SUPREME COURT OF QUEENSLAND

CITATION:	*Pasado Pty Ltd v Totally Raw Pty Ltd & Anor* [2014] QCA 252
PARTIES:	**PASADO PTY LTD** ACN 102 423 834 (appellant) **v** **TOTALLY RAW PTY LTD** ACN 059 964 886 (first respondent) **PERFIDELIS PTY LTD** ACN 110 167 872 (second respondent)
FILE NO/S:	Appeal No 2439 of 2014 DC No 61 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	7 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	16 September 2014
JUDGES:	Holmes and Gotterson JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed, with costs.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – ACCEPTANCE – GENERALLY – where the appellant and the respondents are the corporate entities of three qualified accountants – where the appellant and the respondents combined their individual accounting businesses to form one company – where two years after that formation, the appellant sought to retire from the company – where the respondents proposed the appellant's retirement be achieved by swapping the appellant's shares in the company, for shares in an associated company – where the appellant and the respondents held a meeting and agreed "in principle" to the share swap but where other matters raised by the appellant were left unresolved – where the appellant and the respondents held a subsequent meeting to finalise the agreement during which the appellant did not raise some of the matters left unresolved at the previous meeting – where the appellant and the respondents signed the minutes of the subsequent meeting – where the appellant then

	contended the signed minutes of the meeting did not record an enforceable agreement – whether a valid and binding agreement was formed – whether inferences drawn by the trial judge from primary findings of fact were open on the evidence
	Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, applied
COUNSEL:	C Wilson for the appellant R G Bain QC for the respondents
SOLICITORS:	Rigby Lawyers for the appellant Sajen Legal for the respondents

[1] **HOLMES JA:** I agree with the reasons of Boddice J and the order he proposes.

[2] **GOTTERSON JA**: I agree with the order proposed by Boddice J and with the reasons given by his Honour.

[3] **BODDICE J**: On 14 February 2014 the District Court of Queensland made declarations that a share transfer agreement entered into between the appellant and the respondents on 2 May 2008 was a valid and binding agreement. The Court further declared the appellant was bound to execute instruments of share transfer pursuant to that agreement. The Court made ancillary orders in relation to those share transfers. The appellant was ordered to pay the plaintiff's costs of and incidental to the proceeding.

[4] The appellant appeals those declarations and other orders. The appellant does not challenge any of the primary facts, as found by the trial Judge. At issue is whether inferences drawn by the trial Judge from those primary findings of fact were open on the evidence.

Background

[5] The appellant and the respondents are the corporate entities of three qualified accountants. The appellant is the corporate entity of Mr Elms. The first respondent is the corporate entity of Mr Ramsay. The second respondent is the corporate entity of Mr Rafter. Until 2005, each operated separate accounting and associated businesses.

[6] In 2005, the appellant and the respondents combined their individual businesses into one company, Stratogen Holdings Pty Ltd ("Holdings"). At the time the combined business was formed the appellant and the respondents entered into a shareholders agreement. It governed the conduct of Holdings including the protection of one shareholder from another.

[7] When Holdings was established the appellant and the first and second respondents each held equal shareholdings. However, in 2006 the parties agreed the appellant would hold a reduced shareholding (28.74 per cent), with the first and second respondents each taking an increased shareholding of 35.63 per cent.

Primary facts

[8] Holdings conducted accounting, financial planning, audit and finance broking businesses through various wholly owned subsidiaries. The financial planning business was operated through Stratogen Financial Planning Pty Ltd ("Financial Planning"). It was managed by, and conducted on a day-to-day basis, through an employee, Rob O'Donnell.

[9] In 2007, the retirement from the practice of Mr Elms was discussed by Elms, Ramsay and Rafter. Elms was in favour of an arrangement whereby he would retire and realise his equity in Holdings. In September 2007, Elms made a formal announcement to staff about moving towards retirement. Thereafter, the appellant and the respondents, through Elms, Ramsay and Rafter, held discussions about Elms' retirement from Holdings. No resolution was reached in the ensuing months.

[10] On 7 February 2008, Ramsay and Rafter put forward a written proposal for the realisation of Elms' equity in Holdings. This was to be achieved by an "equity swap" whereby Financial Planning would demerge from Holdings, and the appellant's shareholding in Holdings would be swapped for an additional nine per cent equity in Financial Planning.

[11] On 12 February 2008, a meeting was held between Ramsay, Rafter and Elms. Elms agreed "in principle" to Financial Planning being demerged from Holdings, and to the appellant taking an increased share in Financial Planning in exchange for the appellant's shares in Holdings. During the meeting, Elms raised a number of matters for consideration. Relevantly, those matters included the continued involvement of O'Donnell in Financial Planning, through the purchase of a shareholding in that entity, the value to be ascribed to the parties' respective interests, and the entering into of a shareholders agreement by the parties in respect of Financial Planning. In response, Rafter expressed the view the equity swap needed to be agreed upon first.

[12] Following that meeting Elms left for overseas. After his return, Elms sent an email to Ramsay and Rafter on 16 April 2008 attaching a document setting out issues for discussion in respect of the "in principle" agreement reached in February 2008. Those issues included O'Donnell's continued involvement in Financial Planning through the acquisition of shares, valuation, and the entering into of a shareholders agreement in respect of Financial Planning. Elms subsequently sent a document to Ramsay and Rafter which was in the nature of a valuation of the appellant's interests in Holdings and Financial Planning.

[13] On 2 May 2008, Ramsay and Rafter called a meeting with Elms. No formal notice was given to Elms of any intention to call that meeting. At the meeting, Ramsay and Rafter produced a letter dated 2 May 2008. Ramsay informed Elms he wanted the issues in the letter settled that day, and he would not leave until it was resolved. They then proceeded to discuss the contents of the letter in detail. Elms made notes on his copy of the letter. These notes included ticking items, and noting other issues. At no stage did Mr Elms raise the issue of O'Donnell's retention in Financial Planning, or the need for a shareholders agreement for Financial Planning.

[14] Ultimately, a reworked valuation was agreed upon by the parties at the meeting. Rafter then left to prepare a document styled "Minutes of Meeting of the Directors of Stratogen Holdings Pty Ltd" ("the Minutes"). That document was signed by Ramsay, Rafter and Elms. It was in the following terms:

"MINUTES OF MEETING
OF THE DIRECTORS OF STRATOGEN HOLDINGS PTY LTD

Held at 1/59 Mary Street, Noosaville
on 2 May 2008 at 12:30pm

PRESENT: H D Ramsay (Chairman)
B A Elms
M P Rafter

Company Valuation
A valuation of the company's businesses, excluding Stratogen Financial Planning (Mt Isa) and Stratogen Insurances (Mt Isa), was tabled for consideration.

The methodology of the valuation and the adjustments and assumptions therein were agreed to.

All agreed to the valuation of Stratogen Holdings of $130,464 as tabled.

Stratogen Financial Planning (Mt Isa) and Stratogen Insurances (Mt Isa)
Agreed to spin-off these 2 entities and that the shares be acquired by Stratogen Financial Planning Pty Ltd via a script for script exchange.

It was agreed to instruct Peter Cook to arrange the share transfers as of 1 May 2008.

Pasado Pty Ltd (as trustee) Equity in Stratogen Holdings Pty Ltd
It was agreed that the equity held by Pasado as trustee in Stratogen Holdings Pty Ltd be exchanged with Totally Raw as trustee and Perfidelis as trustee for shares in Stratogen Financial Planning Pty Ltd to equalise the shareholding therein to 1/3rd to each of the [existing] shareholders.

Closure
There being no further business the meeting was closed at 1:30pm.

H D Ramsay (signed)

B A Elms (signed

M P Rafter (signed)"

[15] Over the weekend following that meeting, Elms reflected upon the contents of the Minutes. He regretted signing the document, and decided to take steps to rescind the agreement. He engaged a solicitor who sent a letter, in accordance with his instructions, to Ramsay and Rafter. That letter alleged the resolutions made, and the documents signed, were of no force or effect because personal circumstances placed Elms under duress. It was asserted the valuation was invalid, and Elms' state of mind militated against an ability to make rational decisions. The letter did not assert the Minutes did not record an enforceable agreement between the parties. The letter also did not assert there were critical issues still to be resolved before the parties could make a concluded agreement and, in particular, in relation to the retention of O'Donnell in Financial Planning and the entry into of a new shareholders agreement in respect of Financial Planning.

[16] The appellant failed to execute a transfer of its shares in Holdings, as envisaged in the Minutes. In 2009, the first and second respondents instituted proceedings in the District Court seeking declaratory and other relief. The appellant filed a defence and counterclaim. It asserted the agreement recorded in the Minutes was uncertain and incomplete. It also asserted the agreement was void and should not be enforced because of duress, unconscionable conduct and oppression.

Trial

[17] On the first day of trial, the appellant filed a second amended defence which completely abandoned the counterclaim and any reliance upon duress, unconscionable

conduct or oppression. The appellant added to its defence that the agreement was "uncertain and incomplete", that the parties had failed to reach agreement on a shareholders agreement to govern the terms upon which the parties would hold their shareholding in Financial Planning, and on the retention of the employment of Rob O'Donnell.

[18] Those issues were two of 13 issues pleaded in a second amended defence filed by leave of the Court at the commencement of the trial. Those two issues were only added in the pleading filed on that day. The amended pleading further alleged the parties did not intend to enter into a concluded agreement for the sale of Elms' interest in Holdings.

[19] At trial, the issues narrowed further. Only the retention of O'Donnell, and the existence of a shareholders agreement for Financial Planning, were pressed as being of such importance as to render the Share Transfer Agreement uncertain and incomplete, and to support the assertion the parties did not intend to enter into a concluded agreement capable of forming a binding contract.

Trial Judge's findings

[20] The relevant principles for the determination of whether a binding concluded agreement had been reached between the parties were not in dispute before the trial Judge. It was accepted the intention of the parties was to be tested objectively, by reference to what a reasonable observer would have concluded from all the surrounding circumstances and, in particular, the actions and words of the parties. It was also accepted it was open to the parties, by their words and conduct, to intend to be bound by a binding agreement even though other terms were yet to be agreed. However, the more numerous and significant the areas remaining to be agreed, the slower a Court will be to conclude the parties had the requisite contractual intention.

[21] Accepting those principles, the trial Judge found that having regard to all of the circumstances, and the actions and words of the parties, the parties intended to be bound immediately by the terms of the Share Transfer Agreement contained in the Minutes signed by the parties on 2 May 2008.

[22] In so concluding, the trial Judge found that whilst Elms had raised the retention of O'Donnell in Financial Planning, and the need for a shareholders agreement, at the meeting on 12 February 2008, and in his email on 16 April 2008, Elms did not raise either issue at the meeting on 2 May 2008. The trial Judge found that whilst the retention of O'Donnell and the reaching of a shareholders agreement may have been important to Elms, Elms was content to leave those two issues to be decided later.

[23] The trial Judge observed there was now no suggestion Elms was at some commercial disadvantage in the negotiations on 2 May 2008, or that he lacked commercial experience and acumen. The trial Judge, who had the opportunity to hear and see Elms give evidence, also observed that Elms impressed him "as a feisty man with strong views and a healthy respect for his own ability".

[24] The trial Judge rejected a submission that Elms did not raise these issues as the meeting was all about value. The trial Judge noted there was no reason why Elms could not have raised these issues as being essential terms that had to be agreed before an agreement could be finalised on the share swap, if that was his intention. The trial Judge found that by the May meeting, Elms did not regard these issues as essential terms to be resolved prior to the formation of the Share Transfer Agreement.

[25] In reaching this conclusion, the trial Judge noted that Elms, over the following weekend had regretted signing the Minutes, and instructed a solicitor to seek its rescission. However, the solicitors' letter did not raise as issues the retention of O'Donnell, or the entering into of a shareholders agreement. Further, the solicitors did not allege the Share Transfer Agreement was uncertain or incomplete.

[26] In finding the parties had intended to reach a binding concluded agreement, the trial Judge observed the terms of the Minutes signed by the parties on 2 May 2008 bespoke the language of contract when read as a whole. The act of signing was also significant, as was the fact the Minutes signed on 2 May 2008 dealt with the critical issues of the mechanism of an equity swap, the demerger of Financial Planning and Holdings, and the values to be agreed in relation to both companies.

Submissions

[27] The appellant submits the trial Judge erred in finding the correct inferences to be drawn from the primary facts were:

(a) that the parties intended on 2 May 2008 to be bound immediately by the terms of the Minute;

(b) that the "critical issues" to be resolved before the parties could make a concluded agreement were the mechanism of the equity swap, the demerger of Financial Planning from Holdings and the values to be agreed in relation to the shares in those companies;

(c) that Elms was content to leave the questions of the retention of O'Donnell in Financial Planning and a new shareholders agreement to be decided after the agreement as to mechanism and value was concluded;

(d) that as at 2 May 2008 Elms did not regard those two issues as essential terms to be resolved before a concluded agreement was formed;

(e) that an enforceable share transfer agreement was reached on 2 May 2008.

[28] The appellant submits that in drawing these inferences the trial Judge failed to give due and proper weight to Elms' evidence that the retention of O'Donnell, and the making of a shareholders agreement, were essential before any binding agreement was entered into between the parties. Had due and proper weight been given to the essential nature of those issues, the parties' failure to reach agreement on those essential terms, together with the brief nature of the contents of the Minutes of the meeting held without notice, supported a conclusion the parties did not reach a binding concluded agreement at the 2 May 2008 meeting.

[29] The respondents submit the inferences drawn by the trial Judge were supported by the evidence, and consistent with the terms of the Minutes signed by the parties on 2 May 2008. The two issues identified by the appellant were not essential to the resolution of an equity swap between the parties, and were not raised by Elms at the meeting on 2 May 2008. Against that background, there was no basis for this Court to conclude the trial Judge had failed to give due and proper weight to all of the evidence. There was also no basis for this Court to substitute its own inferences for those made by the trial Judge.

Discussion

[30] Elms, Ramsay and Rafter were experienced, qualified accountants. They had operated Holdings as accounting and financial planning businesses for several years

prior to 2 May 2008. Elms' retirement, and realisation of his equity in Holdings, had been canvassed in April 2007. No resolution had been reached by early 2008, when Ramsay and Rafter gave Elms the letter dated 7 February 2008.

[31] Whilst at the meeting on 12 February 2008, Elms raised for consideration the continued involvement of O'Donnell in Financial Planning, and the entering into of a new shareholders agreement for Financial Planning, nothing in his notes of that meeting suggest Elms conveyed that either matter was an essential term before any concluded agreement could be reached between the parties. Elms accepted he did not express such a view at that meeting. Similarly, the email sent by Elms on 16 April 2008 did not raise these matters on the basis they were essential terms before a concluded agreement could be reached between the parties.

[32] Elms agreed that at the meeting on 2 May 2008, he did not raise either issue with Ramsay or Rafter. Whilst Elms contended the meeting, without notice, occurred in circumstances where Ramsay indicated he would not leave until the matters raised in the letter dated 2 May 2008 were resolved, it is apparent from the notes made by Elms, on the letter dated 2 May 2008, that numerous items were ticked and noted, including the issue of related Mount Isa financial planning businesses being dealt with separately. Those notes are consistent with the meeting taking some time, and involving a genuine discussion of various issues.

[33] Against that background, it was open to the trial Judge to conclude the admitted failure by Elms to raise either issue at that meeting supported the inference Elms did not consider those issues to be essential terms for the reaching of a binding concluded agreement for the equity swap. It was also open for the trial Judge to conclude Elms was happy for those matters to be determined at a later time. The fact Elms consulted a solicitor shortly thereafter, and did not raise either issue in the letter seeking rescission of the Minutes, supported that inference.

[34] The trial Judge's conclusion that all of the circumstances supported an inference the Minutes of 2 May 2008 represented a concluded agreement, entered into between the parties with the intention that it be binding on those parties, was also supported by a consideration of the terms of the Minutes. Those Minutes did not just deal with the value of the appellant's equity in Holdings. The Minutes considered the mechanism for the agreed equity swap, including the transfer of interests in related Mount Isa financial planning businesses. The letter from Ramsay and Rafter dated 2 May 2008 had expressly said that would be dealt with separately. That separate determination, recorded in the Minutes signed by the parties on 2 May 2008, is entirely consistent with the parties having reached a concluded, binding agreement for the transfer of shares in order to realise the equity swap agreed on 2 May 2008.

[35] Whilst it is open to an appellate court to decide on the proper inferences to be drawn from the primary facts as found by a trial Judge, the power for this Court to substitute its own inferences for those drawn by a trial Judge on the primary facts is only to be exercised if it be established the inferences drawn by the trial Judge are wrong because material facts had been overlooked, or given undue or too little weight, or because an opposite inference is so preponderant.[1]

---

[1] *Fox v Percy* (2003) 2014 CLR 118 at 127; *Zuvela v Cosmarnan Concrete Pty Ltd* (1996) 140 ALR 229-230; *White Industries Queensland Pty Ltd v Hennessy Glass and Aluminium Systems Pty Ltd* [1999] 1 Qd R 210 at 219.

[36] The appellant accepted there were no facts that could be pointed to that had been overlooked by the trial Judge. Whilst it was contended the trial Judge failed to give due and proper weight to aspects of the evidence, the inferences drawn by the trial Judge were amply supported by a consideration of the evidence as a whole. An opposite inference was not preponderant.

Conclusion

[37] There is no basis upon which this Court can or should intervene to set aside inferences properly open to the trial Judge on the accepted primary facts. I would dismiss the appeal, with costs.