SUPREME COURT OF QUEENSLAND

CITATION:	*Ross v Leach* [2014] QCA 126
PARTIES:	**PAUL MARK ROSS** (appellant) **v** **CRAIG JOHN LEACH** (respondent)
FILE NO/S:	Appeal No 32 of 2014 SC No 5201 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 May 2014
DELIVERED AT:	Brisbane
HEARING DATE:	26 May 2014
JUDGES:	Muir and Gotterson and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**That the appeal be dismissed with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – WHAT IS – GENERALLY – where the appellant and the respondent, who knew each other, were separately trying to set up a brothel on the Gold Coast – where the parties entered into an agreement in which each had a half-share in the brothel business – where the value of the brothel business was to be the value decided by a licensed valuer at the time of a subject incident – where a subject incident included "any falling out of the two parties" within the agreement – where the appellant gave an undertaking to the Prostitution Licensing Authority to have no association with the respondent in relation to the brothel business – whether the primary judge erred in finding that the test for whether the parties had fallen out for the purposes of the agreement was whether they could still work together – whether the primary judge ought to have construed the phrase "falling out" according to its ordinary meaning – whether the primary judge erred in finding that the parties fell out in January 2009 *Prostitution Act* 1999 (Qld)

Autodesk Inc v Dyason [No 2] (1993) 176 CLR 300; [1993] HCA 6, considered
Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33, considered
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, applied
Water Board v Moustakas (1988) 180 CLR 491; [1988] HCA 12, considered

COUNSEL: M R Bland for the appellant
P Roney QC for the respondent

SOLICITORS: QBM Lawyers for the appellant
Lillas & Loel Lawyers for the respondent

[1] **MUIR JA**: **Introduction** This appeal primarily concerns:

- the meaning of the words "any falling out of the two parties within this agreement" in a written agreement between the parties dated 9 August 2004; and
- whether there was a "falling out" and, if so, when.

[2] The primary judge expressed "strong reservations" about the credit worthiness of both parties. She regarded them as having been vague and careful with their evidence in order to avoid revealing breaches of the *Prostitution Act* 1999 (Qld) and, in the case of the appellant, to avoid revealing any breaching an undertaking he had given to the Prostitution Licensing Authority. The primary judge said that, wherever possible, she "looked to find corroboration for the evidence of both" the parties "either in documents, or in the evidence of independent witnesses". There was no challenge to the primary judge's findings in relation to credit. Accordingly, any recitations of fact in these reasons will be derived from the primary judge's findings, or the effect of those findings, rather than the evidence of either the appellant or the respondent, except where the contrary is indicated.

The grounds of appeal

[3] The issues for determination on the appeal are more confined than those before the primary judge. The grounds of appeal are that the primary judge:

(a) erred in finding that the test for whether the parties had fallen out for the purposes of the 9 August 2004 agreement was whether they could still work together;

(b) ought to have construed the phrase "falling out" according to its ordinary meaning;

(c) erred in finding that the parties fell out in January 2009 because the respondent did not reach a point when he could not have worked with the appellant until that time; and

(d) ought to have found that the parties fell out in November or December 2006 when the appellant revealed the undertaking he had given to the Prostitution Licensing Authority.

The parties' initial dealings

[4] The appellant and the respondent, who knew each other, were separately trying to set up a brothel on the Gold Coast. The respondent located suitable premises in Upton Street, Bundall, but the appellant was unsuccessful in his quest. They had discussions about jointly acquiring the lease of the Upton Street premises and jointly participating in the brothel business.

[5] On 13 July 2004, the appellant and the respondent entered into the following written agreement:

> "**AGREEMENT MADE BETWEEN**
> **PAUL ROSS AND CRAIG LEACH**
> **IN RELATION TO POSSESSION**
> **OF PREMISES AT**
> **37 UPTON STREET BUNDALL**
>
> Craig Leach agrees to relinquish all interests in the proposed brothel and all rights in relation to his lease and possession of premises at 37 Upton Street, Bundall to Paul Ross as of this date 13th July 2004. The subject premises are currently a warehouse with Gold Coast City Council approval and zoning as a brothel.
>
> In return for his relinquishment Craig Leach will receive from Paul Ross the sum of $100,000 to be paid to Craig in full by 31st December 2004.
>
> This agreement contains all of the agreed terms by both parties."

[6] In about August 2004 the appellant told the respondent that he would not be able to pay the $100,000 by the end of that year. A few days later, the appellant and the respondent signed the following two further written agreements, each dated 9 August 2004 to record their arrangement:

> "**AGREEMENT BETWEEN PAUL ROSS AND CRAIG LEACH RE BROTHEL AT 37 UPTON ST, BUNDALL.**
>
> I Paul Mark Ross hereby agree that I have a half share in the brothel business at 37 Upton St Bundall. The other half of the business is owned by Craig Leach. This agreement has been made due to the fact that Craig Leach has been unable to obtain a brothel licence in the past but will continue to try to obtain a licence to operate as a legitimate partner.
>
> This document is a binding agreement between Paul Ross and Craig Leach and supersedes any previous written agreements."

> "**AGREEMENT MADE BETWEEN PAUL MARK ROSS AND CRAIG LEACH IN RELATION TO PROPERTY AT 37 UPTON ST BUNDALL**
>
> It is agreed that Paul Ross owes to Craig Leach the sum of money equal to half the value of the of the proposed Brothel business at 37 Upton St Bundall (not to include freehold building value). This

> value is the value decided by a licensed valuer at the time of a subject incident. **For the purpose of this agreement a subject incident is described as any situation affecting Paul's ability to carry on his position as licensed owner of the Brothel or any falling out of the two parties within this agreement.**
>
> This agreement will be void when and if Craig Leach obtains his Owners License from the Prostitution Licensing Authority." (emphasis added)

[7] For the sake of brevity, the second of the two letters will be described as "the Agreement".

[8] The primary judge found that from the time of the first of the 9 August 2004 agreements or "perhaps from [an] earlier oral agreement [reached] a day or two before" the appellant and the respondent owned the brothel business in equal shares.

[9] The appellant encountered difficulty in obtaining a brothel licence and, in order to improve his prospects in that regard, gave an undertaking to the Prostitution Licensing Authority to have no association with the respondent in relation to the brothel business. The respondent was not told by the appellant of the undertaking at about the time it was given.

[10] By December 2005, the appellant had obtained the brothel licence and a lease of the Upton Street premises. The respondent took time off work between January and June 2006 in order to physically fit out the brothel. He also contributed monies to rent and the fit out. The brothel began to trade in about June 2006 and thereafter the respondent had no role in the brothel's operations and received no profits from it.

Events on and after the date on which the respondent became aware of the appellant's undertaking to the Licensing Authority

[11] In about November or December 2006, the respondent revealed to the appellant that he was considering applying for his brothel licence and taking up a half share in the business. The appellant revealed to the respondent that he had given the undertaking. The respondent said that he was upset and commented, "It would have been nice to know all this before I took six months off work and put $100,000 into the fit-out and had to sell my house".

[12] The primary judge found that the respondent:

> "… never tried to terminate the agreement he had with the [appellant] on the basis that the [appellant] gave the undertaking … When he was asked in cross-examination why he did not ask for repayments of his contributions to the business after the brothel opened in 2006, he replied that when he did inquire how the business was going he was told it was losing money. He added, 'In the beginning, I sort of let it slide. It all changed after I found out the undertaking was given and it was going to be difficult for me to legitimise the partnership.' … The change seems to have been that the [respondent] began to make attempts to extract himself from the arrangement he had with the [appellant]."

[13] As a result of a conversation with the respondent in mid April 2007, Mr Allen went with Mr Liprine to see the appellant. There was a conversation about the acquisition by one of them of the respondent's interest in the brothel. The appellant was uncooperative. Mr Allen visited the appellant at the brothel again in the second half of 2008 after the respondent told him that the appellant wanted to sell his half interest in the business.

[14] The reasons state, in relation to the approach to Mr Allen:

> "[35] According to the [respondent], before the first attendance of Mr Allen on Mr Ross, the [respondent] and the [appellant] discussed 'that we should, perhaps, consider buying each other out.' The [appellant] offered to give the [respondent] $200,000 for his share according to the [respondent]. The [respondent] did not think that was sufficient consideration and offered to buy the [appellant's] 'half-share'. He thought this was around mid-2007. He said he offered as much as half-a-million dollars but the [appellant] would not accept it. In this state of impasse the [respondent] asked a lawyer friend to come from Sydney to the Gold Coast to attempt mediation between the [respondent] and the [appellant]. This attempt failed.
>
> [36] The [respondent] then consulted a solicitor - Mal Chalmers - who wrote on behalf of the [respondent], to the [appellant], demanding an amount of $278,000 owing for 'set-up costs for a licensed brothel which you run'. The letter asserts that the amount was invested by the [respondent] in the business. The response is a letter written by the [appellant] dated 3 November 2008. It begins:
>
> > '[The respondent] has not invested any money in the business that I conduct. You should be aware that the Licence I hold is subject to an undertaking that [the respondent] not play any part whatever in the operation or management of the brothel. [The respondent] did loan to me amounts totalling $91,683.'"

[15] The 3 November 2008 letter asserts that various payments, including an amount of $48,500, were paid. The primary judge accepted that the $48,500 payment was made: by cash in a car park. The primary judge observed in respect of the letter:

> The [appellant's] letter of 3 November 2008 … acknowledged responsibility to pay what remained outstanding of the $91,683 loan monies and then said:
>
> > 'I acknowledge that while establishing the brothel at 37 Upton Street I obtained the benefit of the work [the respondent] did on his account in the years prior to my involvement including, Local Government Approval, Architectural Drawings, Hydraulic Drawings and other work preparatory to the establishment of the brothel.

> Whilst I am under no legal obligation to make any payment to [the respondent] and I am keenly aware of my obligations to comply with my undertakings to the Prostitution Licensing Authority, I am in fairness to [the respondent] prepared to make him an ex-gratia payment in the sum of $150,000 to settle the matter.
>
> Let it be noted that an agreement to compensate [the respondent] for the money spent prior to my involvement was $100,000. This agreement was signed off on by both parties.'"

[16] In a further letter, dated 30 November 2008, the appellant made it clear that the total amount being offered was $150,000.

[17] The respondent commenced proceedings against the appellant in the Supreme Court in January 2009 (631/09) claiming $282,848 monies owing pursuant to an agreement for the set up and operation of the brothel business. The claim was not served. On 20 January, the parties met in the presence of Mr Chalmers and the appellant paid the respondent $170,000 in cash in a sports bag. The proceedings were discontinued. The primary judge found that what was settled was the respondent's claim for expenses, not his claim to be paid a sum equal to half the value of the brothel business.

[18] Addressing whether and when a "subject incident" within the meaning of those words in the Agreement occurred, the primary judge stated:

> "I find that the [appellant] is in breach of his obligations to pay the [respondent] an amount equal to half the value of the Upton Street brothel business. A question arises as to the date at which that value ought to be assessed. The [respondent's] evidence was remarkably prevaricating about when he and the [appellant] 'fell out'. At one point he accepted that it was his case in this Court that there was a falling out in 2006 on his discovery of the undertaking given to the PLA. However, he claimed that there was no falling out until he issued proceeding 631/09. At one point in his evidence the [respondent] claimed that the test for whether the parties had fallen out was whether they could still work together. Presumably he meant work together in the event that he was ever granted a licence. The evidence as to this is sparse. It seems to me that the [respondent] did not reach a point when he could not have worked with the [appellant] until January 2009 and accordingly I find that is when the parties fell out for the purposes of the August 2004 agreement."

The meaning of "any falling out of the two parties within this agreement"

[19] The appellant contended that the primary judge erred in construing "falling out of the two parties within this agreement" to mean an inability to work with each other. That was said to be because:

- the primary judge stated that the respondent claimed in his evidence "that the test for whether the parties had fallen out was whether they could still work together", but no such statement was made;

- evidence of the parties actual subjective intention is inadmissible to assist in the interpretation of a written document; and

- there was no suggestion that the appellant shared or even knew of the respondent's understanding of what a "falling out" might be.

[20] The fact that the primary judge referred to an assertion by the respondent about the test for "falling out" does not necessitate the conclusion that the primary judge accepted the statement, if there was one, as expert opinion evidence. It is highly unlikely that she did, having regard to her view of the respondent's veracity. The observation was made in the context of an exploration of when any "falling out" may have occurred and it could not reasonably be concluded that the primary judge regarded the subjective understanding of either party to the agreement as relevant to its construction.

[21] The appellant contended that "falling out" should be given its *Australian Concise Oxford Dictionary* meaning of "a breach of friendship, a break in a relationship etc., esp. after a quarrel".

[22] That submission must be rejected. The evidence suggests that the parties were acquaintances rather than friends and that they entered into a business arrangement for their mutual convenience. There is no finding to the effect that the parties enjoyed a friendship. The wording of the Agreement makes it plain that the "falling out" referred to is connected with the parties' 9 August 2004 business agreements or arrangements. There is little doubt that the parties had in mind in August 2004 that they would work together in the business should the respondent be granted a licence.

[23] A "falling out" in this context involves a rupture of the relationship between the parties which would make the continuance of their contemplated business relationship untenable or unworkable. That is essentially what the primary judge found. It is apparent, I think, that persons in the position of the parties could cease to have a cordial personal relationship without there being a "falling out" within the meaning of the phrase.

When did the falling out occur? – The appellant's argument

[24] The appellant contended that the "falling out" occurred in November or December 2006 when the appellant disclosed the undertaking to the respondent. The argument was developed as follows. The primary judge found that when the respondent was told of the undertaking in about November or December 2006, he became "upset" and said to the appellant, "It would have been nice to know all this before I took six months off work and put $100,000 into the fit-out and had to sell my house". The primary judge found that, in fact, the respondent had done such things and had paid various sums to rent and fit out the premises.

[25] The primary judge referred to the respondent's evidence that "it all changed after I found out the undertaking was given and it was going to be difficult for me to legitimise the partnership". She observed that "the change seems to have been that the [respondent] began to make attempts to extract himself from the arrangement he had with the [appellant]".

[26] The primary judge found that after the undertaking was revealed, the appellant and the respondent discussed buying each other out but were unable to agree on the amount to be paid. The respondent asked a lawyer friend from Sydney to attempt to mediate a settlement but the attempt failed. The respondent then instructed his solicitor to write a letter to the appellant demanding an amount of $278,000 owing for set up costs for the brothel. This demand resulted in correspondence that culminated in the commencement of proceedings by the respondent against the appellant and the settlement agreement reached on 20 January 2009.

[27] After the undertaking was revealed, the parties only spoke to one another for the purpose of ending their association.

The timing of the falling out – consideration

[28] The respondent argued that it was not part of the appellant's case at first instance that the falling out occurred when the appellant revealed the undertaking he had given to the licensing authority. Consequently, it was contended, the appellant should not be permitted to raise the new argument which "whether deliberately or by inadvertence, [he] failed to put during the hearing when he had an opportunity to do so".[1]

[29] The principle on which the respondent relied is well established. It was discussed at some length in the reasons of Gibbs CJ, Wilson, Brennan and Dawson JJ in *Coulton v Holcombe*[2] and, two years later, in the reasons of Mason CJ, Wilson, Brennan and Dawson JJ in *Water Board v Moustakas*.[3] In the latter case, it was observed in the joint judgment:[4]

> "More than once it has been held by this Court that a point cannot be raised for the first time upon appeal when it could possibly have been met by calling evidence below. Where all the facts have been established beyond controversy or where the point is one of construction or of law, then a court of appeal may find it expedient and in the interests of justice to entertain the point, but otherwise the rule is strictly applied.
>
> In deciding whether or not a point was raised at trial no narrow or technical view should be taken. Ordinarily the pleadings will be of assistance for it is one of their functions to define the issues so that each party knows the case which he is to meet. In cases where the breach of a duty of care is alleged, the particulars should mark out the area of dispute. The particulars may not be decisive if the evidence has been allowed to travel beyond them, although where this happens and fresh issues are raised, the particulars should be amended to reflect the actual conduct of the proceedings. Nevertheless, failure to amend will not necessarily preclude a verdict upon the facts as they have emerged." (citations omitted)

[30] The respondent's argument, in this regard, lacks substance. The timing of the falling out, if there was one, was always an issue in the trial. Moreover, one

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1 *Autodesk Inc v Dyason [No 2]* (1993) 176 CLR 300 at 309–310.
2 (1986) 162 CLR 1 at 8–11.
3 (1988) 180 CLR 491 at 497–498.
4 *Water Board v Moustakas* (1988) 180 CLR 491 at 497.

possible date raised in the defence, and relied on in the alternative in the 12th further amended statement of claim, was the date on which the licensing authority revealed to the respondent the existence of the undertaking. Plainly, that made relevant the date on which the respondent was aware of the undertaking.

[31] The respondent's pleaded case on the trial, as appears from the 12th further amended statement of claim was that the subject incident first occurred when, on 19 January 2009, Supreme Court action No 631 of 2009 was commenced. Alternatively, it was alleged that the subject incident first occurred in or around February 2009 or shortly thereafter. That timing seems to be a product of the allegations that the appellant paid the respondent $170,000 in compromise of the respondent's rights in relation to financial contributions made by the respondent to the brothel business on 20 January 2009 and that, a few weeks later, the appellant sent the respondent a text message incorrectly alleging that the compromise was in relation to the respondent's rights under the Agreement. A further allegation is to the effect that if the Court accepts an allegation of the respondent that "a different earlier subject incident occurred" the appellant is entitled to have the valuation referred to in the Agreement performed in relation to that date.

[32] The appellant alleged in his defence to the 12th further amended statement of claim that:

> "(iv) any subject incident occurred on the earlier of:
>
> (aa) the [respondent] informing the [appellant] of his election in June 2005;
>
> (bb) the Prostitution Licensing Authority informing the [appellant] of [the giving of the undertaking by the respondent];
>
> (cc) the [appellant] providing to the authority the undertaking ..."

[33] The appellant, in seeking to challenge the primary judge's findings of fact, faces a particularly difficult task. As the primary judge remarked, "the evidence … is sparse". Her conclusion was largely the result of impressions based on her reconstruction of what occurred between the parties. The primary judge, who assessed the evidence as it unfolded, enjoyed a considerable advantage over this Court in making factual determinations.

[34] There is no evidence that the appellant said or did anything at or within reasonable proximity to the time of the revelation of the undertaking that may have indicated to the respondent that the business relationship between the parties had changed in any way or that there may be a problem with their working together. One person's undisclosed state of mind would not usually constitute a "falling out" with another. The concept involves change in a relationship, in this case, between two people.

[35] In February 2008, the respondent allowed the appellant access to closed circuit television in the brothel so that he could form an opinion as to how the business was performing. The appellant wanted to check on the respondent's ability to repay the appellant's monetary contributions. It is instructive that the appellant was not then looking to have his interest in the business paid out.

[36] Another matter which is particularly telling against the appellant's argument is that the appellant made no attempt to assert that there had been a "falling out" for the purposes of the agreement until after January 2009. That is consistent with an intention on the part of the appellant to keep the agreement on foot. So too is the fact that Supreme Court proceedings (631/09) concerned only a claim for expenses incurred in the setting up of the brothel business.

[37] In January 2009, the proceeding was settled. Shortly afterwards, the appellant asserted, in effect, that the settlement arrived at between the parties had extinguished any claim by the respondent for payment in respect of his half interest. That behaviour was obviously likely to impact heavily on the ability of the parties to work together and the evidence in this regard supports the primary judge's findings. Those findings cannot be sensibly described as "glaringly improbable" or "contrary to compelling inferences in the case".[5] On the contrary, they were well open on the evidence.

Conclusion

[38] For the above reasons, none of the grounds of appeal have been made out. I would order that the appeal be dismissed with costs.

[39] **GOTTERSON JA:** I agree with the order proposed by Muir JA and with the reasons given by his Honour.

[40] **MORRISON JA:** I have read the reasons of Muir JA and agree with those reasons and the order his Honour proposes.

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5 See *Fox v Percy* (2003) 214 CLR 118 at 128.