Mortgage over Lot 1 on BUP 103758 (in duplicate)
>
> Bank of Queensland has no direct financial interest in these mortgages and therefore cannot lodge them with the appropriate department. Michael O'Connor has asked that your office now attend to the registration of these documents on his behalf.
>
> All costs should be directed to Michael O'Connor via this office.
>
> Please do not hesitate to contact me if you have any questions in this regard."

[15] There is a file note from Mr Bax to Ms Isaac dated 23 March 2004 stating:

> "Enclosed is a letter from Bank of Queensland dated 18 March 2004. You will note that it encloses 2 mortgages and they wish us to attend to registration.
>
> Obviously we are going to have to stamp it first.
>
> It refers to a loan agreement. I don't know whether we prepared that – probably we did. But isn't it the case that we have to stamp this and to be able to stamp it we will have to have the loan agreement so that it can be stamped as well.
>
> Can you please come and see me about this. I am sure there will be significant stamp duty involved."

[16] On 15 July 2004, Ms Isaac wrote to Mr O'Connor, care of Mr Lamb, advising that duty on the mortgages had been assessed and requesting a cheque for stamp duty and registration fees. On 3 August 2004, Ms Isaac advised Mr Lamb in an email

that the mortgages had been stamped and that she was arranging for registration. She requested the original stamped trust deed for "Cavenham Pty Ltd as trustee". In August and September, correspondence passed between Ms Isaac and Mr O'Connor concerning the trust deed and the correct name of the respondent. On 15 September 2004, title searches were carried out in respect of lots 1, 3 and 4. The mortgages over lots 1 and 3 were registered on 19 August 2004.

[17] On 20 September 2004, Mr Bax wrote to Cavenham enclosing a "Form 4 Mortgage in duplicate" in respect of lot 4 for signature and return and the original trust deed for the MD O'Connor Family Trust. The letter asked whether Mr O'Connor wanted the mortgage registered.

[18] The mortgage was signed by Cavenham on 23 September 2004 and lodged for assessment of stamp duty on 30 September 2004. The duty was paid on 8 November 2004.

[19] Sometime after the stamping of the mortgage, a person from Mr Bax's office telephoned Mr O'Connor and advised that difficulty was being experienced in registering the mortgage. Mr O'Connor said "Well, don't worry about it" because he was "becoming frustrated" and thought that his registered first mortgages would cover Cavenham. Also he regarded the loan agreement as "security in itself". In mid-2005, Mr Allen requested Mr O'Connor to release his security over lot 3 because the National Bank wanted first mortgage security over "Melba's downstairs". Mr Allen offered a second mortgage over lot 3 and a personal guarantee from himself and Mr Sullivan. Mr O'Connor agreed to release the first mortgage over lot 3 on these terms because he thought he "would still be covered under Lot 1, which was the main lot where [Mr Allen] was spending $10 million on a gaming room".

[20] On 21 September 2005, Cavenham entered into a loan agreement with Rynah Pty Ltd under which Cavenham agreed to lend Rynah $385,000. This document made no provision for security for the loan. There was, in fact, no advance to Rynah of $385,000. Those monies had already been advanced to Dell. The loan agreement, which had been prepared by the "borrowers" solicitors, was provided by Mr O'Connor to Mr Lamb to pass on to Mr Bax. Mr O'Connor was unable to explain why it was that Rynah was party to the loan agreement.

**The fourth loan transaction**

[21] Also in the second half of 2005, Mr Allen sought a further loan of $750,000. A loan agreement dated 21 September 2005, prepared by Mr Bax's office, was entered into between Cavenham and Mr Allen in respect of this loan. It provided that Mr Allen would grant a second mortgage over a number of parcels of real property, including lot 1, as security for the loan. The loan monies, which Cavenham borrowed from the Bank of Queensland, were advanced on 30 September 2005.

**The extension of loan one**

[22] A loan agreement dated 17 November 2005 was entered into between Cavenham and On the Park Management Pty Ltd. Under it Cavenham agreed to lend to On the Park Management Pty Ltd $350,000 on or before 5 March 2001 and the borrower agreed to grant a second mortgage over lot 4. Mr O'Connor explained that the original loan in respect of lot 4 had expired. Mr O'Connor wanted to renew it and

requested Mr Bax's office "reprint the loan agreement so that [he] could update it with Melba's, thinking still that a loan agreement was security for the loan". At this stage, Cavenham had not been repaid the borrowed sum of $350,000 but was still being paid interest. The loan agreement was sent to Mr O'Connor from Mr Bax's office. After it was executed, he returned it to that office.

**Subsequent events**

[23] Mr O'Connor's first meeting with Mr Bax was on a golf course at Coolum in 2006.

[24] Mr O'Connor's next contact with Mr Bax or his office in relation to the loans was in mid-2006. He went with Mr Lamb to Mr Bax's office. The loans were discussed and, in the course of the discussion, Mr Bax asked Mr O'Connor if he trusted Mr Allen and "questioned giving second mortgages on residential properties given what happened in… the last big recession on the Gold Coast". Mr O'Connor said that he was "confident with [his] investment in Melba's", and that he trusted Mr Allen. The meeting lasted for "maybe half an hour" and during it he was not given any advice by Mr Bax.

[25] Mr O'Connor became concerned about the recovery of the loan monies in February 2008 and had a meeting with Mr Bax. He received no advice from Mr Bax at that meeting. On his way home from the meeting, he telephoned Mr Bax and asked him whether he could put all his "debt under lot 1" and was advised that could not be done as Westpac had a second mortgage on lot 1. By this time, Melba's had refinanced, changing their principal lender from National Australia Bank to Westpac. Receiver's were appointed to Melba's on 2 June 2008.

**The primary judge's findings as to Mr Bax's retainer**

[26] A critical issue in the case is the extent of the appellant's retainer. The primary judge summarised the parties' respective contentions as follows:[3]

> "The [respondent] alleges that it retained the [appellant], through Mr Lamb, on or about 5 October 2003 in respect of the first, second and third loans, on or about 22 September 2005 in respect of the fourth loan, and in November 2005 in relation to the extension of the first loan. The [respondent] alleges that that retainer obliged the [appellant] to act for the [respondent] and protect the [respondent's] commercial interests as money lender as a reasonable and prudent solicitor ordinarily would – in the respects particularized in para 6(b)–(h) of the second further amended statement of claim.
>
> The [appellant] alleges a much more limited, rather clerical type retainer. The [appellant] alleges that it was retained in relation to the first, second and third loans between 6 and 7 October 2003 and November 2004, its obligations being limited to preparing loan agreements in relation to loans two and three, and preparing, stamping and registering mortgages over lots 1 and 3, and a second mortgage over lot 4. The [appellant] denies having been retained in relation to the fourth loan or the first loan extension. See paras 6, 10(b) and 30 of the amended defence."

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3 Reasons at 765 – 766 [19] – [20].

[27] The primary judge found that the retainer:[4]

> "…was a retainer to act generally in the [respondent's] interests in relation to proposed loans to Dell International Pty Ltd and the loan which had been made to On the Park Management Pty Ltd, under which that borrower was in breach by the time the [appellant] was retained."

[28] His Honour found the limited retainer contended for by the appellant inconsistent with "a number of features":

(a) the appellant asking Mr O'Connor in 2006 how much he trusted Mr Allen;

(b) a file note of the appellant relating to a conversation that occurred in February 2008 when the appellant was asked to advise the respondent about its then position under the various loan agreements and securities;

(c) a letter from Mr Lamb to the appellant dated 18 March 2004 which stated *inter alia*:[5]

> "Late last year, Michael O'Connor sought your professional advice as to the most effective method of protecting his interests in a private financing agreement between his family trust and Dell International Pty Ltd."

**The appellant's challenge to the retainer findings**

[29] Counsel for the appellant contended that the question posed by the appellant to Mr O'Connor some years after the alleged retainer in October 2003 could not shed any light on the terms of the retainer. This point would be correct if the relationship between the appellant and the respondent was altered in any material way between the time of the conversation and the date of the retainer. There does not appear to be any evidence either way, but I accept that this evidence is of marginal significance.

[30] I accept also that a file note in respect of a conversation in February 2008, when the appellant was asked to advise the respondent about its then position under various loan agreements and securities, says little, if anything, about the extent of the retainer in October 2003. Much had happened between that date and February 2008. In particular, Mr O'Connor had started to worry about the recoverability of the loan monies.

[31] However, the letter of 18 March 2004 is another matter entirely. In reliance on *Hughes v National Trustees, Executors and Agency Co of Australasia Limited*,[6] the appellant contended that Mr Lamb's statement in the letter was "hearsay and not an admissible basis for proof of the retainer". The issue in *Hughes*, relevantly, was whether a statement made by a testatrix about the misconduct of her son, an applicant for testator's family maintenance, was admissible not merely as original evidence of the testatrix's state of mind concerning conduct of the applicant, but as proof of the truth of what the testatrix said or believed. It was held that the former rather than the latter was the case.

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4 Reasons at [24].

5 Reasons at [25].

6 (1979) 143 CLR 134.

[32] Gibbs J, with whose reasons Mason and Aickin JJ agreed, held that such statements could not be treated as evidence of the truth of the matters asserted.[7] His Honour said:

> "In my opinion consistently with principle it is impossible to treat a statement of this kind as evidence of the truth of the matters said. Unless the statement is admissible to prove that what was said was true, it cannot shift the onus of proof. It is admissible only to prove the reasons which actuated the testatrix in making her will."

[33] After referring to a discussion on the question of the status of inadmissible hearsay evidence admitted without objection by Mahoney J in *Tausz v Elton*,[8] Gibbs J observed:[9]

> "There are no doubt some cases in which inadmissible evidence, having been admitted, may be treated as evidence for all purposes; for example, where one party by his conduct at the trial has led the other to believe that evidence, although hearsay, may be treated as evidence of the facts stated, and the other in reliance on that belief has refrained from adducing proper evidence, the former party is precluded from objecting to the use of the evidence to prove the facts stated. However, in general it is the duty of a judge to reach his decision on evidence that is legally admissible, and to put evidence only to those uses which the law allows. When a statement is admitted, not as evidence of its truth but simply as original evidence, the mere fact of its admission cannot enable it to be given an additional probative value which the law denies it."

[34] It is apparent from the above that his Honour was speaking generally and addressing a situation in which a statement had been admitted as original evidence.

[35] In *Jones v Sutherland Shire Council*,[10] a question arose as to the use which could be made of admissions contained in a letter sent from the appellant's predecessor in title to the respondent Council. The letters were admitted into evidence without objection and it was held that the fact that they were hearsay was relevant only to the question of the weight they were to be given.

[36] After referring to the above passage from the reasons of Gibbs J in *Hughes*, Samuels JA articulated the following principles in relation to the use which may be made of hearsay evidence admitted without objection:[11]

> "In my opinion, the general principle which emerges from the authorities (leaving aside the question of statements which are both admissions and self serving) is this. If evidence, admitted without objection, is legally admissible in proof of some issue in the case, its evidentiary use should be confined to that purpose. The testatrix's statements in *Hughes'* case provide an example. If, on the other

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7 At 152.
8 [1974] 2 NSWLR 163 at 171.
9 (1979) 143 CLR 134 at 153.
10 [1979] 2 NSWLR 206.
11 At 219 – 220 (citations omitted).

> hand, evidence, admitted without objection, is not legally admissible in proof of any issue, it may, once in, be used 'as proof to the extent of whatever rational persuasive power it may have'. Suppose a hearsay document is tendered. It is not legally admissible to prove the truth of the assertions it contains, which are, however, relevant to an issue in the case. It might none the less be legally admissible as original evidence of the making of those assertions. But suppose further that there is in fact no issue to which, as original evidence, the document is relevant. No objection is taken to the tender, and the document is admitted. It is then evidence in proof of the issue to which it is relevant, the want of objection having waived the complaint, which would have been fatal, that, being hearsay, it was legally inadmissible.
>
> It is now necessary to go back and consider the purpose for which the letters in question might have been tendered. They would have been admissible as original evidence had there been any issue about what the late Mr. Jones had said or believed at the relevant time. But there was not...
>
> That being so, the two letters, each dated 5th February, 1960—annexures 'B' and 'C'—were in evidence for what they could prove. There can be no doubt but that their probative value—and I bear in mind the tests proposed in *Walker v. Walker*, and by Professor McCormick, quoted in *McLennan v. Taylor*—was extremely high in relation to any matter concerning the late Mr. Jones's conduct of his own business. It would be scarcely possible to envisage a more reliable source of information."

[37] Paragraph 54 of the *Law of Evidence* (1954), to which his Honour referred, stated:[12]

> "A failure to make a sufficient objection to evidence which is incompetent waives … any ground of complaint of the admission of the evidence. But it has another effect, equally important. If the evidence is received without objection, it becomes part of the evidence in the case, and is usable as proof to the extent of whatever rational persuasive power it may have. The fact that it was inadmissible does not prevent its use as proof so far as it has probative value. Such incompetent evidence, unobjected to … may support a verdict or finding … If the evidence has no probative value, or insufficient probative value to sustain the proposition for which it is offered, the want of objection adds nothing to its worth and it will not support a finding. It is still irrelevant or insufficient."

[38] The other member of the Court who dealt with the evidentiary point, Hutley JA, relevantly said:[13]

> "The relevant documents were tendered in evidence by the plaintiffs. The documents having got into evidence, the fact that they were hearsay was relevant only on the question of their weight: *Walker v. Walker*[14]."

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12 At 216 – 217.

13 At 212.

14 (1937) 57 CLR 630, at 634 – 636 and 638.

[39] In *Walker v Walker*,[15] a letter written by a person not a party to the proceeding to another non-party was called for by counsel for one of the parties. He was required by the other to put it in evidence. Referring to the use to which the letter could be put once in evidence, Latham CJ observed:[16]

> "Once the letter was in, it was for the magistrate to give such weight to it as he might think proper, subject to the limitation that he must not act beyond reason, but he was entitled to attach some importance to the letter as some evidence of the husband's means."

[40] Dixon J, referring to observations of Denman CJ in *Calvert v Flower*,[17] said:[18]

> "The important part of the rule which Lord Denman states is that the party calling for a document and inspecting it must, if required, put it in as part of his case; it is evidence tendered by him. When it is in evidence as part of the proof adduced by him, its probative value must be dealt with as a matter of fact. If the matters which are contained in the document are completely irrelevant to the issues then, of course, they must be thrown out of consideration. But if it contains statements of fact in relation to relevant matters, then it becomes a medium of proof to which such weight may be attached as circumstances warrant. Whether in the end it tells in favour of the party who insisted that it should be put in or in favour of the party calling for it will, of course, depend on the facts of the case, but the purpose of the rule is to enable the party producing the document to have it put in evidence so that he may rely upon it."

[41] The view that once a document which is otherwise inadmissible goes into evidence without objection it has the probative value the Court determines is also implicit in the reasons of Barwick CJ in *Smith v Bagias*.[19]

[42] In *Ritz Hotel Ltd v Charles of the Ritz Ltd*,[20] after referring to the observations of Gibbs J in *Hughes*,[21] McLelland J held that different consequences may result from the admission of inadmissible hearsay evidence depending on whether the evidence was admissible as original evidence or whether there was no basis for admissibility. His Honour said in that regard:[22]

> The principal rule of law which denies to statements probative value which they might otherwise have is the rule against hearsay. The application of this rule may however be waived by the parties. Both parties must join in the waiver since a testimonial statement, properly admitted as such, is available to be used for or against either party: see, eg, *Stunzi Sons Ltd v House of Youth Pty Ltd* (1960) 60 SR (NSW) 220; 77 WN (NSW) 23; *Allied Interstate (Qld) Pty Ltd v Barnes* (1968) 118 CLR 581; *R v Williamson* [1972] 2 NSWLR

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15 (1937) 57 CLR 630.
16 At 634 – 635.
17 (1836) 173 ER 172.
18 *Walker v Walker* (1937) 57 CLR 630 at 636.
19 (1978) 21 ALR 435 at 441 – 442.
20 (1988) 15 NSWLR 158.
21 (1979) 143 CLR 134 at 153.
22 At 170.

> 281; *Cole v Evans* (Court of Appeal 2 May 1975, unreported). The tender of a statement may amount to a waiver by the tendering party of the application of the hearsay rule to that statement, and the absence of objection to the tender may amount to such a waiver by the party against whom the tender is made, but only in my view where such a waiver on each side can reasonably be inferred from the circumstances, and this will occur only where there is no other apparent explanation of the tender and the absence of objection. The most obvious instance of this is where the statement, as original evidence (that is, otherwise than as evidence of the truth of assertions in it) could not be relevant to any issue. If however the statement would be (or is tendered on the basis that it is) relevant to an issue in the proceedings as original (that is, non-testimonial) evidence, then it is not possible to infer either from the tender or the absence of objection, a waiver of the operation of the hearsay rule. This I think is supported by what was said by Samuels JA in *Jones v Sutherland Shire Council* [1979] 2 NSWLR 206 at 219."

[43] It has long been accepted in Queensland that the general principle in civil cases is that inadmissible evidence adduced without objection must be given the probative value the Court considers appropriate.[23] In *Roof & Ceiling Construction Co v SA Wigan & Co Pty Ltd*, Lucas J, the other members of the Court agreeing, said:[24]

> "It seems to me that it should now be regarded as settled that when in a civil case inadmissible though relevant evidence is tendered without objection, it may be given such probative value as the court thinks it is worth."

[44] In *Re Lilley (dec)*,[25] Smith J, in an extensive review of authority, observed:[26]

> "It has been said that, in a trial before a Judge alone, if inadmissible evidence has been received, whether with or without objection, it is the duty of the Judge to reject it when giving judgment—see *Phipson on Evidence* (8th ed.), at p. 673. But in relation to contested proceedings this proposition, if it is construed as extending to all evidence which could have been excluded by an appropriate objection, is, in my view, much too wide. In such proceedings a failure to object to the reception of evidence at the time when it is tendered ordinarily amounts, of course, to a waiver of objections—see *Gilbert v. Endean* (1878), 9 Ch. D. 259; *David Syme & Co. v. Swinburne* (1909), 10 C.L.R. 43, at pp. 56, 60, 75, 76, 86-7; *Miller v. Cameron* (1936), 54 C.L.R. 572—and where there is an effective waiver of objections I do not think that the Judge is bound to disregard relevant evidence. Indeed I doubt whether he is ordinarily entitled to do so—compare *Miller v. Cameron* (1936), 54 C.L.R. 572, at p. 582."

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23 *R v Bryant (No 2)* [1956] St R Qd 570 at 583 (FC) per Stanley J; and at 588 – 591 per Mack J; *McGregor –Lowndes v Collector of Customs* (1968) 11 FLR 349 at 357 – 359; *Roof & Ceiling Construction Co v SA Wigan & Co Pty Ltd* [1972] QWN 14 at 23.

24 [1972] QWN 14 at 25.

25 [1953] VLR 98.

26 At 101.

[45] In *R v LRG*,[27] Callaway JA, with whose reasons the other members of the Court agreed, in considering an argument that a failure to have the complainant verify in court the content of statements made by her in a police interview constituted a miscarriage of justice, said:[28]

> "The position was no different, in principle, from any other case where hearsay evidence is admitted without objection at a trial. The VATE tapes, having been introduced into evidence by a police witness, were hearsay if the statutory conditions were not satisfied. Where hearsay is admitted without objection, there is rarely, if ever, a 'wrong decision of a question of law' within the meaning of the opening words of s 568(1). There is, if anything, a miscarriage of justice. It is a very exceptional case where an objection to hearsay can be taken for the first time in the Court of Appeal. That need not be because of the doctrine of waiver. It is because the reception of hearsay, to which no objection is taken, is an ordinary incident of a trial regularly conducted. Indeed, it would be difficult to conduct most trials without the reception of some technically inadmissible evidence."

[46] In Queensland the practice has been that, where a party wishes to confine the evidentiary use which may be made of a document which is admissible for a limited purpose, counsel for that party states that there is no objection to the document being admitted for that purpose or objects to the document being admitted for any other purpose. It is possible that some laxity has arisen in recent years in relation to objections to evidence and there appears to be an increased reluctance now to take evidentiary points unless the evidence objected to is thought to have a potential bearing on the outcome of the case. However, in my view, the practice that I have identified remains. The observations of Callaway JA quoted above assist in illustrating the principle behind the practice. Plainly, a party's inability to know what evidence was admissible or inadmissible before the close of its case would substantially impede the efficient and due conduct of the case. To the extent that the consequences of a failure to object are determined by the operation of the doctrine of waiver, the effect of the practice in Queensland is that, generally speaking at least, a party who fails to object to inadmissible hearsay evidence contained in a document which is admissible as original evidence will have waived its right to limit the use to which the evidence may be put.

[47] Counsel for the appellant argued that the letter was original evidence of the return of the mortgages referred to in it for the purposes of registration and stamping. There was, however, no issue between the parties about the return of the mortgages or the purpose for which they were returned. Consequently, this is not a case in which the letter was admissible or admitted as proof of an issue in the case other than the issue to which it is plainly relevant: the content of Mr Bax's retainer.

[48] But, even if the letter was admissible for the purposes suggested by counsel for Mr Bax and, if my statement of general principle is wrong, I would find that, in the circumstances of this case, the failure to object to the admissibility of the letter for any purpose other than the limited purpose identified by Mr Bax's counsel, resulted in the letter becoming evidence for all purposes.

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27 [2006] VSCA 288.

28 At [13].

[49] The letter was put in evidence as part of an agreed bundle of documents tendered by consent after counsel for the respondent had opened its case, but prior to any evidence being called. No restrictions were placed by either party on the use to which the evidence could be put. Most of the documentation consisted of loan agreements, mortgages, title searches and communications relating to the stamping and registration of mortgages, all documents which were entirely non-contentious. The letter was the only document which, on the face of it, had a direct bearing on the scope of the appellant's retainer and its potential evidentiary importance was obvious. Moreover, it was apparent from the opening that the respondent's counsel did not intend calling Mr Lamb to give evidence.

**Findings as to the relevance of the 18 March 2004 letter, the extent of Mr Bax's retainer and breach of the retainer**

[50] The primary judge, after quoting the first paragraph of the letter of 18 March, found that Mr Lamb "engaged [Mr Bax] to act in that way on behalf of [Cavenham]".[29] It is useful to quote from that letter again:

> "Late last year, Michael O'Connor sought *your professional advice as to the most effective method of protecting his interests* in a private financing agreement between his family trust and Dell International Pty Ltd." (emphasis added)

[51] The primary judge's finding is supported by the letter. The evidence is that Mr Bax and Mr Lamb were not only good friends, but enjoyed a strong professional relationship. There is no reason revealed by the evidence why the letter should not be taken as accurately recording Mr Lamb's recollection and, in the absence of evidence to the contrary from Mr Bax, the primary judge could more comfortably draw "any inference favourable to the [respondent] for which there was ground in the evidence".[30]

[52] The findings are also supported by Mr O'Connor's evidence that he was advised by Mr Lamb that he should retain Mr Bax in relation to loans two and three and that he communicated his acceptance of that advice to Mr Lamb. No circumstances were identified which might indicate that restrictions were placed on the scope of Mr Bax's retainer when his services were engaged by Mr Lamb on the respondent's behalf.

[53] As to the scope of the retainer and its breach, the primary judge held:[31]

> "The defendant was obliged to act generally in the plaintiff's interests in relation to the proposed transactions. (See the advice which led to the retainer: transcript page 1-22, line 55.) That extended to the defendant's advising the plaintiff about the need for legal protection against contingencies which may arise. It was particularly relevant that the plaintiff was not well-versed in relation to these sorts of transactions, and the defendant should have taken the steps which overall would have led the plaintiff to some adequate understanding. The proper discharge of the defendant's retainer did

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29 Reasons at [26].

30 *Australian Securities and Investments Commission v Hellicar* [2012] HCA 17 at [167].

31 Reasons at [28] – [30].

> not depend on the plaintiff's actively seeking advice. The defendant was obliged proactively to give the appropriate advice.
>
> Yet the defendant made no enquiry of the plaintiff, through Mr O'Connor, as to the level of the plaintiff's financial or business acumen; the defendant made no attempt to ensure that Mr O'Connor understood the scope of the first loan transaction, and the consequences of the breach of clause 9 as to the requirement of a first registered mortgage in favour of the plaintiff; the defendant did not counsel the plaintiff to consider calling up the first loan when repayment was not made; the defendant made no attempt to ascertain the value of the properties against which security was offered for the second and third loans (or to seek to view the purchase contracts relating to those lots); the defendant did not explore the availability of other assets which could have been provided as security; and the defendant failed overall to explain the risks involved in the transactions.
>
> The defendant breached its retainer from the plaintiff by reason of the failures covered in the preceding paragraph."

**Was Mr Bax negligent and in breach of his contractual duty?**

[54] The challenge to the primary judge's findings on negligence and breach of contractual duty were based on the premise that the primary judge erred in finding that the retainer, in addition to the preparation, stamping and registration of documents, was to advise "as to the most effective method of protecting [the respondent's] interests". For the reasons given in paragraphs [49], [50] and [51] hereof, that challenge failed. But even if there had been no express retainer to advise as the primary judge found, it seems to me that a duty of care and a breach of it would have been established by the respondent. At best for Mr Bax, his retainer was to act for the respondent in two loan transactions: loans two and three. Even in that case, Mr Bax's retainer would have extended beyond the formal or mechanical tasks of preparing the loan agreements and mortgages. Mr Bax could not fulfil his duty without ascertaining the extent of the risk his client wished to assume in the transactions, evaluating the extent of the risks involved in the transactions and advising in that regard.

[55] One obvious question which appears to have been ignored by Mr Bax was whether each mortgage should be security for the repayment, not merely of the loan in respect of which was it granted, but for all loans made to Dell or any related entity.

[56] The existence of a duty to advise in circumstances such as those under consideration does not depend on advice or information being specifically sought by the client. In *Yates Property Corporation P/L (in liq) v Boland*,[32] the Full Court of the Federal Court, in addressing the submission that a solicitor retained to conduct litigation and to brief counsel to advise and appear in that litigation, was under no obligation to provide any advice on any substantive aspects of the litigation except as may be specifically requested by the client, said:[33]

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32 (1998) 85 FCR 84.

33 At 103.

> "This extraordinary submission should be rejected. First, it is inconsistent with authority. In *Hawkins v Clayton*, Deane J, with whom Mason CJ and Wilson J agreed, said that the relationship of solicitor and client is a relationship of proximity which ordinarily gives rise to a duty of care requiring the solicitor to take steps to avoid the client suffering foreseeable economic loss. That duty cannot come to an end merely because counsel has been retained. Secondly, the submission completely loses sight of the fact that a solicitor is retained by a client because the solicitor is a professional person who by his training and qualifications is able to provide advice to his client on matters of law. When a solicitor is retained to conduct litigation his function is to further his client's interests in that litigation. That is what he is qualified to do and that is why he is paid a fee."

[57] This reasoning of the Court in *Yates* was applied by this Court in *Littler v Price*,[34] in relation to the duty of a solicitor retained to act in the purchase of an apartment.

[58] In both *Yates* and *Littler*, there was an express retainer to advise. But the duty to advise may exist even if the client does not request it or advice is not proffered by the solicitor. In *Henderson v Amadio Pty Ltd (No 1)*,[35] Heerey J, dealing with a case in which advice was not specifically requested or offered, said:[36]

> "I find that Nevett Ford's retainer imposed an obligation on them to advise their clients as to the nature of the rights and obligations they were undertaking by becoming parties to the contract of sale, transfer and mortgage or guarantee. The retainer was not limited to the task of ensuring that the purchasers obtained a good marketable title to the property.
>
> Once it is accepted that a solicitor is acting for a lay client in relation to a transaction involving, after the retainer commences, the execution of technical legal documents, it must follow in my opinion that the solicitor is obliged to explain and advise the client as to the effect of those documents. (I am speaking of lay clients in the sense of people whose ordinary business does not include transactions of the kind in question; different considerations might well apply, for example, to a client like Hudson Conway.) Much modern legal documentation, such as mortgages and commercial leases, is virtually unintelligible even to well-educated lay people. Yet generally speaking the law binds people to documents they sign, whether read or not. It is for this very reason that a solicitor's explanation and advice is so essential. And often it is important for a client to know what a document does *not* contain."

[59] In reaching his conclusion that the solicitors had an obligation to explain to their clients the legal effect of the transaction, his Honour had regard to the fact that none of the clients had experience with large commercial property investments and that their background was "not such that familiarity with relevant basic concepts of

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34 (2005) 1 Qd R 275.

35 (1995) 62 FCR 1.

36 At 139 – 140.

commercial law or practice could be readily assumed".[37] His Honour also regarded, as relevant, the "potential risk for the clients in the light of their individual circumstances".[38]

[60] Heerey J concluded that:[39]

> "The retainer also imposed an obligation to advise the clients as to the terms of the lease and particularly any unusual terms which might work to their disadvantage: see *Sykes v Midland Bank Executor & Trustee Co Ltd* [1971] 1 QB 113; *County Personnel (Employment Agency) Ltd v Alan R Pulver and Co* [1987] 1 WLR 916... In fact as long ago as 1834, in *Stannard v Ullithorne* (1834) 10 Bing 491; 131 ER 985, Tindall CJ stated:
>
> > 'It may be assumed as a general principle, that an attorney, by reason of the emolument he derives from the business in which he is employed, undertakes, and is bound, to take care that his client does not enter into any covenant or stipulation that may expose him to a greater degree of responsibility than is ordinarily attached to the business at hand, or, at all events, that he does not do so until the consequences have been explained to him.'
>
> The lease was fundamental to the commercial viability of the investment, and the rental income to be derived from it had obviously been a major feature in the selling of the investment, particularly by use of the cashflow."

[61] Heerey J's decision was upheld on appeal. In the course of its reasons, the Appellate Court, concluding that the solicitors' retainer to peruse the lease and advise their client of "any unusual benefits which it conferred on the tenant or any unusual burdens or detriments which it imposed on the purchasers as landlords", observed:[40]

> "We consider that the proposition enunciated by Harman LJ in *Sykes v Midland Bank Executor and Trustee Co Ltd* [1971] 1 QB 113 at 124 that:
>
> > 'When a solicitor is asked to advise on a leasehold title it is, in my judgment, his duty to call his client's attention to clauses in an unusual form which may affect the interests of his client as he knows them'
>
> applies no less when an existing lease is incorporated by reference in a proposed contract of sale than when a new lease is to be entered into by the client."

[62] Part of the rationale for the views expressed by Harman LJ in *Sykes* are to be found in the reasons of Karminski LJ in *Sykes*:[41]

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37 At 141.
38 At 141.
39 At 141 – 142.
40 *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149 at 215.
41 *Sykes v Midland Bank Executor and Trustee Co Ltd* [1971] 1 QB 113 at 130; referred to with approval by the Court in *Amadio*.

> "Clients rely on their solicitors to draw their attention to unusual clauses or dangers in conveyancing matters. This is so even if the clients concerned are experienced professional men, including architects and surveyors. The solicitor is consulted as an expert in conveyancing matters. Those in other professions have usually no knowledge or experience in this field; that is why they consult solicitors. I have no doubt at all that Mr. Rignall's failure to call his clients' attention to clause 2 (xi) was in breach of his duty as a solicitor to these clients, and therefore, negligent."

[63] In *Macindoe & Anor v Parbery*, Young JA observed:[42]

> "Accordingly, there is no lack of authority for the proposition that the retainer of a solicitor for the purchaser on the purchase of a business ordinarily extends beyond mere documentation and includes the duty to warn the purchaser of anything that is unusual and anything that may affect the purchaser obtaining the benefit of the contract which he or she discloses to the solicitor is sought to be obtained. It will be observed that the authorities quoted come mainly from obscure reports. The reason for this is fairly obvious, the question is one of fact which has to be determined in the light of all the circumstances of the case and the way in which the case is presented at the trial. When a case of this nature does get reported in an authorised set of law reports, it is usually only because some other aspect of the case is reportable."

[64] The "standing and experience of the client" were considered by Sir Thomas Bingham MR in *Reeves v Thrings & Long*,[43] in a passage referred to with approval in the judgment of the Privy Council in *Pickersgill v Riley*,[44] to be relevant to a solicitor's duty to draw his client's attention "to any pitfall, particularly any hidden pitfall, the contract might contain".

[65] The authorities discussed above support the conclusion that even if the letter of 18 March is to be ignored, Mr Bax's duties to the respondent went well beyond: altering an existing loan agreement to reflect the terms of loans two and three; producing instruments of mortgage in standard form; and stamping the documents and registering the mortgages if requested. The duty extended, in my view, to ascertaining Cavenham's understanding of the transactions it was proposing to enter, its commercial aims and the degree of risk it was prepared to take. The duty also extended to advising on matters such as the desirability of ensuring that no loan monies were advanced until the loan agreements and mortgages were stamped and the mortgages registered as first mortgages. In that regard, an obvious matter to query was why loan one was not secured by a first mortgage. Another obvious matter for advice would have been the desirability of minimising risk by ensuring that each mortgage was security for all loans including loan one.

[66] The fact that Mr Bax was probably unaware of his client's lack of legal and commercial knowledge and acumen does not assist him. In the absence of a careful written explanation of the salient features of the proposed transactions, the way in

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42 (1994) Aust Torts Reports 81-290 at 61,542.

43 [1996] PNLR 265 at 275.

44 [2004] PNLR 31.

which they should be implemented and an explanation of the risks involved, Mr Bax had a duty to inform himself relevantly in relation to his client with a view to determining what advice needed to be given to sufficiently explain the transactions and protect his client's interests.

[67] However, given the way in which the case was conducted at first instance and on appeal, it is unnecessary, and probably undesirable, to further explore this alternative basis of liability.

[68] The principles and matters discussed above further support the conclusions in paragraph [28] of the primary judge's reasons in respect of the retainer found by him. There was no challenge to the factual accuracy of the findings in paragraph [29] of the primary judge's reasons. Consequently, the finding in paragraph [30] of the primary judge's reasons that Mr Bax breached his retainer by reason of the failures in paragraph [29] was justified.

**Causation – Mr Bax's arguments**

[69] Counsel for Mr Bax contended that even if there was negligence or breach of Mr Bax's retainer, in order for the respondent to succeed it was necessary to draw an inference that if the respondent had been given some advice as to the difference between a first registered mortgage and a second registered mortgage as at October 2003, it would have demanded payment of loan one and would not have made loan two, three or four.

[70] That this is so, it was contended, may be deduced from the following:

(a) Mr O'Connor knew from early 2003 that the National Australia Bank had a first mortgage over lot 4;

(b) when Mr O'Connor found out in early 2003 that, contrary to clause 9 of the loan agreement in respect of loan one, he did not have a registered first mortgage over lot 4 he was sufficiently concerned to contact Mr Allen immediately. He said that he was assured that Mr Sullivan would sort out the mistake but nothing happened and he did not demand repayment;

(c) his evidence as to his knowledge of the difference between a first and second mortgage was unsatisfactory;

(d) his evidence that his security position was "critical" should not have been accepted, because he behaved inconsistently with that assertion between 2001 and 2005 by:

(i) not obtaining any security for loan one in April 2001, and thereafter, even in the light of being aware in early 2003 that the National Australia Bank was registered as first mortgagee of lot 4;

(ii) advancing the funds for loan two before any loan agreement (or mortgage) was executed;

(iii) advancing the funds for loan three before the documents were executed;

(iv) instructing Mr Bax not to persist with the registration of the mortgage over lot 4;

(v) releasing the respondent's first registered mortgage over lot 3 knowing that the intention was that clear title could be given to the bank (for first mortgage) and that the respondent would receive a second mortgage in replacement;

(vi) agreeing to accept second mortgages for loan four with an awareness of the relevance of the amount secured by the first mortgage.

(e) he trusted Mr Sullivan and Mr Allen to rectify the situation with the lot 4 mortgage; and

(f) he considered that the expansion plans for Melba's were an excellent idea and that property values were significantly increasing on the Gold Coast.

[71] Counsel further developed the argument as follows. Mr O'Connor considered that there was enough value in lot 1 to cover him, again, without seeking any advice as whether or not he was right about that. Other evidence of the fact that Mr O'Connor was content with second mortgage security can be seen from his agreement on 21 September 2005 to advance loan four in exchange for a promise by Mr Allen to grant second mortgages over six other lots, again without seeking legal advice as to whether that was a sensible idea.

[72] By the time loan four was advanced on 30 September 2005:

(a) Mr O'Connor had contractually bound the respondent on 21 September 2005 to make that advance by executing the loan four agreement, without seeking any advice from the appellant;

(b) the respondent had obtained approval from the Bank of Queensland to provide the funds necessary to make loan four, without seeking any advice from Mr Bax;

(c) Mr O'Connor had looked at the properties over which Mr Allen was offering second mortgage security and considered them to be valuable waterfront properties with a first mortgage of only $385,000;

(d) Mr O'Connor had considered Melba's to be a profitable business which was being significantly expanded.

[73] On 30 September 2005, the funds were advanced, again without reference to Mr Bax. Mr O'Connor referred to a meeting that he said he had with Mr Bax in mid-2006. He said that he was asked by Mr Bax whether or not he trusted Mr Allen and how long he had known him. Mr Bax questioned lending on the security of second mortgages on residential property given what had happened in the recession on the Gold Coast. Mr O'Connor's evidence was that he replied that he was confident in his investment in Melba's and that he trusted Mr Allen.

[74] Contrary to Mr O'Connor's statement that his security position was critical to him, by this time he knew that there was no registered mortgage on lot 4 (because he had instructed that it not be registered), no mortgage on lot 3 (he had released it) and no mortgage over any of Mr Allen's property. Despite that, in mid-2006, he was comfortable with his security position.

[75] On 5 June 2008, Mr O'Connor still:

(a) trusted Mr Allen; and

(b) was reluctant to do anything that might upset Mr Allen.

[76] Until an amendment was made on the morning of the first day of trial, the respondent's case was that, if advised appropriately, it would have proceeded and obtained proper security, which is an inconsistent alternative to a "no transaction" case. It should be inferred that in giving his evidence, Mr O'Connor was aware of the importance of saying that the respondent's security was "critical".

[77] In the foregoing circumstances, the inference was incorrectly drawn that in October 2003 the respondent would have demanded repayment of loan one and not made loan two, three or four. In any event, the inference is just as likely that had the respondent sought further security for loan one in October 2003 before making any further advances for loans two and three, the borrower would have given such security and loans two and three would have been advanced (and loan four in due course).

**Causation - discussion**

[78] The primary judge rejected submissions made at first instance along the above lines. He expressly accepted Mr O'Connor's evidence that security was "critical" to him. He held that Mr O'Connor "naively thought the plaintiff was making a 'good safe investment'".

[79] The primary judge found:[45]

> "Mr O'Connor was left to negotiate his way through these dealings beset by ignorance and misconception. He was ignorant about the significance of mortgages, particularly issues of priority between first and second mortgages. He misconceived loan agreements, believing they conferred themselves some form of security. He was not alerted to the critical importance of ensuring adequate real property security for the substantial financial advances the plaintiff was asked to make.
>
> I infer that had the defendant advised the plaintiff properly, from October 2003, the plaintiff would (following advice) have demanded payment under the first loan agreement from the defaulting borrower, and that the plaintiff would not have entered into the subsequent transactions which from its angle proved so improvident. As to the former matter, I accept Mr Sullivan's evidence that the amount of the first loan would have been paid, if demanded, within three to six months.
>
> I also accept the supporting submission that 'the plaintiff would have followed advice given to him by Mr Bax is demonstrated by what occurred when Mr Russell was appointed. Caveats were lodged, second mortgages were lodged, proceedings were commenced, receivers were appointed.' In other words, just as Mr O'Connor

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45 Reasons at [34].

> followed Mr Russell's advice, he would likely have heeded the appropriate cautions had they been administered by Mr Bax."

[80] The primary judge's finding of "commercial naiveté", ignorance and misconception on the part of Mr O'Connor was plainly open on the evidence. His whole modus operandi of borrowing from a bank and relending the borrowed monies at a rate of five per cent above the rate charged him by the bank involved assuming substantial risk for modest return; a return which could have been obtained for virtually no risk by lending to the bank itself.

[81] Mr O'Connor saw no difficulty in handing over loan monies before security documents had been stamped or registered or even provided by the borrower. Although the respondent was lending on the security of real property there is no evidence that Mr O'Connor had a good understanding of real property values or that he ever obtained an expert valuation of any of the properties over which security was to be given. Much of the force of the arguments mounted by counsel for Mr Bax is dissipated when regard is had to these matters and the matters referred to by the primary judge.

[82] Mr O'Connor's conduct throughout 2005 was a product of his ignorance, an ignorance which the primary judge implicitly found would not have persisted had Mr Bax not breached his duty under the retainer. Had the duty not been breached, the outcome would have been different for the reasons given by the primary judge in paragraph [36] of his reasons. To those reasons may be added the fact that Mr O'Connor signed documents when requested to do so by Mr Bax and promptly provided the trust deed when it was requested. As to the observations about the absence of a first registered mortgage over lot 4, the explanation is that Mr O'Connor thought, in his uncorrected ignorance, that the respondent was adequately secured by its loan agreement.

[83] Many of the critical conclusions of the primary judge were based on his assessment of Mr O'Connor's credibility.

[84] In *Fox v Percy*,[46] Gleeson CJ, Gummow and Kirby JJ, discussing the circumstances in which an appellate court should interfere with a trial judge's findings of fact, said:

> "… the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings.[47]
>
> … In some, quite rare, cases, although the facts fall short of being 'incontrovertible', an appellate conclusion may be reached that the decision at trial is 'glaringly improbable'[48] or 'contrary to

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46 (2003) 214 CLR 118 at 128.

47 eg, *Voulis v Kozary* (1975) 180 CLR 177; *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306; 160 ALR 588; cf *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 349-351.

48 *Brunskill v Sovereign Marine & General Insurance Co Pty Ltd* (1985) 59 ALJR 842 at 844; 62 ALR 53 at 57.

> compelling inferences' in the case[49]. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must 'not shrink from giving effect to' its own conclusion."

After referring to the nature of an appeal by way of re-hearing, their Honours said:

> "The foregoing procedure shapes the requirements, and limitations, of such an appeal. On the one hand, the appellate court is obliged to 'give the judgment which in its opinion ought to have been given in the first instance'. On the other, it must, of necessity, observe the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole."

[85] In *Devries v Australian National Railways Commission*,[50] Brennan, Gaudron and McHugh JJ said:

> "More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that finding of fact.[51] If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused his advantage'[52] or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable'."[53]

Gleeson CJ, Gummow and Kirby JJ, in their reasons in *Fox v Percy*, referred to *Devries* as one of three cases in which the High Court had reiterated:[54]

> "its earlier statements concerning the need for appellate respect for the advantages of trial judges, and especially where their decisions

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49 *Chambers v Jobling* (1986) 7 NSWLR 1 at 10.

50 (1993) 177 CLR 472 at 479.

51 See *Brunskill* (1985) 59 ALJR 842; 62 ALR 53; *Jones v Hyde* (1989) 63 ALJR 349; 85 ALR 23; *Abalos v Australian Postal Commission* (1990) 171 CLR 167.

52 *SS Hontestroom v SS Sagaporack* [1927] AC 37 at 47.

53 *Brunskill* (1985) 59 ALJR at 844; 62 ALR at 57.

54 (2003) 214 CLR 118 at 127.

> might be affected by their impression about the credibility of witnesses whom the trial judge sees but the appellate court does not."

[86] Their Honours observed that those three decisions "were simply a reminder of the limits under which appellate judges typically operate when compared with trial judges".[55]

[87] As I think the above discussion reveals, the evidence of Mr O'Connor which the primary judge accepted was not "glaringly improbable". It was not shown either that the primary judge "failed to use or palpably misused his advantage" or acted on evidence which was "inconsistent with facts incontrovertibly established by the 'evidence'". As far as I could detect from the transcript, Mr O'Connor's credibility was not attacked in cross-examination.

[88] Accordingly, the primary judge's findings of fact based on his assessment of Mr O'Connor's likely conduct, had he been advised properly, must fail.

**The loan four retainer and the loan extension retainer – Mr Bax's arguments**

[89] It was contended that the respondent failed to prove the retainer in respect of loan four beyond the admissions in the defence because no evidence was called from Mr Lamb as to the pleaded retainer. Mr O'Connor's evidence was that the loan four agreement was made by him without reference to the appellant. The only evidence of the making of any retainer about loan four was that a file was opened on about 6 October 2005.

[90] The respondent entered into the agreement to make loan four on 21 September 2005 and the advance was made on 30 September 2005. No evidence supports any negligence or breach of a retainer by Mr Bax which might have resulted in the respondent not advancing the loan monies by reason of a retainer in respect of loan four before the funds were agreed to be advanced or in fact advanced. Thus, loss was not shown to have been caused by any failure of the appellant to give advice about the loan four transaction.

[91] Mr O'Connor thought that he was extending loan three by entering into a new loan agreement with Rynah about which he knew nothing. The loan agreement made no reference to the fact that Dell was the borrower to which the loan funds had been released. There is also no suggestion in the evidence that Mr O'Connor ever turned his mind to the consideration of the extent to which any of the subject properties may have been sufficiently valuable to provide satisfactory security to the respondent once the mortgagor's liabilities to the holder of the first mortgage security were taken into account.

[92] The respondent failed to prove the pleaded loan one extension retainer beyond the admissions in the defence because there was no evidence from Mr Lamb as to the pleaded retainer. The only evidence of the retainer was a copy typed version of the original loan one agreement which Mr O'Connor obtained in November 2005 and personally amended. There was no evidence that Mr Bax was asked to review or advise about the terms of the loan one extension.

[93] On the hearing of the appeal, leave was sought by Mr Bax to amend the Notice of Appeal by adding the following new paragraphs:

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55 At 127.

> "5A The learned trial Judge erred in finding that the appellant was retained as the respondent's solicitor in September 2005 to act generally, or at all, in the respondent's interests in relation to a loan of $750,000 to Mr Paul Allen advanced on 30 September 2005, if (on the proper construction of his Honour's reasons for judgment) he did so find.
>
> …
>
> 14A The learned trial Judge erred in finding that any negligence found against the appellant as a matter of law was the cause of any loss the respondent suffered by reason of the release of the lot 3 mortgage where:
>
> (a) his Honour correctly found that such release was made by the respondent without reference to the appellant; and
>
> (b) it was not foreseeable that the respondent would take the extraordinary course of releasing that security.
>
> 14B The learned trial Judge erred in finding that any negligence found against the appellant as a matter of law was the cause of any loss the respondent suffered by the respondent in making the fourth loan where his Honour did not find that the appellant had been retained in respect of the fourth loan."

[94] The addition of paragraph 5A was not opposed and the amendment was allowed. The addition of paragraphs 14A and 14B was opposed.

[95] Paragraphs 14A and 14B were relied on to advance arguments that:

- the losses claimed by the respondent in respect of loan four and the loan one extension arose from the making of further advances in the future as a result of unreasonable conduct of the respondent and were not reasonably foreseeable; and

- the respondent's conduct in releasing the mortgage over lot 3 which secured loan three, novating the loan three agreement to another party and making the loan four agreement, all without reference to the appellant or any other legal advice were unreasonable such that in accordance with the principles of causation articulated in *March v E & MH Stramare Pty Ltd*,[56] the relevant losses were not caused by Mr Bax's breach of duty.

[96] It was further contended, referring to Mason CJ's observations in *March v Stramare*,[57] that the above conduct of the respondent had severed the chain of causation.

[97] As a matter of logic and commonsense, it was said that Mr O'Connor's conduct was so unreasonable that the claimed losses could not be regarded as flowing from Mr Bax's conduct.

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56 (1991) 171 CLR 506.

57 At 517.

[98] The relevant pleadings are paragraphs 34 and 35 of the Second Further Amended Statement of Claim and paragraphs 30 and 31 of the Amended Defence. They provide:

> "34. In the premises, the plaintiff claims that had the defendant discharged its duty of care to the plaintiff, and complied with its contractual obligations, then the plaintiff:
>
> ~~a. Would have obtained proper security to ensure that in the event of default of the loans or the collapse of Melba's, the plaintiff was at no risk of having its loans repaid out of the assets of those entities.~~
>
> b. ~~In the alternative, would not have advanced the monies at all.~~
>
> a. Would not have advanced the Second, Third and Fourth loans at all, and would not have agreed to the First Loan Extension, and would have called in the First loan
>
> b. In the alternative, would have obtained proper security from ~~Melba's or its directors~~ the borrower in each case in order to ensure that in the event of default of the loans or the collapse of the Melba's business, the plaintiff was at no risk of not having its loans repaid out of the assets of those entities.
>
> c. Would not have suffered any loss, or in the alternative, would not have suffered losses of the extent it did.
>
> **QUANTUM**
>
> 35. As a result of the defendant's negligence and/or breach of contract the plaintiff has suffered loss as follows:
>
> | | |
> |---|---|
> | ~~Loss of monies advanced~~ | ~~$1,100,000.00~~ |
> | ~~Financial loss to 29 April 2010, including default interest payments calculated to 29 April 2010~~ | ~~$1,586,254.76~~ |
> | Loss of monies advanced, less net interest benefit received, calculated by Lytras Benjamin | $1,146,750 |
> | Fees ~~payable~~ paid to Russell & Co | ~~$112,000.00~~ |
> | | $120,561.61 |
> | Fees ~~paid~~ payable to Korda Mentha | ~~$36,000.00~~ |
> | | $37,436.09 |

| | |
|---|---|
| Interest at ~~8~~9% pa from 29 April 2010 | ~~$42,300.13~~ |
| to ~~31 August 2010~~ 16 November 2011 | $159,759.47 |
| Rates arrears paid to Gold Coast City Council for Lot 1, not recovered by the plaintiff | $12,913.26 |
| | ~~$242,000.00~~ |
| ~~Default interest payments~~ | |
| | ~~$1,500,000.00~~ |
| TOTAL | ~~$1,789,468.16~~ |
| | $1,477,420.20 |

…

30 The defendant denies the facts alleged in paragraph 34 of the statement of claim because the plaintiff did not:

(a) rely on the defendant to advise it whether or not to make any of the Second, Third and Fourth Loans or agree to the First Loan Extension;

(b) retain the defendant in relation to the Fourth Loan or the First Loan Extension.

31 The defendant denies paragraph 35 of the statement of claim because the plaintiff suffered loss by reason of:

(a) its agreement to release its mortgage over lot 3 without obtaining a replacement security;

(b) its failure to take security by way of real property mortgage for the First Loan or the Fourth Loan or the First Loan Extension;

(c) the fact that the NAB and subsequently Westpac, as first mortgagees, had priority to the plaintiff in respect of lots 3 and 4."

[99] Paragraphs [35] and [36] of the reasons which were quoted earlier pose an obstacle to the success of the arguments advanced by Mr Bax in relation to loan four and the extension of loan one.

[100] The primary judge's findings in paragraphs [35] and [36] were based on his assessment of Mr O'Connor and Mr Sullivan against the background of the trial. It has not been demonstrated that, applying the principles discussed above, those findings should be set aside.

[101] The primary judge thus found, implicitly, if not expressly, that the respondent's losses in relation to the transactions under consideration also flowed from the

breaches of duty in respect of loans two and three. His Honour was not shown to have erred in that respect.

[102] That different questions of causation might apply to loan four and the loan on extension than to the other three loans was not the focus of attention on the trial. The primary judge was advised that if the respondent succeeded on liability, the damages would be in accordance with the calculation made by the respondent's valuer. There was no attempt to apportion damages between loan four and the other transactions. The primary judge proceeded on that basis, as he was entitled to do. There is also the question whether Mr Bax should be permitted to change tack on appeal. It was said in this regard in the joint reasons in *Coulton v Holcombe*:[58]

> "In *O'Brien v. Komesaroff*, Mason J., in a judgment in which the other members of the Court concurred, said:
>
> > 'In some cases when a question of law is raised for the first time in an ultimate court of appeal, as for example upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is expedient in the interests of justice that the question should be argued and decided (*Connecticut Fire Insurance Co. v. Kavanagh*; *Suttor v. Gundowda Pty. Ltd.*; *Green v. Sommerville*). However, this is not such a case. The facts are not admitted nor are they beyond controversy.
> >
> > The consequence is that the appellants' case fails at the threshold. They cannot argue this point on appeal; it was not pleaded by them nor was it made an issue by the conduct of the parties at the trial.'
>
> In our opinion, no distinction is to be drawn in the application of these principles between an intermediate court of appeal and an ultimate court of appeal. Finally, in a recent decision of six justices of this Court (*University of Wollongong v. Metwally [No.2]*) the Court said:
>
> > 'It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.'
>
> The Court of Appeal recognized the great importance, in the public interest, of these principles. Their Honours summarized them in the following terms:
>
> > 'the finality of litigation; the difficulty of inducing an appeal court to consider new facts; the undesirability of encouraging tactical decisions not to present an issue at

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58 (1986) 162 CLR 1 at 8 (citations omitted).

> first instance: keeping it in reserve for appeal; and the need for vigilance to avoid injustice to a party having to meet new facts and new issues of law for the first time at the appeal court'."

[103] Counsel for the respondent submitted that the amendment of the Notice of Appeal to include grounds 14A and 14B should not be permitted as had the matters within those grounds been raised, the respondent's case may well have been conducted differently. It is difficult, but not impossible, to see what other evidentiary approach may have been taken. I think it undesirable also that the new issues be determined for the first time by a court which has not had the advantage of seeing the witnesses, principally Mr O'Connor and Mr Pyne, a solicitor who gave expert evidence. The issues, as the arguments of Mr Bax's counsel implicitly acknowledge, are essentially factual. Finally, the primary judge's findings on causation, unless successfully challenged, would appear to stand in the way of the success of the new grounds.

**Conclusion**

[104] For the above reasons, I would:

- refuse leave to amend the Notice of Appeal by the addition of grounds 14A and 14B; and
- dismiss the appeal with costs.

[105] **MARTIN J:** I agree with the reasons given by Muir JA, and with the orders he proposes.